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HONORING THE LIFE AND SPIRIT OF THE PACIFIC SALMON (5): Legal Systems to Protect Salmon in the United States and Japan

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C. Citizen Involvement

1. Public Participation and Open Government

(1) The United States

One of the important legal requirements of the National Environmental Policy Act is public participation. As mentioned above, the National Environmental Policy Act requires administrative agencies to make their Draft Environmental Impact Statements and Final Environmental Impact Statements public, to open meetings to the public, and to collect public opinions.[303] The information must be open not only to the general public but also to mass media such as newspapers, magazines, and broadcasting stations so that information can be reported extensively and secure broad public participation. Through this process, the National Environmental Policy Act ensures public involvement in the formulation of regional power policies.[304] Public participation is also required in other statutes such as the National Forest Management Act of 1976, the Federal Land Policy and Management Act of 1976, and some state laws.

The Administrative Procedure Act clarifies the spirit of "due process of law" and provides for administrative procedure related to administrative measures and administrative legislation.[305] According to section 3 of the Administrative Procedure Act enacted in 1946, all administrative agencies must open administrative information, including substantial regulations, general policies, decisions, and official records, to the public subject to specific conditions.[306] However, for many years, administrative agencies had a tendency to use the Administrative Procedure Act to limit the publication of information rather than to provide it to the public.

The Freedom of Information Act was enacted in 1966[307] and amended in 1974[308] to make a drastic reform of section 3 of the Administrative Procedure Act by allowing much greater citizen access to government records. Today, the Act describes certain

matters that administrative agencies must publish in the federal register.[309] The Act also allows citizens to read and make photo-copies of documents such as (a) administrative orders as the results of decision procedures, (b) letters and memoranda, (c) statements of policy and legislative construction, (d) research reports, and (e) staff's manual and instructions toward the staff which might have influence upon citizens.[310] Each agency must make certain records available to any person immediately even if they are not listed in the provisions mentioned above.[311]

The administrative agencies are able to refuse requests for information if it is related to: (a) national security, (b) internal affairs, (c) secret legal matters, (d) trade secrets, (e) memorandums between or inside of agencies which would not be available by law, (f) personal privacy, (g) criminal investigation records, (h) reports on financial regulations, and (i) wells.[312] If an administrative agency decides to refuse publication of information, citizens can object to the decision and institute a lawsuit. Sometimes these exceptions prevent citizens from obtaining government records, but nonetheless the Freedom of Information Act is a powerful law in favor of open government.

The Government in the Sunshine Act of 1976[313] is similar in concept to the Freedom of Information Act. It is an act to open meetings to the public, that is to say, not normal, day-to-day meetings among agency employees, but important meetings of boards and commissions where public policy is made.[314] This Act is applicable to almost all federal administrative agencies.[315]

The Act provides ten cases in which the administrative agencies are allowed to have closed-door meetings, including national security and personal privacy matters.[316] If an administrative agency decides not to hold a public meeting, it should take certain formalities and preserve the complete minutes of the proceedings or a recording of the meeting for at least two years after such meeting, or one year after the conclusion of any agency proceeding.[317] Like the Freedom of Information Act, this law is a major step forward in allowing the public to understand how government agencies do their business.

These various laws, which have also been adopted at the state level, are called Sunshine Laws because, as is commonly said, "sunshine" is the best disinfectant. They make it possible that not only people but also media institutions will be able to access information.

(2) Japan

The Japanese environmental laws require much less public participation than American environmental laws. It is still not common in Japan that a statute has a provision on public participation. Only some statutes have provisions for accepting comments from the general public,[318] holding a public hearing or information meeting,[319] and requiring an advisory committee.[320] There are many statutes that have no provision of public participation at all. Moreover, even if statutes have such provisions, it seems that they are only a mere shell of public participation. It is a kind of one-way statement from the general public. In other words, comments from the general public are simply received by the promoter of the project.

Recently some statutes were re-enacted or amended to have a more concrete provision for public participation than before.[321] They are expected to realize substantial public participation. However, these new provisions also tend to be executed only as a matter of form.

All of the administrative information about environmental issues, including internal records and draft documents, should be open to the public so that the general public can participate in the administrative activities from an early stage. The national and local governments have to account for their activities because they protect and manage natural resources and wildlife in trust for the public. In Japan, some local governments have issued regulations since the 1980s to open general administrative information to the public.[322] It was not until 1999 that the Diet enacted the Open Administrative Information Act.

It is good that the Open Administrative Information Act of 1999

provides for people to claim the right to see the administrative documents and that the national government has a duty to satisfy such claims.[323] Like the United States, the Act is only applicable to the national government's administrative agencies, not to the local governments'.[324] The Act guarantees everyone the right to access administrative documents.[325] When an application is submitted to an agency, the chief of the agency must make the requested information available except for cases which are related to (a) personal privacy, (b) trade secrets, (c) national security, (d) criminal investigation records, (e) memoranda between or inside of national and local agencies, or (f) administrative internal affairs.[326]

The applicant can raise an objection to an administrative agency if the agency decides not to open the required document to the applicant. In this case, the agency must submit the objection to the Open Information Council for deliberation.[327] The discussion of the Open Information Council is closed to the public, and the applicant is not able to raise an objection to the decision made by the Council.[328]

(3) Summary

Traditionally, Japanese people have a custom of leaving administrative activities to the national and local governments solely. There has also been an idea among the general public that the decision made by the governments are always right. The governments also have the same idea, and they never doubt the justice of their activities. In other words, Japan simply has no history of letting the general public participate in governmental activities. Importantly, the custom or aura still works today. It is one of the reasons that most Japanese environmental laws have no provision for public participation.

However, as environmental issues have grown since the 1970s, the general public has started to doubt the national government's ability to manage and keep the environment healthy. At the same time, the general public noticed that they have been lacking in

opportunities to participate in administrative activities. In recent years, administrative agencies and the Japanese Diet began to add provisions for public participation into some environmental laws. The situation is improving.

Having been enacted only recently, the Open Administrative Information Act of 1999 shows no dramatic effects yet. One of the causes of this may be that Japanese people are unaccustomed to request and examine administrative documents by themselves since they have become quite used to depending on administrative activities of administrative agencies. It is necessary to raise public concern about administrative information in order to make the most of the public participation provisions and the Open Administrative Information Act of 1999.

2. Administrative Appeals

Administrative activities bear watching by citizens. In the case that citizens wish to complain about administrative activities or that citizens find some administrative actions do not follow laws, citizens are able to ask administrative agencies directly to review their activities. Both the United States and Japan have such administrative appeals system. They are not the same, however. This section outlines both countries' administrative appeals system.

(1) The United States

The Administrative Procedure Act states that "final agency action" is subject to judicial review.[329] The plaintiff must consider two doctrines applicable to administrative remedies before seeking judicial review. They are exhaustion and ripeness.[330] The plaintiff is required to exhaust administrative remedies in order to prevent unnecessary or untimely judicial interference in the administrative process, conserve judicial resources, and reduce friction between administrative agencies. The exhaustion doctrine emphasizes the

position of the party. Ripeness, by contrast, is concerned with the institutional relationships between courts and administrative agencies, and the competence of the courts to resolve disputes without further administrative refinement of the issues. Different agencies have different procedures for administrative remedies. Unlike in Japan, which has an organic common act for administrative remedies of all agencies, in the United States each agency has a statute or rule to provide the procedures for administrative remedies.

For instance, decisions of the Forest Service officials may be appealed administratively under the Forest Service Appeal Regulation.[331] Appealable decisions are grouped in two categories: (a) Chief's appeal decisions relate to forest plans, which are programmatic plans developed under the National Forest Management Act; and (b) Regional forester appeal decisions relate to project level plans, which reflect local resource management needs and are the result of site specific analysis.[332] As to the National Marine Fisheries Service, the Office of Administrative Appeals adjudicates appeals of initial administrative determinations.[333] The Corps of Engineers has an administrative appeal process whereby applicants and landowners may appeal denied permits, issued permits that contain requirements that are unacceptable to the applicant, or jurisdictional determinations.[334] The decisions are made by the Corps District offices according to their administrative appeal regulation.[335]

(2) Japan

In Japan, there are two procedures to seek correction of illegal or unreasonable administrative disposition or forbearance against administrative agencies. First, the grievance procedures of national and local governments are open to consultation. The Ministry of Public Management, Home Affairs, Posts and Telecommunications and the Ministry of Justice have legal responsibilities for dealing with such claims.[336] These grievance procedures are to give citizens an

account of the administrative activities and to give the government offices concerned some advice. The grievance procedures are not procedures to settle troubles legally. Second, the Administrative Appeal Review Act of 1962 provides that citizens may make a claim for correction of illegal or unreasonable disposition or forbearance by an administrative agency.[337] Only the citizen suffering such illegal or unreasonable disposition or forbearance may seek correction in written form.[338] A claim must be made within sixty days of when the citizen receives the disposition or forbearance.[339] The citizen may ask for a re-review in some cases if he or she in not satisfied with the conclusion of the review.[340]

(3) Summary

From the viewpoint of economizing on time and cost, the administrative remedies are useful to citizens. However, they are only reviews by administrative agencies themselves; they are not absolutely perfect or fair remedies. There should be an independent institution to review administrative activities on neutral ground. That is the justification for existence of a judicial review system which will be discussed in the next section.

3. Judicial Review

(1) The United States

As mentioned above, the United States has a lot of powerful statutes that contribute much toward the protection of salmon. The National Environmental Policy Act of 1969 and the Open Government Acts set a good example for all other countries. The Endangered Species Act of 1972 is highly praised as the most advanced wildlife protection statute in the world and is said to be an expression of the conscience of the United States people. Nevertheless, there are some problems that remain unresolved regarding the construction

of each provision and the application of the statutes by the administrative agencies. The reason is that sometimes the administrative agencies' constructions of each provision are far removed from the original in meaning, or sometimes the administrative agencies fail or come up short in achievement of the legislative purposes.

For success in achievement of the legislative purposes, enthusiastic scrutiny by the general public and environmental organizations and strict enforcement of the statutes by the courts are indispensable. The basic statute is the Administrative Procedure Act of 1946, which allows citizens to sue administrative agencies that have not properly carried out their duties.[341] Many statutes in the United States have provisions for public participation so that the general public can directly influence administrative agencies. Moreover, many environmental statutes provide for civil suit system. It allows everyone to institute a lawsuit in a federal district court against a private person, company, or administrative agency that violates a statute or a regulation (such as a standard or an administrative order), or against the Secretary of the Environmental Protection Agency who neglects his or her duty. The civil suit system assures the general public of a significant opportunity to force a private person or an administrative agency to observe a statute.[342]

At the same time, the strict and impartial courts play the important role with their powerful authority to correct the course of administrative agencies. It is because of the balance between the administrative agencies' activities, sufficient public participation, and strict and timely judicial review regarding application of the statutes that the statutes take roots deep in the society and become the driving force of the society in the United States. Some representative cases shown below, which involve salmon protection issues, fully prove the importance of judicial review.

The courts have played an important role in enforcing laws that protect Pacific Salmon. In May 1991, the Northwest Power Planning Council asked the fish and wildlife agencies of the States of Oregon and Idaho, the Columbia River Inter-Tribal Fish Commission

(CRITFC), and the Columbia Basin Fish and Wildlife Authority (CBFWA) to submit their recommendation to revise a fish and wildlife program.[343] Then the Council published its final amendments to the Columbia River Basin Fish and Wildlife Program "The Strategy for Salmon" in September 1992, but the amendments did not reflect their recommendation.

In February 1993, the Northwest Resource Information Center, Inc. (NRIC), the Confederated Tribes and Bands of the Yakima Indian Nation, and the Aluminum Company of America and other companies purchasing power from the Bonneville Power Administration challenged the Council's final amendments.[344] In September 1994, the court of appeals of the Ninth Circuit held that "the Council has failed at least two requirements of the NPA (Northwest Power Act) in its process, as well as section 706 of the APA (Administrative Procedure Act): it has failed to explain a statutory basis for its rejection of recommendations of fishery managers and it has failed to evaluate proposed program measures against sound biological objectives,"[345] and recommended the Council reconsider the program. Soon after the 1994 decision, the Council published a revised program, which was highly valued by specialists on salmon and environmental organizations since it respected the professional advice from the fish and wildlife agencies. Moreover, the Council released a new program based on an "adaptive management strategy" in December 1995, which was also valued by Indian tribes and environmental organizations.

The courts have also overturned rulings by the National Marine Fisheries Service. Since 1990 some salmon has been designated as endangered species or threatened species under the Endangered Species Act.[346] In the case there are designated species in the river, the federal agencies are not been able to operate and manage any dams without asking the National Marine Fisheries Service for a biological opinion. The Council asked the National Marine Fisheries Service to submit its biological advice on the draft revision of the Fish and Wildlife Program in 1991. In 1992, the National Marine

Fisheries Service approved the draft with its biological opinion. Then the Idaho Department of Fish and Game challenged the biological opinion of the National Marine Fisheries Service.[347] The district court Judge Marsh intended to command the National Marine Fisheries Service to research and remake its biological opinion. However, Judge Marsh held plaintiffs' motion in abeyance pending the filing of a new, revised biological opinion because on March 16, 1994 the federal defendants started reconsidering the original biological opinion pursuant to the district court's order.[348] The revised biological opinion of the National Marine Fisheries Service was published on March 3, 1995, which found that proposed Columbia River Power System operations were likely to jeopardize the continued existence of the listed species.[349]

Based upon this jeopardy finding, the National Marine Fisheries Service had to consider whether there were any reasonable and prudent alternatives to the Columbia River Power System management that might avoid jeopardy. The National Marine Fisheries Service determined that there was a reasonable and prudent alternative for Columbia River Power System management. The National Marine Fisheries Service proposed a reasonable and prudent alternative listing a number of elements and actions, including continuation of the transportation program. On March 10, 1995, the United States Army Corps of Engineers and the United States Bureau of Reclamation filed their Records of Decision based upon the revised biological opinion.[350] Although the State of Oregon and American Rivers challenged the revised biological opinion of the National Marine Fisheries Service again, this time Judge Marsh did not find any illegality in it.[351]

However, on May 7, 2003, a federal judge found the National Marine Fisheries Service's biological opinion invalid and remanded the biological opinion back to the National Marine Fisheries Service for revamping.[352] This case deals with the effect of continued operation of the Federal Columbia River Power System on threatened and endangered salmon species in the Columbia basin.

On December 21, the National Marine Fisheries Service issued a biological opinion to the United States Army Corps of Engineers, the Bonneville Power Administration, and the United States Bureau of Reclamation, operating the Federal Columbia River Power System. The biological opinion addressed the effects of proposed Federal Columbia River Power System's action on threatened or endangered salmon and steelhead in the Columbia basin, and concluded that the continued operation of the System would jeopardize a number of species and adversely modify their critical habitat. Then the National Marine Fisheries Service, pursuant to section 7 (b)(3)(A) of the Endangered Species Act and 50 C.F.R. §402.14(h)(3), proposed a reasonable and prudent alternative course of action (RPA) that it concluded will avoid jeopardy and adverse modification of the critical habitat of the fish. The National Marine Fisheries Service issued an Incidental Take Statement in conjunction with the reasonable and prudent alternative course of action. Sixteen non-profit environmental and conservation organizations, backed by the State of Oregon and the Columbia basin's four treaty fishing tribes,[353] sought an injunction requiring the National Marine Fisheries Service to withdraw its biological opinion because the reasonable and prudent alternative course of action and accompanying Incidental Take Statement in the biological opinion are arbitrary and capricious, and reinitiate consultation with the action agencies.

On May 7, 2003, the United States District Judge James A. Redden found that the National Marine Fisheries Service's no-jeopardy conclusion in its biological opinion to be arbitrary and capricious on the grounds that (a) the National Marine Fisheries Service's definition of "action area" is arbitrary and capricious, and (b) the National Marine Fisheries Service specifically relied on off-site federal mitigation actions that are not reasonably certain to occur in order to reach the no-jeopardy conclusion as to eight of the twelve salmon evolutionary significant units.[354]

Consequently, judicial review played a significant role in the process through Judge Marsh's first ruling and Judge Redden's ruling,

which led to the revised biological opinion, that was much more protective of the salmon.

The adequate management of national forests surrounding rivers is indispensable in protecting salmon. The Forest Service in the Department of Agriculture has engaged in study of the connection between salmon protection and forest management since the late 1980s. In 1993, following section 7 of the Endangered Species Act, the Forest Service and the National Marine Fisheries Service reached an agreement to consult with each other over salmon protection matters not only when the Forest Service prepares a forest management plan but also when it develops an individual Land and Resource Management Plan.[355]

In 1993, environmental groups, including the Pacific Rivers Council, brought an action seeking declaratory and injunctive relief against the Forest Service (they moved for summary judgment and injunction respecting timber sales, range activities, and road building projects), alleging violation of the Endangered Species Act by failing to consult with the National Marine Fisheries Service about the affects of two Land and Resource Management Plans on threatened salmon.[356] The district court found that the Forest Service has violated the Endangered Species Act by failing to comply with section 7 regarding the continued implementation of the Wallowa-Whitman and Umatilla Land and Resource Management Plans and enjoined any future activities that fall within the scope of section 7(d) pending compliance.[357] The environmental groups and the Forest Service appealed. The court of appeals affirmed the district court's judgment in part, reversed in part, and remanded to the district court to modify its injunction to include the ongoing and announced timber, range, and road projects.[358]

Moreover, conservation organizations, including the Pacific Rivers Council, brought action for declaratory judgment and injunctive relief, challenging the Forest Service's failure to consult with the National Marine Fisheries Service under the Endangered Species Act on affects of six Land and Resource Management Plans on

endangered salmon.[359] The plaintiffs' motion for a preliminary injunction was granted[360] and the Forest Service was required to reinitiate consultation with the National Marine Fisheries Service under section 7 (a)(2) of the Endangered Species Act on the effects of the Land and Resource Management Plans for the six national forests in the State of Idaho on endangered Snake River sockeye salmon and Snake River spring/summer and fall chinook salmon.[361]

Losing the series of these cases from 1993 to 1995, the Forest Service, under the pressure of necessity, reviewed its national forest management plans to give more attention to watershed management that would recover salmon and their habitat. Since then, the Forest Service has been wrestling with the difficult problem of managing national forests on the basis of watershed management.

Nevertheless, the problem still remains as to how the Forest Service, the Council, and other federal agencies should deal with individual cases to achieve the objectives of the Northwest Power Act. We can expect a success only after careful and adequate execution by those agencies. The courts will continue to be useful in this process since agencies are often pressured by development interests. Federal judges must sometimes enforce the environmental laws to protect the salmon. Thus success in the effort to combine salmon protection, power development, and other uses of the rivers will require judicial review to assure that the agencies, which make so many important decisions, follow the law.

(2) Japan

Although one of the most effective ways to correct an illegal activity of private companies or administrative agencies is judicial review, the court plays little role in Japan. There is even such a comment; "The court has nothing to do with the protection of nature."[362] There are two main kinds of lawsuits, a civil suit and an administrative suit, to challenge an environmental issue in Japan.

Citizens can institute a civil suit against a private person, com-

pany, or an administrative agency according to the Civil Procedure Act of 1996. There are two main categories of civil suit, a civil suit for injunction and a civil suit for compensation, but both of them play little role in nature protection.

In the case challenging an environmental issue such as logging or construction in rivers, the court rarely approves of citizen's standing since basically trespass of an individual legal right is required to institute a civil suit for injunction. Moreover, the court does not approve injunctions unless there is a high possibility that a citizen's life or body will be injured. A civil suit for compensation also does not play a significant role in nature protection. To institute a civil suit for compensation, citizen is required to prove an economical damage upon his or her body or private properties. It is difficult to prove it in most environmental cases, however. And also it is too late or no use to protect nature even if a court approves the compensation after nature is destroyed.

In comparison with the United States where the Administrative Procedure Act requires people to satisfy only basic conditions to institute a lawsuit against an activity of administrative agency, in Japan the Administrative Procedure Act of 1962 provides several strict requirements for lawsuits against the activities of administrative agencies. Therefore, it is extraordinary difficult for the general public to sue an administrative agency.

There are six main essential conditions. (a) A plaintiff must institute a lawsuit basically in the district court under which jurisdiction the defendant administrative agency is located; (b) The object a plaintiff can challenge is restricted to an administrative decision or an activity that directly affects or regulates an individual citizen's right or duty. For example, people are not able to challenge a city planning or an environmental standard because they are not considered to directly affect or regulate an individual citizen's right or duty; (c) Only a plaintiff who has standing can institute a lawsuit. The court approves standing only when the plaintiff's right or a right that seems to be protected by a statute is trespassed or will be inevitably

trespassed. In general, the court does not approve standing except when the plaintiff's life or body is in danger. Therefore, it is almost impossible to challenge an administrative agency's destructive activity to nature such as forest cutting, development of a shore, lake, or river, or destruction of wildlife critical habitat, unless the plaintiff's life or body is in danger directly by such activities; (d) Since a lawsuit must be significant, a plaintiff's proposal is rejected when the significance is lost. For example, in the case that a plaintiff challenges the propriety of a reclamation project, the plaintiff's proposal will be rejected if the project is completed during the suit; (e) A defendant must be a chief of the administrative agency, such as a Minister or a prefectural governor; (f) A plaintiff must institute a lawsuit within six months after he or she knew of the administrative decision. Nobody can challenge an administrative decision more than one year after the decision.

Some of those requirements are similar to those of the United States. However, under the present Administrative Procedure Act, it is quite difficult for Japanese citizens to reach the courtroom, while in the United States lawsuits against administrative agencies are commonplace. In fact, Japanese courts shut their doors on most cases regarding environmental issues on the grounds of incapacity.

Unlike in the United States where many environmental statutes have a provision to allow every citizen to institute a lawsuit against an administrative agency, Japan has no such statute. Therefore, a lawsuit under the Administrative Procedure Act is almost the only way left for citizens to ask the court to decide an environmental issue. However, as mentioned above, in most cases citizens' proposals tend to be rejected on the ground of incapacity before the court starts its deliberation.

(3) Summary

It is well-known fact that judicial review is of almost no use to protect nature in Japan. Inadequate activities of administrative

agencies will be continued and Japanese environmental circumstance will get worse unless the Diet carries out drastic legislative reform regarding the lawsuit procedure system.

The judges must realize their own responsibilities, too. The judges are not willing to expand the related provisions to approve citizens' standing or to propose legislative reforms, in spite of the fact that they are well aware of a wide gap between citizens' great demand for lawsuits to protect nature and the present legal system's ability to respond to that demand. They just narrowly interpret provisions of present statutes and deny most citizens' standing in both civil and administrative cases. Even if Japan did adopt ideal environmental statutes, the current state of judicial review does not assure that these laws will be carried out unless the individual judges act upon their beliefs.

IV. Conclusion

The United States and Japan both have enjoyed the benefits of many kinds of wild salmon for a long time. The United States, having experienced the time of indiscriminate fishing and the extinction of some wild salmon runs, is now seriously wrestling with a difficult problem of protecting wild salmon and their watersheds. The United States makes the most of many current environmental laws and an active judicial review system to sustain and restore the runs of wild salmon. On the other hand, Japan has neither environmental law for research and protection of wild salmon and their watersheds nor an adequate judicial review system. Japan is far behind the United States both in studying wild salmon and developing the legal system to protect wild salmon and their watersheds.

It is difficult to introduce the way of the United States to Japan as it now stands because these two countries are different as regards the natural and social environment, their basic legal system, and the traditions and attitudes surrounding wild salmon. However, the basic doctrines in the United States' legal system on wild salmon and watershed management are applicable to Japan. Japan should adopt

these good points of the United States' system.

In 1964, the United States Congress established the Public Land Law Review Commission in order to review federal policies, laws, and regulations pertaining to the public lands and to recommend appropriate revisions.[363] Following the example of the Public Land Law Review Commission, the Japanese Diet should establish a special commission consisting of many diverse experts and representatives of environmental organizations and the general public, in order to investigate in depth various environmental problems and to propose a new environmental legal system for Japan, including substantial protections for wild salmon and comprehensive watershed management. Only then can Japan begin to move toward true sustainability.

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Notes

303. "Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes." 42 U.S.C.A. §4332 (West 2003); Pub. L. No. 91-190, §102, 83 Stat. 852, 853 (1970). "(2) Each agency, in accordance with published rules, shall make available for public inspection and copying (A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases." 5 U.S.C.A. §552 (a)(2)(A) (West 1996).

"Agencies shall: (a) Make diligent efforts to involve the public in preparing and implementing their NEPA procedures. (b) Provide public notice of NEPA-related hearings, public meetings, and the availability of environmental documents so as to inform those persons and agencies who may be interested or affected. (1) In all cases the agency shall mail notice to those who have requested it on an individual action. (2) In the case of an action with effects of national concern notice shall include publication in the FEDERAL REGISTER and notice by mail to national organizations reasonably expected to be interested in the matter and may include listing in the *102 Monitor*. An agency engaged in rulemaking may provide notice by mail to national organizations who have requested that notice regularly be provided. Agencies shall maintain a list of such organizations. (3) In the case of an action with effects primarily of local concern the notice may include: (i) Notice to State and areawide

clearinghouses pursuant to OMB Circular A-95 (Revised). (ii) Notice to Indian tribes when effects may occur on reservations. (iii) Following the affected State's public notice procedures for comparable actions. (iv) Publication in local newspapers (in papers of general circulation rather than legal papers). (v) Notice through other local media. (vi) Notice to potentially interested community organizations including small business associations. (vii) Publication in newsletters that may be expected to reach potentially interested persons. (viii) Direct mailing to owners and occupants of nearby or affected property. (ix) Posting of notice on and off site in the area where the action is to be located. (c) Hold or sponsor public hearings or public meetings whenever appropriate or in accordance with statutory requirements applicable to the agency. Criteria shall include whether there is: (1) Substantial environmental controversy concerning the proposed action or substantial interest in holding the hearing. (2) A request for a hearing by another agency with jurisdiction over the action supported by reasons why a hearing will be helpful. If a draft environmental impact statement is to be considered at a public hearing, the agency should make the statement available to the public at least 15 days in advance (unless the purpose of the hearing is to provide information for the draft environmental impact statement). (d) Solicit appropriate information from the public. (e) Explain in its procedures where interested persons can get information or status reports on environmental impact statements and other elements of the NEPA process. (f) Make environmental impact statements, the comments received, and any underlying documents available to the public pursuant to the provisions of the Freedom of Information Act (5 U.S.C. §552), without regard to the exclusion for interagency memoranda where such memoranda transmit comments of Federal agencies on the environmental impact of the proposed action. Materials to be made available to the public shall be provided to the public without charge to the extent

practicable, or at a fee which is not more than the actual costs of reproducing copies required to be sent to other Federal agencies, including the Council." 40 C.F.R. §1506.6 (2003).

304. "To insure widespread public involvement in the formulation of regional power policies, the Council and Administrator (of Bonneville Power Administration) shall maintain comprehensive programs to (A) inform the Pacific Northwest public of major regional power issues, (B) obtain public views concerning major regional power issues, and (C) secure advice and consultation from the Administrator's customers and others." 16 U.S.C. § 839b (g)(1) (West 2000); Pub. L. No. 96-501, §4 (g)(1), 94 Stat. 2697, 2707 (1980).
305. An Act to improve the administration of justice by prescribing fair administrative procedure, Pub. L. No. 404, Chap. 324, 60 Stat. 237 (1946); 5 U.S.C.A. §551 to 559, 701 to 706, 1305, 3105, 3344, 4301, 5335, 5372, 7521 (West 1996).
306. Pub. L. No. 404, Chap. 324, §3, 60 Stat. 237, 238 (1946).
307. An Act to amend section 3 of the Administrative Procedure Act, chapter 324, of the Act of June 11, 1946 (60 Stat. 238), to clarify and protect the right of the public to information, and for other purposes, Pub. L. No. 89-487, 80 Stat. 250 (1966); 5 U.S.C.A. §552 (West 1996).
308. An Act to amend section 552 of title 5, United States Code, known as the Freedom of Information Act, Pub. L. No. 93-502, §§1 to 3, 88 Stat. 1561, 1561-1564 (1974); 5 U.S.C.A. §552 (West 1996).
309. "Each agency shall separately state and currently publish in the Federal Register for the guidance of the public (A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions; (B) statements of the general course and method by which its functions are channeled and determined, including the

nature and requirements of all formal and informal procedures available; (C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations; (D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and (E) each amendment, revision, or repeal of the foregoing." 5 U.S.C.A. §552 (a)(1) (West 1996).

310. "Each agency, in accordance with published rules, shall make available for public inspection and copying (A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases; (B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; and (C) administrative staff manuals and instructions to staff that affect a member of the public; unless the materials are promptly published and copies offered for sale." 5 U.S.C.A. §552 (a)(2) (West 1996).

311. "Except with respect to the records made available under paragraphs (1) and (2) of this section, each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person." 5 U.S.C.A. §552 (a)(3) (West 1996).

312. The provision with regard to public information (5 U.S.C.A. §552 (West 1996)) "does not apply to matters that are (1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order; (2) related solely to the internal personnel rules and practices of an agency; (3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be

withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld; (4) trade secrets and commercial or financial information obtained from a person and privileged or confidential; (5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency; (6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy; (7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual; (8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or (9) geological and geophysical information and data, including maps, concerning

wells." 5 U.S.C.A. §552 (b) (West 1996).

313. An Act to provide that meetings of Government agencies shall be open to the public, and for other purposes, Pub. L. No. 94-409, 90 Stat. 1241 (1976); 5 U.S.C.A. §551, 552, 552b, 556, 557 (West 1996). The Government in Sunshine Act declares the policy of the United States. That is to say: "the public is entitled to the fullest practicable information regarding the decisionmaking processes of the Federal Government." The purpose of the Act is "to provide the public with such information while protecting the rights of individuals and the ability of the Government to carry out its responsibilities." Pub. L. No. 94-409, §2, 90 Stat. 1241, 1241 (1976).

314. "The term "meeting" means the deliberations of at least the number of individual agency members required to take action on behalf of the agency where such deliberations determine or result in the joint conduct or disposition of official agency business, but does not include deliberations required or permitted by subsection (d) or (e)." 5 U.S.C.A. §552b (a)(2) (West 1996).

315. "The term "agency" means any agency, as defined in section 552 (e) of this title, headed by a collegial body composed of two or more individual members, a majority of whom are appointed to such position by the President with the advice and consent of the Senate, and any subdivision thereof authorized to act on behalf of the agency." 5 U.S.C.A. §552b (a)(1) (West 1996).

316. "Except in a case where the agency finds that the public interest requires otherwise, the second sentence of subsection (b) shall not apply to any portion of an agency meeting, and the requirements of subsections (d) and (e) shall not apply to any information pertaining to such meeting otherwise required by this section to be disclosed to the public, where the agency properly determines that such portion or portions of its meeting or the disclosure of such information is likely to (1) disclose matters that are (A) specifically authorized under criteria established by an Executive order to be kept secret in the interests of national

defense or foreign policy and (B) in fact properly classified pursuant to such Executive order; (2) relate solely to the internal personnel rules and practices of an agency; (3) disclose matters specifically exempted from disclosure by statute (other than section 552 of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld; (4) disclose trade secrets and commercial or financial information obtained from a person and privileged or confidential; (5) involve accusing any person of a crime, or formally censuring any person; (6) disclose information of a personal nature where disclosure would constitute a clearly unwarranted invasion of personal privacy; (7) disclose investigatory records compiled for law enforcement purposes, or information which if written would be contained in such records, but only to the extent that the production of such records or information would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel; (8) disclose information contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; (9) disclose information the premature disclosure of which would (A) in the case of an agency which regulates currencies, securities, commodities, or financial institutions, be likely to (i) lead to significant finan-

cial speculation in currencies, securities, or commodities, or (ii) significantly endanger the stability of any financial institution; or (B) in the case of any agency, be likely to significantly frustrate implementation of a proposed agency action, except that subparagraph (B) shall not apply in any instance where the agency has already disclosed to the public the content or nature of its proposed action, or where the agency is required by law to make such disclosure on its own initiative prior to taking final agency action on such proposal; or (10) specifically concern the agency's issuance of a subpena, or the agency's participation in a civil action or proceeding, an action in a foreign court or international tribunal, or an arbitration, or the initiation, conduct, or disposition by the agency of a particular case of formal agency adjudication pursuant to the procedures in section 554 of this title or otherwise involving a determination on the record after opportunity for a hearing." 5 U.S.C.A. §552b (c) (West 1996).

317. "For every meeting closed pursuant to paragraphs (1) through (10) of subsection (c), the General Counsel or chief legal officer of the agency shall publicly certify that, in his or her opinion, the meeting may be closed to the public and shall state each relevant exemptive provision. A copy of such certification, together with a statement from the presiding officer of the meeting setting forth the time and place of the meeting, and the persons present, shall be retained by the agency. The agency shall maintain a complete transcript or electronic recording adequate to record fully the proceedings of each meeting, or portion of a meeting, closed to the public, except that in the case of a meeting, or portion of a meeting, closed to the public pursuant to paragraph (8), (9)(A), or (10) of subsection (c), the agency shall maintain either such a transcript or recording, or a set of minutes. Such minutes shall fully and clearly describe all matters discussed and shall provide a full and accurate summary of any actions taken, and the reasons therefor, including a

description of each of the views expressed on any item and the record of any rollcall vote (reflecting the vote of each member on the question). All documents considered in connection with any action shall be identified in such minutes." 5 U.S.C.A. §552b (f)(1) (West 1996).

"The agency shall make promptly available to the public, in a place easily accessible to the public, the transcript, electronic recording, or minutes (as required by paragraph (1)) of the discussion of any item on the agenda, or of any item of the testimony of any witness received at the meeting, except for such item or items of such discussion or testimony as the agency determines to contain information which may be withheld under subsection (c). Copies of such transcript, or minutes, or a transcription of such recording disclosing the identity of each speaker, shall be furnished to any person at the actual cost of duplication or transcription. The agency shall maintain a complete verbatim copy of the transcript, a complete copy of the minutes, or a complete electronic recording of each meeting, or portion of a meeting, closed to the public, for a period of at least two years after such meeting, or until one year after the conclusion of any agency proceeding with respect to which the meeting or portion was held, whichever occurs later." 5 U.S.C.A. §552b (f)(2) (West 1996).

318. For example, the Bird and Game Animals' Conservation and Proper Hunting Act, Law No. 88 of 2002, the Forest Act, Law No. 249 of 1951, and the Public Water Reclamation Act, Law No. 57 of 1921 have such provisions.
319. For example, the Forest Act, Law No. 249 of 1951, the River Act, Law No. 167 of 1964, and the City Planning Act, Law No. 100 of 1968 have such provisions.
320. For example, the Natural Park Act, Law No. 161 of 1957, the Natural Environmental Conservation Act, Law No. 85 of 1972, the Endangered Species Act, Law No. 75 of 1992, the Harbor Act, Law No. 218 of 1950, and the River Act, Law No. 167 of

1964 have such provisions.

321. For example, the Environmental Impact Assessment Act, Law No.81 of 1997, the River Act, Law No.167 of 1964, and the Wastes Disposition and Cleaning Act, Law No.137 of 1970, were re-enacted or amended recently. Consequently, they turned out to have provisions of public participation for the first time.

322. In March 1982, Kaneyama-machi in Yamagata Prefecture issued the first freedom of information regulation. Secondly Kanagawa Prefecture issued a freedom of information regulation in October 1982.

According to a report of the Ministry of Internal Affairs and Communications dated July 30, 2004, 2,950 (93.1%) of all 3,170 local public bodies including prefectures, cities, towns, and villages in Japan have issued their freedom of information regulations. More information upon this report is available at <http://www.soumu.go.jp/s-news/2004/04073_8.html>.

323. §1, the Open Administrative Information Act, Law No. 42 of 1999.

324. The Act does not require the local governments to issue their own regulation to open administrative information. It merely recommends them to have such regulations. §§2 and 41, the Open Administrative Information Act, Law No. 42 of 1999.

325. §3, the Open Administrative Information Act, Law No. 42 of 1999. The application must be presented to an agency in writing. The applicant's name, address, the exact name of the requested administrative document, the cost price of the document, and a fee are required to apply. §4 and 16, the Open Administrative Information Act, Law No. 42 of 1999.

326. §5, the Open Administrative Information Act, Law No. 42 of 1999. In the case that the requested administrative document includes the exception information, but it is easy for the agency to delete it partly, the chief of the agency must open the remainder of the requested document to the applicant. §6 (1), the Open Administrative Information Act, Law No. 42 of 1999. The chief

of the agency can open the exception information at his or her discretion if he or she finds the needs to do so in view of the public interest. §7, the Open Administrative Information Act, Law No. 42 of 1999. The decision whether the chief of the agency open the requester document must be made within thirty days from the application. The chief can table the decision for not exceed thirty days if there is an inevitable difficulty to decide it. §10, the Open Administrative Information Act, Law No. 42 of 1999.

327. §18, the Open Administrative Information Act, Law No. 42 of 1999. The Open Information Council is established in the Cabinet. The Council is composed of twelve members appointed by the Prime Minister with the Diet's approval. The term of the members is three years, and the Open Administrative Information Act allows reappointment of them. §§21 to 23, the Open Administrative Information Act, Law No. 42 of 1999. The member can not reveal any secret information that he or she knows at the Council. Less than one year's imprisonment or fine of 300,000 Japanese yen will be required for the violation of this provision. §§23 (8) and 43, the Open Administrative Information Act, Law No. 42 of 1999.
328. §§32 and 33, the Open Administrative Information Act, Law No. 42 of 1999.
329. 5 U.S.C.A. §704 (West 1996).
330. About exhaustion and ripeness, see generally Glen O. Robinson, Ernest Gellhorn & Harold H. Bruff, *The Administrative Process* 170-188 (4th ed., West 1993).
331. Ernest Gellhorn & Ronald M. Levin, *Administrative Law and Process* 384 (3d ed., West 1990).
332. 36 C.F.R. §215. 1-215. 22 (2003). More information upon the Forest Service's administrative appeals is available at <http://www.southernregion.fs.fed.us/appeals/>.
333. The Office of Administrative Appeals consists of a chief appeals officer, two appeals officers, and appeals specialists. The regu-

lations governing appeals and the Office of Administrative Appeals are found at 50 C.F.R. §679.43 (2003). The Office of Administrative Appeals' jurisdiction includes the Individual Fishing Quota Program for Pacific halibut and Sablefish, the License Limitation Program (ground-fish and crab), the Americans Fisheries Act, the North Pacific Ground-fish Observer Program, and the Western Alaska Community Development Program. More information upon the National Marine Fisheries Service's administrative appeals is available at 〈http://www.fakr.noaa.gov/appeals/default.htm〉.

334. More information upon the U. S. Army Corps of Engineers' administrative appeal process is available at 〈http://www.usace.army.mil/inet/functions/cw/cecwo/reg/appeals.htm〉.
335. The request for an appeal of such decisions is appealed to the Corps Division offices. Requests for appeal must be furnished to the Division office within sixty days of the date of the appealable decision. The Division will either upheld to the District decisions or send the case back to the District, with direction to make a new decision. Complete text of the Administrative Appeal Regulation of the Corps of Engineers is found in the Federal Register, Part III dated Tuesday, March 28, 2000.
336. §4 (14), the Ministry of Public Management, Home Affairs, Posts and Telecommunications Establishment Act, Law No. 91 of 1999; §§2 and 8, the Ministry of Justice Establishment Act, Law No. 93 of 1999.
337. §4, the Administrative Appeal Review Act, Law No. 160 of 1962.
338. §§4 and 9, the Administrative Appeal Review Act, Law No. 160 of 1962.
339. §§14 (1) and 45, the Administrative Appeal Review Act, Law No. 160 of 1962.
340. A claim for re-review must be set up within the next thirty days of the first review. §53, the Administrative Appeal Review Act, Law No. 160 of 1962.
341. See generally Robinson, Gellhorn & Bruff, *supra* note 330.

342. Generally speaking, there are three important conditions to institute a lawsuit under the civil suit system. (a) A plaintiff must notify a defendant of the planned lawsuit in a certain term in advance; (b) It is impossible to institute a lawsuit if the Secretary of Environmental Protection Agency or a state institutes a lawsuit in order to execute a stature; and (c) It is impossible to institute a lawsuit against the Secretary of Environmental Protection Agency on the charge of a neglect of a legal duty in the case that the Secretary is allowed to achieve such duty at his or her discretion. In general, the civil suit provision allows everyone to institute a lawsuit. However, there are also some statutes, including the Clean Water Act, which allow civil suit on a certain condition.

343. The Pacific Northwest Electric Power and Conservation Planning Council must ask Indian tribes and fish and wildlife agencies to submit necessary recommendation to the Council to assure the recovery of fish and wildlife before it prepare a fish and wildlife program. In November 1982, after receiving over 200-pages recommendation from Indian tribes and fish and wildlife agencies, the Council released its first fish and wildlife program (the Columbia Basin Fish and Wildlife Program), and amended it in 1984, 1985, 1986, and 1987. The program adopted an innovative "water budget" and "bypass" systems instead of obeying the recommendation from Indian tribes and fish and wildlife agencies. However, it soon became clear that the water budget and bypass systems did not work well although the Council succeeded in enough budgets for them.

344. The Northwest Resource Information Center, Inc. and the Confederated Tribes and Bands of the Yakima Indian Nation charged that (i) the Council's Program failed to explain a statutory basis for its rejection of the recommendations of fishery managers as required under §839b (h)(7); (ii) the Council failed to comply with the criteria set out in §839b (h)(6) for adopting specific program measures; (iii) the Council failed to adopt sound

biological objectives; and (iv) the Council may not be "committed" to implementing the Program's intermediate-term actions. The Direct Service Industries (DSIs) complained that (i) the Council violated the Northwest Power Act by failing to conduct a critical cost-benefit analysis of each measure in the Program, and that the Program's economic impact and drawdown measures violate the Northwest Power Act; (ii) the Strategy for Salmon's economic impact imposes unreasonable burdens on the hydropower system, violating the Northwest Power Act. Northwest Resource Information Center, Inc. v. Northwest Power Planning Council, 35 F. 3d 1371, 1384-95 (9th Cir. 1994).

345. The Court of Appeals, Tang, Circuit Judge, held that: (1) §839b (h)(7) requires the Council to explain, in the Program, a statutory basis for its rejection of recommendations. The Council failed to do so here with respect to the recommendations of agencies and tribes and was, therefore, not in accordance with the Northwest Power Act (35 F. 3d 1371, 1386 (9th Cir. 1994)); (2) § 839b (h)(7) provides a mandate that the Council will give "due weight" to the recommendations and expertise of fishery managers when resolving inconsistencies in recommendations of program measures (35 F. 3d 1371, 1386 (9th Cir. 1994)). The fish and wildlife provisions of the Northwest Power Act and their legislative history require that a high degree of deference be given to fishery managers' interpretations of such provisions and their recommendations for program measures (35 F. 3d 1371, 1388 (9th Cir. 1994)); (3) The criteria in §839b (h)(6) are mandatory and no less substantive, and measures adopted thereunder no less reviewable by Court of Appeals (35 F. 3d 1371, 1389 (9th Cir. 1994)); (4) the Program fails to incorporate the sound biological objectives contemplated in the Act (35 F. 3d 1371, 1392 (9th Cir. 1994)); and (5) Congress did not say the Council should perform a critical cost-benefit analysis of each measure (35 F. 3d 1371, 1394 (9th Cir. 1994)). There is also concern that the Council may have failed to give proper deference to fishery

managers and to fully comply with other substantive criteria for program measures (35 F. 3d 1371, 1395 (9th Cir. 1994)).

346. See note 44.

347. The Idaho Department of Fish and Game claimed that defendants have violated the Endangered Species Act (ESA) by (1) failing to insure that the Federal Columbia River Power System operations are not likely to jeopardize listed species; (2) omitting consideration of all relevant scientific factors; (3) failing to include all reasonable and prudent mitigation measures to reduce incidental take of listed species; (4) limiting consideration of short and long term impacts and measures to the immediate nine-month operational period under consideration; and (5) operating the Federal Columbia River Power System between April 15 and May 26, 1993 prior to completion of the biological opinion.

348. Idaho Department of Fish and Game v. National Marine Fisheries Service, Civ. No. 93-1603-MA (FN3), 1995 WL 464544. The start of reconsidering was only 20 days before the decision.

349. 1995 WL 464544.

350. 1995 WL 464544.

351. American Rivers v. National Marine Fisheries Service, 1997 U. S. Dist. LEXIS 5337 (D. Or. April 3, 1997).

352. The National Marine Fisheries Service has changed its name to the National Oceanic and Atmospheric Administration Fisheries as a sub-agency of the National Oceanic and Atmospheric Administration. To avoid confusion, this paper adopts the former name (the National Marine Fisheries Service) throughout, even for reference to the agency's actions that occurred after the effective date of the name change.

353. They are the Nez Perce Tribe, Confederated Tribes and Bands of the Yakima Indian Nation, Confederated Tribes of the Umatilla Indian Reservation, and Confederated Tribes of the Warm Springs Reservation of Oregon.

354. The Unites States Fish and Wildlife Service of the Department

of the Interior defines the term "an evolutionary significant unit" as "a sub-portion of a species that is defined by substantial reproductive isolation from other conspecific units and represents an important component of the evolutionary legacy of the species." 〈http://www.delta.dfg.ca.gov/afrp/acronym_template.asp?code=27〉

355. The Forest and Rangeland Renewable Resources Planning Act of 1974, as amended by the National Forest Management Act of 1976, 16 U.S.C. §§1600-1614, requires the United States Forest Service (USFS) to prepare Land and Resource Management Plans (LRMPs) for individual units of the national forest system. Pacific Rivers Council v. Thomas, 873 F. Supp. 365, 367 (D. Idaho 1995).
356. Pacific Rivers Council v. Robertson, 854 F. Supp. 713 (D. Or. 1993). "Plaintiffs filed this action against defendants seeking declaratory and injunctive relief on grounds that the Forest Service (USFS) has violated the Endangered Species Act (ESA) by failing to engage in §7 consultations with the NMFS (National Marine Fisheries Service) on two Land and Resource Management Plans (LRMPs) for the Wallowa-Whitman and Umatilla forests regarding effects of the LRMPs on threatened Snake River chinook salmon. The forest plans were adopted in 1990, the salmon were listed in 1992. Plaintiffs assert three claims for relief against the USFS: (1) violation of the ESA and the APA (Administrative Procedure Act) by failing to consult with the NMFS over the Wallowa-Whitman and Umatilla LRMPs; (2) violation of the ESA and the APA by failing to ensure that adoption and implementation of the Umatilla and Wallowa-Whitman LRMPs are not likely to jeopardize the species; and (3) violation of the ESA §9 and the APA by "taking" listed species without an incidental take permit." 854 F. Supp. 713, 714-715 (D. Or. 1993).
357. 854 F. Supp. 713, 725 (D. Or. 1993).
358. Pacific River Council v. Thomas, 30 F. 3d. 1050 (9th Cir. 1994).

The court of appeals affirmed "the district court's judgment granting an injunction against the Forest Service pending compliance with the ESA and hold that the Land and Resource Management Plans constitute continuing agency action requiring consultation under §7 (a)(2) of the ESA." The court reversed "the district court's judgment excluding from the injunction ongoing and announced timber, range, and road projects", stating that "the district court erred in relying on §7 (d) of the ESA at a time when the Forest Service had failed to enter into consultation as required by §7 (a)(2) of that statute." The court remanded "to the district court to modify its injunction to include the ongoing and announced timber, range and road projects." 30 F. 3d 1050, 1057 (9th Cir. 1994).

359. Pacific River Council v. Thomas, 873 F. Supp. 365 (D. Idaho 1995). "The LRMPs (Land and Resource Management Plans) at issue in this case and the dates of their adoption are as follows: (1) Boise National Forest LRMP — April 27, 1990; (2) Challis National Forest LRMP — June 3, 1987; (3) Nez Perce National Forest LRMP — October 8, 1987; (4) Payette National Forest LRMP — May 6, 1988; (5) Salmon National Forest LRMP — January 11, 1988; and (6) Sawtooth National Forest LRMP — September 6, 1987." 873 F. Supp. 365, 367 (D. Idaho 1995). "The Snake River sockeye salmon were listed by the NMFS (National Marine Fisheries Service) as an endangered species protected by the ESA (Endangered Species Act) on November 21, 1991. *See* 56 Fed. Reg. 58619 (1991). The NMFS listed the spring/summer and fall chinook salmon as threatened on April 22, 1992. *See* 57 Fed. Reg. 14654 (1992). Then on August 18, 1994, the NMFS took emergency action and listed the spring/summer and fall chinook salmon as endangered species. *See* 59 Fed. Reg. 42529 (1994). The listing announcements cited the destruction of spawning habitat by logging, grazing, mining, road building and other land disturbing activities as a significant factor in the decline of the species." 873 F. Supp. 365, 368 (D.

Idaho 1995).

360. The district court held that "this injunction may be modified during the course of this litigation to allow some ongoing and/or announced projects to proceed. Projects identified as "not likely to adversely affect" may be presented by motion or motions of the parties to the court for review to determine if they may proceed under §7 (d) pending completion of consultation on the Land and Resource Management Plans under §7 (a)(2) of the Endangered Species Act, 16 U.S.C. §1536 (a)(2)." 873 F. Supp. 365, 374 (D. Idaho 1995).
361. 873 F. Supp. 365, 374-375 (D. Idaho 1995).
362. Hatakeyama, *supra* note 59, at 283.
363. An Act for the establishment of a Public Land Law Review Commission to study existing laws and procedures relating to the administration of the public lands of the United States, and for other purposes, Pub. L. No. 88-606, 78 Stat. 982 (1964).

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附記

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