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1 J. Envtl. L. Litig. 11 (1986)

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ARTICLES

Dale D. Goble*

The Council and the Constitution: An Article on the Constitutionality of the Northwest Power Planning Council

Congress “created a new constitution” for the Federal Columbia River Power System and the Pacific Northwest’s electric power resources¹ when it enacted the Pacific Northwest Electric Power Planning and Conservation Act (PNEPPCA or the Act) in 1980.² It did so by restructuring the relationship between the region’s electric power and fishery interests.³ The centerpiece of this

* Associate Professor, University of Idaho College of Law; B.A., Columbia College; J.D., University of Oregon. I would like to thank Mike Blumm, Chris Kelly, Frank Ostrander, and Steve Smith for helpful comments on earlier drafts of this article, and Charles Wilkinson for letting me (again) pick his mind. The usual disclaimers of responsibility apply.

¹ *What the States Wanted: A Hemingway Retrospective*, NW. ENERGY NEWS, Dec./Jan., 1985/86, at 4, 7 (quoting Council member and former lobbyist Roy Hemingway) [hereinafter *Hemingway Retrospective*].

² Pub. L. No. 96-501, 94 Stat. 2697 (1980) (codified at 16 U.S.C. §§ 839-839h (1982)). The Act is applicable to the “Pacific Northwest,” an area defined by the Columbia River Basin. It includes Idaho, Oregon, and Washington as well as Montana west of the Continental Divide, and those parts of Nevada, Utah, and Wyoming which are within the Columbia Basin. Pacific Northwest Electric Power Planning and Conservation Act § 3(14), 16 U.S.C. § 839a(14) (1982).

³ The Act had two major effects on the various regional interests. First, it restructured the relationships among the previously limited group of participants. These participants can be somewhat simplistically placed into four groups: (1) the federal agencies that operate the Federal Columbia River Power System projects (the Army Corps of Engineers and the Bureau of Reclamation), sell the power (the Bonneville Power Administration (BPA)), or license nonfederal hy-

new structure is the state-appointed Pacific Northwest Electric Power and Conservation Planning Council (Northwest Power Planning Council or the Council), which is to plan the region's electric energy future and oversee the rebuilding of the Columbia River Basin's fabled anadromous salmon and steelhead runs.

This new "constitution," however, is itself now challenged as unconstitutional.⁴ The challenge centers on the Council and the scope of its authority. The fundamental issue is whether the fed-

droelectric projects (the Federal Energy Regulatory Commission); (2) the investor-owned utilities; (3) the publicly owned utilities (cooperatives, public utility districts, or municipalities); and (4) the direct service industries which purchase their electricity directly from BPA. *See infra* note 28.

Second, the Act enfranchised a disparate group of interests which had not been represented previously in regional energy policies. Due to the Act's participation requirements, *e.g.*, Pacific Northwest Electric Power Planning and Conservation Act § 4(g), 16 U.S.C. § 839b(g) (1982), the public generally has a much greater possibility of involvement in energy decision making. More specifically, the Act also enfranchised (1) the four regional states, by empowering them to appoint the Northwest Power Planning Council (the Council), *id.* § 4(a), 16 U.S.C. § 839b(a), and (2) those interested in the anadromous fish resource, by requiring the Council to prepare a fish enhancement program following elaborate consultation provisions. *Id.* § 4(h), 16 U.S.C. § 839b(h).

⁴ In July, 1983, a coalition of construction industry groups challenged the legality of the Northwest Conservation and Power Plan (the Plan) prepared by the Council, and the constitutionality of the Council itself. *See* Petitioners' Opening Brief at 1, *Seattle Master Builders Ass'n v. Pacific Northwest Elec. Power and Conservation Planning Council*, 786 F.2d 1359 (9th Cir. 1986) [hereinafter *Petitioners' Opening Brief*]. The homebuilders were joined by Pacific Legal Foundation as amicus. *See* Brief Amicus Curiae of Pacific Legal Foundation at 8-36, *Seattle Master Builders Ass'n v. Pacific Northwest Elec. Power and Conservation Planning Council*, 786 F.2d 1359 (9th Cir. 1986) [hereinafter *Pacific Legal Foundation Brief*]. The Northwest Power Planning Council was joined by the four regional states and the National Governors' Association as amicus. *See* Brief of Amici Curiae States of Oregon, Idaho, Montana, and Washington and the National Governors' Association, *Seattle Master Builders Ass'n v. Pacific Northwest Elec. Power and Conservation Planning Council*, 786 F.2d 1359 (9th Cir. 1986) [hereinafter *State Amici Brief*]. The United States was allowed to intervene as a respondent. *See* Brief for the United States as Intervenor at 6, *Seattle Master Builders Ass'n v. Pacific Northwest Elec. Power and Conservation Planning Council*, 786 F.2d 1359 (9th Cir. 1986) [hereinafter *United States Brief*].

The challenge to the Plan centered on the Model Conservation Standards (MCS). The MCS are building design standards applicable to new electrically heated residential buildings; the standards are "to produce all power savings that are cost-effective for the region and are economically feasible for consumers." Pacific Northwest Electric Power Planning and Conservation Act § 4(f)(1), 16 U.S.C. § 839b(f)(1) (1982). The MCS are to be implemented by state and local governments. Failure to do so can lead to the imposition of a surcharge on electricity sold by BPA to the utility serving the nonimplementing jurisdiction. *Id.* § 4(f)(2), 16 U.S.C. § 839b(f)(2).

eral Constitution prohibits Congress and the states from creating cooperative regional institutions to manage regional resources. More specifically, the question is whether Congress can constitutionally authorize a state-appointed body to guide the actions of a federal agency. The Ninth Circuit Court of Appeals has provided a preliminary answer to these questions, concluding that the Northwest Power Planning Council is constitutional.⁵ That conclusion, however, is currently on appeal.⁶

This article examines the dispute. To provide the necessary background, it first reviews the Act's history and its substantive provisions. The article then examines the constitutional bases of the Act and the challenge to those bases in the context of the

The builders contend that (1) the MCS fail to satisfy the statutory standards because they are neither cost-effective nor economically feasible; (2) the MCS are unreasonable because the Council failed to test the proposed standards for their actual effectiveness; (3) the MCS would inequitably affect new construction; and (4) the Council unlawfully failed to prepare an environmental impact statement. *See* Petitioners' Opening Brief, *supra*, at 49-55. In addition, the builders argue that the Council is unconstitutional, thereby making the MCS invalid. The constitutional issues are the subject of this article.

The constitutional questions are presented only indirectly by the factual setting. The builders argue that the Council is unconstitutional because it exercises significant authority over a federal agency, which it cannot do unless it is composed of federal appointees. Under most provisions of PNEPPCA, the BPA Administrator is required to act in a manner "consistent" with the Plan and the Columbia River Basin Fish and Wildlife Program (the Program). *See infra* notes 43-68 and accompanying text. Such requirements would appear to raise the issue presented by the homebuilders since the federal agency is subject to planning decisions made by a nonfederal body. The MCS, however, are unusual in that the Council is only authorized to recommend, not dictate, a surcharge to the BPA Administrator. Pacific Northwest Electric Power Planning and Conservation Act § 4(f)(2), 16 U.S.C. § 839b(f)(2) (1982). Thus, it is argued, the MCS do not raise the constitutional issue since the Administrator is not required to act consistently with the Council's determination on imposing a surcharge. This is the position of the United States, which, at BPA's urging, intervened in the suit. The United States argued that "the power to make recommendation[s] to a federal agency does not constitute the exercise of significant authority for purposes of the Appointments Clause." United States Brief, *supra*, at 6. The United States urged the court not to reach the constitutional issue which it acknowledged was raised by other provisions of the Act. *Id.* at 6-7. The Ninth Circuit, however, did not note this difficulty. *See* Seattle Master Builders Ass'n. v. Pacific Northwest Elec. Power and Conservation Planning Council, 786 F.2d 1359 (9th Cir. 1986).

⁵ Seattle Master Builders Ass'n. v. Pacific Northwest Elec. Power and Conservation Planning Council, 786 F.2d 1359 (9th Cir. 1986). The initial version of this article was in the publication process when the Ninth Circuit's decision was announced.

⁶ The homebuilders recently filed a petition for certiorari with the United States Supreme Court. *See* 55 U.S.L.W. 3317 (U.S. Oct. 6, 1986) (No. 86-629).

Ninth Circuit's decision. A major difficulty in analyzing the issues raised by the statute is the parties' complete disagreement as to what those issues are. The challengers characterize the case as involving a question of separation of powers.⁷ The Council, on the other hand, views the case as raising federalism issues.⁸

The homebuilders challenging the Act raise the separation-of-powers issues because they view the Act as a congressional attempt to subject an executive branch agency, the Bonneville Power Administration (BPA), to the control of a nonexecutive branch body, the Council. They contend, first, that the Council is not an interstate compact agency but is instead a federal agency because it lacks "the classic indicia of an interstate compact."⁹ The Act therefore is unconstitutional because the Council's members were not appointed by the executive branch as required by the appointments clause of the Constitution. Alternatively, the Council's opponents argue that, even if it is an interstate compact agency, its members are required to be appointed in compliance with the appointments clause because of the Council's authority over BPA. The appointment of Council members by the Governors of the four regional states violates the appointments clause, the challengers argue, because an executive branch agency is subject to control by officials not appointed by the President. The homebuilders thus conclude that Congress sought unconstitutionally to intrude into an area reserved to the executive branch when it authorized the regional states to appoint individuals to control a federal agency.¹⁰

The Council and the states, on the other hand, view the case as involving federalism issues. They contend that the Council is a validly created interstate compact agency. They argue that the

⁷ See *Seattle Master Builders Ass'n v. Pacific Northwest Elec. Power and Conservation Planning Council*, 786 F.2d at 1372-73 (Beezer, J., dissenting); Pacific Legal Foundation Brief, *supra* note 4, at 15-16; Petitioners' Opening Brief, *supra* note 4, at 53-55; Petitioners' Reply Brief at 22-25, *Seattle Master Builders Ass'n v. Pacific Northwest Elec. Power and Conservation Planning Council*, 786 F.2d 1359 (9th Cir. 1986) [hereinafter Petitioners' Reply Brief].

⁸ Respondent's Brief at 64-71, *Seattle Master Builders Ass'n v. Pacific Northwest Elec. Power and Conservation Planning Council*, 786 F.2d 1359 (9th Cir. 1986) [hereinafter Respondent's Brief].

⁹ *Seattle Master Builders Ass'n v. Pacific Northwest Elec. Power and Conservation Planning Council*, 786 F.2d at 1372 (Beezer, J., dissenting); see also Pacific Legal Foundation Brief, *supra* note 4, at 23-33; Petitioners' Reply Brief, *supra* note 7, at 27-29.

¹⁰ Petitioners' Opening Brief, *supra* note 4, at 53-55; Petitioners' Reply Brief, *supra* note 7, at 21-25.

Council's authority over BPA's decision making is constitutionally permissible since it is merely an example of the general principle that federal agencies can be subject to state law when there is a "clear congressional mandate."¹¹ Thus, the Council's defenders conclude that although the Act includes two uncommon features—an interstate compact agency and a waiver of federal supremacy—neither raises significant constitutional problems.

This article concludes that the Council is constitutional. Both prongs of the homebuilders' argument are predicated upon the belief that Congress may not constitutionally subject federal agencies to state decisionmakers. Thus they argue that the Council is not a compact because of the control it exercises over BPA¹² and that its members must be appointed by the executive branch because of the authority they possess.¹³ Challengers and proponents alike, however, have overstated the novelty of the Council. Although it is widely touted as unique,¹⁴ its novelty is the result of combining common components into a new arrangement. By themselves, the Council's components—an interstate compact agency and a relinquishment of federal supremacy over the management of federal property—are hardly novel. In fact, even the combination has precedent.¹⁵ The challenge to the constitutional-

¹¹ Seattle Master Builders Ass'n. v. Pacific Northwest Elec. Power and Conservation Planning Council, 786 F.2d at 1364; Respondent's Brief, *supra* note 8, at 64-71; State Amici Brief, *supra* note 4, at 23-26.

¹² Seattle Master Builders Ass'n. v. Pacific Northwest Elec. Power and Conservation Planning Council, 786 F.2d at 1373 (Beezer, J., dissenting); Petitioners' Reply Brief, *supra* note 7, at 27-33.

¹³ Seattle Master Builders Ass'n. v. Pacific Northwest Elec. Power and Conservation Planning Council, 786 F.2d at 1375-76 (Beezer, J., dissenting); Pacific Legal Foundation Brief, *supra* note 4, at 10-15; Petitioners' Opening Brief, *supra* note 4, at 50-55.

¹⁴ *E.g.*, Hemingway, *The Northwest Power Planning Council: Its Origins and Future Role*, 13 ENVTL. L. 673 (1983) ("[T]he Council is a unique experiment in American federalism . . .").

¹⁵ Both the Susquehanna River Basin Compact and the Delaware River Basin Compact authorize the compact agency to develop a comprehensive plan for the development of water resources in the respective river basins. Each also restricts the decision making authority of federal agencies by providing that "[n]o expenditure or commitment shall be made for or on account of the construction, acquisition or operation of any [federal] project or facility nor shall it be deemed authorized, unless it shall have first been included by the [interstate] commission in the comprehensive plan." Susquehanna River Basin Compact, Pub. L. No. 91-575, § 12.1, 84 Stat. 1509, 1524 (1970); *see* Delaware River Basin Compact, Pub. L. No. 87-328, § 11.1(b), 75 Stat. 688, 701 (1961).

ity of the Council thus rests upon a misperception of the Council and of the Constitution.¹⁶

I

THE PACIFIC NORTHWEST ELECTRIC POWER PLANNING AND CONSERVATION ACT

A. *The Historical Context*

PNEPPCA's roots lie in the high degree of cooperation which has developed among the utilities in the Pacific Northwest.¹⁷ This cooperation can initially be traced to the role of BPA as the region's wholesaler of electricity and to the mutual benefits which resulted from operating the region's hydroelectric projects in a coordinated fashion.¹⁸ By the 1960's, most projects were operated under a unified management system. Given this history of cooper-

¹⁶ Although the constitutional challenge has little basis, the current litigation and the resulting uncertainty has allowed BPA and the other managers of the federal property subject to disposition under PNEPPCA to evade the statutory obligations. See Blumm, *Reexamining the Parity Promise: More Challenges than Successes to the Implementation of the Columbia Basin Fish and Wildlife Program*, 16 ENVTL. L. 461 (1986); Chaney, *Implementing the Columbia River Basin Fish and Wildlife Program: A Case History*, 22 IDAHO L. REV. — (1986) (in press); Lothrop, *The Failure of the Fish Passage Provisions of the Columbia Basin Fish and Wildlife Program and Some Suggested Remedies*, 34 ANADROMOUS FISH L. MEMO 1 (1985).

¹⁷ This brief historical background draws primarily upon H.R. REP. NO. 976, 96th Cong., 2d Sess., pt. 2, at 26-32, reprinted in 1980 U.S. CODE CONG. & ADMIN. NEWS 6023, 6023-30; K. LEE, D. KLEMKA & M. MARTS, *ELECTRIC POWER AND THE FUTURE OF THE PACIFIC NORTHWEST* (1980); Balmer, *From Symbiosis to Synergy: A Case Study of Public and Private Electric Power in the Pacific Northwest*, 13 ENVTL. L. 637, 646-58 (1983); Blumm, *The Northwest's Hydroelectric Heritage: Prologue to the Pacific Northwest Electric Power Planning and Conservation Act*, 58 WASH. L. REV. 175, 214-30 (1983).

¹⁸ By the end of the 1950's, BPA had assumed a central role in the planning and operation of the region's electric power system. This role was enhanced in the 1960's with the authorization of four upstream storage projects in the Columbia River Treaty between Canada and the United States. Columbia River Treaty, Jan. 17, 1961-Sept. 16, 1964, United States-Canada, arts. II, XII, 15 U.S.T. 1555, 1558, 1563-65, T.I.A.S. No. 5638. See generally Johnson, *The Canada-United States Controversy over the Columbia River*, 41 WASH. L. REV. 676 (1966). The availability of storage increased the centralization of the region's electric power system by increasing the potential amount of electricity which could be generated by the downstream dams. Capturing this potential, however, required an integrated operation of all the dams in the basin so that releases of water could be fully utilized. The result was the Pacific Northwest Coordination Agreement which "formalized 'the one-utility concept' under which system operations are coordinated to maximize hydropower production." Blumm, *supra* note 17, at 218.

ation and the advantages it produced, it was natural for the region's utilities to integrate their planning for future load requirements. In the 1960's, when the region's utilities and BPA forecast substantial power requirements for the 1980's, they developed a regional response. Since the available hydroelectric sites had been dammed, attention focused on thermal generating plants. For the publicly owned utilities, the transition to a thermal system was to be financed through "net billing," an accounting procedure under which BPA agreed to purchase the future output of a thermal plant, paying for the power by crediting its preference customers' accounts for the amount of money the customer invested in the plant.¹⁹ The investor-owned utilities (IOUs) were expected to build their own thermal plants to meet their load growth. Since the projected cost of electricity from these plants was only slightly higher than existing hydroelectricity, the loss of inexpensive BPA-marketed power was not expected to be significant. Under this "Phase One Hydro-Thermal Program," construction was begun on seven thermal plants.²⁰

When escalating costs of the thermal plants exhausted the possibilities of net billing in late 1973, BPA concluded that it had insufficient power reserves to provide firm power to nonpreference customers and announced that it would not renew contracts with either the IOUs or the direct service industries (DSIs).²¹ The result was a flurry of rate increases for customers of IOUs, renegotiated contracts with the DSIs, and the beginning of a Phase Two Hydro-Thermal Program. Since Phase Two was developed by BPA and the utilities without public involvement, it ran afoul of the then recently enacted National Environmental Policy Act of

One byproduct of this method of operation was the decimation of the already declining anadromous fish stocks of the Columbia Basin. See Blumm, *Hydropower v. Salmon: The Struggle of the Pacific Northwest's Anadromous Fish Resources for a Peaceful Coexistence with the Federal Columbia River Power System*, 11 ENVTL. L. 211, 243-47, 251 (1981); Goble, *Introduction to the Symposium on Legal Structures for Managing the Pacific Northwest Salmon and Steelhead: The Biological and Historical Context*, 22 IDAHO L. REV. — (1986) (in press).

¹⁹ See K. LEE, D. KLEMKA & M. MARTS, *supra* note 17, at 80-81. The Bonneville Power Administration effectively accepted the risk that the plants would never come on line.

²⁰ See generally *id.* at 66-86.

²¹ The DSIs are primarily aluminum plants which purchase electricity directly from BPA. See *id.* at 40.

1969 (NEPA).²² BPA was required to terminate its involvement pending preparation of an environmental impact statement.²³ The demise of Phase Two created a regional crisis of predicted shortages and immediate rate disparities between customers of the IOUs and those of the publicly owned utilities. Litigation seeking access to the cheap federal power was initiated, and the state of Oregon enacted legislation creating the Oregon Domestic and Rural Power Authority in an attempt to obtain a share of the preference power.²⁴ As the struggle for BPA electricity and the prospect of lengthy court battles increased, so did pressure for a legislative solution to the allocational problems facing the region.²⁵

Although legislative changes to BPA's authority were considered as early as 1975, it was not until 1977 that a bill drafted by the region's utilities was introduced. Regional negotiations continued for the next three years. The oil shortages and the resulting energy crisis of the 1970's had changed the political landscape; the utility industry was no longer the only interested group. BPA and the industry could no longer simply impose their wishes: "Energy policy alternatives were by now of interest to additional groups who wanted to participate in decision making. Environmental groups, antinuclear activists, and soft technology supporters joined fish interests and Indian tribes in seeking a voice in power and river policies."²⁶ PNEPPCA emerged from these extended negotiations when a majority of the interests concluded that their interrelationships were so extensive that accommodation was necessary.²⁷

²² Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified as amended at 42 U.S.C. §§ 4321-4370a (1982 & Supp. II 1984)).

²³ *Natural Resources Defense Council v. Hodel*, 435 F. Supp. 590 (D. Or. 1977), *aff'd sub nom.* *Natural Resources Defense Council v. Munro*, 626 F.2d 134 (9th Cir. 1980); *see also* *Port of Astoria v. Hodel*, 8 Env't Rep. Cas. (BNA) 1156 (D. Or. 1975), *aff'd*, 595 F.2d 467 (9th Cir. 1979).

²⁴ *See generally* K. LEE, D. KLEMKA & M. MARTS, *supra* note 17, at 131, 165-66; Larsen, *Public v. Private Power Revisited: An Oregon Power Authority Proposal*, 7 ENVTL. L. 315 (1977).

²⁵ The completion of the Trojan nuclear power plant, for example, quadrupled Portland's rates within three years. K. LEE, D. KLEMKA & M. MARTS, *supra* note 17, at 140.

²⁶ Balmer, *supra* note 17, at 656.

²⁷ As Representative Dicks of Washington explained to his House colleagues: The bill enjoys widespread, bipartisan support both within and without the Northwest region. It is needed this year to avert a serious economic and energy crisis that will engulf the Northwest in a potentially explosive reallocation of energy when the Bonneville Power Administration's contracts begin expiring in 1981.

B. The Substantive Provisions

1. A Sketch of the Act

PNEPPCA has three primary components. First, it allocates low-cost federal hydroelectricity. Section five of the Act increases BPA's obligations to supply electricity by requiring it to provide power to customers who previously lacked an allocation, while simultaneously restricting the agency's authority to reduce its supply obligations.²⁸ Second, BPA's authority to acquire electricity is

With this legislation, these problems can be averted. This bill embodies a regionally negotiated and supported "peace treaty" by all of the affected parties. It insures a smooth reallocation of power by establishing a regional planning process which permits BPA to sign new utility and industry contracts necessary for the coordinated planning and efficient use of regional resources.

126 CONG. REC. 29,802 (1980); see also *id.* at 29,806-7 (statement of Rep. Swift); *id.* at 27,827 (statement of Rep. Gore); *id.* at 27,812-3 (statement of Rep. Lujan); *id.* at 27,809-10 (statement of Rep. Kazen).

The one major group which continued to oppose the bill was the environmental community, which viewed it as a thermal power plant relief act. Cavanagh, *The Pacific Northwest Electric Power Planning and Conservation (and Thermal Power Plant Relief) Act*, 4 U. PUGET SOUND L. REV. 27 (1980); see also 126 CONG. REC. 29,803 (1980) (statement of Rep. AuCoin); *id.* at 29,801-02 (statement of Rep. Weaver). But see *Conservation's Vote*, NW. ENERGY NEWS, Dec./Jan., 1985/86, at 23 (quoting Cavanagh: "In retrospect, I'm more than happy to admit that I'm glad the Act passed.").

²⁸ Prior to the adoption of the Act, BPA's obligations were restricted to the Federal Columbia River Power System hydroelectric projects and the agency's net billed interest in the Phase One Hydro-Thermal plants, since the agency was not authorized to acquire generating capacity. 16 U.S.C. § 832a (1982). PNEPPCA dramatically changed this by defining a minimum statutory entitlement for each of the four classes of BPA customers, and requiring the agency to offer its customers new contracts within nine months of the Act's adoption. Pacific Northwest Electric Power Planning and Conservation Act § 5(g)(1), 16 U.S.C. § 839c(g)(1) (1982).

(1) *publicly owned utilities* (publics): The Act required that BPA offer each public a contract to provide firm electric power to meet its load in excess of its then-existing generating capacity. BPA thus contracted to meet the full power requirements of those publics without generating capacity, and the load growth of those publics with generating capacity. *Id.* § 5(b), 16 U.S.C. § 839c(b). BPA can restrict its obligations to provide electricity to the publics as a class only when their total demand plus that of the federal agencies exceeds the capability of the Federal Base System. *Id.* § 5(b)(6), 16 U.S.C. § 839c(b)(6).

(2) *federal agencies*: The federal agencies in the region are to receive contracts from BPA on the same terms as the publics, including the right not to have their power supply reduced until the full capability of the Federal Base System has been employed. *Id.* § 5(b)(3), (6), 16 U.S.C. § 839c(b)(3), (6).

(3) *investor-owned utilities* (IOUs): BPA was to offer a regional IOU a contract to meet the IOU's load in excess of that utility's then-existing generating capacity. BPA's contractual responsibility to provide power to an IOU, however,

enhanced to enable it to meet its increased responsibilities. Section six authorizes BPA to acquire²⁹ the output of new conserving and generating resources.³⁰ This new authority, however, is restricted

is subject to the statutory preference for publics and agencies. Contracts with IOUs thus provide that BPA may restrict sales. *Id.* § 5(b)(1), (2), 16 U.S.C. § 839c(b)(1), (2). The contractual entitlement of an IOU thus is limited to the amount of power which BPA acquires from or on behalf of that customer. *Id.* § 5(e), 16 U.S.C. § 839c(e).

(4) *direct service industries* (DSIs): Each DSI was offered a contract for the amount of "industrial firm power" which the DSI had contracted to purchase in 1975. *Id.* § 5(d)(1), 16 U.S.C. § 839c(d)(1). To meet its firm power obligations to other customers, BPA can freely restrict the top quartile of power to a DSI. See H.R. REP. NO. 976, 96th Cong., 2d Sess., pt. 2, at 48, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 6023, 6046; *id.* pt. 1, at 62. A DSI's statutory entitlement thus is to seventy-five percent of the power for which it previously held a contract when the remaining twenty-five percent is necessary to meet firm load requirements.

The statutory entitlements created by the Act in section five thus are the sum of (1) the total Federal Base System, (2) seventy-five percent of the DSI load, and (3) any power BPA acquires from or on behalf of any customer. The Act deems the existing resources sufficient for the contracts required by the section. Pacific Northwest Electric Power Planning and Conservation Act § 5(g)(7), 16 U.S.C. § 839c(g)(7) (1982).

See generally Mellem, *Darkness to Dawn? Generating and Conserving Electricity in the Pacific Northwest: A Primer on the Northwest Power Act*, 58 WASH. L. REV. 245 (1983); Michie, *Impacts of the Pacific Northwest Electric Power Planning and Conservation Act on the Development of Energy Resources in the Pacific Northwest: An Analysis of the Resource Acquisition Priority Scheme*, 4 U. PUGET SOUND L. REV. 299 (1981).

²⁹ The Act specifies that acquisition of resources under section six "shall not be construed as authorizing the Administrator to construct, or have ownership of . . . any electric generating facility." Pacific Northwest Electric Power Planning and Conservation Act § 3(1), 16 U.S.C. § 839a(1) (1982). The authority to acquire a resource thus is only the power to purchase the output of a generating facility.

³⁰ The Act increases BPA's authority by specifying that "the Administrator shall acquire . . . sufficient resources . . . to meet his contractual obligations" incurred under section five. *Id.* § 6(a)(2), 16 U.S.C. § 839d(a)(2). The Act also recognizes the need for flexibility and provides BPA several alternatives for accomplishing its new statutory responsibilities.

The Act grants BPA the power to acquire resources to meet its obligations. In acquiring resources, however, BPA must promote conservation; generating resources can be acquired only if there are insufficient conservation or renewable resources to meet projected demands. *Id.* §§ 4(e)(1), 6(a)(1), 16 U.S.C. §§ 839b(e)(1), 839d(a)(1). The preference for conservation is demonstrated not only by ranking it first in priority for resource acquisitions, *id.* § 4(e)(1), 16 U.S.C. § 839b(e)(1), but also by granting it a 10% cost bonus. *Id.* § 3(4)(D), 16 U.S.C. § 839a(4)(D). This preference also extends to the methods which BPA can employ to acquire conservation. The Act authorizes the agency to make loans and grants directly to individuals and businesses for conservation, *id.* § 6(a)(1)(A), 16 U.S.C. § 839d(a)(1)(A), to issue bonds to finance the loans and grants, *id.* § 8(d), 16 U.S.C. § 838k, to provide billing credits to a utility which

by the third major component of the Act, the Northwest Power Planning Council. BPA's authority is conditioned upon the requirement that the agency must act consistently with two plans developed by the Council.³¹ As one of the chief sponsors of the bill noted, "[t]he regional power plan, drafted by the regional council, will be the map of the region's future energy path."³²

The council mechanism was initially proposed by the region's governors, who felt that the utility-drafted bill did not give sufficient emphasis to the public interest in regional energy planning.³³ As adopted, the Council is composed of eight persons, two of whom are appointed by each of the four regional states: Idaho, Montana, Oregon, and Washington.³⁴ It is charged with preparing two planning documents. The first is a twenty-year regional con-

independently undertakes conservation measures, *id.* § 6(h)(1)(A), 16 U.S.C. § 839d(h)(1)(A), and to provide technical and financial assistance, *id.* § 6(e), 16 U.S.C. § 839d(e). In acquiring other types of resources, the agency can either acquire the output of the resource or grant billing credits to a customer whose acquisition of a resource reduces BPA's obligations under section five. *Id.* § 6(b)(2), (h)(1)(B), 16 U.S.C. § 839d(b)(2), (h)(1)(B).

If BPA is unable to acquire sufficient resources to meet its obligations under section five, it has three alternatives. First, if the shortages are short term, the agency can either draw on its reserves or make short-term purchases from out of the region. The most important reserve available to the agency is the top quartile of power sold to the DSIs, which is freely interruptible. Second, BPA's authority under the Federal Columbia River Transmission System Act to make purchases "to meet temporary deficiencies," 16 U.S.C. § 838i(b)(6)(i) (1982), has effectively been limited to purchases lasting no more than five years. Pacific Northwest Electric Power Planning and Conservation Act §§ 3(12), 5(c), 16 U.S.C. §§ 839a(12), 839c(c) (1982).

Finally, if BPA is unable to acquire sufficient resources to meet its obligations, and shortages cannot be remedied through reserves or Transmission Act purchases, the agency can declare insufficiency and thus reduce its obligations to supply power. While PNEPPCA restricts BPA's authority to declare insufficiency, *e.g.*, *id.* § 5(b)(5), 16 U.S.C. § 839c(b)(5), it does not deny BPA this option. *See, e.g.*, 126 CONG. REC. 30,181-84 (1980) (statement of Sen. Hatfield). *See generally* Mellem, *supra* note 28; Michie, *supra* note 28.

³¹ *See generally infra* notes 43-68 and accompanying text.

³² 126 CONG. REC. 27,819 (1980) (statement of Rep. Swift).

³³ *See Pacific Northwest Electric Power Supply and Conservation Act, 1979: Hearings on S. 2080 Before the Senate Comm. on Energy and Natural Resources, 95th Cong., 2d Sess. 523-28 (1978) (statement of Montana Governor Judge); id.* at 626-42 (statement of Idaho Governor Evans).

³⁴ Pacific Northwest Electric Power Planning and Conservation Act § 4(a)(2), 16 U.S.C. § 839b(a)(2) (1982). The size of the Council was a hotly disputed issue. Idaho and Montana sought a small council (4-5 members) with clear political accountability to each state's governor. Washington, on the other hand, sought a proportionally weighted council, perhaps because it has almost half the region's population. A compromise was eventually struck and added to the bill in the House Interior Committee. Hemingway, *supra* note 14, at 673 n.2.

servation and electric power plan (the Plan).³⁵ The Plan is to contain a schedule for implementing conservation measures and developing additional generating capacity to meet regional electric loads.³⁶ The second planning document is "a program to protect, mitigate, and enhance fish and wildlife" resources and habitat (the Program).³⁷ The Program is to redress the historic imbalance between power and fish in the Basin.³⁸

PNEPPCA thus sought to alleviate the region's apparent shortages by reallocating existing supplies and by increasing BPA's authority to acquire conservation and output of generating facilities. In addition, the Act sought to allay fears that the BPA Administrator would become an "energy czar" as a result of her expanded authority.³⁹ It did so by balancing the expanded federal role with an expanded state role. Given the pivotal position of energy planning to the state siting responsibilities over energy projects, a state-appointed planning council was a necessary check on BPA's authority: "The states feared that without a regional planning authority responsible to the states, BPA's decisions on what new generating plants should be built would simply over-

³⁵ Pacific Northwest Electric Power Planning and Conservation Act § 4(d)(1), 16 U.S.C. § 839b(d)(1) (1982). The Council voted to adopt a regional conservation and electric power plan on April 27, 1983. See 1 NORTHWEST POWER PLANNING COUNCIL, 1983 NORTHWEST CONSERVATION AND ELECTRIC POWER PLAN at i. The formal adoption occurred on June 1, 1983. See 48 Fed. Reg. 24,493 (1983). The Plan was amended on January 23, 1986. See 1 NORTHWEST POWER PLANNING COUNCIL, 1986 NORTHWEST CONSERVATION AND ELECTRIC POWER PLAN.

³⁶ Pacific Northwest Electric Power Planning and Conservation Act § 4(e)(2), 16 U.S.C. § 839b(e)(2) (1982).

³⁷ *Id.* § 4(h)(1)(A), 16 U.S.C. § 839b(h)(1)(A). The Council adopted the required fish and wildlife program on November 15, 1982. See NORTHWEST POWER PLANNING COUNCIL, COLUMBIA RIVER BASIN FISH AND WILDLIFE PROGRAM at i (1982). The Program was amended on October 10, 1984. See *id.* (rev. ed. 1984).

³⁸ See generally Blumm, *supra* note 18; Blumm, *Promising a Process for Parity: The Pacific Northwest Electric Power Planning and Conservation Act and Anadromous Fish Protection*, 11 ENVTL. L. 497 (1981); Goble, *supra* note 18; Wilkinson & Conner, *The Law of the Pacific Salmon Fishery: Conservation and Allocation of a Transboundary Common Property Resource*, 32 U. KAN. L. REV. 17 (1983).

³⁹ The "energy czar" concern was a common refrain in the House debates where the state-appointed Council was added to the bill. See, e.g., 126 CONG. REC. 27,818, 27,828 (1980) (statements of Rep. Swift); *id.* at 27,815 (statement of Rep. Dingell); *id.* at 27,812-13 (statement of Rep. Lujan).

whelm the state planning and siting process.”⁴⁰ It is this balancing of state and federal interests through the Council which has raised constitutional questions.⁴¹

Before reaching these constitutional claims, however, there is a threshold issue: what authority does the Council exercise in relation to BPA? If the Council has merely the authority to recommend that BPA pursue certain actions, its structure is constitutionally irrelevant: state bodies can suggest federal action without creating constitutional difficulties. Constitutional questions are raised only if the Council has mandatory authority over federal conduct. The challenge to the constitutionality of the Council thus is contingent upon its relationship with BPA.⁴²

2. *The Council and BPA: The Constitutional Dimension*

The relationship between the Council and BPA is a major theme in PNEPPCA. The Act requires BPA to act “in a manner consistent with” the council’s Plan and Program.⁴³ This require-

⁴⁰ Hemingway, *supra* note 14, at 679; see also H.R. REP. NO. 976, 96th Cong., 2d Sess., pt. 2, at 78, reprinted in 1980 U.S. CODE CONG. & ADMIN. NEWS 6023, 6069.

⁴¹ See H.R. REP. NO. 976, 96th Cong., 2d Sess., pt. 2, at 40, reprinted in 1980 U.S. CODE CONG. & ADMIN. NEWS 6023, 6038; 126 CONG. REC. 27,820 (1980) (statement of Rep. Swift); Pacific Legal Foundation Brief, *supra* note 4, at 8-36; Petitioners’ Opening Brief, *supra* note 4, at 49-55; Petitioners’ Reply Brief, *supra* note 7, at 21-36.

⁴² Throughout this article the consistency requirement is discussed in terms of conditioning BPA’s authority. While BPA is the dominant federal actor, some of the consistency requirements are equally applicable to the federal agencies which either operate the Federal Columbia River Power System, i.e., the Army Corps of Engineers and the Bureau of Reclamation, or regulate the nonfederal projects which are part of the regional system, i.e., the Federal Energy Regulatory Commission. See, e.g., Pacific Northwest Electric Power Planning and Conservation Act § 4(h)(11)(A), 16 U.S.C. § 839b(h)(11)(A) (1982).

⁴³ PNEPPCA contains general provisions requiring BPA to use its statutory authorities to protect fish and wildlife “in a manner consistent with” the Plan and the Program, *id.* § 4(h)(10)(A), 16 U.S.C. § 839b(h)(10)(A), and requiring resource acquisition decisions to be consistent with the Plan. *Id.* § 4(d)(2), 16 U.S.C. § 839b(d)(2); see also *id.* § 6(a)(1), (f)(1), 16 U.S.C. § 839d(a)(1), (f)(1) (iterating the general requirement that resources be acquired only when “consistent with the plan”).

PNEPPCA is only one of several statutes adopted by Congress that impose “consistency” requirements on federal property managers. For example, the Coastal Zone Management Act (CZMA), 16 U.S.C. §§ 1451-1464 (1982), requires federal agencies conducting activities directly affecting the coastal zone to do so “in a manner which is, to the maximum extent practicable, consistent with approved state management programs.” *Id.* § 1456(c)(1); see also *id.* § 1456(c)(2), (c)(3)(A)-(B), (d). Under CZMA, discretionary federal activities

ment significantly restricts the federal agency's conduct in two ways. First, the Act denies the agency the authority to make commitments unilaterally either to acquire major new resources or to sell electricity to new large load customers. Second, the Act authorizes the Council to make its own consistency determinations and to force BPA to respond to the Council's decisions.

PNEPPCA imposes stringent consistency provisions when BPA seeks to acquire a "major resource," which the Act defines as a source of electricity or conservation with a capacity of more than fifty megawatts to be acquired for more than five years.⁴⁴ Before acquiring such a resource, BPA must provide the public an opportunity to participate in evaluating the proposal and to make a written consistency determination.⁴⁵ If BPA determines that the proposal is inconsistent with the Plan but that the resource is nonetheless needed to meet the agency's electricity supply obligations, the acquisition requires specific congressional approval.⁴⁶ If BPA concludes that the acquisition proposal is consistent with the

occurring on federal lands are exempt from direct state regulation. 16 U.S.C. § 1453(1); *see* Granite Rock Co. v. California Coastal Comm'n, 590 F. Supp. 1361, 1370 (N.D. Cal. 1984), *rev'd on other grounds*, 768 F.2d 1077 (9th Cir. 1985), *appeal docketed*, 54 U.S.L.W. 3508 (U.S. Jan. 15, 1986) (No. 85-1200). Such federal actions are, however, subject to a consistency requirement if they directly affect the coastal zone. Secretary of the Interior v. California, 464 U.S. 312, 323 (1984). Similarly, the Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331-1353 (1982), prohibits the Secretary of the Interior from issuing permits to explore the lands lying on the outer continental shelf unless the coastal state agrees that the exploration is consistent with its coastal zone management plan, or the Secretary of Commerce determines that the exploration is "in the interest of national security." *Id.* § 1340(c)(2). The same procedures are applicable if the Secretary of the Interior proposes to permit actual oil and gas development. *Id.* § 1351(d). Finally, the Federal Land Policy and Management Act, 43 U.S.C. §§ 1701-1784 (1982 & Supp. II 1984), prohibits certain land transfers unless they are consistent with "State and local government land use plans and programs." *Id.* § 1721(c)(1).

⁴⁴ Pacific Northwest Electric Power Planning and Conservation Act § 3(12), 16 U.S.C. § 839a(12) (1982).

⁴⁵ The agency is required to provide notice to the public, the Council, the Governors of the four regional states, and the agency's customers. *Id.* § 6(c)(1)(A), 16 U.S.C. § 839d(c)(1)(A). BPA is to hold at least one public hearing at least sixty days after the notice, create a record to assist in evaluating the proposal, and render a written decision which must include a consistency determination. This decision is to be made public and provided to the Council. *Id.* § 6(c)(1)(B)-(D), 16 U.S.C. § 839d(c)(1)(B)-(D).

⁴⁶ BPA must make formal findings that the resource is needed to meet its statutory obligations, and may acquire the resource only when "the expenditure of funds . . . has been specifically authorized by Act of Congress." *Id.* § 6(c)(3)(A), (B), 16 U.S.C. § 839d(c)(3)(A), (B).

Plan, the Council may nonetheless prevent the acquisition by determining that it is, in fact, inconsistent.⁴⁷ Once the Council has determined that the proposal is inconsistent, the resource may be acquired only if Congress authorizes the expenditure of the necessary funds.⁴⁸ BPA thus is able to acquire a major resource without specific Congressional approval only when both the agency and the Council agree that the resource is consistent with the Plan.

The agency is similarly restricted when it attempts to make a major commitment of resources. PNEPPCA prohibits BPA from increasing the amount of electricity it sells to a DSI without the Council's concurrence that the sale is consistent with the Plan.⁴⁹ The prohibition on additional sales to DSIs works with the restrictions on acquisition of major resources since the agency will be unable to justify inconsistent resource acquisitions by increasing its contractual obligations.

The Act does grant BPA some flexibility to meet unexpected demands or to take advantage of unexpected resources. PNEPPCA authorizes the agency to acquire an inconsistent nonmajor resource under certain circumstances. Importantly, however, BPA is required to find that the acquisition, although inconsistent with the Plan, is nonetheless consistent with the statutory criteria embodied in the Plan.⁵⁰ Since the Act allows the Council to review the Plan as seldom as every five years,⁵¹ BPA's

⁴⁷ *Id.* § 6(c)(2), (3), 16 U.S.C. § 839d(c)(2), (3).

⁴⁸ Following the Council's inconsistency determination, the proposal can proceed only if the BPA Administrator finds that the acquisition is required to meet contractual obligations under the Act. The proposal is then reported to Congress for its decision. *Id.* § 6(c)(3), 16 U.S.C. § 839d(c)(3).

⁴⁹ *Id.* § 5(d)(3), 16 U.S.C. § 839c(d)(3). In addition to the concurrence of the Council, the sale cannot be made until the agency concludes that (a) additional reserves are needed to assure firm loads, (b) the sale to a DSI is an economical means of providing the reserve, (c) the reserve cannot be created by selling to the DSI through a utility, and (d) the agency can acquire sufficient electricity to serve the load. *Id.* § 5(d)(3)(A)-(D), 16 U.S.C. § 839c(d)(3)(A)-(D).

⁵⁰ *Id.* § 6(b)(2), 16 U.S.C. § 839d(b)(2). The Act imposes two primary requirements. First, the resource must be "cost effective," a comparative term for resources which are needed and less expensive than other available resources. *Id.* § 3(4)(A), 16 U.S.C. § 839a(4)(A). Second, the Act establishes a priority scheme: conservation, renewable resources, cogeneration and waste heat, and conventional thermal resources such as coal and nuclear. *Id.* § 4(e)(1), 16 U.S.C. § 839b(e)(1). Conservation is not only the first priority resource, it also receives a 10% cost-effectiveness bonus since such resources are deemed cost effective if they are no more than 110% of the cost of the nonconservation resource. *Id.* § 3(4)(D), 16 U.S.C. § 839a(4)(D).

⁵¹ *Id.* § 4(d)(1), 16 U.S.C. § 839b(d)(1).

limited authority to acquire small or short-term resources will allow the region to take advantage of resources which might become available between Plan revisions.⁵² By limiting the size and duration of acquisitions and requiring them to be consistent with the statutory criteria, the Act provides flexibility while minimizing the effect on the Plan.

Finally, the Council is given independent authority to evaluate the consistency of the BPA Administrator's actions under the Plan.⁵³ If the agency refuses to act, PNEPPCA grants the Council authority to force the Administrator to make a final decision.⁵⁴ Since the Administrator's decision is reviewable on the consistency standard, Congress effectively gave the Council the power to initiate judicial review of BPA's actions.

The Act thus embodies a coherent scheme that prohibits BPA from independently making major commitments either to acquire a resource or to provide additional electricity to a DSI. The Council's oversight role is further strengthened by the explicit grant of authority to review BPA's actions and to initiate judicial review of its conduct. The Act thus contains an explicit waiver of federal supremacy: BPA is required to act consistently with plans produced by the state-appointed Council.

The Act's legislative history provides additional support for this conclusion. The Council assumed its current form as a result of amendments negotiated by the Governors of the regional states and introduced in the House Interior and Insular Affairs Committee by Representative Pat Williams.⁵⁵ Representative Williams explained the purpose of the Council and its relationship to BPA by noting that "[t]he amendment provides for Council members to be appointed by the Governors rather than by the Secretary of Energy. Gubernatorial appointment will ensure regional control over regional power matters and will provide a more meaningful

⁵² Nonmajor resources, because of their size or limited duration, may require less than five years to move from conception to operation. In addition, during the debate on the bill its proponents were quick to point out that it did not reduce BPA's obligation under the Public Utility Regulatory Policy Act (PURPA). See Public Utility Regulatory Policy Act of 1978, § 210, 16 U.S.C. § 824a-3 (1982). Most projects which qualify under PURPA are nonmajor resources and thus could be acquired if consistent with the statutory criteria of the Plan.

⁵³ Pacific Northwest Electric Power Planning and Conservation Act § 4(i), 16 U.S.C. § 839b(i) (1982).

⁵⁴ *Id.* § 4(j), 16 U.S.C. § 839b(j).

⁵⁵ See H.R. REP. NO. 976, 96th Cong., 2d Sess., pt. 2, at 70, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 6023, 6063.

check on the Bonneville Administrator.”⁵⁶ Representative Williams also noted that a state-appointed council was necessary to balance the expanded BPA authority and ensure “a strong, cooperative planning role for the states.”⁵⁷ This idea of the Council as a check or constraint on BPA,⁵⁸ and the Plan and the Program as guiding the Administrator’s conduct,⁵⁹ was a common refrain in the debates leading to passage of the Act. The bill’s proponents argued that it would reduce the power of the federal government in regional energy planning:

[This] bill lets the Northwest States guide BPA’s actions: Rarely does the Congress step back from increased federalization, but in this bill it is the Northwest States that will, for the first time, be given an opportunity and a mechanism for guiding BPA’s exercise of its new authorities. . . . The regional power plan, drafted by the regional council, will be the map of the region’s future energy path.⁶⁰

The Act’s legislative history thus reinforces the statutory language and structure: in place of federal dominance, the Act was to shift decision making to the people of the Northwest by requiring BPA to act “in a manner consistent with” the Council’s planning decisions.⁶¹

⁵⁶ *Id.*; see also *id.* at 78, reprinted in 1980 U.S. CODE CONG. & ADMIN. NEWS at 6068.

⁵⁷ *Id.* at 78, reprinted in 1980 U.S. CODE CONG. & ADMIN. NEWS at 6069.

⁵⁸ See, e.g., 126 CONG. REC. 29,811 (1980) (statement of Rep. Dingell); *id.* at 29,805 (statement of Rep. Foley); *id.* at 27,828 (statement of Rep. Swift); *id.* at 27,819 (statement of Rep. Swift); *id.* at 27,815 (statement of Rep. Dingell).

⁵⁹ See, e.g., H.R. REP. NO. 976, 96th Cong., 2d Sess., pt. 2, at 33, 40, reprinted in 1980 U.S. CODE CONG. & ADMIN. NEWS 6023, 6031, 6038; 126 CONG. REC. 29,801 (1980) (statement of Rep. Kazen); *id.* at 27,826 (statement of Rep. Dicks); *id.* at 27,825 (statement of Rep. Bonker); *id.* at 27,816 (statement of Rep. Moorhead); *id.* at 27,809-10 (statement of Rep. Kazen).

⁶⁰ 126 CONG. REC. 27,819 (1980) (statement of Rep. Swift); see also *id.* at 29,802 (statement of Rep. Lujan).

⁶¹ See *id.* at 29,802 (statement of Rep. Lujan); *id.* at 27,818 (statement of Rep. Swift); *id.* at 27,810 (statement of Rep. Ullman). Representative Bonker went even further, arguing that under the Act, “[t]he regional power council will have the authority in the development of the plan [sic] to actually instruct the Bonneville Power Administrator to buy out WWPPS [sic] 3 and 5, and terminate them.” *Id.* at 29,806 (statement of Rep. Bonker); cf. *id.* at 27,815 (statement of Rep. Pritchard) (the Council “will not only draw up the plan detailing what the region’s [energy] needs will be, it will have the authority to make sure [BPA] adheres to the plan”).

The plain meaning of the term "consistent" is "not contradictory," or "marked by agreement."⁶² BPA's conduct therefore is to agree with and not contradict the Council's planning decisions. The Council thus does not have the power to direct BPA. Nonetheless, the federal agency's authority to act is significantly restricted since its actions must conform to the Plan and the Program.⁶³

This interpretation of the respective roles of the Council and BPA is supported by decisions construing the consistency requirements in other federal statutes. For example, in reviewing the consistency provisions of the Coastal Zone Management Act (CZMA),⁶⁴ one court concluded:

Though I reject the notion that Congress intended to give the states an absolute "veto power" over federal action in the coastal zone, I believe it is manifest from the fact of the statute that Congress did intend to cede some authority in matters of coastal development to the affected states in order to achieve cooperative and coordinated development of scarce natural resources. The requirement of consistency with federally-approved state coastal zone management programs is not one to be dismissed lightly.⁶⁵

Another court decided that "consistency" requires a determination "that the activity will be carried out in a manner which conforms with the state program."⁶⁶ Since the consistency requirement in CZMA is limited by the phrase "to the maximum extent

⁶² See, e.g., BLACK'S LAW DICTIONARY 279 (rev. 5th ed. 1979); WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 484 (unabridged ed. 1981).

⁶³ The Council's authority over BPA is of two types. First, PNEPPCA itself provides the Council with certain procedural mechanisms to force BPA to act in accordance with the Plan and Program. See *supra* notes 53-54 and accompanying text. Second, BPA is subject to federal judicial process at the insistence of "[a] person . . . adversely affected or aggrieved" by its conduct. Administrative Procedure Act § 10(a), 5 U.S.C. § 702 (1982). In such situations, the courts are to determine whether the agency's actions are "not . . . in accordance with law." *Id.* § 10(e), 5 U.S.C. § 706(2)(A); see, e.g., Columbia Basin Land Protection Ass'n v. Schlesinger, 643 F.2d 585, 596 (9th Cir. 1981). See generally Petitioners' Opening Brief, *supra* note 4, at 50-52.

⁶⁴ 16 U.S.C. §§ 1451-1464 (1982).

⁶⁵ Conservation Law Found. v. Watt, 560 F. Supp. 561, 576 (D. Mass.), *aff'd sub nom.* Massachusetts v. Watt, 716 F.2d 946 (1st Cir. 1983).

⁶⁶ California *ex rel.* Brown v. Watt, 520 F. Supp. 1359, 1368 (C.D. Cal. 1981), *aff'd*, 683 F.2d 1253, 1263-66 (9th Cir. 1982), *rev'd on other grounds sub nom.* Secretary of the Interior v. California, 464 U.S. 312 (1984); see also Granite Rock Co. v. California Coastal Comm'n, 590 F. Supp. 1361, 1370 (N.D. Cal. 1984), *rev'd on other grounds*, 768 F.2d 1077 (9th Cir. 1985), *appeal docketed*, 54 U.S.L.W. 3508 (U.S. Jan. 15, 1986) (No. 85-1200). For the current state of judicial interpretations on the reach of the consistency provisions, see Dahl, *Fed-*

practicable,"⁸⁷ PNEPPCA's consistency mandate should be even more expansively construed and BPA's authority concomitantly restricted.

PNEPPCA thus authorizes the waiver of BPA's immunity from nonfederal control by establishing a detailed structure that permits a state-appointed body to develop plans to which the agency must conform. As one Council member has noted, "[s]omewhere along the continuum between directive and advisory lies the meaning of 'consistent with the plan.'"⁸⁸ Regardless of precisely where the point lies, PNEPPCA does give the regional states, through the Council, significant authority over BPA.

II

THE COUNCIL AND THE CONSTITUTION

Those challenging the constitutionality of PNEPPCA and the Council contend that Congress cannot delegate such authority over federal conduct to a body of state-appointed officers, arguing that such oversight responsibilities may be exercised only by federal officers appointed by the executive branch. The homebuilders' argument thus is that Congress may not constitutionally subject federal executive officers to the control of state-appointed officers. In short, some activities may constitutionally be performed only by federal officers appointed in compliance with the appointments clause.

As applied to PNEPPCA and the Council, the argument involves two contentions. The first focuses on the constitutional status of the Council. The challengers argue that the Council is not actually an interstate compact agency because it does not comply with the constitutional requirements for creating such a body. Rather, it is a federal agency with state-appointed officers.⁸⁹ This is unconstitutional, the challengers contend, because it subjects federal executive authority to officers not appointed by the execu-

eral Consistency Under the Coastal Zone Management Act Revisited, 5 COASTAL L. MEMO 1 (1986).

⁸⁷ 16 U.S.C. § 1456(c)(1) (1982).

⁸⁸ Hemingway, *supra* note 14, at 691. The Act's scheme indicates that the point varies with the magnitude of BPA's proposed action. See *supra* notes 44-52 and accompanying text.

⁸⁹ Seattle Master Builders Ass'n v. Pacific Northwest Elec. Power and Conservation Planning Council, 786 F.2d at 1371-73 (Beezer, J., dissenting); see also Petitioners' Reply Brief, *supra* note 7, at 27-29.

tive branch. The first question thus is the constitutional status of the Council: Is it an interstate compact agency or a federal agency administered by state-appointed officials?

In addition, the homebuilders argue that even if the Council is a constitutionally created interstate compact agency, its members nonetheless must be appointed in compliance with the appointments clause because the compact clause "is not an exception to the Appointments Clause."⁷⁰ This second argument ultimately turns upon the characterization of the Council's authority. Those challenging the Council's constitutionality argue that its authority is of a type which can only be exercised by "Officers of the United States."⁷¹ Thus, for the challengers, the constitutionality of the Council ultimately depends upon characterizing the type of authority exercised by its members. Portraying that authority as "significant authority pursuant to the laws of the United States,"⁷² they conclude that only federal officers may exercise such authority and that the Council is therefore unconstitutional since its members are not federally appointed.⁷³

A. *The Interstate Compact Clause*

The Northwest Power Planning Council was initially proposed by the Governors of the four regional states.⁷⁴ The Governors negotiated the Council's final formulation which was introduced on

⁷⁰ Seattle Master Builders Ass'n v. Pacific Northwest Elec. Power and Conservation Planning Council, 786 F.2d at 1375 (Beezer, J., dissenting); Petitioners' Reply Brief, *supra* note 7, at 29-30.

⁷¹ See U.S. CONST. art. II, § 2, cl. 2; *infra* text accompanying note 119.

⁷² Seattle Master Builders Ass'n v. Pacific Northwest Elec. Power and Conservation Planning Council, 786 F.2d at 1375 (Beezer, J., dissenting) (quoting Buckley v. Valeo, 424 U.S. 1, 126 (1976)); see also Petitioners' Opening Brief, *supra* note 4, at 52-55; Petitioners' Reply Brief, *supra* note 7, at 29-33.

⁷³ See *infra* notes 118-49 and accompanying text.

⁷⁴ See *Pacific Northwest Electric Power Supply and Conservation Act, 1979: Hearings on S. 2080 Before the Senate Comm. on Energy and Natural Resources, 95th Cong., 2d Sess. 523-28 (1978)* (statement of Governor Judge); *id.* at 626-42 (statement of Governor Evans); Hemingway, *supra* note 14, at 678.

In their attempts to increase the formal requirements, the opponents of the Council ignore this crucial bit of history, preferring to continually refer to the Council as a federal creation. See Pacific Legal Foundation Brief, *supra* note 4, at 33-34; Petitioners' Reply Brief, *supra* note 7, at 27-29. As the Supreme Court has frequently stated, however, "[t]he terms 'agreement' or 'compact' taken by themselves are sufficiently comprehensive to embrace all forms of stipulation, written or verbal, and relating to all kinds of subjects." *Virginia v. Tennessee*, 148 U.S. 503, 517-18 (1893). The letter from the four Governors is itself an agreement under the constitutional standard announced in *Virginia v. Tennessee*.

their behalf as amendments to the bill in the House Interior Committee.⁷⁵ The amendments were adopted and the Act as approved gives congressional consent to the agreement of the region's Governors. PNEPPCA provides: "[t]he consent of Congress is given for an agreement . . . pursuant to which . . . there shall be established a regional agency to be known as the 'Pacific Northwest Electric Power and Conservation Planning Council.'"⁷⁶ Each of the regional states has subsequently adopted legislation formally ratifying the compact.⁷⁷

The compact clause provides that "[n]o State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State."⁷⁸ The Constitution thus imposes no procedural or substantive requirements beyond congressional approval of "any agreement or compact" between states. Indeed, the clause is so lacking in formal requirements that the Supreme Court has stated that the agreement between the states need not even be reduced to a writing: "The terms 'agreement' or 'compact' taken by themselves are sufficiently comprehensive to embrace all forms of stipulation, written or verbal, and relating to all kinds of subjects."⁷⁹ As a result of the absence of formal requirements, the

⁷⁵ See H.R. REP. NO. 976, 96th Cong., 2d Sess., pt. 2, at 70, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 6023, 6063. See generally Hemingway, *supra* note 14, at 673 n.2, 678-80 (discussing the negotiations and the compromises required); Hemingway *Retrospective*, *supra* note 1, at 4-7. One of the recurring refrains in the debates leading to the passage of the bill containing the Council as a compact agency was the statement that the "bill embodies a regionally negotiated" solution. See, e.g., 126 CONG. REC. 29,802 (1980) (statement of Rep. Dicks); see also *id.* at 27,812 (statement of Rep. Lujan).

⁷⁶ Pacific Northwest Electric Power Planning and Conservation Act § 4(a)(2), 16 U.S.C. § 839b(a)(2) (1982). The Act also provides that appointment of Council members by three states "shall constitute an agreement by the States establishing the Council and such agreement is hereby consented to by the Congress." *Id.*

⁷⁷ See IDAHO CODE § 61-1202 (Supp. 1986); MONT. CODE ANN. § 90-4-402 (1985); OR. REV. STAT. § 469.805 (1985); WASH. REV. CODE § 43.52A.030 (Supp. 1986); see also Pacific Northwest Electric Power Planning and Conservation Act § 4(a)(2)(B), 16 U.S.C. § 839b(a)(2)(B) (1982) (providing for ratification through appointment of Council members within six months).

⁷⁸ U.S. CONST. art. I, § 10, cl. 3.

⁷⁹ *Virginia v. Tennessee*, 148 U.S. 503, 517-18 (1893); cf. *Holmes v. Jennison*, 39 U.S. (14 Pet.) 540, 571-72 (1840) (considering terms "treaty," "agreement," and "compact"). While the terms are very broad, not all interstate agreements fall within the clause and require congressional approval. The only agreements that require congressional approval are those that "may tend to increase and build up the political influence of the contracting States, so as to encroach upon or impair the supremacy of the United States or interfere with their rightful

Court has deferred to Congress, recognizing that the clause involves questions of political accommodation between the federal and state governments. Thus the Court has consistently followed the principle that Congress is the proper body to determine what form its consent will take: "[t]he constitution makes no provision respecting the mode or form in which the consent of congress is to be signified, very properly leaving that matter to the wisdom of that body."⁸⁰

Two corollaries of this general principle are particularly relevant to the constitutional challenge to the Northwest Power Planning Council: Congress may give its consent in advance of state action,⁸¹ and may grant its consent conditionally.⁸² Despite the asserted novelty of the procedures creating the Council,⁸³ examples of both advance and conditional congressional consent are common.

Since at least 1911,⁸⁴ Congress has enacted statutes providing advance consent to compacts on a variety of subjects. These invitations to interstate cooperation have applied to regulation of interstate electricity,⁸⁵ flood control,⁸⁶ tobacco production,⁸⁷ parks

management of particular subjects placed under their entire control." *Virginia v. Tennessee*, 148 U.S. at 518. As the Court subsequently noted, "[t]he relevant inquiry must be one of impact on our federal structure." *United States Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 471 (1978); see also *New Hampshire v. Maine*, 426 U.S. 363 (1976). See generally Engdahl, *Characterization of Interstate Arrangements: When Is a Compact Not a Compact?*, 64 MICH. L. REV. 63 (1965).

⁸⁰ *Green v. Biddle*, 21 U.S. (8 Wheat.) 1, 85-86 (1823). The question, the Court said, is whether Congress has, "by some positive act, in relation to such agreement, signified the consent of that body to its validity." *Id.* at 86. Thus the Court found consent to be implied from subsequent actions of Congress which were inconsistent with a lack of consent. *Id.*; see also *Wharton v. Wise*, 153 U.S. 155, 173 (1894); *Virginia v. Tennessee*, 148 U.S. 503, 525 (1893).

⁸¹ *Cuyler v. Adams*, 449 U.S. 433, 441 (1981); *Virginia v. Tennessee*, 148 U.S. 503, 521 (1893).

⁸² *Cuyler v. Adams*, 449 U.S. at 439-40; *Petty v. Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275, 281-82 n.7 (1959); *James v. Dravo Constructing Co.*, 302 U.S. 134, 148 (1937); *Tobin v. United States*, 306 F.2d 270 (D.C. Cir.), *cert. denied*, 371 U.S. 902 (1962).

⁸³ See Pacific Legal Foundation Brief, *supra* note 4, at 28-33; Petitioners' Reply Brief, *supra* note 7, at 27-29.

⁸⁴ See Weeks Law, Pub. L. No. 61-435, § 1, 36 Stat. 961 (1911) (codified at 16 U.S.C. § 552 (1982)).

⁸⁵ Federal Power Act, Pub. L. No. 66-280, § 20, 41 Stat. 1063, 1073 (1920) (codified at 16 U.S.C. § 813 (1982)); see *Safe Harbor Water Power Corp. v. Federal Power Comm'n*, 124 F.2d 800 (3d Cir. 1941), *cert. denied*, 316 U.S. 663 (1942).

and parkways,⁸⁸ crime prevention,⁸⁹ forest fires,⁹⁰ fisheries,⁹¹ and radioactive waste management.⁹² In most of these cases, Congress was responding to state actions; the tobacco production compact, for example, was the result of a Virginia statute.⁹³ This has not, however, uniformly been the case. For instance, Congress adopted a statute providing advance consent to the formation of compacts between states "for the purpose of conserving the forests and the water supply of the States,"⁹⁴ even though at the time there were no negotiations on the subject among the states.⁹⁵

Examples of conditional consent are also common. Perhaps the most celebrated instance is the Boulder Canyon Project Act.⁹⁶ In consenting to the Colorado River Compact of 1922, Congress imposed several conditions on the agreement, including changes in the procedure for state ratification.⁹⁷ When Arizona subsequently

⁸⁸ Flood Control Act of June 22, 1936, Pub. L. No. 74-738, § 4, 49 Stat. 1570, 1571 (codified at 33 U.S.C. § 701d (1982)).

⁸⁹ Tobacco Control Act, Pub. L. No. 74-534, § 1, 49 Stat. 1239 (1936) (codified at 7 U.S.C. § 515 (1982)).

⁹⁰ Act of June 23, 1936, Pub. L. No. 74-770½, 49 Stat. 1894, 1895 (codified at 16 U.S.C. § 17m (1982)).

⁹¹ Act of June 6, 1934, Pub. L. No. 73-293, 48 Stat. 909 (codified as amended at 4 U.S.C. § 112 (1982)).

⁹² Act of June 25, 1949, Pub. L. No. 81-128, 63 Stat. 271, repealed by Act of June 30, 1978, Pub. L. No. 95-307, § 8(a), 92 Stat. 353, 356.

⁹³ H.R.J. Res. 302, 54 Stat. 261 (1940) (codified at Fish and Wildlife Coordination Act, 16 U.S.C. § 667a (1982)).

⁹⁴ Low-Level Radioactive Waste Policy Amendments Act of 1985, Pub. L. No. 99-240, § 4, 99 Stat. 1842, 1845-46 (amending 42 U.S.C. §§ 2021b-2021d (1982)).

⁹⁵ See generally F. ZIMMERMAN & M. WENDELL, *THE INTERSTATE COMPACT SINCE 1925*, 57-58 & n.219 (1951).

⁹⁶ Weeks Law, Pub. L. No. 61-435, § 1, 36 Stat. 961 (1911) (codified at 16 U.S.C. § 552 (1982)).

⁹⁷ F. ZIMMERMAN & M. WENDELL, *supra* note 93, at 57. Pacific Legal Foundation argues that "[w]hile the . . . procedure [for adopting compacts] does not necessarily require interstate negotiations prior to the formation of a compact, it does require at least one state to develop an arrangement which can then be accepted by other states." Pacific Legal Foundation Brief, *supra* note 4, at 29. Since neither the Constitution nor any court case has imposed this requirement, it is not surprising that the Foundation's attorneys are unable to cite any authority for this proposition. *But see* Safe Harbor Water Power Corp. v. Federal Power Comm'n, 124 F.2d 800 (3d Cir. 1941), *cert. denied*, 316 U.S. 663 (1942) (construing section twenty of the Federal Power Act as authorization for compacts regulating interstate electricity rates); P. HARDY, *INTERSTATE COMPACTS* 17 (1982).

⁹⁸ Pub. L. No. 70-642, 45 Stat. 1057 (1928) (codified at 43 U.S.C. §§ 617-617t (1982)).

⁹⁹ *Id.* § 13, 45 Stat. at 1064 (codified at 43 U.S.C. § 617c (1982)).

challenged the constitutionality of the Act and the compact, the Court noted the conditions imposed in the statute granting consent to the compact and held the statute and compact constitutional.⁹⁸

Federal involvement in the formation of other compacts has been pervasive. In granting advance consent to a compact on the Republican River, for example, Congress conditioned its consent upon the inclusion of a federal participant in the negotiations.⁹⁹ Such involvement has been a common feature.¹⁰⁰ While many of the federal statutes have been little more than consent to agreements on general topics, others have included detailed specifications of terms and conditions.¹⁰¹ For example, Congress has recently granted advance consent to the formation of interstate compacts for regional disposal of low-level radioactive waste as part of a complex regulatory scheme.¹⁰²

The lack of formal constitutional requirements beyond congressional consent and the concomitant judicial recognition that com-

⁹⁸ See *Arizona v. California*, 283 U.S. 423, 448, 464 (1931); see also *Arizona v. California*, 292 U.S. 341, 345 (1934) (noting the conditional congressional consent); P. HARDY, *supra* note 95, at 18-19.

⁹⁹ Act of Aug. 4, 1942, Pub. L. No. 77-696, 56 Stat. 736.

¹⁰⁰ See, e.g., *Susquehanna River Basin Compact*, Pub. L. No. 91-575, 84 Stat. 1509 (1970) (federal commissioners to sit on interstate regulatory body); *Delaware River Basin Compact*, Pub. L. No. 87-328, 75 Stat. 688 (1961) (same); S.J. Res. 76-222, 54 Stat. 748 (1940) (same); Act of May 31, 1939, Pub. L. No. 76-96, 53 Stat. 785 (federal participation in compact negotiations); Act of Aug. 19, 1921, Pub. L. No. 67-56, § 1, 42 Stat. 171 (congressional consent to the initial negotiations for a Colorado River compact "upon condition" that a federal representative participate in the negotiations); see also *Seawright v. Stokes*, 44 U.S. (3 How.) 151, 166 (1845); Grad, *Federal-State Compact: A New Experiment in Co-Operative Federalism*, 63 COLUM. L. REV. 825, 840-50 (1963).

¹⁰¹ See *supra* notes 85-92. The Pacific Legal Foundation would again raise a general pattern of conduct into a hard constitutional rule, suggesting that the Council is somehow constitutionally infirm because of the specificity of the federal legislation. See Pacific Legal Foundation Brief, *supra* note 4, at 32. Similarly, the homebuilders contend that there simply was too much federal involvement in the creation of the Council. Petitioners' Reply Brief, *supra* note 7, at 28-29. There is no warrant, however, for such restrictions on Congress and the states in the Constitution. There similarly is no support for the conclusion in the history of interstate compacts. As Emanuel Celler, Chairman of the Judiciary Committee of the House of Representatives, noted, the history is one of an "increasing federal role in interstate compacts, not only at the approval level, as required by the Constitution, but also at the levels of negotiation, administration, and most recently, full membership and participation." Celler, *Congress, Compact, and Interstate Authorities*, 26 L. & CONTEMP. PROBS. 682, 683 (1961).

¹⁰² See generally *Low-Level Radioactive Waste Policy Amendments Act of 1985*, Pub. L. No. 99-240, 99 Stat. 1842 (amending 42 U.S.C. §§ 2021b-2021d (1982)); Comment, *Low-Level Radioactive Waste Disposal Compacts*, 5 VA. J. NAT. RESOURCES L. 383 (1986).

pacts are largely political adjustments between the states and Congress have combined to produce a variety of agreements.¹⁰³ The Northwest Power Planning Council is another example of this tradition of flexibility and ad hoc adjustment.

Seeking to avoid this result, those challenging the constitutionality of the Council argue that it is not actually a compact agency. This argument is predicated upon the conclusion that "the Council lacks several of the classic indicia of an interstate compact,"¹⁰⁴ a conclusion that draws upon dicta in a recent Supreme Court case, *Northeast Bancorp, Inc. v. Board of Governors*.¹⁰⁵ In *Northeast Bancorp*, the Court was concerned with two state statutes which imposed reciprocity requirements and similar regional limitations on interstate bank acquisitions. Although noting the similarities in the statutes and the fact that there was "evidence of cooperation among legislators, officials, bankers and others in the two States in studying the idea and lobbying for the statutes," the Court nonetheless expressed "some doubt" that the reciprocal statutes were an interstate compact because "several of the classic indicia of a compact [were] missing."¹⁰⁶ The missing indicia included the lack of a joint organization, the fact that each state remained free to modify its statute, and the divergence in statutory terms. The Court, however, concluded that even if the statutes amounted to a compact, it was not the type of agreement which violated the compact clause because it did not increase the political power of the states involved.¹⁰⁷

Applying these factors to PNEPPCA, the challengers conclude that it also lacks the indicia of a compact. Although the Council is

¹⁰³ See generally R. LEACH & R. SUGG, *THE ADMINISTRATION OF INTERSTATE COMPACTS* (1959); F. ZIMMERMAN & M. WENDELL, *supra* note 93.

¹⁰⁴ *Seattle Master Builders Ass'n v. Pacific Northwest Elec. Power and Conservation Planning Council*, 786 F.2d at 1372 (Beezer, J., dissenting); see also *Petitioners Reply Brief*, *supra* note 7, at 27-29 & n.20.

¹⁰⁵ 105 S. Ct. 2545, 2554 (1985). The case arose from the application by three banks to the Federal Reserve Board for approval of their proposals to acquire banks located in other states. Under the applicable federal law, the Board could approve the acquisitions only if the state in which the bank to be purchased was located reciprocally authorized the acquisition of out-of-state banks. The applications were opposed by other banks who contended, inter alia, that the state statutes purporting to authorize the acquisitions were in fact interstate compacts which had not been consented to by Congress and thus were unconstitutional. The challenge was predicated upon the fact that the statute involved required reciprocity and imposed regional limitations.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 2554-55.

a regional organization, its opponents argue that none of the regional states conditioned their participation on action by the other states and thus may unilaterally repeal their statutes, and that the Act lacks "the most important indicia of an interstate compact agency: a state purpose."¹⁰⁸ These arguments, however, ignore the broad congressional authority under the interstate compact clause and seek to impose restrictions not found in the constitutional text.

For example, the question of whether a state is free to withdraw unilaterally from an interstate compact is an issue which the Supreme Court has specifically refused to decide. In *West Virginia ex rel. Dyer v. Sims*,¹⁰⁹ the West Virginia Supreme Court held that that state's participation in the Ohio River Valley Water Sanitation Compact violated the West Virginia Constitution. On certiorari to the United States Supreme Court, the United States urged that the compact be read to allow unilateral withdrawal, while the other member states argued that withdrawal was precluded once congressional consent to the compact had been obtained.¹¹⁰ Refusing to decide the broad issue, the Court nonetheless concluded that compacts cannot be "unilaterally nullified, or given final meaning by an organ of one" of the compacting states.¹¹¹ At a minimum, the decision suggests that an explicit agreement prohibiting unilateral withdrawal is not a necessary

¹⁰⁸ *Seattle Master Builders Ass'n v. Pacific Northwest Elec. Power and Conservation Planning Council*, 786 F.2d at 1373 (Beezer, J., dissenting). Judge Beezer also argues that the Council is not an interstate compact because it has effect beyond the boundaries of the regional states. Beyond the mere assertion that such extra-regional effect would be impossible "[i]f the Council [were] truly an interstate compact agency," *id.* at 1372, he provides no reason for limiting interstate compact agencies to solely regional effects. Indeed, interstate water compacts frequently have effects beyond the member states' boundaries. For example, the Ohio River Valley Water Sanitation Compact joined Illinois, Indiana, Kentucky, New York, Ohio, Pennsylvania, Virginia, and West Virginia in a regional effort to maintain the Ohio River Basin's waters in a sanitary condition. See *Ohio River Valley Water Sanitation Compact*, Pub. L. No. 76-739, 54 Stat. 752 (1940). The compact affects the downstream states of Arkansas, Louisiana, Mississippi, Missouri, and Tennessee, none of which are represented in the compact. In reviewing the Ohio River compact, however, the Supreme Court did not suggest that the exclusion of the lower Mississippi River states was a fatal flaw. *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22 (1951). Judge Beezer's extraterritorial restriction thus is a spurious requirement that is not present in either the constitutional text or the caselaw construing that text.

¹⁰⁹ 341 U.S. 22 (1951).

¹¹⁰ *Id.* at 28.

¹¹¹ *Id.*

precondition for a valid compact since no such agreement was present in the challenged compact.¹¹²

Similarly, the purported "state purpose" requirement is unwarranted. First, interstate compacts have been used in situations where individual states are incapable of resolving a problem. Since the problem is a regional one, a regional response is required. The state purpose requirement as developed by the challengers is inherently inconsistent with an underlying rationale for compacts. Second, there *is* a state purpose in the challenged compact. In addition to the control over energy planning granted to the states through the Council, the interstate cooperation in the protection of the anadromous fish resources within the basin is a sufficient state purpose.¹¹³ Indeed, the Supreme Court has noted that the interstate compact mechanism is a preferable solution to "awkward and unsatisfactory" litigation for the allocation of similar regional resources.¹¹⁴ Since the Federal Columbia River Power System's dams seriously affect the migration of these fish,¹¹⁵ the state's involvement in the operation of the power system through the Council's fish and wildlife program assists in achieving an important state goal. Finally, there is simply no basis in the text of the Constitution, the caselaw construing that text, or the history of the uses of interstate compacts to support the imposition of a "state purpose" requirement.

The variety of objectives and administrative structures which have been established under the compact clause renders the challengers' search for a list of necessary elements the search for a will-o'-the-wisp. As the Supreme Court has repeatedly observed, the compact clause provides "a supple device for dealing with in-

¹¹² The compact itself is silent on the right to withdraw. See *Ohio River Valley Water Sanitation Compact*, Pub. L. No. 76-739, 54 Stat. 752 (1940). If there were a prohibition on unilateral withdrawal, it would be the result of compacting rather than an indicia of a compact. The challengers have stood the case law on its head.

¹¹³ The Supreme Court has repeatedly recognized "the legitimate state concerns for conservation and protection of wild animals." *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979). The joint regulation of fishing by Oregon and Washington is the basis of the *Columbia River Compact*, Pub. L. No. 65-123, 40 Stat. 515 (1918).

¹¹⁴ *West Virginia ex rel. Dyer v. Sims*, 341 U.S. at 27; cf. *Idaho ex rel. Evans v. Oregon*, 462 U.S. 1017 (1983) (original action for equitable apportionment of anadromous fish spawning in the Columbia River Basin).

¹¹⁵ For discussions of the effect of the dams and their operation on the anadromous fish runs in the Basin, see generally Blumm, *supra* note 18; Goble, *supra* note 18.

terests confined within a region."¹¹⁶ Thus, the argument that the Council is not a true compact agency misperceives the roles of Congress and the Court. It seeks to introduce formalities and requirements which neither the Constitution nor the Court has found necessary; it would reduce the flexibility which has been the hallmark of interstate compacts. As one influential article noted, "[t]he framers . . . astutely created a mechanism of legal control over affairs that are projected beyond State lines and yet may not call for, nor be capable of, national treatment. They allowed interstate adjustments but duly safeguarded the national interest."¹¹⁷

Such is the case with the Northwest Power Planning Council. PNEPPCA establishes a balance between regional concerns with power planning and anadromous fish resources on the one hand, and the federal interest in managing its property on the other. Both regional and federal interests are safeguarded through political accommodation which the courts have been unwilling to second guess. The challenge to the Council under the compact clause ultimately is based on a list of restrictions that neither the constitutional text nor the cases explicating that text contain.

B. *The Appointments Clause*

Those questioning the constitutionality of PNEPPCA contend that its constitutional problems extend beyond the compact clause, arguing that it is unconstitutional even if it is a validly created interstate compact. This second challenge hinges upon the appointments clause of the Constitution, which specifies the method through which "all . . . Officers of the United States" are to be appointed.¹¹⁸ Thus, if the members of the Council are officers of the United States, they must be appointed in compliance with the clause. Since they were not so appointed, the conclusion that they are federal officers would necessitate the further conclusion that the Council is unconstitutional. The definition of the term is the crucial question: Who is an "officer of the United States"?

¹¹⁶ West Virginia *ex rel. Dyer v. Sims*, 341 U.S. at 27.

¹¹⁷ Frankfurter & Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 YALE L.J. 685, 695 (1925); see also West Virginia *ex rel. Dyer v. Sims*, 341 U.S. at 27-28; State Amici Brief, *supra* note 4, at 7-23; Grad, *supra* note 100.

¹¹⁸ U.S. CONST. art. II, § 2, cl. 2. See generally Petitioners' Opening Brief, *supra* note 4, at 52; Petitioners' Reply Brief, *supra* note 7, at 21-36.

1. *Officers of the United States: Development of the Law*

The language of the clause itself provides little guidance in determining who is an officer of the United States, merely specifying that the President

shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not otherwise provided for, and which shall be established by Law: but the Congress may by law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.¹¹⁹

The clause allocates the power to appoint among the branches of the federal government; it does not define the scope of that power.

The debates during the drafting of the Constitution are similarly opaque. The drafters were concerned with the locus of the power to appoint, rather than the objects of the power; the lan-

¹¹⁹ U.S. CONST. art. II, § 2, cl. 2. Not only is the clause unhelpful, its text raises a host of questions. For example, does the clause provide the only constitutional method for appointing individuals employed by the federal government other than those whose appointment is specifically covered in the Constitution? Are there employees of the federal government who are not officers of the United States? Who are heads of departments? Are they officers, inferior officers, or neither? Are "inferior Officers" and "all other Officers" mutually exclusive categories? Is the distinction between the two classes substantive or is it a decision reserved by the clause to Congress? Does Congress have unlimited discretion to vest the power to appoint inferior officers in any branch it chooses?

Such questions are of more than academic interest since the various possibilities produce divergent institutional arrangements. For example, if "all other Officers" and "inferior Officers" are mutually exclusive categories some basis for distinguishing between the categories is required. One method that draws support from the constitutional text is to conclude that it is for Congress, "as they think proper," to decide the issue. An alternative approach is to treat the two terms as objective categories in need of definition. Under the former, Congress and the President decide; under the latter, it is for the Supreme Court. See generally Comment, *Abolition of Federal Offices as an Infringement on the President's Power to Remove Federal Executive Officers: A Reassessment of Constitutional Doctrines*, 42 *FORD. L. REV.* 562, 601-08 (1974) (arguing that the distinction is substantive and restricts congressional power to delegate appointment authority).

The text thus poses, but does not resolve, the question of how "Officer of the United States" is defined. The term's definition has also proved to be problematic in nonconstitutional contexts. See Hurlley, *Who is an "Officer" for Purposes of the Securities Exchange Act of 1934: Colby v. Klune Revisited*, 44 *FORD. L. REV.* 489 (1975). For a discerning examination of the appointments clause, see generally Burkoff, *Appointment and Removal under the Federal Constitution: The Impact of Buckley v. Valeo*, 22 *WAYNE L. REV.* 1335, 1336-79 (1976).

guage reflects a compromise between those who sought to have the power vested in a strong executive who, they argued, would make better selections than the more political legislature, and those who preferred to have the power lodged in the more democratic Congress because they feared that a strong President would become autocratic.¹²⁰ There is, therefore, no discussion of who is an officer or whether all individuals working for the federal government were to be officers of the United States. As one commentator has noted, the debates at best demonstrate a "concern with crafting an appointments system checking the tendency of either the Congress or the President toward administrative hegemony."¹²¹

The case law also provides little guidance. There have been few cases construing the clause; those which have are generally conclusory and often inconsistent. The courts have followed two distinguishable approaches. Under the first, they have treated the term as having an objective content and have attempted to define it. Under the second, the status of the individual has depended upon the procedures under which she was employed; if the procedure satisfied the formal requirements for appointing either an inferior officer or a noninferior officer, the individual was an officer of the United States. The decision on the status of the position, in short, was for the President and Congress.

While these two approaches may not be logically inconsistent, they do spring from fundamentally divergent views of the respective roles of the courts and the political branches. Unfortunately, the same case frequently has elements of both positions. For example, in *United States v. Hartwell*,¹²² the first case to examine

¹²⁰ 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 63, 119-121, 128, 232-33, 292 (1911); 2 *id.* at 33, 41-44, 80-83, 389, 405-06, 538-40, 627-28, 639; see also L. MARTIN, GENUINE INFORMATION (1787), reprinted in 3 *id.* at 172, 218. See generally J. HARRIS, THE ADVICE AND CONSENT OF THE SENATE 17-25 (1953).

¹²¹ Burkoff, *supra* note 119, at 1342; see also Note, *Power of Appointment to Public Office under the Federal Constitution*, 42 HARV. L. REV. 426 (1929).

¹²² 73 U.S. (6 Wall.) 385 (1867). *Hartwell* did not strictly involve the appointments clause. *Hartwell*, employed as a clerk in the office of an assistant treasurer in Boston, was indicted for embezzlement under a statute applicable to officers of the United States. *Hartwell's* attorneys argued that he was not an officer, but merely a clerk, which they contended was a "subordinate and assistant to the officer, and performs such services as he directs." *Id.* at 391. The statute, they contended, thus did not apply to their client. Despite the fact that the case presented an issue of statutory construction rather than constitutional law, the case is generally treated as the first case bearing on the appointments clause.

the definition of "officer," the Court held that Hartwell was an inferior officer under both approaches. First, it defined the term "office" as "a public station, or employment, conferred by the appointment of government. The term embraces the ideas of tenure, duration, emolument, and duties."¹²³ It then applied this definition to Hartwell's position as a Treasury Department clerk, noting that he was employed under a statute which specified the number of clerks to be employed and the salaries they were to receive. Given these facts, the Court concluded he was an officer because he "was appointed pursuant to law, and his compensation was fixed by law. . . . His duties were continuing and permanent, not occasional or temporary."¹²⁴

The Court, however, concluded that Hartwell was also an officer because he "was appointed by the head of a department within the meaning of the constitutional provision upon the subject of the appointing power."¹²⁵ Hartwell thus was an officer both because of the formality of his employment and the nature of his duties. While justice arguably was served, the analysis in the case is of little assistance since the definition of "officer" apparently applied to most permanent employees,¹²⁶ and the explication of

¹²³ *Id.* at 393.

¹²⁴ *Id.*

¹²⁵ *Id.* at 393-94 (footnote omitted). Hartwell was appointed under a statute which "authorized the assistant treasurer, at Boston, with the approbation of the Secretary of the Treasury, to appoint a specified number of clerks." *Id.* at 393. It is unclear whether it was the approbation of the Secretary of the Treasury or the appointment by the assistant treasurer which satisfied the constitutional requirement that inferior officers be appointed by the heads of departments.

While *Hartwell* contains both approaches, in *United States v. Smith*, 124 U.S. 525 (1888), the Court seemed to construe *Hartwell* as turning solely upon the method of appointment:

His appointment . . . under the act of Congress could only be made with the approbation of the Secretary of the Treasury. This fact, in the opinion of the court, rendered his appointment one by the head of the department within the constitutional provision upon the subject of the appointing power.

Id. at 532.

¹²⁶ Thus, where the statute under which the individual was employed authorized positions which were temporary, intermittent, or largely undefined, the employee was held not to be an officer. For example, a special merchant appraiser employed to determine the value of an unusual cargo for customs, *Auffmordt v. Hedden*, 137 U.S. 310, 326-28 (1890), a special master appointed to hear one case, *United States ex rel. Lotsch v. Kelly*, 86 F.2d 613 (2d Cir. 1936), and a special agent of the Land Office, *United States v. Schlierholz*, 137 F. 616 (E.D. Ark. 1905), were all held not to be officers due to the nature of their employment. The latter case demonstrates the type of analysis employed in this line of

the formal requirements was conclusory. Nonetheless, *Hartwell* was the basis for the leading decision during this period, *United States v. Germaine*.¹²⁷

The Court began its analysis in *Germaine* by defining "officer" tautologically as "all persons who can be said to hold an office under the Government."¹²⁸ The Court recognized that not all federal employees were officers, holding that the distinction between officers and employees was the mode of employment. The Court then examined *Germaine's* employment, concluded that the official who had appointed him to his post was not a head of a department, and held that he was therefore not an officer because his appointment did not meet the Constitution's formal requirements.¹²⁹ Just as in *Hartwell*, however, the Court concluded: "If

cases. The court reviewed the statute under which the individual had been appointed to determine what status Congress had intended, concluding that

[t]here is nothing in any of the acts under which defendant was employed fixing the tenure, duration, emolument, and duties of his position. Whether they shall be continuing and permanent, or occasional and intermittent, what his duties shall consist of, what his compensation shall be, are all dependent upon the will of the Secretary of the Interior No regular appropriation to pay his compensation is made, but it is paid out of the general appropriation for the protection of timber and public lands. He is but an agent or person employed by the Secretary, removable at his pleasure, to perform such duties at such times and at such places as may be demanded of him. The Secretary may appoint one or one hundred persons to do the same thing.

Id. at 621.

¹²⁷ 99 U.S. 508 (1878). The facts in *Germaine* were similar to those in *Hartwell*. *Germaine* was charged with extortion under a federal statute punishing "[e]very officer of the United States." *Id.* at 509. The defendant's constitutional status was again treated as determinative of his criminal liability.

¹²⁸ *Id.* at 510. The Court sought to distinguish "officers" from "employees" and "agents," noting in passing that "nine-tenths of the persons rendering service to the government undoubtedly are [agents and employees] without thereby becoming its officers." *Id.* at 509. The Court thus decided with only passing comment that the appointments clause was not the sole method of employing federal workers.

¹²⁹ *Id.* at 510-11. The Court concluded that the phrase "heads of departments" applied only to cabinet-level officials and not to "inferior commissioners and bureau officers, who are themselves mere aids and subordinates of the heads of departments." *Id.* at 511. This conclusion was based upon the use of the term "department" in the provision authorizing the President to require a written opinion from "the principal Officer in each of the executive Departments." U.S. CONST. art. II, § 2, cl. 1. Since the President had never requested a written report from officials such as the one who employed *Germaine*, the Court concluded that he was not the head of a department, and *Germaine* was therefore not an officer of the United States. If, as the Court's analysis suggests, the President has the unilateral power to create heads of departments simply by requiring

we look to the nature of defendant's employment, we think it equally clear that he is not an officer."¹³⁰ The Court cited the "occasional and intermittent" nature of his employment, the fact that he served only when the Commissioner of Pensions determined that a surgeon was necessary to examine a particular pensioner, and that he was paid by the examination rather than through a regular appropriation.¹³¹

This bifurcated approach to officer status was apparently laid to rest in two cases decided in 1888, *United States v. Mouat*¹³² and *United States v. Smith*.¹³³ In *Mouat*, the Court read *Germaine* as holding that "[u]nless a person in the service of the Government . . . holds his place by virtue of an appointment [in compliance with the formal requirements] he is not, strictly speaking, an officer of the United States."¹³⁴ Similarly, in *Smith*, the Court held that the defendant was not an officer since an

officer of the United States can only be appointed by the President, by and with the advice and consent of the Senate, or by a court of law, or the head of a department. A person in the service of the Government who does not derive his position from one of those sources is not an officer of the United States in the sense of the Constitution.¹³⁵

Neither case relied upon the duties of the plaintiff's position with the government. Only the formalities of his appointment were relevant.

a written report, it is difficult to see how the term can have any objective meaning.

¹³⁰ 99 U.S. at 511.

¹³¹ *Id.* at 512.

¹³² 124 U.S. 303 (1888). The plaintiff, a Navy paymaster's clerk, sought to be paid his travel expenses, based upon a statute applicable to officers of the Navy. Naval employees were to be paid at a lesser rate.

¹³³ 124 U.S. 525 (1888). The case involved a clerk in the office of the collector of customs in New York City who was charged with embezzlement under a statute applicable to officers. The Court concluded that the collector of customs was not the head of a department.

¹³⁴ 124 U.S. at 307.

¹³⁵ 124 U.S. at 532; *see also* *Oswald v. United States*, 96 F.2d 10, 13 (9th Cir. 1936); *McGrath v. United States*, 275 F. 294 (2d Cir. 1921); *Scully v. United States*, 193 F. 185 (D. Nev. 1910); Comment, *supra* note 119, at 566 n.34; *cf.* *Hoepfel v. United States*, 85 F.2d 237, 241 (D.C. Cir. 1936), *cert. denied*, 299 U.S. 557 (1937) ("We think it is well settled that a person in the service of the United States, who has been appointed in any of the modes prescribed in . . . the Constitution, is an officer of the United States, and, conversely, that any person in the service of the United States who has not been so appointed is not, strictly speaking, an officer of the United States.").

This position was strongly reaffirmed in *Burnap v. United States*,¹⁸⁶ a 1920 Supreme Court decision which held that “[t]he distinction between officer and employee . . . does not rest upon differences in the qualifications necessary to fill the positions or in the character of the service to be performed.”¹⁸⁷ Thus, the fact that an individual performs duties identical to an officer was insufficient to make that individual an officer if she was not appointed as required by the Constitution. The term “officer” was effectively drained of all meaning; it was simply a label to be applied to individuals who were hired in formal compliance with the constitutional requirements.

And thus the law remained, undisturbed until the recent Supreme Court decision of *Buckley v. Valeo*.¹⁸⁸ With *Buckley*, the Court called into question this existing interpretation of the appointments clause.

2. *Buckley v. Valeo: Starting Anew*

Buckley involved a constitutional challenge to the method of appointing the members of the Federal Election Commission (the Commission), an agency created to oversee the campaign financing reforms adopted after Watergate. Under the existing law as developed in *Mouat*, *Smith*, and *Burnap*, none of the six Federal Election Commissioners (the Commissioners) were officers of the United States since their appointment did not comply with consti-

¹⁸⁶ 252 U.S. 512 (1920).

¹⁸⁷ *Id.* at 516. The distinction between “officer” and “employee,” the Court continued, “is determined by the manner in which Congress has specifically provided for the creation of the several positions, their duties and appointment thereto.” *Id.* The Court therefore looked to the statutes which authorized the position, concluding that “[t]here is no statute which creates an office of landscape architect . . . nor any which defines the duties of the position.” *Id.* at 517. The considerations thus were purely formal: Did Congress and the President resolve the issue by providing for the position to be filled in the constitutional manner?

¹⁸⁸ 424 U.S. 1 (1976) (per curiam). *But see* *Williams v. Phillips*, 360 F. Supp. 1363 (D.D.C.), *motion for stay pending appeal denied*, 482 F.2d 669 (D.C. Cir. 1973). *Williams* involved a challenge to the legality of the defendant serving as acting director of the Office of Economic Opportunity since his name had never been submitted to the Senate for confirmation. Plaintiffs were United States Senators who contended that, in the absence of a delegation of authority to appoint the Director, his name was required to be submitted to the Senate for its advice and consent. The district court agreed; the court of appeals denied the motion for stay, concluding that the defendant had not shown sufficient likelihood for success on the merits. Neither court discussed the definition of “officer.”

tutional methods: two Commissioners were appointed by the President pro tempore of the Senate, two by the Speaker of the House of Representatives, and the final two, although appointed by the President, were required to be confirmed by both the House and the Senate.¹³⁹ The fact that the Commissioners were not officers, however, was of little significance since there were no particular consequences attached to that status; *Burnap* had, after all, held that the distinction between “officer” and “employee” was purely formal. The *Buckley* decision changed all of this. While not acknowledging the fact, the Court rejected the existing precedent by holding that the Commissioners, despite their nonconstitutional appointment, were nonetheless officers.

The Court began by discarding the formalist position adopted in *Burnap*: the drafters of the appointments clause, the Court stated, had “a less frivolous purpose” than merely prescribing “protocol.”¹⁴⁰ Instead, the term “officers of the United States” was intended to have “substantive meaning.”¹⁴¹ The Court found support for this proposition in *Germaine*, reaffirming that decision’s tautological definition of “officers” as “‘all persons who can be said to hold an office under the government.’”¹⁴² It concluded that the “fair import” of the phrase is that “any appointee exercising significant authority pursuant to the laws of the United States is an officer of the United States” who must be appointed in compliance with the clause.¹⁴³ The Commissioners fit this definition, the Court decided, because they exercised as much authority as a postmaster first class or the clerk of a district court, positions previously held to be offices.¹⁴⁴ The Court then reviewed other possible sources of congressional authority to create offices; it concluded that, while Congress could create officers of Congress, the Commissioners were not such officers because the pow-

¹³⁹ 424 U.S. at 126.

¹⁴⁰ *Id.* at 125.

¹⁴¹ *Id.* at 126.

¹⁴² *Id.* at 126 (quoting *United States v. Germaine*, 99 U.S. at 510).

¹⁴³ *Id.* at 126. The Court subsequently phrased the definition as “all appointed officials exercising responsibility under the public laws of the Nation.” *Id.* at 131.

¹⁴⁴ *Id.* at 126 (citing *Myers v. United States*, 272 U.S. 52 (1926) (postmaster) and *Ex parte Hennen*, 38 U.S. (13 Pet.) 230 (1839) (court clerk)). This conclusion ignores the determination in *Burnap* that “[t]he distinction between officer and employee in this connection does not rest upon differences in the qualifications necessary to fill the positions or in the character of the service to be performed.” *Burnap v. United States*, 252 U.S. at 516.

ers which they exercised were executive in nature. Executive powers cannot be vested in officers of Congress.¹⁴⁵

The decision thus intertwines appointments clause and separation-of-powers concerns. The constitutional difficulty was not that the delegated powers infringed upon the executive, but rather that the Commission could not exercise such powers because of the manner in which it was appointed; an officer who carries out executive authority cannot be appointed by Congress.¹⁴⁶ The legislative branch cannot both create an office with enforcement powers and retain unilateral power to appoint the officeholder since this allows Congress both to enact and to enforce the law.¹⁴⁷ This is precisely the danger of which Madison and Montesquieu warned: "When the legislative and executive powers are united in the same person or body . . . there can be no liberty, because apprehensions may arise lest *the same* monarch or senate should *enact* tyrannical laws to *execute* them in a tyrannical manner."¹⁴⁸ Given this spectre of tyranny, the standard which the Court enun-

¹⁴⁵ The Court held that the Commission as appointed might exercise the investigative and information gathering responsibilities delegated to it since these functions could "be regarded as merely in aid of the legislative function of Congress" and thus were powers which Congress could constitutionally delegate to an officer of Congress. 424 U.S. at 138. This was not the case with the enforcement powers delegated to the Commission, however, because such powers fell within the President's power to "take Care that the Laws be faithfully executed." *Id.*; see U.S. CONST. art. II, § 3. Such functions can only be exercised by officers of the United States. 424 U.S. at 141.

¹⁴⁶ "[T]he Commission's inability to exercise certain powers [delegated to it is due to] the method by which its members have been selected . . ." 424 U.S. at 142; see also *Ameron, Inc. v. United States Army Corps of Eng'rs*, 607 F. Supp. 962, 972 (D.N.J. 1985), *aff'd*, 787 F.2d 875, 881-87 (3d Cir. 1986) (distinguishing between giving executive officers legislative powers and giving legislative officers executive powers). See generally Burkoff, *supra* note 119, at 1369-80.

¹⁴⁷ We hold that these provisions of the Act, vesting in the Commission primary responsibility for conducting civil litigation in the courts of the United States for vindicating public rights, violate [the appointments clause] of the Constitution. Such functions may be discharged only by persons who are "Officers of the United States" within the language of that section.

424 U.S. at 140; *cf. id.* at 272 (White, J., concurring) ("A fundamental tenet [of the drafters of the Constitution] was that the same persons should not both legislate and administer the laws.").

¹⁴⁸ *Id.* at 120 (quoting THE FEDERALIST NO. 47, at 302 (J. Madison) (J. Cooke ed. 1961) (quoting Montesquieu) (emphasis in original)); *cf. id.* at 138 ("The Commission's enforcement power, exemplified by its discretionary power to seek judicial relief . . . is the ultimate remedy for a breach of law, and it is to the President, and not to the Congress, that the Constitution entrusts the responsibility to 'take Care that the Laws be faithfully executed.'").

ciated makes sense: whether a federal employee appointed by Congress exercises significant executive authority under a congressional delegation is central to the separation-of-powers concern with the accumulation of unchecked power by one branch.¹⁴⁹

3. *The Council and the Appointments Clause*

It is clear that Council members are not officers of the United States since they were appointed by the Governors of the four regional states.¹⁵⁰ Furthermore, Congress did not intend them to be federal officers, specifically providing in PNEPPCA that the “members . . . of the Council shall not be deemed to be officers or employees of the United States for any purpose.”¹⁵¹ Following *Buckley*, however, there remains the additional question of whether the members must be officers of the United States because of the authority which they possess. The challenge to the constitutionality of the Council is based on this point. The Council’s opponents rely upon *Buckley*’s definition of “officer” as “any appointee exercising significant authority pursuant to the laws of

¹⁴⁹ The decline, if not demise, of the nondelegation doctrine, makes the appointments clause a more attractive basis for attacking Congressional policy. While theoretically Congress has greater authority to delegate power, it is prohibited from retaining appointive powers beyond confirmation. It would thus have greater leeway in delegating, but would know that when it did so the offices it created would be staffed by officers under executive control. In this regard the *Buckley* decision is like *Chadha*: once Congress chooses to delegate power, it cannot retain formal independent authority over the delegatee. *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983). In *Buckley*, this meant that Congress could not independently appoint—and thus remove—the individuals exercising the delegated power. In *Chadha* it meant that Congress could not delegate authority while retaining power to override individual judgments of the delegatee. As the Court recently noted:

Congress of course initially determined the content of the Balanced Budget and Emergency Deficit Control Act; and undoubtedly the content of the Act determined the nature of the executive duty. However, as *Chadha* makes clear, once Congress makes its choice in enacting legislation, its participation ends. Congress can thereafter control the execution of its enactment only indirectly—by passing new legislation.

Bowsher v. Synar, 54 U.S.L.W. 5064, 5069 (U.S. July 7, 1986). In each situation, Congress was required to involve the executive. See generally Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573 (1984).

¹⁵⁰ Pacific Northwest Electric Power Planning and Conservation Act § 4(a)(3), 16 U.S.C. § 839b(a)(3) (1982).

¹⁵¹ *Id.* § 4(a)(3), 16 U.S.C. § 839b(a)(3); see also *id.* § 4(a)(2)(A)(iv), 16 U.S.C. § 839b(a)(2)(A)(iv) (the Council “shall not be considered an agency or instrumentality of the United States for the purpose of any Federal law”).

the United States."¹⁵³ They contend that its members exercise such authority and thus are federal officers who must be appointed in compliance with the appointments clause.¹⁵³

The *Buckley* Court's determination that the Commissioners were officers provides little guidance.¹⁵⁴ Perhaps because all the parties acknowledged that the Commissioners were more than mere employees,¹⁵⁵ the Court did not feel it necessary to do more than note that the Commissioners must be officers because they exercised powers as significant as other positions previously determined to be offices.¹⁵⁶ Despite the limited analysis of the question, three requirements can be parsed from the decision.¹⁵⁷ First, the definition is applicable only to executive/administrative and judicial officers. This requirement is found in the care with which the

¹⁵³ 424 U.S. at 126.

¹⁵³ Petitioners' Opening Brief, *supra* note 4, at 52; see also *Seattle Master Builders Ass'n v. Pacific Northwest Elec. Power and Conservation Planning Council*, 786 F.2d at 1373-74 (Beezer, J., dissenting).

¹⁵⁴ In a footnote to its conclusion that the Commissioners "are at the very least . . . 'inferior Officers,'" the Court did note that the term "officers of the United States" did not include all individuals employed by the federal government since there is the additional class, "employees." 424 U.S. at 126 n.162. The Court defined "employees" as "lesser functionaries subordinate to officers of the United States." *Id.* The Commissioners were not employees because they "are not subject to the control or direction of any other executive, judicial, or legislative authority." *Id.* This definition is insufficient to separate "employees" from "inferior officers" since the latter category is also subject to the control and direction of officers of the United States.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 126 (citing *Myers v. United States*, 272 U.S. 52 (1926) (postmasters) and *Ex parte Hennen*, 38 U.S. (13 Pet.) 230 (1839) (court clerk)). One question raised by the Court's uncritical reliance on *Myers* and *Hennen*, is whether all positions previously determined to be offices are still to be treated as such. If so, the number of unconstitutionally appointed officers is very large. See, e.g., *United States v. Moore*, 95 U.S. 760 (1877) (assistant surgeons); *United States v. Hartwell*, 73 U.S. (6 Wall.) 385 (1867) (Treasury Department clerk); *Kennedy v. United States*, 146 F.2d 26 (5th Cir. 1944) (junior instructors of shop mathematics); *Callahan v. United States*, 122 F.2d 216 (D.C. Cir. 1941) (customs clerks); *United States v. McCrory*, 91 F. 295 (5th Cir. 1899) (letter carriers); *Surowitz v. United States*, 80 F. Supp. 716 (S.D.N.Y. 1948) (attorneys); *Basking v. United States*, 32 F. Supp. 518 (E.D.S.C. 1940) (prison guards). See generally *Burkoff*, *supra* note 119, at 1364-67.

¹⁵⁷ *Cf.* *Seattle Master Builders Ass'n v. Pacific Northwest Elec. Power and Conservation Planning Council*, 786 F.2d at 1365 (citing *Buckley v. Valeo*, 424 U.S. 1 (1976)) ("The appointments clause applies to (1) all executive or administrative officers, 424 U.S. at 123-26; (2) who serve pursuant to federal law, 424 U.S. at 126; and (3) who exercise significant authority over federal government actions. 424 U.S. at 126-27 & n.162. Unless all three prongs of the *Buckley* test are met, there is no violation of the appointments clause.").

Court distinguished officers of the United States from other officers, such as officers of Congress.¹⁵⁸ Second, an officer of the United States must exercise “significant authority.” It is unclear what constitutes “significant authority” since the court merely asserted a fortiori that the Commissioners exercised such powers.¹⁵⁹ Third, that authority must be exercised “pursuant to the laws of the United States.” That is, the source of the individual’s authority to act must be a federal statute.

The dispute in *Seattle Master Builders Association* focuses on this final requirement. Those challenging the Council’s constitutionality contend that the source of the Council’s authority is a federal statute, PNEPPCA.¹⁶⁰ The Ninth Circuit, on the other hand, concluded that

the Council members perform their duties pursuant to a compact which requires both state legislation and congressional approval. Without substantive state legislation, there would be no Council and no Council members to appoint. While congressional consent gives the interstate compact some attributes of federal law, the Council members’ appointment, salaries and administrative operations are pursuant to the laws of the four individual states, within

¹⁵⁸ 424 U.S. at 139-41. Recognizing that Congress has the authority under the necessary and proper clause to create generic offices to be filled as it determines, the Court concluded that this power is bounded by the appointments clause: if Congress chooses to fill the office in a manner different than that provided by the clause, the appointee will not be an officer of the United States. In such cases, the appointees may “properly perform duties only in aid of those functions that congress may carry out by itself, or in an area sufficiently removed from the administration and enforcement of the public law as to permit their being performed by persons not ‘Officers of the United States.’” *Id.* at 139; *cf.* *Bowsher v. Synar*, 54 U.S.L.W. 5064 (U.S. July 7, 1986) (prohibiting the comptroller general, as an officer of Congress, from performing executive functions).

¹⁵⁹ 424 U.S. at 126. Justice White, in a concurring opinion, concluded simply that it was “evident” that the Commissioners were among the officers of the United States referred to in the appointments clause given “the breadth of their assigned duties and the nature and importance of their assigned functions.” *Id.* at 269-70 (White, J., concurring). Both phrases are examples of the “I-know-it-when-I-see-it” school of jurisprudence. The Ninth Circuit interpreted the requirement with an equally opaque phrase: “exercise [of] significant authority over federal government actions.” *Seattle Master Builders Ass’n v. Pacific Northwest Elec. Power and Conservation Planning Council*, 786 F.2d at 1365.

¹⁶⁰ *Seattle Master Builders Ass’n v. Pacific Northwest Elec. Power and Conservation Planning Council*, 786 F.2d at 1373-74 (Beezer, J., dissenting); *Petitioners’ Opening Brief*, *supra* note 4, at 52.

parameters set by the Act. . . . More important, the states ultimately empower the Council members to carry out their duties.¹⁶¹

The challengers' contention that the Council is empowered by federal rather than state law is, as the court concluded, based upon a misperception of the congressional role in the creation of interstate compacts. It also springs from two additional misperceptions: it ignores the basic thrust of the *Buckley* decision by disregarding the crucial separation of powers context, and it fails to recognize that Congress has the constitutional authority to subject the managers of federal property to nonfederal policymakers. Each of these three failings requires additional discussion.

(a) The Appointments Clause and the Compact Clause

The homebuilders' appointments clause argument sweeps too broadly because it impinges upon another constitutional provision, the interstate compact clause. Regardless of the applicability of the *Buckley* decision to other areas of federalism, it is necessarily inapplicable to interstate compact agencies. To conclude otherwise leads to the incongruous result that the members of all interstate compact agencies must be appointed by the federal government.¹⁶²

¹⁶¹ Seattle Master Builders Ass'n v. Pacific Northwest Elec. Power and Conservation Planning Council, 786 F.2d at 1365 (citations omitted). The court continued:

Federal law provides congressional consent for formation of the Council as it does for the creation of all compacts and compact agencies. Federal law also affects the substance of Council policy decisions because the Act constrains Council policy-making . . . and subjects some Council operations to federal law. As with any compact, congressional consent did not result in the creation but only authorized the creation of the compact organization and the appointment of its officials. The appointment, salaries and direction of the Council members are state-derived.

Id.

¹⁶² In his dissent, Circuit Judge Beezer acknowledged that "[a] compact operates as federal law." *Id.* at 1377 (Beezer, J., dissenting). He seeks to avoid the logical conclusion of this premise by contending that the Council "is not an ordinary compact" because it "can produce substantive effects under federal law." *Id.* The fallacy in his analysis is that it ignores the premise from which it begins: a compact is a federal law and thus all compact agencies operate pursuant to federal law. The fact that the Council may "produce substantive effects under federal law" is not relevant to its status as a compact agency because all compact agencies produce such effects. Since all compact agencies necessarily exercise such authority as a result of the constitutional requirement of congressional consent, it is at best incongruous to assert that this makes the Council different than other compact agencies operating under like authority.

One of the continuing difficulties in responding to the challenger's arguments is that they fail to clearly distinguish the two major issues: (1) What is the status

The compact clause prohibits states from entering into any agreement "without the consent of Congress."¹⁶³ The Supreme Court has held that "congressional consent transforms an interstate compact within [the Compact] Clause into a law of the United States."¹⁶⁴ Therefore, the required congressional consent makes the compact "a law of the United States" and all members of a compact agency thus exercise their authority pursuant to federal law. If every individual who exercised authority pursuant to federal law were required to be appointed under the appointments

of the Council? and (2) May any nonfederal entity exercise the authority the Council exercises? If a state can exercise the type of authority delegated to the Council, the fact that it is delegated to an interstate compact agency is immaterial because its status as a compact agency does not prevent it from exercising such powers. *See, e.g.,* Grad, *supra* note 100, at 846-48.

¹⁶³ U.S. CONST. art. I, § 10, cl. 3.

¹⁶⁴ *Cuyler v. Adams*, 449 U.S. 433, 438 (1981). In its earliest cases, the Supreme Court held that a compact, "by the sanction of Congress, has become a law of the Union." *Pennsylvania v. Wheeling and Belmont Bridge Co.*, 54 U.S. (13 How.) 519, 566 (1851); *see also Pennsylvania v. Wheeling and Belmont Bridge Co.*, 59 U.S. (18 How.) 421, 430, 432-33 (1855). The Court then seemed to question this result, holding, without mentioning *Wheeling and Belmont Bridge*, that "[t]he assent of Congress did not make the act giving [the assent] a statute of the United States." *People v. Central R.R.*, 79 U.S. (12 Wall.) 455, 456 (1870). The Court next asserted jurisdiction over the interpretation of a compact, citing the language from *Wheeling and Belmont Bridge* that congressional assent to a compact made it "a law of the Union." *Wedding v. Meyler*, 192 U.S. 573, 582 (1904). The Court then noted that "[t]he decisions are not uniform as to whether the interpretation of an interstate compact presents a federal question." *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110 n.12 (1938) (comparing *People v. Central R.R.* with *Wedding v. Meyler* and *Wharton v. Wise*, 153 U.S. 155 (1894)). Finally, in *Delaware River Joint Toll Bridge Comm'n v. Colburn*, 310 U.S. 419, 427 (1940), the Court noted that the *Central R.R.* decision "has long been doubted," and concluded that it had jurisdiction to hear cases arising under compacts because "a compact sanctioned by Congress . . . involves a federal 'title, right, privilege or immunity.'" *See also Petty v. Tennessee-Missouri Bridge Comm'n.*, 359 U.S. 275, 277 (1959); *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 26 (1951). Remaining doubts as to the status of compacts were finally settled when the Court held that "congressional consent transforms an interstate compact within [the Compact] Clause into a law of the United States." *Cuyler v. Adams*, 449 U.S. at 438. *See generally id.* at 438-41, 450-51. The Court thus has returned to its initial position: a compact, "by the sanction of Congress, has become a law of the Union." *Id.* at 438; *see also Jacobsen v. Tahoe Regional Planning Agency*, 566 F.2d 1353, 1358 (9th Cir. 1977), *aff'd in part & rev'd in part on other grounds sub nom. Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979); *League to Save Lake Tahoe v. Tahoe Regional Planning Agency*, 507 F.2d 517, 520-22 (9th Cir. 1974), *cert. denied*, 420 U.S. 974 (1975). *See generally* P. HARDY, *supra* note 95, at 19; Engdahl, *Construction of Interstate Compacts: A Questionable Federal Question*, 51 VA. L. REV. 987 (1965).

clause, the result would be anomalous: interstate compact agencies could not be staffed with state appointees since all members of such agencies would have to be federal officers.¹⁶⁵ The absurdity of this conclusion suggests that it is incorrect. While congressional consent makes the compact a federal statute for certain purposes, that consent cannot transform the compact agency into a federal entity. Rather, an interstate compact agency is a hybrid, reflecting something of each of the parties—both the federal and state governments—necessary to its creation.

This hybrid nature is demonstrated by a recent Supreme Court case, *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*.¹⁶⁶ The issue before the Court was whether the federal courts had jurisdiction over an interstate compact agency under a federal civil rights statute. The Court concluded that it did have jurisdiction because the agency's actions were "under color of state law," despite the fact that congressional consent meant that the agency was also acting pursuant to federal law.¹⁶⁷ The Court

¹⁶⁵ The Supreme Court's assessment of compacts as a valuable method for resolving state disputes short of litigation was in error. See *West Virginia ex rel. Dyer v. Sims*, 341 U.S. at 27-28.

¹⁶⁶ 440 U.S. 391, 400-02 (1979). The issue has also been examined—though inconclusively—in the cases in which the courts have examined the immunity of interstate compact agencies from suit under the eleventh amendment. The amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens or another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI.

In *Petty v. Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275 (1959), six Justices concluded that the eleventh amendment barred suits against interstate compact agencies unless the participating states had waived their immunity. *Id.* at 277. Three of these Justices joined in the Court's majority opinion, while the other three filed a dissenting opinion. The remaining three Justices reached the same conclusion as the majority "with the understanding that [they did] not reach the constitutional question as to whether the Eleventh Amendment immunizes from suit agencies created by two or more States under state compacts which the Constitution requires to be approved by the Congress." *Id.* at 283. Thus, six of the nine Justices concluded that the agency was a state instrumentality. Both of the lower courts also decided that the agency was a state instrumentality, though they concluded that the states had not waived their immunity. See *Petty v. Tennessee-Missouri Bridge Comm'n*, 153 F. Supp. 512 (E.D. Mo. 1957), *aff'd*, 254 F.2d 857 (8th Cir. 1958).

This holding was limited in *Lake Country Estates*, where the Court held that the eleventh amendment was not applicable to an interstate compact agency which exercised powers similar to counties and cities, entities not covered by the amendment. The Court was careful, however, not to decide that all compact agencies lacked immunity. 440 U.S. at 401.

¹⁶⁷ 440 U.S. at 398-400 & n.13.

therefore rejected the court of appeals' conclusion that the agency was solely a creature of federal law.¹⁶⁸

Two conclusions emerge from these cases. First, congressional consent "transforms an interstate compact . . . into a law of the United States," thus conferring jurisdiction on the federal courts to construe the terms of such compacts¹⁶⁹ and preempting inconsistent state constitutional and statutory provisions.¹⁷⁰ At the same time, however, interstate compacts remain creatures of the involved states subject to federal restrictions applicable to states.¹⁷¹ Interstate compact agencies, in short, are hybrids, partaking something of both of the entities necessary to their creation. Attempting to categorize such agencies as either federal or state thus misses the central point: they are both and neither.

(b) The Appointments Clause and the Separation of Powers Doctrine

The challengers' argument also sweeps too broadly because it seizes upon a phrase while ignoring its context. The *Buckley* Court's entire analysis is predicated upon its construction of the appointments clause in the context of its "cognate" separation-of-powers provisions.¹⁷² The decision, as in *Germaine* and the other appointments clause cases, was concerned with determining the status of an individual who was employed by the United States. The Court's definition thus was employed to distinguish between classes of federal employees; it was not used to distinguish between federal and nonfederal employees. Since the two questions differ radically, it is hardly surprising that a standard helpful in resolving one leads to absurd results when applied to the other.

Similarly, the *Buckley* Court simply held that Congress could not both create an office with enforcement powers and retain unilateral power to appoint the officeholder since this allowed Congress both to enact and to enforce the law.¹⁷³ Within the separa-

¹⁶⁸ See *Jacobsen v. Tahoe Regional Planning Agency*, 566 F.2d 1353, 1358 (9th Cir. 1977).

¹⁶⁹ *Cuyler v. Adams*, 449 U.S. 433, 438 (1981).

¹⁷⁰ *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22 (1951).

¹⁷¹ *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. at 398-402.

¹⁷² 424 U.S. 1, 124 (1976).

¹⁷³ *Id.* at 140 ("We hold that these provisions of the Act, vesting in the Commission primary responsibility for conducting civil litigation in the courts of the United States for vindicating public rights, violate [the appointments clause] of

tion-of-powers context, the standard which the Court enunciated makes sense: whether a federal employee appointed by Congress exercises significant authority under a congressional delegation is central to the separation-of-powers concern for the accumulation of unchecked power within one branch. This concern is not present when the power to appoint is separated from the grantor of the power. Thus, the *Buckley* standard is simply inapplicable because it does not answer the question raised by the procedure used to appoint the members of the Council.

The challengers respond by noting that the Framers of the Constitution considered and rejected a proposal to allow the states to appoint some federal officers. The proposal was rejected, they contend, because it violated the separation-of-powers goal of structuring the three branches of the federal government so that each had sufficient intrinsic authority to resist the encroachments of the other branches. They thus argue that the Council's method of appointment is unconstitutional because it results in a dilution of executive authority.¹⁷⁴

It is important to note that the challenger's characterization of the Framers' reasons for rejecting state appointment of federal officers is open to question. A more likely reading of the admittedly scanty evidence suggests that state appointment of federal officers was rejected on federalism rather than separation-of-powers grounds: Governor Morris objected to the motion to allow state appointment because "[t]his would be putting it in the power of the states to say, 'You shall be viceroys but we will be viceroys over you.'"¹⁷⁵ The concepts of federalism and separation of powers implicate different interests. As examined in more detail below, the Council does not violate traditional federalism restrictions.

The fundamental problem with this branch of the homebuilders' argument, however, is that it fails to address the central question: How can state and federal officers be distinguished? That is, is the definition provided by the *Buckley* Court relevant to the determi-

the Constitution. Such functions may be discharged only by persons who are 'Officers of the United States' within the language of that section."). See *Bowsher v. Synar*, 54 U.S.L.W. 5064, 5069 (U.S. July 7, 1986) ("[W]e see no escape from the conclusion that, because Congress had retained removal authority over the Comptroller General, he may not be entrusted with executive powers.").

¹⁷⁴ See Petitioners' Reply Brief, *supra* note 7, at 22-25; United States Brief, *supra* note 4, at 18-19.

¹⁷⁵ 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 406 (1911).

nation of an individual's status as either a federal officer or a state officer? To the extent that these are very different questions, the challengers' historical argument is simply irrelevant.

Again, the difficulty is that the challengers seek to lift a phrase from a complex decision, and use that phrase to answer a problem it was not intended to resolve.¹⁷⁶

(c) The Appointments Clause and Federalism: The Property Clause

Finally, the challengers' argument that the Council exercises "significant authority pursuant to federal law" sweeps too broadly because their wooden application of the phrase would invalidate many programs and processes which have long gone unquestioned. Many individuals who are not officers of the United States nonetheless exercise significant authority under federal law. The argument fails to acknowledge that Congress has the authority to waive federal supremacy, thus subjecting federal agencies to the control of nonfederal bodies.

Questions arise largely because the Council's authority to guide the conduct of a federal agency seems to violate one of the fundamental principles of American constitutional law: federal activities are immune from state interference or control. This immunity is simply one result of the principle that federal actions are supreme.¹⁷⁷ As Chief Justice Marshall stated in *M'Culloch v. Maryland*,¹⁷⁸ "[t]he government of the United States, then, though limited in its powers, is supreme; and its laws, when made in pursuance of the constitution, form the supreme law of the land, 'any thing in the constitution or laws of any State to the contrary notwithstanding.'"¹⁷⁹

Federal supremacy may, however, be waived. Congress can authorize nonfederal entities to exercise control over federal agen-

¹⁷⁶ Cf. Respondents' Brief, *supra* note 8, at 65 ("In *Buckley*, the Court was concerned with the degree of authority required to constitute a person *within* the federal government as an 'inferior officer' of the United States. It was simply not addressing the question of *which* persons are officers of the *United States* as opposed to officers of some other political body, such as a state." (emphasis in original)).

¹⁷⁷ The supremacy clause provides: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land." U.S. CONST. art. VI, cl. 2.

¹⁷⁸ 17 U.S. (4 Wheat.) 316 (1819).

¹⁷⁹ *Id.* at 406 (quoting U.S. CONST. art. VI, cl. 2).

cies, just as it can waive sovereign immunity, supremacy's procedural first cousin. These waivers of federal supremacy effectively delegate congressional authority since they empower nonfederal entities to regulate activities which they would otherwise be unable to control.

The authority of Congress to subject federal agencies to regulation by nonfederal entities has long been upheld. Furthermore, in no area has Congress as consistently or as broadly waived supremacy as it has when dealing with federal property. At the center of PNEPPCA lies an allocation of federal property: the hydroelectricity produced by the Federal Columbia River Power System.¹⁸⁰ This hydroelectricity is federal property subject to congressional control under the property clause of the Constitution.¹⁸¹ Under the property clause, Congress possesses plenary power over the disposition of federal property; as the Supreme Court has repeatedly noted, "[t]he power over [public property] thus entrusted to Congress is without limitations."¹⁸²

When legislating for public property, Congress has frequently chosen to waive federal supremacy so that state laws will be applicable to federal property managers. The Reclamation Act of 1902, for example, requires the Secretary of the Interior to "proceed in conformity with [state water rights] laws" in constructing

¹⁸⁰ During the debates on PNEPPCA, its proponents repeatedly asserted that the "purpose of the bill is to solve an allocation problem," the allocation of cheap federal hydroelectricity among the competing regional claimants. See 126 CONG. REC. 29,804-05 (1980) (statement of Rep. Foley); see also *id.* at 27,810, (statement of Rep. Ullman); *id.* at 27,809 (statement of Rep. Kazen).

¹⁸¹ The property clause provides: "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. CONST. art. IV, § 3, cl. 2. In *Ashwander v. Tennessee Valley Authority (TVA)*, 297 U.S. 288, 330-39 (1936), the Supreme Court held that the property clause provided express authority for the federal government, through TVA, to generate and sell electricity. The Court concluded that there was nothing to distinguish electricity—"which simply is the mechanical energy, incidental to falling water at the dam, converted into the electrical energy"—from other property subject to congressional control under the clause. *Id.* at 340.

¹⁸² *Kleppe v. New Mexico*, 426 U.S. 529, 539 (1976) (quoting *United States v. San Francisco*, 310 U.S. 16, 29 (1940)); see also *Ivanhoe Irrigation District v. McCracken*, 357 U.S. 275, 294-95 (1958); *Alabama v. Texas*, 347 U.S. 272, 273 (1954); *Federal Power Comm'n v. Idaho Power Co.*, 344 U.S. 17, 21 (1952); *United States v. California*, 332 U.S. 19, 27 (1947); *Gibson v. Choteau*, 80 U.S. (13 Wall.) 92, 99 (1871); *United States v. Gratiot*, 39 U.S. (14 Pet.) 526, 537 (1840). Congress' plenary power over federal property has led to expansive interpretations of congressional authority to waive federal supremacy in conjunction with the property clause.

federal water projects.¹⁸³ In a recent challenge to the authority of California to impose restrictions on the operation of a federal irrigation project and the disposition of the water it stores, the Supreme Court upheld the restrictions, acknowledging the authority of Congress to subject federal property managers to state bodies.¹⁸⁴ Similar examples abound: the Federal Land Policy and Management Act requires the Secretary of the Interior to condition the granting of rights of way across federal lands upon "compliance with State [health, environmental, and siting] standards . . . if those standards are more stringent than applicable Federal standards."¹⁸⁵ This provision has repeatedly been construed to require compliance with state substantive standards.¹⁸⁶ In perhaps the most striking example, the Ninth Circuit Court of Appeals held that the Secretary of the Interior was required to condition a BPA right of way upon compliance with route-specific standards developed by a state agency.¹⁸⁷ Similarly, the Clean Water Act requires the applicant for a federal license for "any activity . . . which may result in any discharge into the navigable waters" to provide a certificate from the appropriate state or "interstate water pollution control agency" that the discharge will be in compliance with state or interstate standards.¹⁸⁸ This provision effectively grants the state or interstate body the power to prevent the issuance of federal licenses and is an exercise of significant au-

¹⁸³ 43 U.S.C. § 383 (1982).

¹⁸⁴ *California v. United States*, 438 U.S. 645, 651-53, 674-79 (1978). The state board imposed twenty-five conditions on the project, including a requirement that preference be given to users within the basin in which the dam was located, that water be released to control chemical concentrations in the river, and that access to the project site be provided. *Id.* at 652 n.8. These conditions were significant restrictions on the control and disposition of federal property—yet the Court praised the Reclamation Act of 1902 authorizing such nonfederal control as a leading example of "cooperative federalism," without any suggestion that it was unconstitutional for Congress to require a federal agency to comply with the determinations of a nonfederal entity. *Id.* at 650.

¹⁸⁵ 43 U.S.C. § 1765(a)(iv) (1982); *see also id.* § 1712(c)(8) (in preparing and revising land use plans, the Secretary "shall . . . provide for compliance with applicable pollution control laws, including State and Federal air, water, noise, or other pollution standards or implementation plans").

¹⁸⁶ *Citizens & Landowners Against the Miles City/New Underwood Powerline v. Secretary of Energy*, 683 F.2d 1171, 1178-82 (8th Cir. 1982); *Columbia Basin Land Protection Ass'n v. Schlesinger*, 643 F.2d 585, 604-05 (9th Cir. 1981).

¹⁸⁷ *Montana v. Johnson*, 738 F.2d 1074, 1080-81 (9th Cir. 1984); *see also Citizens for a Better Henderson v. Hodel*, 768 F.2d 1051, 1055 (9th Cir. 1985).

¹⁸⁸ 33 U.S.C. § 1341(a)(1) (1982).

thority under federal law. In the face of an argument that federal facilities were required to comply with state air pollution laws, the Supreme Court held that it was a question of congressional intent: federal facilities can be regulated by nonfederal entities when there is "a clear congressional mandate" authorizing such regulation.¹⁸⁹

The law is straightforward: while federal actions are supreme under the Constitution, Congress has the authority to waive that supremacy and subject federal agencies to the control of nonfederal entities. The only question in such situations is whether

¹⁸⁹ *Hancock v. Train*, 426 U.S. 167, 179 (1976) (citing *Kern-Limerick, Inc. v. Scurlock*, 347 U.S. 110, 122 (1954)); *cf. Environmental Protection Agency v. California ex rel. State Water Resources Control Bd.*, 426 U.S. 200, 211 (1976) ("Federal installations are subject to state regulation only when and to the extent that congressional authorization is clear and unambiguous."). Congress subsequently reversed the result (though not the principle) in *Hancock* by amending the Clean Air Act to require all federal facilities and activities which might discharge air pollutants to comply with all "state, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of air pollution in the same manner, and to the same extent as any nongovernmental entity." 42 U.S.C. § 7418(a) (1982). The Clean Water Act contains a similarly worded waiver. *See* 33 U.S.C. § 1323(a) (1982). Failure to comply with a state water quality control plan was a basis for enjoining a proposed National Forest Service timber sale. None of the parties felt that the state regulation was constitutionally impermissible. *See Northwest Indian Cemetery Protective Ass'n v. Peterson*, 764 F.2d 581, 588-89 (9th Cir. 1985); *see also Sierra Club v. Peterson*, 705 F.2d 1475 (9th Cir. 1983) (holding that the President had the authority through an Executive Order to require federal agencies to comply with state permit requirements before applying herbicides to federal timberlands). *See generally Breen, Federal Supremacy and Sovereign Immunity Waivers in Federal Environmental Law*, 15 ENVTL. L. REP. (ENVTL. L. INST.) 10,325 (1985).

Similarly, in construing the Coastal Zone Management Act's requirement that actions "directly affecting" the coastal zone were required to be consistent with state plans, the Court did not indicate that there was any constitutional question that Congress could not so condition the uses of federal property. *See Secretary of the Interior v. California*, 464 U.S. 312, 339-40 (1984).

The parties challenging the constitutionality of the Northwest Power Planning Council seem to assert that Congress cannot constitutionally waive federal supremacy: "Congress has put a State-appointed body in a privileged position over the Federal Executive, granting it the right to constrain the discretion of the Federal government alone. This violates national supremacy." Petitioners' Reply Brief, *supra* note 7 at 33. The argument is not developed.

Congress has provided the requisite "clear mandate."¹⁹⁰ PNEPPCA provides such a mandate.¹⁹¹

Congressional power under the property clause can provide requisite authority for PNEPPCA in another way. Congress has the power under the clause to authorize other entities to control the acquisition or disposition of federal property. The classic example is the authority granted to miners' organizations and states to determine requirements for the acquisition of rights to mineral resources on the public lands.¹⁹² If Congress may constitutionally empower local miners' organizations or states to adopt rules controlling the disposition of federal property, it may also constitutionally authorize an interstate compact agency to do so.¹⁹³

One of the Council's functions under PNEPPCA is to effect the acquisition¹⁹⁴ and disposition¹⁹⁵ of federal property. The Council thus can be viewed as a "local legislature" overseeing the acquisition and disposition of federal property.¹⁹⁶ As such, it is well

¹⁹⁰ In his dissent, Circuit Judge Beezer rejected this argument because of "the peculiar nature of the Council." *Seattle Master Builders Ass'n. v. Pacific Northwest Elec. Power and Conservation Planning Council*, 786 F.2d at 1376 (Beezer, J., dissenting). He begins by noting that

[i]n some cases, Congress specifies that federal entities must obey state laws that would otherwise be preempted. . . . In those cases, Congress has merely narrowed the scope of federal preemption. The state legislatures are not authorized to pass legislation solely for the purpose of regulating federal agencies.

Id. at 1377. This argument ignores the fact that the Model Conservation Standards (MCS), which are the subject of the suit, were adopted to regulate homebuilders throughout the region. The effect of the MCS on BPA is only incidental to this primary purpose. *See Pacific Northwest Electric Power Planning and Conservation Act* § 4(f), 16 U.S.C. § 839b(f) (1982).

¹⁹¹ *See supra* notes 43-68 and accompanying text.

¹⁹² *See, e.g., Butte City Water Co. v. Baker*, 196 U.S. 119, 126 (1905).

¹⁹³ *See generally Gaetke, Separation of Powers, Legislative Vetoes, and the Public Lands*, 56 U. COLO. L. REV. 559 (1985).

¹⁹⁴ *Pacific Northwest Electric Power Planning and Conservation Act* § 6(b), (c), 16 U.S.C. § 839d(b), (c) (1982).

¹⁹⁵ *Id.* § 5(d)(3), 16 U.S.C. § 839c(d)(3).

¹⁹⁶ *See Butte City Water Co. v. Baker*, 196 U.S. at 126. The Supreme Court has held that Congress, acting as a proprietor, occupies a position analogous to a principal and that, as such, it may designate an agent to manage its property. *United States v. Midwest Oil Co.*, 236 U.S. 459, 474-75 (1915). Congressional designation of the Council as its agent to oversee the disposition of federal hydroelectricity is within the traditional scope of congressional discretion over federal property since Congress has frequently granted nonfederal entities the authority to control acquisition of rights in federal property. *Cf. United States v. San Francisco*, 310 U.S. 16, 29-30 (1940) (congressional power under the clause is "without limitations. 'And it is not for the courts to say how that trust shall be administered. That is for Congress to determine.'" (quoting *Light v. United*

within the constitutional grant of power to Congress to regulate the public's property.

CONCLUSION

Ultimately, the challengers' argument is flawed by their characterization of the case in separation-of-powers terms. This approach ignores the federalism issue, obscuring the essential question posed by the new regional "constitution" created by Congress and the states: Does the Constitution prohibit the use of such cooperative regional institutions to manage regional resources? The problem with the challengers' argument thus stems from their mischaracterization of the issue. While both federalism and separation doctrines are attempts to prevent tyranny by promoting tension among different political bodies through the division of political power,¹⁹⁷ the two doctrines' focus differs. Separation focuses on the horizontal relationship among the three branches of the federal government with an eye to a balancing of powers among them.¹⁹⁸ Federalism, on the other hand, is concerned with the ver-

States, 220 U.S. 523, 537 (1911)); *Capital Co. v. Fox*, 85 F.2d 97, 101 (2d Cir. 1936) ("Congress may not indeed delegate its powers to the states generally, but the doctrine is not universally true; in some matters it certainly may do just that."); *United States v. Matherson*, 367 F. Supp. 779, 781 (E.D.N.Y. 1973) (noting that Congress' plenary power over public property "is without limitation and preempts that of the Executive or of the several states unless Congress specifically authorizes the administration of public land by one or both of these governmental units." (emphasis added)).

¹⁹⁷ See, e.g., THE FEDERALIST NO. 10 (J. Madison).

¹⁹⁸ The Supreme Court provided the following classic formulation:

It is believed to be one of the chief merits of the American system of written constitutional law, that all the powers intrusted to government, whether State or national, are divided into three grand departments, the executive, the legislative and the judicial. That the functions appropriate to each of these branches of government shall be vested in a separate body of public servants, and that the perfection of the system requires that the lines which separate and divide these departments shall be broadly and clearly defined. It is also essential to the successful working of this system that the person intrusted with the powers in any one of these branches shall not be permitted to encroach upon the powers confided to the others, but that each shall by the law of its creation be limited to the exercise of the powers appropriate to its own department and no other.

Kilbourn v. Thompson, 103 U.S. 168, 190-91 (1880); see also *Humphrey's Executor v. United States*, 295 U.S. 602, 629-30 (1935); *Springer v. Philippine Islands*, 277 U.S. 189, 201-02 (1928). Such hyperbolic views, of course, belong more to rhetoric than to reality. Thus, the Court has acknowledged that "the

tical balance between local and national authority.¹⁹⁹

The separation doctrine refers to the balance between three named institutions: Congress, the President, and the Supreme Court. It is built into the structure of the federal government through the delegations of legislative, executive, and judicial power in the first three articles of the Constitution.²⁰⁰ The Constitution established certain decision making processes which allow these three institutions with their different constituencies, values, and priorities to interact with each other over time, in the belief that the policies produced by the process will, in the long run, reflect a broad range of constitutional and social values. The basic issue under the separation doctrine thus is whether the actions of one named institution threaten the ability of another named institution to carry out its functions in jointly running the government. The focus is on relationships and interconnections. As the Supreme Court has stated:

[T]he proper inquiry focuses on the extent to which [a challenged statute] prevents the Executive Branch from accomplishing its constitutionally assigned functions. . . . Only where the potential for disruption is present must we determine whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress.²⁰¹

Federalism, on the other hand, is concerned not with the intrusion of one branch of the federal government into the constitutional role of another branch, but rather with the intrusion of one layer of government into the realm of another—with claims of local autonomy, for example, against demands of national uniform-

separate powers were not intended to operate with absolute independence.” *United States v. Nixon*, 418 U.S. 683, 707 (1974). Indeed, the view of the federal government as composed of “three airtight departments” has been labeled “archaic.” *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 443 (1977). In its stead, the Court has repeatedly cited with approval the language of Justice Jackson: “While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.” *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring). This pragmatic, flexible perception of the doctrine is more in accord with Madison’s views on the question. See THE FEDERALIST NOS. 47-48 (J. Madison); see also L. TRIBE, AMERICAN CONSTITUTIONAL LAW 15-17 (1978).

¹⁹⁹ See generally R. POUND, *Law and Federal Government*, in FEDERALISM AS A DEMOCRATIC PROCESS 3 (1942).

²⁰⁰ See, e.g., Strauss, *supra* note 149.

²⁰¹ *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 443 (1977) (citations omitted); see also *United States v. Nixon*, 418 U.S. 683, 711-12 (1974).

ity.²⁰² Since the supremacy clause specifies that the national interest must prevail over the local when the subject matter has been delegated to the national government, federalism questions generally begin with the powers granted to the federal government.²⁰³ The supremacy clause, however, does not require Congress to occupy a field completely or prohibit it from authorizing concurrent or exclusive state action.²⁰⁴ Indeed, the Supreme Court has recognized that local variations are a basis for construing federal supremacy narrowly.²⁰⁵

The distinction between federalism and separation issues, thus, is the distinction between concerns for local autonomy as against national control, on the one hand, and effective political parity among Congress, the President, and the Supreme Court, on the other. The question of the constitutionality of the Council raises federalism issues. In enacting PNEPPCA, Congress recognized the local interest in the regional hydroelectric and fishery resources and sought to balance those values against the national interest in managing federal property. Thus, the issues concern

²⁰² Federalism can be defined as "any political system in which there is a constitutional distribution of powers between provincial governments and a common central authority." W. BENNETT, *AMERICAN THEORIES OF FEDERALISM* 10 (1964). The concern thus is with the intrusion of the federal government into areas of state authority, with state intrusions into areas of federal authority, or with one state intruding into another's authority. As with separation, the Constitution provides more process than substance; the representation of the local interests in the federal legislature ensures that such concerns have a say. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985); Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 *COLUM. L. REV.* 543 (1954). As James Madison noted, "the new Federal Government . . . will partake sufficiently of the spirit of [the States], to be disinclined to invade the rights of the individual States, or the prerogatives of their governments." *THE FEDERALIST* NO. 46, at 319 (J. Madison) (J. Cooke ed. 1961). See generally *id.* NOS. 17 (A. Hamilton), 46 (J. Madison).

²⁰³ The supremacy clause provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. art. VI, cl. 2; see, e.g., *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 235 (1796).

²⁰⁴ See, e.g., *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248-56 (1985); *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n.*, 461 U.S. 190, 203-23 (1983); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 141-52 (1963).

²⁰⁵ E.g., *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. at 148-49.

the degree to which local interests, when they differ from national interests, may be authorized to affect federal decision making. The question of the constitutionality of the Council is not a separation issue since Congress has not weakened the office of the President by enacting the statute; it does not "upset the constitutional balance of 'a workable government.'"²⁰⁶ In fact, Congress has not directly challenged presidential authority. Congress has merely limited the authority of an administrative agency, an entity that is not subject to the exclusive control of any of the three constitutional actors, but is instead subject to varying types of control by each.

This does not mean that the separation and federalism doctrines denominate two watertight compartments anymore than do the terms "executive," "legislative," and "judicial." Disputes may implicate complex combinations of federalism and separation issues. Nevertheless, the Council's authority over BPA impinges, at most, only marginally on the President's constitutional authority and does not upset "the proper balance between the coordinate branches."²⁰⁷ This is the teaching of the *Buckley* Court's analysis of the Federal Elections Commission: the act creating the Commission was unconstitutional because it threatened to upset the balance by reserving to Congress both the power to create offices and to control the officeholders.

This is also the teaching of the numerous cases in which the Supreme Court has upheld congressional actions subjecting federal agencies to state supervision: the President is not attacked by requiring federal property managers to comply with state pollution or facility siting laws.²⁰⁸ Rather, Congress is engaged in the political balancing of local and national interests. The court's role in such cases is to ensure that Congress intended to allow the local interests to predominate.²⁰⁹

²⁰⁶ *United States v. Nixon*, 418 U.S. 683, 707 (1974) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952)).

²⁰⁷ *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 443 (1977).

²⁰⁸ See *supra* notes 183-94 and accompanying text; cf. *Safe Harbor Water Power Corp. v. Federal Power Comm'n*, 124 F.2d 800, 807-08 (3d Cir. 1941) (upholding congressional authorization for states to regulate interstate electricity rates through an interstate compact agency, even though this displaced the jurisdiction of the Federal Power Commission).

²⁰⁹ See, e.g., *Hancock v. Train*, 426 U.S. 167, 179 (1976) (federal facilities can be regulated by nonfederal entities when there is "a clear congressional mandate" authorizing such regulations).

The argument that the Northwest Power Planning Council is an unconstitutional intrusion by Congress into an area reserved to the President, thus, is a red herring. Congress has long exercised the power to waive federal supremacy and subject federal property managers to the control of nonfederal bodies. This long history reflects the simple fact that in doing so Congress has done nothing which prevents the executive "from accomplishing its constitutionally assigned functions."²¹⁰

²¹⁰ Nixon v. Administrator of Gen. Servs., 433 U.S. at 443.