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Neil Kagan

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The Elk Creek Dam Story

NEIL KAGAN*

“It takes a long time sometimes.”

– Jean Louise (“Scout”) Finch, in Harper Lee’s *To Kill a Mockingbird*

“Endless pressure, endlessly applied.”

– Pacific Northwest environmental leader Brock Evans

Salmon cannot wait. They have a biological urge that impels them to swim hundreds of miles, following clues beyond our senses, to return to their stream of origin to start the cycle of life anew.

But sometimes these remarkable creatures have no choice. Sometimes they and their offspring must wait through several lifetimes to regain their birthright. And sometimes an environmental lawyer must wait with them for most of his career.

In 1985, as a solo attorney practicing in southern Oregon, I filed a lawsuit in U.S. District Court to stop the construction of a dam on Elk Creek. Elk Creek is a lovely tributary of the famous Wild and Scenic Rogue River in Southwest Oregon. I was supremely confident that I would make short work of the dam project. I thought it was an open-and-shut case. The U.S. Army Corps of Engineers had failed to consider adequately the environmental impacts of its planned dam on the renowned salmon that ply the river and its tributaries.

After Judge James Burns delivered a swift (and, to me, rude) rejection, the Corps began building the dam. I appealed the case to the U.S. Court of Appeals for the Ninth Circuit. Eleven and a half months later, the court of appeals shocked Oregon’s powerful U.S. Senator Mark Hatfield, who had forced money on the Corps to build a dam that even the Corps could not love. The court of appeals overturned Judge Burns and ordered him to

* Neil Kagan is a senior counsel for the National Wildlife Federation working on water quality issues nationally and in the Great Lakes states. He is also an Adjunct Clinical Assistant Professor of Law at Michigan Law School, where he serves as Director of the Environmental Law Clinic. Professor Kagan has a B.Sc. in Biology from Pennsylvania State University, a M.Sc. from Michigan State University, and a J.D. from the University of Oregon School of Law, with a certificate in Environmental and Natural Resources Law. Before joining NWF, he practiced environmental and land use law in Oregon both as a solo practitioner and as a staff attorney and lobbyist for 1000 Friends of Oregon, a land use watchdog group.

enter appropriate injunctive relief. Returning to district court, the Corps argued that finishing the dam – and blocking the salmon runs irrevocably – would actually be better for the environment. Nevertheless, Portland lawyer Gary Kahn and I convinced Judge Burns to order a halt to construction at one-third the design height of the dam.

But despite this legal victory, I still had failed the fish. The salmon were blocked by man-made concrete, poured into a river that had run free and clear for time beyond the memory of all but the salmon themselves.

The Corps proposed to trap the fish as they returned to spawn, and then to transport and release them upstream. (Passage downstream was not a problem.) Judge Burns agreed with this proposal, and the fish were duly trapped, trucked, hauled, and released. Meanwhile, the land upstream of the dam, which would have been flooded, became a *de facto* wildlife refuge for many species. But with the salmon coming to visit only with the assistance of the U.S. Government, the valley was perhaps a bit of a Disneyland of nature. The salmon deserved more.

The lawsuits continued over ten years – including three trips to the district court, three trips to the court of appeals, and one memorable trip to the Supreme Court of the United States. Judge Burns said that compared to the Elk Creek Dam case, the apocryphal British case *Jarndyce v. Jarndyce*, immortalized by Charles Dickens in his novel, *Bleak House*, was a “piker.” Finally, the Corps decided that it had lost one time too many. Raising the white flag, the Corps gave up on completing the dam.

What about the salmon, though? To the consternation of local boosters, the Corps proposed to blow a hole in the never-completed dam (the polite term is “notching”) to allow the salmon free passage. Litigation brought later by Eugene attorney Pete Frost, after the salmon were listed under the Endangered Species Act, created more pressure for notching.

More years went by, though, as Congressman after Congressman representing Southwest Oregon blocked the funds necessary to make the waters run free. But, although it takes a long time, even the most boosterish politicians can finally see a boondoggle for a boondoggle. The money was eventually released.

The dam was notched. In the fall of 2008, the salmon returned to Elk Creek under their own power for the first time in twenty-two years.

We must set ambitious goals for ourselves. They can seem out of reach. The powerful will scoff or stand in the way, or both. We will suffer setbacks. We will wonder whether our goals can ever be achieved. No story is guaranteed a happy ending.

But, trying counts. If we can just keep going, we might just win.