BPA WATCH

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PLAYING FAVORITES

Our story begins in Portland, Oregon, at the White House Bed and Breakfast, a mansion that was once the home of a lumber baron and is now an immaculately-restored inn with polished wood floors, chandeliers and gilt-gold ceilings.[1] The date: September 9, 2008.

In a private meeting room there, representatives from the Bonneville Power Administration ("BPA") and the Bonneville Environmental Foundation ("BEF") met for lunch and spent the afternoon discussing their 10-year-old business relationship. They called their meeting a "strategic retreat." Their objective: to develop principles for a new contract allowing BPA to send millions of dollars to the BEF.

BPA and the BEF

What follows in this newsletter is a close look at the unusual relationship between BPA, a federal power marketing agency, and the BEF, a nonprofit organization.

We explain what happened at the White House retreat and why it is important. We document how BPA signed the new BEF contract in secrecy before the incoming Obama Administration could notice. We describe how BPA eventually released the BEF contract and modified its exorbitant provisions. We dissect the business ties between BPA and the BEF.

We also show how BPA encouraged the BEF to create a profit-making subsidiary that would invest BPA money in new renewable energy projects. BPA apparently wanted the BEF to become its favored independent power producer to compete with the

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private sector in generating "clean energy."

Unlike a private company, which has stockholders who share the benefits and risks of an investment, BPA, as a federal agency, does not. It has no shareholders. Instead, BPA has utility customers in the Pacific Northwest who pay BPA's costs.

That's why BPA's transparency is so important -- there are no securities filings, public disclosure reports and other readily-available documents. When BPA inserts itself into the marketplace, its utility customers must rely on BPA to voluntarily disclose what it is doing and why.

BPA did not do so. On the following pages, we document BPA's lapses. We show that BPA's record-keeping is so lax it supposedly does not know who sits on the board of directors of the BEF's profit-making subsidiary, even though one of the current board members is none other than a former BPA vice president.

Finally, we describe what BPA has to show for its investment in the BEF subsidiary. Although the BEF subsidiary has successfully invested in solar and other projects, it has used BPA money only on one facility. It spent half a million dollars on an experimental biogas plant near Boardman, Oregon. But the plant consists of a large lagoon full of cow manure from which biogas is collected and flared off. Because of technical problems, the plant has produced no power to date.

Their Missions

BPA and the BEF may share the "Bonneville" name but they are separate legal entities with distinct missions.

BPA is part of the U.S. Department of Energy. Congress created the BPA in 1937 to sell and deliver electricity from Bonneville Dam on the Columbia River. Since then, Congress has expanded BPA's duties. BPA now sells and delivers electricity from 31 federal dams in the Pacific Northwest and other sources. It also promotes conservation and renewable energy, and restores fish and wildlife habitat in the region. BPA is based in Portland.[2]

The BEF describes itself as an "entrepreneurial" nonprofit entity that is "on a mission to fundamentally transform the relationship between humans and the earth's energy and water resources."[3] It, too, is based in Portland.

BPA helped establish the BEF in 1998 to augment BPA's environmental duties. The business model was straightforward but ambitious: BPA would help fund the BEF, as if it were a start-up company. The BEF would then invest in a variety of projects and activities to generate income. The BEF would re-invest the money in another round of projects, creating "a self-sustaining engine of wealth," in the words of one long-time supporter.

Former U.S. Sen. Mark Hatfield, who represented Oregon in Congress for 30 years, served as the first chairman of the BEF's board of directors. Hatfield's name lent instant credibility to the BEF's fledgling efforts. Other board members included retired electric utility executives, environmental leaders and tribal members.[4]

The BEF describes itself as a nonprofit "entrepreneurial" entity.

But there were nagging questions from the start. Why did BPA need a foundation named after itself? Most federal agencies, after all, discharge their legal duties without creating and funding a nonprofit entity. BPA had already spent billions of dollars to preserve and restore fish and wildlife habitat in the Columbia River Basin. And it had already bought power from its first wind project *before* it created the BEF.[5]

If BPA needed more help, why did it not identify those needs and call for bids from interested companies or nonprofits? Why limit those efforts just to the BEF?

BPA never answered those questions. Instead, it sent a stream of revenue to BEF from the sale of "environmentally-preferred" power generated at two existing hydroelectric facilities and one wind project.[6]

The Initial Arrangement

Here is how the initial arrangement worked. Three environmental groups -- the Natural Resources Defense Council, the Renewable Northwest Project and the Northwest Energy Coalition -- publicly endorsed the BEF and participated in its launching. They also "endorsed" the dams and the wind project, and said electricity from those facilities was "environmentally preferred." The operation of those power plants was better for the environment than other facilities.[7]

Relying on this endorsement, BPA sold "environmentally preferred" power to interested utility customers, who voluntarily paid a premium for this electricity. BPA then shared 60% of the premium with the BEF.[8]

The problem was that each of the "environmentally-preferred" plants already generated power. BPA was already under an obligation to market the power and had done so from the dams for years. The environmental groups' endorsement did not change the way the dams or the wind project operated. No new power was produced.

Nor was BPA interested in finding out what the public -- or its utility customers -- thought about this unusual arrangement. BPA held no public meetings on its decision to send money to the BEF.[9] BPA just signed the BEF contract and that was it.

When staff at the U.S. Office of Management and Budget ("OMB") in Washington, D.C., attempted to ask questions at the Department of Energy about the BEF, they got little traction. Perhaps it was former Sen. Hatfield's presence on the BEF board. Perhaps it was the Department's interest in promoting things "green." This was after all, the Clinton Administration, and Al Gore was vice president. For whatever reason, OMB staff quietly dropped their inquiries.[10]

The BEF Brand

Over the years, BPA paid the BEF approximately $3 million in a series of sole-source contracts, awarded without competition.[11] It was a modest amount of money. The BEF also obtained several million dollars a year from grants, gifts and contributions from foundations, corporations, electric utilities and individuals who wanted to promote clean energy.[12] The BEF proved itself an independent and proficient fund-raiser. With this money, the BEF installed solar panels on dozens of public schools, primarily in Oregon and Washington State, and gave grants to local environmental groups to restore salmon and wildlife habitat.

But it was the BEF's creation of "green tags" in 2001 that put it on the map of environmental innovation. The tags, formally known as "renewable energy certificates," represent the positive environmental attributes of clean energy generated from solar, wind and other plants.

The BEF convinced renewable energy developers to sell the attributes separately, apart from the power, and thus create an additional flow of revenue for themselves. The BEF bought the "green tags" from the developers and then sold them to electric utilities who, in turn, offered this "green power" to retail consumers. For a few dollars more on their monthly bill, environmentally-conscious consumers (i.e., individuals or businesses) could help develop new sources of clean energy, the utilities said. The BEF was the broker, the middleman.[13]

A decade after it was created, the BEF had about $14 million in net assets and two dozen employees.[14] The BEF had developed its own unique "brand," as BEF executives called it.[15] BPA, however, was still an essential source of money, roughly 15% of the BEF's annual income.[16]

But the flow of BPA money was largely dependent on the voluntary actions of BPA's utility customers, who bought "environmentally preferred" power or "green tags." Furthermore, BPA required the BEF to document how it spent BPA money.[17]

What the BEF Wanted

In 2008, the BEF wanted *more* BPA money and *less* BPA oversight in how those funds were used. The BEF wanted to change the ground rules of its relationship. It wanted BPA to recover the costs of the new contract from all of its utility customers, not just those that wanted to be "green."[18]

And BPA had tacitly agreed, even before the White House retreat.[19] The existing BPA-BEF contract did not expire until 2011, but both parties wanted to move quickly.[20] BPA should get "out of the business of micromanaging the BEF," an internal BPA memo said with a sense of urgency on September 2, six days before the retreat. The Presidential election was only two months away. BPA should "lock the funding mechanism down before a new Administration takes office," the BPA memo concluded.[21]

The BPA memo also identified another issue of importance that the White House attendees should address. Whom should BPA tell about the new BEF contract? The memo asked: Do we need approval from the U.S. Department of Energy and OMB?[22]

Ten years earlier, OMB had attempted to ask questions about BPA's relationship with the BEF, but there was little interest at the Department of Energy in pursuing the matter. It was now the waning days of the Bush Administration. Would OMB still ask questions? How would the Department of Energy respond?

The Retreat

The BEF came well-prepared to the retreat at the White House Bed and Breakfast. Several months earlier, the BEF had created a profit-making subsidiary, BEF Renewable Inc., to invest in new solar, wind and other plants.[23]

Although it is unusual for a nonprofit entity to create a profit-making subsidiary, it is perfectly legal. And in the renewable energy industry, it makes financial sense. The reason: the profit-making subsidiary can claim federal and state tax credits for building or producing renewable energy. The BEF, as the nonprofit "parent," cannot use these credits -- they go to waste. In contrast, BEF Renewable Inc., the profit-making subsidiary, uses the tax credits to reduce its costs and compete more effectively with private companies. The profits, if any, accrue to the parent nonprofit.

BPA believed in the BEF's corporate tax strategy. BPA had even helped pay for legal and financial advice for the BEF on how it could take advantage of tax credits to install solar panels at schools and other public institutions.[24]

How should BPA structure its relationship with the BEF going forward? How much money did the BEF and its profit-making subsidiary need to succeed? Those were among the questions the White House attendees discussed. [**see page 13 for the list of attendees**]

"One million [a year] is peanuts, really," explained Preston Michie, a retired BPA lawyer hired by BPA to facilitate the retreat and draft the new BEF contract. But if BPA sent more money to the BEF, "then [we] have to justify it."[25]

"Give us this box of money and we will innovate well and get [other] investors," former deputy BPA Administrator Jack Robertson told the attendees.[26] Robertson, the driving force at BPA in creating the BEF in 1998, had been invited as an unpaid participant at the retreat to provide some history and guidance.[27]

Walter Pollock, a retired BPA vice president who served as chairman of BEF's board of directors, asked: What would BPA's utility customers think of a new long-term contract with the BEF? "How will this be received?"[28]

More than 100 public agencies and rural electric cooperatives ("public power utilities") in Washington, Oregon, Idaho and Montana buy electricity from BPA. By law, they are BPA's preferred customers and pay BPA's costs in their power and transmission rates. But no one in the room that day represented BPA's customers.

Nor did their absence seem to bother anyone. BEF board member Ralph Cavanagh, a California lawyer for the Natural Resources Defense Council, an environmental group, told the attendees: "BPA customers live lives of resentful acquiescence."[29]

The implication was clear: there was no need to tell the customers, and even if they found out, they might complain but nothing else would happen.

And in the next three months, BPA would proceed with this strategy in mind. BPA would draft a new contract with the BEF, and it would tell no one. Not the customers. Not the press. Not the officials at OMB or the Department of Energy.

The Club

By almost any standard, the relationship between BPA and the BEF was cozy. "Like two cousins, BEF and BPA are steeped in a similar set of cultural values and bring complementary skill sets to the region," the BEF said in an internal document prepared for BPA to assist it in drafting the new contract.[30]

The BEF's first executive director was **Angus Duncan**, who had served as a member of the Northwest Power and Conservation Council, a regional organization created by the Northwest Power Act of 1980. Duncan had wanted to become BPA Administrator in 1998 but was passed over for the job.[31]

Most BEF board members have worked with each other for years. They do not earn a salary for sitting on the board, but they set policy and provide oversight, and they have access to confidential information about BEF investments. Many of the BEF board members were (and are) BPA contractors or have other ties to BPA:

- Board chairman **Walter Pollock**, who succeeded former Senator Hatfield when he retired as BEF chairman, worked as a BPA consultant between 2006 and 2009 to facilitate a regional wind energy forum.[32]

- One long-time BEF board member, **Bill Drummond**, who manages the Western Montana Generating and Transmission Cooperative in Missoula, Montana, was recently named deputy BPA administrator.[33]

- Two other BEF board members represent environmental groups that had helped create the BEF in 1998. **Ralph Cavanagh** represents the Natural Resources Defense Council. **Rachel Shimshak** represents the Renewable Northwest Project. BEF chief executive officer Margie Gardner serves on the Renewable Northwest's board of directors.[34] Cavanagh serves on the Renewable Northwest board, too.[35]

- Other BEF board members include **Brett Wilcox**, former owner of two aluminum smelters that bought power from BPA for years. Former Sen. Hatfield had served on the board of directors of one Wilcox company.[36] Wilcox was also a successful wind energy developer and had sold power on a sole-source contract to BPA.[37] He had also worked for an independent power producer, whose principals were former BPA Administrator Donald Hodel, who headed the agency in the 1970s, and his deputy administrator, Earl Gjelde.[38] The BEF itself had invested in one of Wilcox's wind projects, White Creek in Washington State.[39]

There were other ties, too. The wife of BPA general counsel **Randy Roach** worked part-time at the BEF as its marketing coordinator. Roach had recused (disqualified) himself in 2007 from reviewing BEF matters, but it was not clear who assumed his duties in managing the BEF contract negotiation process.[40]

Someone in BPA's Office of General Counsel -- the legal department -- had hired **Preston Michie** in 2008 as chief negotiator and drafter for the BEF contract. Michie had retired as a BPA lawyer eight years earlier but still maintained an office at BPA and worked as a BPA consultant on transmission and wind energy issues. In that period, BPA paid Michie approximately $960,000 for legal, technical and policy advice.[41]

Michie's Interests

Michie had outside interests, apart from his duties at BPA. He was in business with Pam A. Field, identified in public records as a former BEF marketing director. They were partners in a company called Team S.O.U.P., which taught negotiation classes to BPA employees. Over a six-year period, BPA paid approximately $122,000 to Team S.O.U.P. for these courses.[42] Michie and Field were also partners in Team S.O.U.P. Investment Club.[43]

Michie and former deputy BPA administrator Robertson, who participated in the White House retreat, were principals in a nonprofit entity called the Northwest Hydrogen Alliance. Field was a principal in that entity, too.[44] Michie was also a co-founder and board president of Ridgeline Energy, a Seattle wind energy developer.[45] He also served on the board of directors of the Energy Trust, a nonprofit group that funded energy efficiency and renewable energy projects in the region, and occasionally invested money in BEF-sponsored projects.[46]

The Negotiations

In October 2008, only a month after the White House retreat, Michie circulated the first draft contract to colleagues at BPA and the BEF. The draft allowed BPA to pay the BEF between $1.2 million and $3.2 million a year. The exact amount depended on the size of an annual BPA "success fee" or "bonus" that rewarded the BEF for good work. The contract would last 20 years.[47]

More drafts soon followed. In e-mails to colleagues at BPA, Michie noted the rapid progress of contract negotiations. The next step, he said, was to inform BPA Administrator Steve Wright about the proposed terms.

That task fell to deputy administrator Hickok, who met with Wright and BPA chief operating officer Anita Decker on December 18.

The next day, Hickok e-mailed Margie Gardner at the BEF:

> I met with Steve W and Anita yesterday to get them caught up to where we are on this…We don't think we need to run any public process on this….[48]

Gardner followed up with a three-page letter to Administrator Wright praising the BEF's accomplishments. "I believe BEF can be a premier environmental entrepreneur -- doing good to do well -- to make a positive impact on the future of our region, our country and our planet," Gardner wrote.[49]

More Money

Michie's next draft, dated December 18, was even more generous to the BEF. It required BPA to pay the BEF an annual "base payment" of $1.3 million, plus inflation.

The draft also allowed BPA to send extra money to the BEF:

- BPA could make an annual supplemental payment equal to the base payment for that fiscal year; and
- BPA could increase the base payment by 33% from the previous fiscal year's base payment.

BPA could repeat this process every year, if it wished. The 33% increase would compound, as would the supplemental payment.

BPA clearly did not contemplate using the two provisions every year. Doing so would bring the total cost of the BEF contract over two decades to a mind-boggling *$2.2 billion*. But BPA wanted the discretion to send large extra payments to the BEF whenever BPA wanted -- at intervals of its own choosing, based on what the BEF was doing.

And the BEF wanted to become a renewable energy developer in its own right. It was not happy with the more modest role of cheerleading the development of solar, wind and other plants. The BEF hoped to compete with the private sector.

To do that, the contract explicitly allowed BEF to transfer BPA payments to its profit-making subsidiary, BEF Renewable Inc.[50] Michie explained the language this way on December 31 in an e-mail to BPA executives Steve Hickok and Paul Norman:

> Howdy folks. I met with Margie [Gardner, the BEF's chief executive officer] yesterday. Margie asked that we include a reference to BEF Renewables, Inc.…[in the contract] to make clear she can propose things BEFR may do.[51]

The flow of money went this way: BPA could make discretionary payments to the BEF, which could make discretionary payments to BEF Renewable, Inc., which would then return the "profits" back to the BEF for more projects.

Wright Signs the Secret Contract

A few weeks later, the final version of the BEF contract was sent to Administrator Wright for his review. He signed the 20-year contract on January 30, 2009.[52]

Whether Wright understood the potential fiscal impacts of the contract is a mystery, even to this day. BPA would later assert in writing that it never calculated the maximum amount of money it could pay the BEF under the new contract. Asked under the Freedom of Information Act ("FOIA") to release its analysis of the costs of the BEF contract, BPA simply said it had "no responsive documents."[53] If this response is accurate, BPA staff never gave Wright -- and he never demanded to know -- the total potential price tag of the BEF contract.[54]

The Political Vacuum

The bottom line, however, was that BPA had acted in time -- before the Obama Administration could notice.

BPA had kept its promise. It had "locked" down the funding. Yes, the BEF contract was signed a few weeks *after* Obama took office. Yes, Obama was certainly more interested in renewable energy and "green job" initiatives than his Presidential rival, John McCain (or Obama's predecessor, George Bush). But President Obama's Energy Secretary, Steven Chu, had been in office for roughly a week -- he had eight days under his belt in managing the sprawling Department of Energy bureaucracy.[55] Who knew what would happen? Who knew what kind of questions the new Administration would ask? So BPA acted on its own, operating in a political vacuum before the new President and his team could establish themselves.

Eleven years earlier, BPA had created the BEF with fanfare. There was a reception and photographs and a self-laudatory press release about the "innovative" new foundation that would bear BPA's name.

Now there was silence. No notice in the Federal Register. No public comment. BPA did not even post the contract or the accompanying Record of Decision on its website, as it would normally do for important agreements. Nor did BPA inform anyone at the Department of Energy. In response to a FOIA request, BPA said it had no communications whatsoever with the Department.[56]

On paper, the BPA Administrator reports to the Energy Secretary. In practice, however, the Administrator has significant autonomy. BPA does not depend on Congressional appropriations, like most federal agencies. Instead, BPA is a "self-financing" agency. Most of its revenues come from publicly-owned utilities and rural electric cooperatives who are BPA's "preference customers."[57]

Over the years, a number of federal budget directors have sought to force BPA to raise power rates and pay more money to the U.S. Treasury. But the Congressional delegation from the Pacific Northwest, both Democrats and Republicans, have opposed those efforts with the blunt message, "Keep your hands away from our cheap power."

BPA did not inform the Department of Energy.

It should therefore come as no surprise that the Department of Energy and BPA have developed their own "don't ask, don't tell" policy. The Department of Energy did not normally ask tough questions about what BPA was doing. And there were few repercussions if BPA was something less than candid in its reporting requirements to the Department of Energy.

In his weekly report to Energy Secretary Chu sent a few days before he signed the BEF contract, Wright described several routine internal actions and said BPA would soon begin the annual *Science Bowl* for middle school students in Oregon and Washington State. There was no mention of the BEF. Under a heading entitled "Upcoming Events or Matters of Secretarial Interest," BPA said: "Nothing to report."[58]

BPA Releases the BEF Contract

BPA's contract with the BEF might have gone unnoticed for years, had it not been for an inquiry from the Canby Utility Board, a small municipal electric utility in Oregon. Canby learned about the contract by accident in February 2010, thirteen months after it was signed, and asked BPA to post it on its website.

And BPA did so.[59]

For the first time, the BPA-BEF contract was there in plain view for all to see.[60] *Clearing Up*, the regional trade publication, carried articles about the lucrative provisions and reported for the first time on the potential $2.2 billion price tag of the contract.[61] Reporter Ben Tansey wrote a column about BPA's secrecy.[62] The Public Power Council, a trade association of publicly-owned utilities, expressed concern about BPA's lack of transparency and open-ended financial commitment to the BEF.[63]

Canby voiced concerns, too. In an April letter to Administrator Wright, Canby asked questions about the contract terms and why BPA sent money to the BEF under a 20-year, sole-source contract.[64]

BPA did not respond.

Then, in May 2010, Canby filed a petition in federal court seeking to invalidate the BEF contract. In its petition, Canby Utility said "the BEF contract raises important legal issues…including whether BPA exercised sound business principles when it signed the sole source contract with BEF."[65]

The pressure was now on BPA to do something.

A month later, in June 2010, BPA announced, with agreement from the BEF, that it would withdraw the 2009 contract and replace it with a new version. BPA explained that the 2009 contract was clumsily drafted and should have capped annual expenditures at $1.3 million, the base amount.

BPA never explained how that "error" could have occurred. The 2009 contract contained two separate mechanisms that allowed BPA to send more money each year to the BEF. Did BPA expect its customers to believe someone just plopped down the language in the contract by mistake? And none of the lawyers in BPA's Office of General Counsel noticed?

Despite those unanswered questions, BPA was unambiguously apologetic on one matter. Administrator Wright acknowledged that BPA should have posted the BEF contract and Record of Decision on its website promptly in 2009.[66]

BPA's Proposed Replacement Contract

To correct the flaws in the contract, Wright said BPA would seek public comment on a new, more-carefully written replacement contract. The proposed replacement would last 20 years, like the old version. But it would only allow BPA to make a fixed annual payment of $1.3 million per year, plus inflation. In addition, the proposed replacement *prohibited* BEF from spending BPA money on BEF Renewable, Inc., the profit-making subsidiary.[67]

Canby remained unconvinced. It urged BPA not to sign a long-term contract with the BEF at all. "BPA has not explained why it chose the BEF under a sole-source process (without competition) and whether other entities (profit-making or nonprofit) could perform the same work at approximately the same or less cost," Canby wrote.[68]

Canby suggested that BPA sign a one-year contract with the BEF while BPA identified its needs for outside help in the environmental area. At the end of one year, BPA should publish a request for proposals, inviting BEF and other interested parties to compete for BPA money.[69]

Canby also asked BPA to address the potential conflicts of interest of former BPA lawyer Preston Michie, who drafted the BEF contract as a BPA consultant while maintaining an extensive network of business relationships.[70]

The Public Power Council had concerns and made them known to BPA: it suggested BPA sign a shorter-term contract, not one for 20 years.[71]

The BEF had its own requests, too. The BEF's Margie Gardner asked BPA to restore the 2009 contract language allowing the BEF to transfer BPA funds to its profit-making subsidiary, BEF Renewable, Inc.[72]

Gardner said the BEF subsidiary was an important "legal vehicle to cut renewable energy development costs by 30% to 50%, by capitalizing on federal and state tax incentives." Some critics are "concerned that BPA money would benefit for-profit investors," Gardner acknowledged. But the subsidiary was wholly-owned by the BEF (the nonprofit parent). All profits would revert back to the BEF, she assured BPA.[73]

A More Modest Arrangement

BPA's final version of the replacement contract required it to pay $1.3 million, plus inflation, to the BEF.[74] Nothing more. BPA also shortened the contract term to 10 years.[75]

But BPA restored the language allowing BEF to spend BPA money on its profit-making subsidiary.[76] BPA, however, made the transfer of BPA money more stringent than the BEF had suggested. In its comments to BPA, the BEF had asked for authority to freely move BPA money to the subsidiary.[77]

BPA added an additional requirement. The BEF had to demonstrate that "but for" BPA money, the renewable energy project (the investment) would not go forward at all. In other words, the BEF had to show its subsidiary needed BPA money to proceed. This requirement entailed some explanation on BEF's part that it could not secure funding from other sources.[78]

On the whole, BPA's replacement contract was a shrunken version of the 2009 agreement. BPA's customers -- the utilities that BEF board member Ralph Cavanagh had disparaged at the White House retreat -- had not acquiesced. They had objected to BPA's secrecy and demanded cost control. And BPA had responded by undoing the excesses of the 2009 version.

On November 29, 2010, Administrator Wright signed the new BEF contract. It remains in effect until 2020.[79]

BPA also issued a Record of Decision on the same day. In the document, BPA insisted that the 2009 contract was not secret because BPA had informed several dozen environmental groups (but none of its utility customers) in a perfunctory, two-paragraph e-mail sent three days *after* it signed the agreement.[80]

Under that approach to "transparency," BPA could negotiate a contract behind closed doors and release it after it became binding. In BPA's view, that process was not "secret" because an interested party could read the completed contract.

Nor was the Record of Decision more convincing when it came to addressing the role of Preston Michie in writing the 2009 contract:

> …[A]s for Mr. Michie's involvement as a BPA contractor in negotiations with the BEF over the 2009 contract, his service was limited to assisting BPA to develop the business terms of the 2009 Contract and *did not involve the practice of law*. He had no involvement or participation in the new Contract which is the focus of this ROD. As such, BPA does not find there are any credible conflict of interest issues raised by Canby. [Words in italics added for emphasis.]

Basic questions remain about the BEF's profit-making subsidiary.

But BPA's assertion about what happened in 2008 and 2009 was inaccurate. BPA later released several hundred pages showing that Michie had, in fact, written the 2009 BEF contract and made notable changes to it, including the insertion of specific language requested by the BEF to allow it to use BPA money for its profit-making subsidiary.[81] BPA's records also show that Michie helped write the 2009 Record of Decision.[82] He did much more than just "develop the business terms."

The Profit-Making Subsidiary

The BEF story might have died had it not been for lingering questions about BEF Renewable, Inc., the profit-making subsidiary.

Those issues surfaced after BPA signed the replacement contract in November 2010, and they came to light almost by accident.

Some months earlier, Canby had submitted a FOIA request to BPA for a copy of the minutes from meetings of BEF's board of directors.[83] The BEF's by-laws allow BPA to send a "liaison" to the BEF board, which usually meets three times a year.[84] BPA assigned the "liaison" job to deputy BPA administrator Steve Hickok, who had once worked as a legislative aide to Senator Hatfield.[85] In those circumstances, one would expect BPA to have a copy of minutes from BEF board meetings going back to 1998. BPA, however, said it did not have those records, except for two meetings in 2009 and one in 2010.[86]

What the Minutes Showed

The BEF board minutes were revealing because they referred to a separate board of directors for the profit-making subsidiary, BEF Renewable Inc., and identified two members: Isaac Regenstreif, a retired PacifiCorp manager now active in nonprofit organizations in Portland; and Joanna Garth, a BEF lawyer and staff member. But there was no mention of who else served on the subsidiary board.[87]

BPA was then asked to provide a complete list of current and past members of the subsidiary board.[88] It was, after all, something BPA should know. The existing contract allowed BEF to transfer BPA money to the subsidiary. Although the subsidiary's board members, like the members of the BEF board, do not earn a salary, they set policy and provide oversight and make decisions about investments. Surely, BPA would have a record of who sat on the subsidiary's board of directors?

BPA said "no." It did not know the names of all the subsidiary board members.[89] But BPA said it had three documents with partial answers:

- A copy of BEF board minutes previously released.
- An internal BEF memo that made a brief reference to the subsidiary board.
- A confidential financial disclosure (ethics) form by an unnamed BPA employee, who listed the subsidiary, BEF Renewable, Inc., as an "outside position." BPA said federal law prevented it from releasing the employee's disclosure form and refused to divulge the employee's name.[90]

The last item raised only more questions: Who was the unnamed BPA employee?

The BEF Discloses Names

For answers, Canby turned to the BEF itself, which ironically was more forthcoming than BPA.

On April 29, 2011, Canby e-mailed BEF chief executive officer Gardner and asked her to release the names of the subsidiary's current and past board members.[91] Gardner responded.

Five people sat on the subsidiary board. Gardner said she was a board member herself, along with Regenstreif and Garth (the two names listed in previously-released BPA documents). The fourth member was Angus Duncan, Gardner's predecessor as BEF chief executive officer.

> **BPA says it does not have a complete list of the subsidiary's board members.**

The fifth board member was Paul Norman, former BPA senior vice president. Norman attended the White House retreat in 2008 and was a recipient (along with other BPA employees) of key e-mails from BPA negotiator Preston Michie as he explained the terms of the secret BEF contract.

Norman retired from BPA in September 2009, nine months after Administrator Wright signed the BEF contract.[92] In December 2009, Norman said he joined the subsidiary board. "I joined the BEF [Renewable] Inc. board because I wanted to make a positive contribution in retirement, and I like the mission and people at BEF and BEF Inc.," he explained.[93]

Norman's role raises even more questions about BPA's record-keeping. He was on the BEF subsidiary board throughout 2010, when BPA proposed a replacement contract and evaluated whether to allow the BEF to transfer funds to the subsidiary.

If BPA is to be believed, it did not know Norman served on the subsidiary board. BPA's response earlier this year to a FOIA request, asking for the names of BEF subsidiary board members, makes no mention of Norman.[94]

Gardner (BEF's chief executive officer) also disclosed that another BPA employee, assistant BPA general counsel Timothy Johnson, had served briefly on the subsidiary board, too. Johnson was the unnamed BPA employee who listed the subsidiary on his confidential financial disclosure form. He still works at BPA.

When asked for details, Johnson said he served on the subsidiary board for only five or six months between fall 2009 and spring 2010. He and Paul Norman apparently served on the subsidiary board at the same time.

Johnson said he acted in his personal capacity, not as a BPA employee, and received no compensation for serving on the subsidiary board. Johnson said he attended only one board meeting and made no decisions. Johnson also said he provided no legal or consulting services to the BEF or its subsidiary. He said BPA's ethics officer approved his participation on the subsidiary board.[95]

Where the Money Went

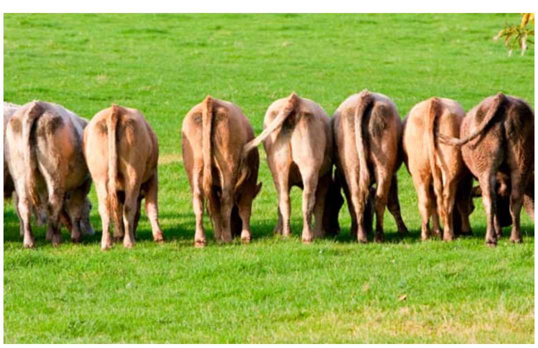
There was one remaining but essential piece of the puzzle to learn about the BEF's profit-making subsidiary, BEF Renewable Inc. Where did the money go?

In July 2011, Canby asked BPA to release financial information summarizing the subsidiary's investments with BPA money.

Public records -- available from other sources -- show the subsidiary currently has about $5.2 million in assets and has invested in two solar projects in Portland, a biogas plant in Colorado, and a biogas plant near Boardman in northeastern Oregon.[96]

But it was not clear whether BPA was (is) an investor in any (or all) of those projects. Canby also asked BPA to release all correspondence with the BEF relating to the transfer of BPA funds to the subsidiary.[97]

BPA said it had no responsive documents, except for a draft BEF annual report submitted a few weeks earlier.[98] The BEF would soon submit the final version, BPA said. So Canby waited until the BEF sent this information to BPA in August.



The BEF's final report said it had transferred $513,000 to the subsidiary for an experimental biogas digester at the Three Mile Canyon Farm near Boardman. (This sum is about 39% of the total amount, $1.3 million, which BPA paid the BEF in 2010. The remainder of the BPA money went primarily for BEF grants to environmental groups to restore rivers.)

According to the BEF report, the Three Mile Canyon Farm is the only project of the subsidiary in which BPA has invested. The project is supposed to generate biogas from cow manure and then burn the biogas to generate electricity. The Three Mile Canyon Farm would seem like an excellent location. It's a 93,000-acre farm with 16,000 cows.[99]

In this venture, the BEF subsidiary is a 50-50% partner with Northwest Natural Gas, the gas utility in the Portland area. In 2008, the two entities formed a corporation, Northwest Biogas L.L.C., to build and operate the project.[100]

But the BPA contract is clear. In order to transfer BPA money to the subsidiary, the BEF must meet two conditions: it must show the project uses tax credits *and* it must demonstrate that "but for" the BPA money, the project would not proceed.[101]

The Oregon Tax Credit

At first glance, the BEF easily meets the state tax credit requirement. Under Oregon law, the biogas project has already qualified to take 50% of the capital costs as a credit against state income tax liability. The BEF subsidiary's share is approximately $140,000 or $150,000.[102]

The problem is that the project qualified for the tax credits as a research, development and demonstration project that produces biogas, not electricity. In other words, the tax credits accrue to the subsidiary, BEF Renewable, Inc., even though there is no power generated to show for BPA's investment.

This practice is apparently legal under the BPA contract. There is no requirement that the tax credits accrue for a project that produces electricity. Under this arrangement, BEF Renewable, Inc. is more than one hundred thousand dollars richer (i.e., the value of the tax credit) but BPA has nothing to show so far for its investment -- no tangible benefits for BPA's utility customers who funded the project.[103]

The "But For" Requirement

The "but for" requirement was (and is) even more difficult for the BEF to prove. The BEF's annual report to BPA made no mention of this contractual requirement. Instead, the BEF report described the experimental nature of the biogas plant and the *potential* application to generate electricity in the territories of rural publicly-owned utilities.[104]

After receiving the BEF's draft annual report in July, BPA could have asked the BEF to demonstrate that "but for" BPA's $513,000 investment, the biogas project would not go forward. There is no record BPA did so.[105]

The biogas project now consists of a large covered lagoon with 31,000 car tires, which serve as the "medium" for breaking down (aerating) the manure into biogas.[106] Unlike the conventional biogas digester, which uses a steel or concrete tank, the tires in the lagoon do the same job. It's comparatively cheap.

But the project produces no electricity because of problems with the quantity and quality of the biogas. Instead, the biogas is flared -- it is burned without generating power. BEF Renewable Inc. says it is now re-assessing its strategy for the project though it still hopes to proceed with a second phase, which involves power generation. "It's a demonstration technology and takes some time," BEF's Margie Gardner said.[107]

Meanwhile, the owner of the property, Three Mile Canyon Farms, is seeking to produce electricity by installing a conventional biogas plant and selling power to PacifiCorp, an investor-owned utility.[108]

BEF Renewable Inc. -- and its joint venture partner, Northwest Natural Gas -- may eventually solve the technical problems. And perhaps the project will someday produce electricity.[109]

But why should BPA, as a federal agency, fund this experimental work under a sole-source contract? If BPA wants to develop experimental biogas technology that can produce electricity for rural communities, why doesn't BPA put out its needs to bid and see who responds? BPA can then evaluate the competing technologies and choose the contractor that is most likely to deliver cost-effective results.

Concluding Thoughts

Readers of **BPA Watch** will recognize some of the issues raised by this newsletter. In prior newsletters, we have written about BPA's problems with transparency. On some subjects, BPA publishes a wealth of information and hosts seemingly-endless public forums, meetings and workshops on issues of interest to its utility customers and stakeholders. On other subjects, particularly political ones, BPA "goes dark," and claims it has no records. [Click **here** for newsletter archive]

The BEF story raises familiar themes.

In **BPA Watch newsletter #2**, for example, we documented how BPA paid $226 million to the owners of an aging aluminum smelter in Washington State to shut down during the energy crisis in 2001. BPA's money was supposed to help the owners retrofit the smelter so it could restart later. But the smelter owner took BPA's money and never produced a pound of aluminum again. BPA claims not to have any records showing how it decided on the $226-million figure.

In **BPA Watch newsletter #4**, we described how BPA hired a government relations firm in Washington, D.C., to contact members of Congress and federal officials about BPA issues without always disclosing that BPA was its client.

In **BPA Watch newsletter #6**, we described how Administrator Wright improperly offered early retirement to a veteran employee under indictment for conflict-of-interest and other charges. Wright's offer was intended to avoid press coverage about computer management problems at BPA -- problems that a public trial would likely expose. Wright hoped the employee would accept the money, and the news story would quietly die of its own accord. It did not.

The BEF story raises similar issues of transparency and accountability. The amount of BPA money is certainly modest, though BPA's ability to send extra funds to the BEF would have been much higher if the secret 2009 contract remained in effect.

The issue here is not the BEF's competence or idealism. Its staff is smart and hard-working, and brings years of experience to the tasks at hand. But there is something parochial about BPA's system of rewarding its friends, as if no one outside of a small club is qualified to receive BPA money.

Imagine the consequences if BPA signed a sole-source, multi-million dollar contract with a nonprofit foundation whose mission was to promote nuclear power or clean coal. And suppose the foundation's board members were an informal group of contractors, consultants and former BPA employees who had worked together for years. And suppose the nonprofit foundation had a profit-making subsidiary that invested in experimental nuclear or coal technology.

The region's environmental groups would legitimately cry "favoritism" -- they would object to this "crony capitalism."

So we conclude with a question:

Why the double standard, a tolerant attitude toward things "green," as if the environmental label inoculates BPA and its partners from scrutiny and competition?

END

***Daniel Seligman** is an attorney-at-law and the publisher of **BPA Watch**. He represented Canby in its efforts to shine a light on BPA's relationship with the Bonneville Environmental Foundation. The analysis and views expressed in this newsletter are his own, not necessarily those of Canby.*

Who's Who at the 2008 White House B&B Retreat

Representing BPA:

- Steve Hickok, deputy administrator.
- Paul Norman, senior vice president.
- Terry Oliver, technology innovation manager.

Representing BEF:

- Ralph Cavanagh, board member.
- Angus Duncan, former chief executive officer.
- Margie Gardner, current chief executive officer.
- Joanna Gilson, staff member (note taker).
- Walter Pollock, board chairman.

Other Participant:

- Jack Robertson, former deputy BPA administrator.

ENDNOTES

Note: BPA posts its responses to Freedom of Information Act ("FOIA") requests on its website, www.bpa.gov/corporate/public_affairs/FOIA/Reading_Room.cfm Readers of this newsletter who wish to see BPA's responses can download the information at that site.

1 www.portlandswhitehouse.com.

2 www.bpa.gov.

3 www.b-e-f.org.

4 The Bonneville Environmental Foundation was incorporated as a nonprofit entity in Oregon on July 10, 1998. See Secretary of State registry number #642657-89. The BEF has a 9-member Board of Directors. The BEF is a 501c(3) organization under the I.R.S. code.

5 BPA signed its first contract to buy power from a wind project a year before it signed the BEF contract. See BPA press release #28-97 (July 24, 1997): "BPA inks deal to buy wind energy." The wind project was the Foote Creek Rim facility that the three environmental groups would "endorse" a year later.

6 The "endorsed resources" (power plants) were: 1) **Packwood Lake** in Washington State (27.5 MW), owned by the Washington Public Power

Supply System ("WPPSS"), a joint operating agency now called Energy Northwest; 2) the **Idaho Falls** Hydroelectric Project in Idaho (which consisted of three small dams on the Snake River with a total capacity of 27 MW), owned by the City of Idaho Falls; and 3) a wind project (15 MW) located on the top of **Foote Creek Rim**, near Arlington, Wyoming. BPA was already under contract to market power from the three plants.

7 BPA's 1998 contract with the BEF, #98PB-10317.

8 *Id.*, Exhibit A (Endorsed Resources).

9 The Canby Utility Board objected and asked BPA to prepare a draft Record of Decision ("ROD") and invite public comment prior to publication of a final ROD. See Canby letter dated February 1, 1999, to BPA Administrator Johansen. "We want to stress from the outset that we have no quarrel with utilities that want to buy "green power" from BPA or anyone else. Nor do we question the competence or the integrity of the members of the Foundation [BEF] board. But we are concerned about the lack of definition of the term "green power," the precedent of BPA sharing its revenue stream with a nonprofit Foundation that bears its name but which BPA does not control…." Canby said. BPA declined to prepare the ROD.

10 Information obtained by Canby lawyer Daniel Seligman in March 1999 in Washington, D.C.

11 The $3-million figure comes from BPA's response to FOIA request #2010-1557 (July 7, 2010).

12 In the early years of the BPA-BEF relationship, BPA even touted the BEF's "independence" by publicizing the BEF's grants from non-BPA sources. See BPA press release #02-99 (January 15, 1999).

13 Each "green tag" (renewable energy certificate) represents a megawatt hour of energy. The BEF now describes these tags as "offsets" against the "carbon footprint" of utilities, businesses and individuals. Critics argue that there is no guarantee that the developers who sold the certificates to BEF will use the money for new renewable facilities. For the BEF's perspective, see "Green Tags – A new Way to Market Renewable Energy" (2004) and "The ABCs of RECs and Greenhouse Gas Offsets" (2008), posted at www.b-e-f.org/links. For an alternative perspective, see the Climate Trust's analysis of the difference between a renewable energy certificate and an offset. www.climatetrust.org/faq.html. See, also, the Cascade Policy Institute's critical paper on the BEF, "The Climate Swindle" (March 2010), available at www.cascadepolicy.org/news/2010/0326/the-climate-swindle-2. The Institute is a free-market, libertarian think tank in Portland.

14 BEF, like other nonprofit organizations, files an I.R.S. form #990 once a year. The forms are public and are available at http://www2.guidestar.org.

15 The reference to the BEF "brand" is found in the BEF's *Briefing Book*, sent to BPA (December 3, 2008). The *Briefing Book* contains historical information and strategic planning documents. BPA released the document in response to FOIA request #2010-1469.

16 BPA estimated that BEF's annual income was roughly $7 million, of which BPA supplied approximately $1.1 million. See BPA's 2009 Record of Decision at page 5.

17 BPA's 2004 Funding Memorandum of Agreement ("MOA") with the BEF, #04PB-11472 (July 15, 2004). The BEF's reporting requirements are contained in section 4.

18 BPA response to FOIA request #2010-1049 (all communications between BPA and the BEF leading up the signing of the 20-year contract on January 30, 2009). See, for example, Draft 4 of the "Proposal for a Long-Term Sustainable Funding

Mechanism for BPA's Support of the Bonneville Environmental Foundation," September 2, 2008.

19 *Id.*

20 BPA's contracts with its utility customers for the sale of "environmentally-preferred power" ended on September 30, 2011. In 2008, BPA decided not to replace this product and to instead pass through the "green tags" associated with the utilities' purchase of power under the new Regional Dialogue contracts, which were set to begin October 1, 2011 (the start of fiscal year 2012). BPA's original funding mechanism envisioned for the BEF was therefore not available past that date. As the newsletter makes clear, this change would not have forced BPA to rush ahead and sign a new long-term agreement with the BEF. The expiration of the existing "environmentally-preferred power" contracts was still three years away. According to internal BPA documents, it was the need to lock down the new funding mechanism before the new President took office in January 2009 that motivated BPA and the BEF to move quickly.

21 BPA response to FOIA request #2010-1049.

22 *Id.* See Draft 2 of a "Draft Agency Decision Framework" for the BPA-BEF contract, page 10.

23 BEF Renewable, Inc., the profit-making subsidiary, was incorporated in Oregon on June 26, 2008. See Secretary of State registry number #530179-93.

24 BEF's "Progress Report" to BPA for FY 2007 (June 30, 2008), pages 16-17. The BEF spent approximately $16,000 of BPA funds to investigate how it could devise a legal and financial model to monetize federal, state and local tax credits for solar projects.

25 See Draft Minutes of the BPA-BEF Strategic Retreat (September 9, 2008), contained in BPA response to FOIA request #2010-1049.

26 *Id.*

27 Phone conversation with Jack Robertson, September 20, 2011.

28 *Id.*

29 *Id.* Earlier in the discussion, another attendee (Terry Oliver, the BPA technology innovation manager) spoke about the need to "raise customer enthusiasm not just resentful acquiescence" for the new BPA-BEF contract. Cavanagh seems to have taken this phrase and put his own stamp on it: "BPA customers live lives of resentful acquiescence."

30 The BEF's 2008 *Briefing Book*, released by BPA in response to FOIA request #2010-1469.

31 Duncan is currently chair of the Oregon Global Warming Commission. He served on the Northwest Power and Conservation Council between 1989-1995.

32 BPA retained Pollock as a consultant for two tasks: 1) to serve as the facilitator of the Steering Committee of the Northwest Wind Integration Forum; and 2) to facilitate negotiations between BPA and the Warm Springs Tribe regarding the location of BPA transmission lines on the reservation. See BPA response to FOIA request #2011-00530. In 2009, while still serving as a BPA wind energy consultant, Pollock joined the board of Tonbridge Power, a Toronto company that is attempting to build a transmission line to deliver wind energy between Canada and Montana, where it would connect with BPA transmission lines. See press release (April 28, 2009): "Tonbridge Power names veteran power executive to its board of directors."

33 BPA press release #44-11 (August 19, 2011). "BPA selects Bill Drummond as deputy administrator." www.piersystem.com/go/doc/1582/1173371.

34 The board members of the Renewable Northwest Project are available at www.rnp.org/our_members.

35 *Id.*

36 Golden Northwest Aluminum, Inc., Form 10-K for year 2000, filed with the U.S. Securities and Exchange Commission (March 30, 2000), at pages 22-23. Hatfield became a director in 1999. It is not known how long he served.

37 BPA response to FOIA request #2010-1579, relating to BPA's purchase of power from Northwestern Wind L.L.C.'s Klondike I wind plant in Oregon.

38 Donald Hodel later served as Secretary of Energy (1982-1985) and Secretary of Interior (1985-1988) in the Reagan Administration. Gjelde, who served as Hodel's deputy at BPA, was also his deputy at the Energy and Interior Departments.

39 The BEF's 2008 *Briefing Book*, released by BPA in response to FOIA request #2010-1469. The BEF obtains royalty payments from the operation of White Creek wind farm.

40 Randy Roach's recusal was obtained under FOIA #2010-1109 from BPA. The recusal, dated January 25, 2007, states that "Marilyn, my wife, has accepted an administrative job with the Bonneville Environmental Foundation (BEF) to start February 1, so I am recusing myself from issues having to do with it…."

41 BPA response to FOIA request #2010-1497 (September 2010). Michie's work for BPA on the BEF contract was performed under two consulting contracts.

42 BPA response to FOIA request #2010-1613 (June 22, 2010). The $122,000 paid under this contract between 2001-2007 is in addition to Michie's other consulting contracts for legal, technical and policy advice.

43 Canby learned of Preston Michie's business relationships in 2010. It documented these activities in its comments to BPA on the proposed 2010 replacement contract with the BEF. See, for example, Attachment 23 (Team S.O.U.P.), to Canby comments of July 23, 2010, available at www.bpa.gov/applications/publiccomments/CommentList.aspx?ID=104.

44 *Id.*, Attachment 24.

45 *Id.*, Attachment 25.

46 *Id.*, Attachment 26.

47 BPA response to FOIA request #2010-1049 (May 20, 2010).

48 *Id.* Hickok's e-mail to Gardner said the draft BEF contract would not increase BPA's renewable resource programs and budgets. According to Hickok, the $1 million annual expenditure in the proposed contract was similar to what BPA was sending to the BEF under the old contract. See e-mail on December 19, 2008. If Hickok used the $1 million-figure as a justification for convincing Administrator Wright and chief operating officer Decker that "no public process was needed," he gave them inaccurate information. The total proposed cost to BPA, even in the October 2008 draft, was clearly more than $1 million a year. The *required* minimum annual "base payment" was $1.2 million, plus inflation. (The base payment would later rise to $1.3 million.) Furthermore, BPA could increase the sum in a series of bonus payments at its discretion.

49 Letter from Margie Gardner at the BEF to Administrator Wright, December 3, 2008, and contained in BPA response to FOIA request #2010-1469 (June 9, 2010).

50 BPA response to FOIA request #2020-1049 (May 20, 2010). BPA's response contains the draft contracts.

51 *Id.*

52 BPA-BEF contract no. 09EO-40085 (signed by Margie Gardner for the BEF on January 15, 2009, and by Stephen Wright for BPA on January 30, 2009). BPA did not release the 2009 contract and the accompanying Record of Decision until February 2010. The documents are posted on the BPA website at www.bpa.gov/corporate/pubs/RODS/2009.

53 BPA response to FOIA request #2010-1049 (May 20, 2010). Canby asked for "all analyses performed by BPA that show the maximum total amount that BPA could pay to the BEF over the course of the 20-year contract term." BPA said it had "no responsive documents."

54 Nor was BPA's Record of Decision much help in analyzing the fiscal impacts of the contract over 20 years. As noted elsewhere in this newsletter, BPA released the ROD thirteen months later, in February 2010, at the same time it released the contract. Typically, RODs are posted on BPA's website at the same time the underlying action (e.g., contract) is signed, which would have been January 2009. The ROD is supposed to contain BPA's legal, policy and financial analysis. In this case, however, the document contained a number of muddled and inconsistent explanations. In one place, for example, BPA said the $1.3 annual base payment to the BEF was the same amount that BPA had historically paid. ROD at page 14. Elsewhere in the document, BPA acknowledged it could increase the annual base payment to the BEF by 33% *and* make a supplemental payment, too. ROD at page 13. Yet in another place, BPA asserted that "it is the intent of the Administrator that the total budget of BPA will never be higher with this agreement in place than it would have been without this agreement." ROD at page 14. Those statements clearly could not all be true at the same time: BPA could not simultaneously hold payments steady while increasing them by 33% and not pay more than it would in the absence of the new contract.

55 President Obama named Steven Chu as his new Energy Secretary. He was confirmed by the U.S. Senate on January 20 and took office on January 21. http://en.wikipedia.org/wiki/Steven_Chu

56 BPA response to FOIA request #2010-1048 (March 31, 2010). Canby asked for copies of "all communications between BPA and the U.S. Department of Energy regarding the BPA-BEF contract prior to Administrator Wright signing the agreement on January 30, 2009." BPA said it had "no responsive documents."

57 The Bonneville Project Act of 1937, which created BPA, said that "public bodies and cooperatives" shall receive preference and priority to federal power. 16 U.S.C. § 832c(a).

58 BPA response to FOIA request #2010-0426. Canby asked for BPA's "Weekly Reports" to the U.S. Department of Energy. The reports did not mention the BEF contract. See, for example, the reports from January 23, 2009 and January 30, 2009 (the date Wright signed the BEF contract). By that time, Chu had assumed his duties as the new Energy Secretary. BPA also submitted "30-60-90 Day Reports" to the Department of Energy. Canby also requested those documents. See BPA response to FOIA request #2010-0201. The reports omit any mention of the BEF contract.

59 www.bpa.gov/corporate/pubs/RODS/2009. BPA's contract allowed the BEF to spend money on a broad range of activities that enhance BPA's "mission," including but not limited to increasing the potential supply of cost-effective renewable energy, furthering technology innovation goals, and educating the public on reducing greenhouse gases. Section 3(H). Either party could terminate on five years notice for "any reason." Section 5(A).

60 BPA would later say it provided notice to environmental groups on February 2, 2009 that it had just signed the 20-year BEF contract. See e-mail dated February 2, 2009, three days after BPA signed the contract. But BPA did not provide the contract or the Record of Decision to them. As footnote 80 explains, BPA's e-mail was perfunctory and was less than accurate in its description of the BEF contract. BPA did not provide notice to utility customers, who first learned of the BEF contract *a year later*, in February 2010, when BPA finally posted the contract and Record of Decision on its website.

61 See *Clearing Up* article, March 8, 2010.

62 See Ben Tansey column in *Clearing Up*, March 22, 2010: *$2 Billion BEF Contract Exposure: Boondoggle or Boilerplate?*

63 See letter from PPC executive director Scott Corwin to BPA on April 5, 2010. "The lack of process around this contract raises concerns….[T]he contract contains provisions allowing the potential for alarmingly high escalation of cost and supplemental payments at the agency's [BPA's] discretion. Moving forward with a ROD [Record of Decision] and contract of this nature without any external notice or public process does not meet the aspirations held by BPA for openness and transparency."

64 See Canby letter to BPA on April 6, 2010.

65 Canby Utility filed a petition in May 2010 in the U.S. Court of Appeals for the Ninth Circuit in May 2010 to challenge the contract. Case No. #10-71592. See *Clearing Up*, May 24, 2010. Canby dismissed its petition in December 2010 after BPA signed the replacement contract with the BEF. The 13-month delay in the posting of the BPA contract creates legal issues under the Northwest Power Act, which requires petitioners to file their actions in the Ninth Circuit within 90 days of BPA's action. 16 U.S.C. § 839(f)(e)(5). If BPA does not promptly tell customers and other interested parties about its actions, it is not clear when the "90-day clock" starts ticking. The Court never addressed this issue because Canby dismissed its petition.

66 See, for example, Administrator Wright's letter to Canby Utility, June 23, 2010. "Having reviewed the concerns expressed by you and others in the region, I believe BPA could have better met the expectations of BPA's customers and constituents for public notice and transparency in the decision making process that led to the execution of the [BEF] agreement. I take responsibility for this and regret it."

67 BPA posted its draft replacement contract at www.bpa.gov/applications/publiccomments/CommentList.aspx?ID=104

68 See Canby's comments to BPA, July 23, 2010, posted at www.bpa.gov/applications/publiccomments/CommentList.aspx?ID=104

69 *Id.*

70 *Id.*

71 See Public Power Council comments to BPA, July 23, 2010, at www.bpa.gov/applications/publiccomments/CommentList.aspx?ID=104

72 See BEF comments to BPA, July 23, 2010, at www.bpa.gov/applications/publiccomments/CommentList.aspx?ID=104 BEF also asked BPA to allow it to allocate 20% of BPA funds for general and administrative (overhead) expenses. BPA agreed. See Section 6(B)(iii) of the 2010 replacement contract. BPA had previously allowed BEF to charge these costs in the 2004 Funding Memorandum.

73 *Id.*

74 Section 6(B) of the 2010 BPA contract with the BEF.

75 *Id.*, section 4. BPA has a right to extend the term by another five (5) years. Both parties may terminate the contract on five years notice for any reason. Section 5(A). The latter provision remained unchanged from the 2009 contract.

76 *Id.*, section 6(A)(iii).

77 The BEF's proposed language, allowing it to transfer BPA money to the BEF's profit-making subsidiary, is available at www.bpa.gov/applications/publiccomments/CommentList.aspx?ID=104 (see "contract language recommendation").

78 Section 6(A)(iii)(1). "The Foundation [BEF] may perform such transfer of funds provided that….such funds must be necessary in order for BEF Renewable Inc. to take advantage of tax credits or

other beneficial public financial instruments arising from projects that BEF Renewable Inc. would not otherwise be able to fund *but for* the use of Bonneville [BPA] funds." (Italics added for emphasis.) The contract also states if the BEF sells the subsidiary, the BEF (as the parent entity) must retain the revenues generated by BPA's investment for additional activities consistent with the contract.

79 BPA-BEF contract no. 11EO-40087 (signed by Margie Gardner for the BEF on November 19, 2010, and by Stephen Wright for BPA on November 29, 2010). The contract and the accompanying Record of Decision are available at www.bpa.gov/corporate/pubs/RODS/2010.

80 BPA Record of Decision (November 29, 2010) at page 7. The e-mail from BPA to the environmental groups is dated February 2, 2009, after BPA signed the BEF contract but before it went into effect. See Attachment 12 to the ROD. The e-mail is not entirely accurate in its description of the BEF contract. "There is no rate impact associated with this change in funding mechanism," the BPA e-mail states. This may be true in a literal sense because the BEF contract, by itself, would not raise power rates, but it is a misleading comment because it suggests there is no increased flow of money to the BEF. As this newsletter makes clear, the purpose of the White House retreat in 2008 was, in fact, to increase the flow of money to the BEF. Some of the environmental groups may have endorsed such an approach, had they known of the details, while others may have wondered why BPA was playing favorites and not inviting them to the table. They never knew because BPA signed the contract before it informed them.

81 BPA response to FOIA requests #2010-1049 and #2010-1695.

82 BPA response to FOIA request #2010-1049, which contains draft "Agency Framework Decisions."

83 BPA's response to FOIA request #2010-1467. BPA's response, May 24, 2010, contains the available BEF board minutes.

84 Article 4.03 of the BEF's Bylaws creates a position of "BPA liaison."

85 The term "liaison" did not capture the importance of Hickok's role on the BEF board. In effect, he was an *ex officio* (non-voting) board member and sat on two committees, Finance and Audit. See BEF's 2008 *Briefing Book*, contained in BPA response to FOIA request #2010-1469. The *Briefing Book* described BEF's governance. The BEF was eager to exploit the BPA connection and even posted a picture of Hickok and Senator Hatfield on its home page. The photo remained on the BEF homepage for years and was only removed after Hickok retired from BPA in 2009 and from the BEF board.

86 BPA response to FOIA request #2010-1467 (August 24, 2010) contains the minutes from BEF board meeting minutes. BPA said it had minutes from only three meetings: March 12, 2009; October 15, 2009; and March 11, 2010.

87 *Id*. See BEF board minutes from March 12, 2009.

88 Canby's FOIA request to BPA #2011-0524 (January 24, 2011).

89 BPA response to FOIA request #2011-0524 (April 4, 2011).

90 The internal BEF memo (October 9, 2008) listed five board members of BEF Renewable, Inc. The five were: Regenstreif, the former PacifiCorp official; Garth, the BEF staff attorney; Jim Maloney (former power supply manager for the Eugene Water & Electric Board), who served only briefly on the subsidiary board; BEF chief executive officer Gardner; and former BEF chief executive officer Angus Duncan. BPA said it was precluded from releasing the third document (the financial disclosure form) under 5 U.S.C. app § 107(a)(Ethics in Government Act of 1978).

91 BEF e-mails to Canby on April 29, 2011 and May 27, 2011.

92 Norman also serves as a consultant to BPA to facilitate the Northwest Wind Integration Forum, a regional group of utility and environmental representatives and other stakeholders. He assumed those duties and replaced BEF board chairman Walter Pollock, who facilitated the last forum.

93 E-mail from Paul Norman to **BPA Watch**, September 19, 2010.

94 BPA response to FOIA request #2011-0524 (April 4, 2011).

95 Phone conversation between Canby lawyer Seligman and BPA assistant general counsel Timothy Johnson (June 29, 2011).

96 See BEF's latest I.R.S. #990 form, filed December 31, 2010. The form shows that the BEF has invested approximately $5.2 million in BEF Renewable, Inc. The two solar projects are East Portland Solar and Groundwater Solar. The biogas plant in Colorado is located at the Larimer County landfill. BEF Renewable Inc.'s partner in that venture is Timberline Energy. The two entities have formed a joint venture called Larimer Energy L.L.C.

97 BPA response to FOIA request #2011-1520.

98 *Id*.

99 www.threemilecanyonfarms.com.

100 Northwest Biogas L.L.C. was incorporated as a profit-making company in Oregon on December 31, 2008. See Secretary of State registry number #568674-93.

101 Section 6(A)(iii)(1) of the BPA-BEF contract.

102 E-mail from Gardner to **BPA Watch**, September 20, 2011. Information from the Oregon Department of Energy ("ODOE") shows a higher potential value of the state Business Energy Tax Credits ("BETC") for the project. See application of Northwest Biogas L.L.C., #26109 (pre-certification date, September 4, 2009). www.oregon.gov/ENERGY/betc_applications.shtml The exact amount of the BETC credit, according to ODOE, is $492,352. BEF's Renewable Inc.'s share (assuming a 50-50% split) is $246,176. It is not clear why the ODOE numbers are different.

103 From the State of Oregon's perspective, the experimental biogas plant has value, even if it does not generate power. The reason is that dairy farms are under pressure to reduce runoff from manure into streams and, more importantly, there is a value in capturing biogas (primary methane) and *not* letting it escape into the atmosphere. Methane is a particularly potent greenhouse gas. It is therefore better to capture the methane from cow manure and flare it off (i.e., burn it) rather than allow thousands of pounds of manure to decompose naturally.

104 BEF Annual Report to BPA, FY 2011 (August 2011), at page 9.

105 The BEF annual report describes the biogas plant as a demonstration project. But that description, by itself, does not answer the question whether Northwest Natural Gas (the 50% partner) would have underwritten the entire venture or whether another entity could taken the BEF Renewable, Inc.'s place. That's the "but for" determination the BEF should have supplied to BPA -- and which BPA should have demanded from the BEF.

106 Biogas is produced by the breakdown of animal waste and plants. The BEF's biogas plant in Oregon relies on an experimental process patented by J-U-B Engineers in Kennewick, Washington State. Numerous press articles described the innovative process. See, for example, http://biomassmagazine.com/articles/2318/northwest-project-to-build-tire-filled-digester and www.pnl.gov/edo/newsletter/article.asp?id=308 .

107 E-mail from Gardner to the author, September 20, 2011.

108 Meeting notes and presentation from TMF Biofuels to the Renewable Advisory Council of the Energy Trust (June 22, 2011). PacifiCorp will buy the output (electricity) of the proposed plant.

109 It is not clear how BPA's public power customers (i.e., public agencies and rural electric cooperatives) would benefit by a biogas plant that generates electricity in the territory of PacifiCorp. Nonetheless, the BPA-BEF contract allows this to happen. E.g., BEF can transfer BPA money to BEF Renewable Inc. for projects that would benefit "regional customers." Section 6(A)(iii)(1). "Regional customers" includes *both* public power and investor-owned utilities. Section 3(M). Whether BPA's public power customers should -- as a matter of policy -- pay for this investment in *their* power rates is another question.