

FERC????

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BLM Pumped Storage Workshop
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*I'm Bob Deibel and
I approve this message..*

**FERC
&
You!**

ID UPDATE

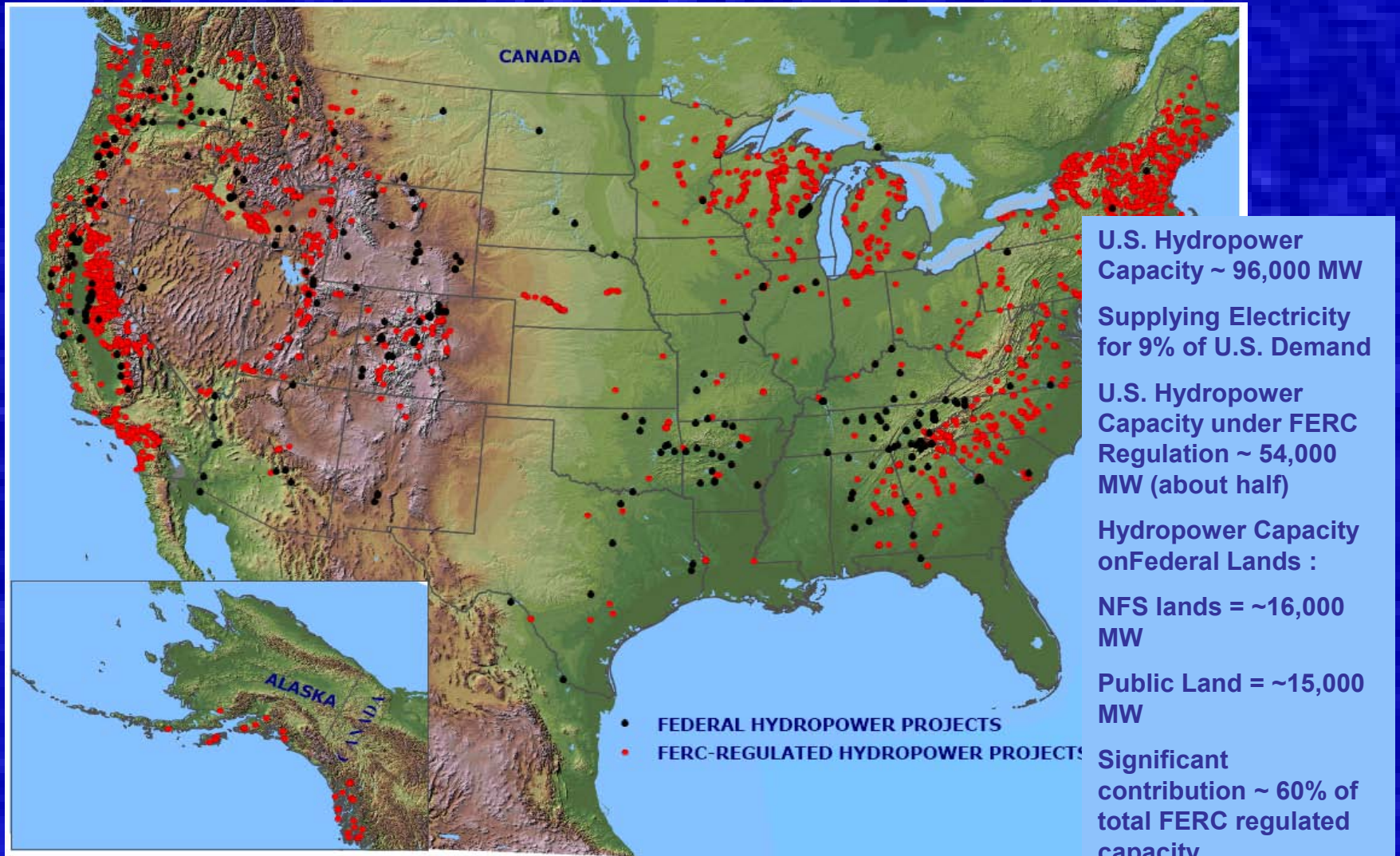


Zero Degrees of Freedom Effect

$$N - 1 = ? \text{ d.f.}$$

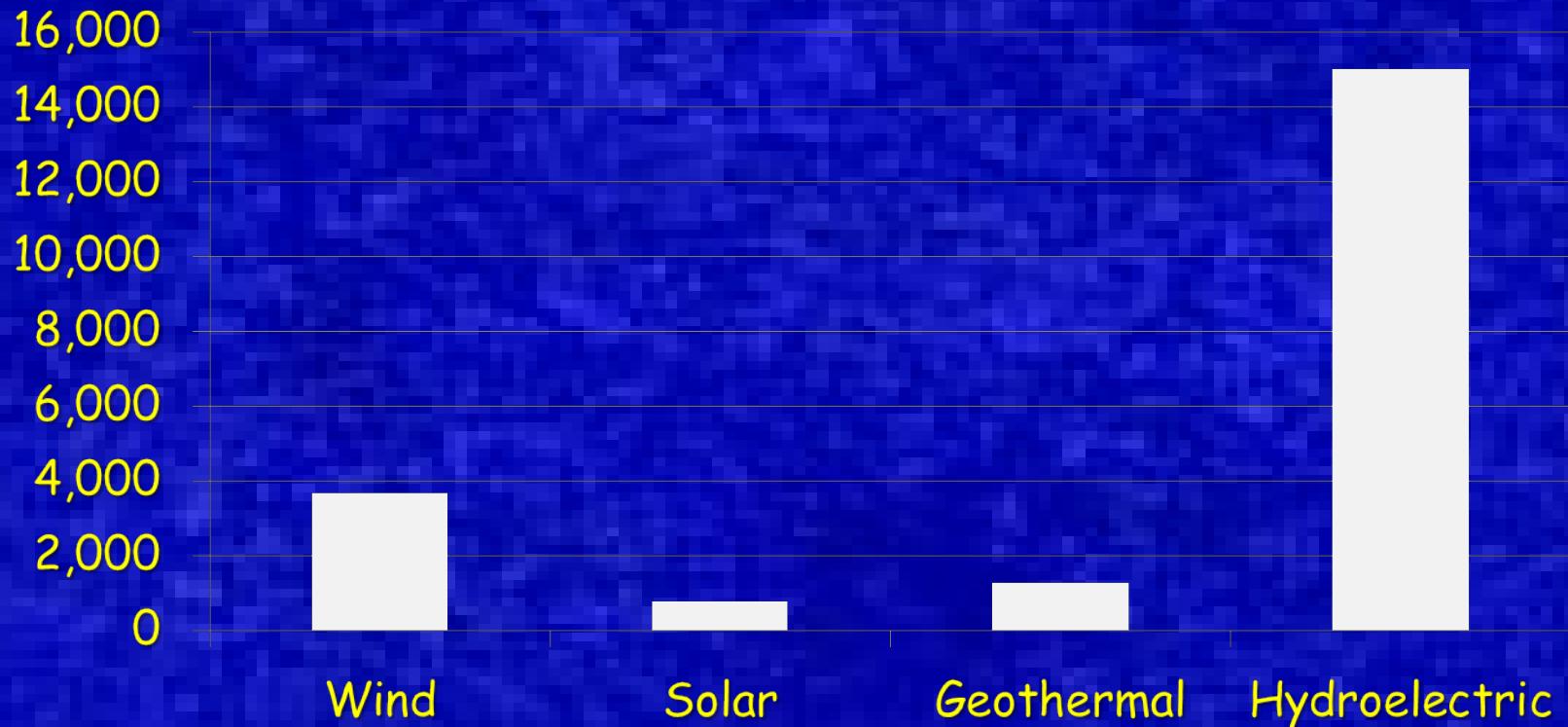
- Where N = Sample Size;
- To calculate your experience - substitute the number of hydroprojects you've worked on for N and then see how much experience you have?

Conventional U.S. Hydropower: Federal and FERC-Regulated



Renewables and Hydroelectric licensing on Public Lands

Authorized MW
As of May 2011



Constitutional Structure

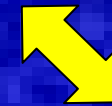
3 Branches of Govt (?)



Legislature



Executive



Supreme Court



4th Branch?

FERC:



1. Independent Commission
2. Regulates Non-Federal hydroelectric projects
3. Administers Quasi-legal proceedings
4. Lead decision maker (NEPA/License order)
5. Determines consistency of project with purposes of Federal Reservation

Basics

- This is your shot as Licenses are issued from 30 to 50 years
- Once a license is granted, the opportunities to change the stipulations within the license are minimal - unless triggered by conditions or formal petition
- The BLM/FS, or any Federal agency, cannot use mandatory conditioning authority to veto a license

FERC Process = Counter Cultural

- FERC proceedings are litigation from the start
- The first point of legal review is the Appellate Court (FERC analogous to a District Court in developing the record)
- FERC is the decision maker & determines if a project is consistent with the Purposes of the Reservation
- FS/BLM controls outcome on Federal lands via Sect. 4(e)
- SUA/ROW "piggy back authorization"

FERC Process = Counter Cultural

- FS/BLM not responsible or lead on ESA, Cultural Resources, etc.
- Water is currency
- Requires specialized expertise (instream flow modeling, project operations, etc.)
- Early & ongoing communication w/ OGC/Solicitor's
- Real Deadlines that FS/BLM do not control
- IF not in the record at FERC by X-date, it doesn't count
- Extreme diligence and oversight

Independent Commission

- Initially the Federal Power Commission under the Federal Power Act of 1935
- Reorganized as the Federal Energy Regulatory Commission within DOE 1977 (but retained independent status)
- Commissioner's nominated by President and Confirmed by Senate

FERC Jurisdiction

- All Federal lands
- Interstate and Navigable Waters
- Connected to the grid

FERC Makes & Administers Rules

- Promulgates rules to define processes (ie ILP)
- Sets and regulates schedules and deadlines
- Deadlines matter!
 - If filing due before 5 PM on X-date, then must be filed by that time
 - Eg. Intervention could be rejected if not timely filed!
- Explicit format for filings

Quasi-legal proceeding

- “if it isn't in the record, then it doesn't count!” (repeat) (*ref Bangor Decision*)
- “ex parte” communication
- Filings must be served on formal parties to a proceeding
- Must Intervene to be a formal party to a proceeding

Intervention

- Advisable to Intervene in a proceeding to retain legal options
- Cooperating Agency under NEPA -
 - FS & NPS Policy and Practice is to not “formally” cooperate with FERC on it’s NEPA due to FERC’s Policy;
 - If a cooperator, FERC prohibits party to be an intervenor;
 - FS prefers to retain legal remedies vs. formally “Big C” Cooperate under NEPA;
 - FS Informally cooperates to bolster the record;

Legal Matters

- FERC is the “fact finding” body under the legal system - analogous to a District Court
- First venue to litigate a matter is the Appellate Court
- Remember “if it isn't in the record, then....”
- Can't supplement the record after FERC issues a decision
- Must intervene to be a party to a legal proceeding before the Appellate Court

FERC Lead Decision Maker

- Defines rules of practice
- Maintains administrative record
- Issues the decision to license a project via a "Commission Order"
- Determines if project is consistent with the "purposes of the reservation" not FS or BLM!! (*ref Rainsong Decision*)
- Lead on NEPA
 - Therefore, lead on ESA consultation, Cultural Resources

Authorities

- BLM & FS authority via Section 4(e) & 10(a)
- U.S. Fish and Wildlife Service and National Marine Fisheries Service participate via the Fish and Wildlife Conservation Act and Sections 10(j) and 18 of the Federal Power Act
- States have authority to prescribe and recommend conditions to meet CWA mandates (401 WQC) or Fish and Wildlife goals (10(j));

BLM - FS Authorities

- Federal Power Act (*16 U.S.C. § 791-823d*):
 - Section 4(e) - Mandatory conditions;
 - Section 10(a) - Agency recommendations;

Wild and Scenic Rivers Act:

- Sec. 7 - Protects designated rivers;
- Rivers found eligible or suitable by agencies are not protected under the WSR Act;

Section 4(e)

“That licenses shall be issued within any reservation only after a finding by the Commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservation.”

4(e) Requirements

- FERC must include Section 4(e) conditions in any license issued as long as they are:
 - Reasonably related to goals of the reservation;
 - Otherwise consistent with Federal Power Act;
 - Supported by Substantial evidence
 - Consistent with purposes of the Reservation (determined by FERC)

Section 10(a)

“The project adopted shall be, in the judgment of the Commission, be best adapted to a comprehensive plan for improving or developing a waterway for the use or benefit of interstate or foreign commerce; for improvement and utilization of waterpower development; for the adequate protection, mitigation and enhancement of fish and wildlife (including spawning grounds and habitat); and for other beneficial public uses.”

Conditions Summary

- Section 4(e) and 18 are:
 - MANDATORY - FERC must include!!
- Section 10(a) and 10(j) are:
 - RECOMMENDATIONS - FERC *may* include, Caveat: 10(j) more formal process to accept part or reject



Hydropower Assistance



Flows & Rec
Guide

Hydrokinetics & Rec
Impacts Guide

What is Hydropower Assistance?

The National Park Service provides technical assistance on Hydropower Licensing Proceedings of the Federal Energy Regulatory Commission.

[Hydro & Parks](#)

[In the News](#)

[Projects](#)

[Results](#)

[Project](#)

[Examples](#)

[Information &](#)

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www.nps.gov/hydro

Primary Hydropower Authorities

□ Federal Power Act

- No new hydro in National Parks and National Monuments
- No hydro if adverse effects on federal lands in other park units
- Consultation requirements re: Recreation - ANY PROJECT

□ Wild and Scenic Rivers Act

- Prohibitions & limitations
- Technical assistance on rivers

NPS Role -FERC Hydro

NPS primarily makes recommendations about:

- Recreation access and facilities
- Instream flows for recreation
- Riparian corridor and conservation buffer zone protection

NPS rarely has mandatory conditioning authority



Assessing Recreation Impacts from Hydrokinetic Energy Projects

Hydrokinetics and Recreation Work Group

Doug Whittaker, Bo Shelby, Joan Harn, Rich Bowers,
Susan Rosebrough, Rupak Thapaliaya, and Randy Thoreson

A Workshop in Portland, Oregon • June
2011



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		5555

FS Results in Re-licensing 126 Proceedings

Improved coordination &
mgt of Federal land

3 Project's Decommissioned

Improved fish
passage
for ~1,000
miles of stream



Terrestrial
habitat
mitigation ~
\$30 million

Improved flow
regimes for >
800 miles of
stream



Aquatic
habitat
mitigation
funds ~ \$200
million

Land
Exchanges

Improved management and
facility upgrades 200 sites

Adaptive Mgt

Rec Flow
Schedules

Nearby Park/USFS/FWS

Ex: Baker River, WA

- Restore the Baker and Skagit Rivers by improving upstream and downstream fish passage and increasing minimum flows.
- \$12 million to purchase and/or provide easements for approximately 3500 acres of wildlife habitat with compatible recreation allowed.
- \$20 million for Recreation Enhancements
 - 8 miles of trail construction;
 - Redevelopment of Baker Lake Resort with 30 to 50 new campsites;
 - Maintenance funding for numerous U.S. Forest Service campgrounds, trails and roads;
 - Management of dispersed camping;
 - Increased law enforcement;
 - New day use park at Lake Shannon.



Non-Park Example Results: Priest Rapids, Columbia River, WA

- Recreation Mitigation - \$21 million
 - Land-based trails - 11 miles
 - Water trail - 6 miles
 - Develop two barrier free fishing piers.
 - Create two new park sites.
 - Improve and enhance eight existing day-use areas.
 - Expand and enhance camping sites; providing approximately 250 new campsites.
 - Create and or expand seven swimming areas and one barrier free swimming area.
 - Implement an interpretation and education plan
 - Create, improve and/or extend twenty boat launches.
 - Manage shoreline dispersed recreation sites.
 - Review, monitor, and provide plan updates every 6-12 years.



Hydropower Licensing Workshop

U.S. Fish and Wildlife Service Roles and Responsibilities in Hydropower Licensing

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United States Fish and Wildlife Service Mission Statement

“The mission of the U.S. Fish and Wildlife Service is, working with others, to conserve, protect, and enhance fish and wildlife and their habitats for the continuing benefit of the American people.”

Hydropower Licensing U.S. Fish and Wildlife Service Statutory Authorities

- Fish and Wildlife Coordination Act
- Endangered Species Act
- National Environmental Policy Act
- Federal Power Act



Hydropower Licensing U.S. Fish and Wildlife Service Statutory Authorities

Fish and Wildlife Coordination Act

- Consultation with FWS and State
- Prevent Loss of and Damage to Fish and Wildlife
- Equal Consideration



Hydropower Licensing

U.S. Fish and Wildlife Service

Statutory Authorities

Endangered Species Act

- Conservation of Ecosystems through Federal Action and Programs;
- Directs Federal Agencies to utilize their authorities to further the purposes of the ESA;



Hydropower Licensing

U.S. Fish and Wildlife Service

Statutory Authorities

Endangered Species Act

- **Section 7 Consultation**
 - **FERC must consult with FWS to ensure the jeopardy and adverse modification of critical habitat is avoided.**



Hydropower Licensing

U.S. Fish and Wildlife Service

Statutory Authorities

Federal Power Act

- Section 4(e)
- Section 10(a)
- Section 10(j)
- Section 18
- Section 30(c)
- Section 33



Hydropower Licensing

U.S. Fish and Wildlife Service

Statutory Authorities

Federal Power Act – Section 4(e)

- **Mandatory Conditions for Federal Lands**
 - **National Wildlife Refuges**
 - **Waterfowl Protection Areas**
 - **National Fish Hatcheries**



Hydropower Licensing U.S. Fish and Wildlife Service Statutory Authorities

Federal Power Act – Section 10(a)

- FERC must consider fish and wildlife recommendations of resource agencies and Indian Tribes to ensure projects are “best adapted” to the comprehensive development of the waterway.



Hydropower Licensing

U.S. Fish and Wildlife Service

Statutory Authorities

Federal Power Act – Section 10(j)

- Fish and wildlife recommendations must be included in license unless inconsistent with other Federal law;
- Recommendations must provide for protection, mitigation, and enhancement;
- **Dispute Resolution; Consistency Finding;**



Hydropower Licensing U.S. Fish and Wildlife Service Statutory Authorities

Federal Power Act – Section 18

- **Mandatory Prescription of Fishways**
“The Commission shall require the construction, maintenance, and operation by a licensee as its own expense of such fishways as may be prescribed by the Secretary of the Interior or the Secretary of Commerce.”



Hydropower Licensing

U.S. Fish and Wildlife Service

Statutory Authorities

Federal Power Act – Section 30(c)

- **Mandatory Fish and Wildlife Conditions for projects exempted from licensing;**
- **Conditions must prevent loss of or damage to Fish and Wildlife; FWS; NOAA Fisheries; State.**



Hydropower Licensing

U.S. Fish and Wildlife Service

Responsibilities

- Analyze impacts on fish and wildlife;
- Seek mitigation based on value and abundance of habitat affected;
- Build the Administrative Record;
- Adopt CEQ's Definition of Mitigation;
- Goal: No Net Loss of in-kind Habitat Value.



Key Court Cases

- **Bangor Hydro-Electric v. FERC** 78 F.3d 659 (D.C. Cir. 1996)
- **American Rivers v. FERC** 201 F.3d 1186 (9th Cir. 2000)
- **Tacoma v. FERC** No. 05-1054 (D.C. Cir. 2006)
- **Rainsong v. FERC** 106 F.3d 269 (9th Cir. 1997)
- **Umpqua Valley Audubon v. FERC** 9th Circuit, Not Published, No. 04-72600
- **PUD No. 1 v. WA Dept of Ecology** 114 S.Ct. 1900 (1994)

Rainsong v. FERC

- FERC determines if project is consistent with purposes of the reservation
- FERC's consistency finding under section 4(e) of the FPA is an independent, threshold determination FERC must make before balancing economic and environmental factors in deciding whether to issue a hydropower license
- FERC may not give "presumptive weight" to Forest Plans in making consistency findings under section 4(e)

Bangor Hydro-Electric v. FERC

- FERC performs primarily as a "neutral forum" responsible for compiling the record for the benefit of the court of appeals. It is not the Commission's role to judge the validity of the agency's position-- substantively or procedurally
- Providing "conclusory assertions" in support of conditions is not reasonable support, or substantial evidence, for a court to uphold 4(e) conditions

American Rivers v. FERC

- Environmental Baseline = Existing Project
- FERC must still evaluate resource impacts prior to licensing but is not required to gather information to recreate a 50-year old environmental base upon which to make present day development decisions
- Conditions imposed by the Secretary of Interior for fishway passages under §18 of the FPA, like those under §4(e), cannot be rejected or modified by FERC

Tacoma v. FERC 2006

- Affirmed 4(e) authority
- FERC's license order determined that the DOI could only exercise 4(e) authority over those portions of the project on the "reservation"
- The Court concluded that so long as some portion of the project is on the reservation, the Secretary is authorized to impose any conditions that will protect the reservation, including utilization of the reservation in a manner consistent with its original purpose

Umpqua Valley Audubon v. FERC

- Submitting conditions to FERC does not constitute a formal decision
- The Court affirmed the Forest Service's policy change that it will no longer issue a record of decision when filing 4(e) conditions at FERC and that FERC is the lead agency under NEPA

PUD No. 1 v. WA Dept of Ecology

- Supreme Court held that a state may deny or condition certification as the state determines to be necessary to protect the beneficial uses designated in the state's water quality standards.
- This includes the authority to set minimum instream flows
- Basis for 401 Water Quality Cert being "mandatory" in a license

New and Different Challenges

- Long protracted and difficult process;
- Hydroprojects require different skills than typically used in your day to day activities;
- Complex and sophisticated models typically run by consultants or utility experts that are more familiar with hydropower operations and effects;
- 180° Shift - Not typically addressed by S&G's in LRMP (i.e. buffer, seasonal restriction, etc.). Technical staff under your guidance must define what the outcome would look like vs. defending an area!!!
- Legal burden of proof via the substantial evidence standard is higher for hydroprojects than for most projects I have participated.

Independent Post-Trial Review Key Points

- Most contested issues relate to water
- Know process and engage line officer at key points
- Anticipate actions in schedule - don't wait!
- Prepare focused and supportable conditions supported by the facts
- Educate each other!

**Your
turn
to
fire
away**



Questions or comments