

**BONNEVILLE POWER ADMINISTRATION  
ADMINISTRATOR'S RECORD OF DECISION  
2008 COLUMBIA BASIN FISH ACCORDS**

**May 2, 2008**

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**1.0 INTRODUCTION**

To improve fish survival and habitat, and to advance fish recovery in the Columbia River Basin, the Bonneville Power Administration (BPA) has decided to enter into unprecedented agreements with four tribes, two states, and two other federal agencies. The agreements address fish affected by federal dams of the Federal Columbia River Power System (FCRPS), with a focus on salmon and steelhead fish listed under the Endangered Species Act. These agreements will result in numerous new projects and dedicated funding for certain on-going projects (such as watershed restoration programs) throughout the Columbia River Basin for the next 10 years. The agreements also mark a turning point for the parties, ushering in a collaborative partnership rather than continuing with an adversarial relationship.

Through these agreements, BPA commits funding on a long-term basis to tribal and state fish and wildlife managers to implement projects for the benefit of fish in the Basin, recognizing their role as co-managers of the fishery resource. These parties are agreeing to projects that will have biological benefits that will make a meaningful difference for the fish. These agreements will be known collectively as “the 2008 Columbia Basin Fish Accords” (the Accords). Specifically, the Accords consist of:

(1) An agreement between BPA, the U.S. Army Corps of Engineers, and the U.S. Bureau of Reclamation (together, the three federal agencies are known as the “Action Agencies”) and the:

- Confederated Tribes of the Umatilla Indian Reservation,
- Confederated Tribes of the Warm Springs Reservation,
- Confederated Tribes and Bands of the Yakama Nation, and
- Columbia River Inter-Tribal Fish Commission (CRITFC).

These Tribes and CRITFC are collectively referred to as the “Three Treaty Tribes.” This agreement is referred to as the “Three Treaty Tribes MOA.”

(2) An agreement between the Action Agencies and the Confederated Tribes of the Colville Indian Reservation. This agreement is referred to as the “Colville MOA.”

(3) An agreement between the Action Agencies and the State of Idaho. This agreement is referred to as the “Idaho MOA.”

(4) An agreement between the Action Agencies and the State of Montana. This agreement is referred to as the “Montana MOA.”

The purpose of this Record of Decision is to describe the backdrop that lead to these agreements, what the agreements contain, and why BPA has decided to enter into them.<sup>1</sup> This Record of Decision also documents BPA’s consideration of the National Environmental Policy Act (NEPA) in entering into the Accords.<sup>2</sup>

## **2.0 BACKGROUND**

### **2.1 Litigation Leads to Collaborative Remand**

Litigation over the impacts of the FCRPS on threatened and endangered fish species has engulfed the Action Agencies and regional interests for well over a decade. Under the Endangered Species Act (ESA),<sup>3</sup> the Action Agencies consult with the National Oceanic and Atmospheric Administration (NOAA) regarding the effects of the FCRPS on listed salmon and steelhead. NOAA evaluates the Action Agencies’ proposed operations and mitigation actions, and issues a Biological Opinion (BiOp) addressing whether or not the Action Agencies are avoiding jeopardy to the species and avoiding destruction or adverse modification of their critical habitat. Lawsuits over the BiOps have invariably followed.

The origins of the most recent litigation can be traced to a challenge to the 2000 BiOp issued by NOAA. In that case, plaintiff environmental organizations challenged the sufficiency of the 2000 BiOp. The federal district court in Oregon found the 2000 BiOp flawed because it relied on mitigation actions, such as improvements to habitat, hatcheries, and harvest, that were not reasonably certain to occur, and because the action area had been too narrowly defined.<sup>4</sup> The court remanded the BiOp to NOAA for more work. The Action Agencies had already adopted and were implementing the measures contained in the 2000 BiOp, including Reasonable and Prudent Alternative (RPA) actions that would modify the proposed action to protect the listed species. As a result, the Action Agencies decided that rather than re-analyzing the proposed action considered in the 2000 BiOp, they would update the 2000 BiOp RPA by developing an Updated Proposed Action (UPA). The 2004 UPA described current and planned future operations of the FCRPS, including most of the 2000 RPA actions identified in the 2000 BiOp, as well as a more focused approach to mitigation. The UPA was analyzed by NOAA in a BiOp released in November 2004.

The 2004 BiOp was challenged by the same plaintiffs. In May 2005 the court found the 2004 BiOp flawed and ordered NOAA to prepare a new Biological Opinion. Further, the

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<sup>1</sup> The terms “Accords,” “agreements” and “MOAs” are used interchangeably throughout this Decision; the Accords are available at [www.salmonrecovery.gov](http://www.salmonrecovery.gov).

<sup>2</sup> 42 U.S.C. § 4321 *et seq.*

<sup>3</sup> 16 U.S.C. § 1531 *et seq.*

<sup>4</sup> *Nat’l Wildlife Fed’n. v. NMFS*, 254 F. Supp. 2d 1196 (D. Or. 2003).

court ordered NOAA, the Corps, and the Bureau of Reclamation to collaborate with sovereign states and tribes to develop items to include in the FCRPS proposed action, clarify policy issues, and reach agreement or narrow the areas of disagreement on scientific and technical information.

The parties to this FCRPS remand collaboration process were NOAA, the Action Agencies, four states (Idaho, Montana, Oregon, and Washington), and seven tribes (the Confederated Tribes of the Colville Reservation, the Confederated Tribes of the Umatilla Indian Reservation, the Confederated Tribes of the Warm Springs Reservation of Oregon, the Confederated Tribes and Bands of the Yakama Indian Nation, the Kootenai Tribe of Idaho, the Nez Perce Tribe, and the Spokane Tribe of Indians). NOAA and the Action Agencies filed quarterly status reports developed with the input of the states and tribes with the court throughout the remand period.

A goal of the collaborating sovereign parties was to identify actions for salmon recovery to be used by the Action Agencies in developing a new proposed RPA. This collaboration effort included extensive meetings among sovereign parties managed by a Policy Working Group (PWG).

## **2.2 Collaboration Leads to Negotiations**

One of the benefits of the collaboration process for the BiOp remand was the development of a closer working relationship amongst the sovereigns, despite their conflicting litigation views. As the sovereign parties' policy, technical and legal staff worked together, common goals and interests were more readily identified. Beginning in 2006 several of the sovereign parties began to explore the potential for resolving their mutual issues through negotiations. The parties recognized that years of litigation focused attention in the courtroom and directed attention away from the mutual work on the ground for the benefit of fish that all are engaged in. In addition, the litigation has been a tremendous drain on parties and their staffs, taking up time and resources that might be better spent working together.

By the middle of 2007, negotiations were underway in earnest. The parties sought to resolve outstanding issues, to resolve litigation matters, and to set forth long-term mutual commitments between them for the benefit of fish and wildlife in the region. The parties sought to keep discussions confidential in order to be as candid as possible and to produce the best outcome. The Action Agencies approached all of the sovereigns in the collaborative remand, but not all the sovereigns expressed an interest in or need for negotiations.<sup>5</sup> The parties explored whether negotiations could develop with all sovereigns at a single negotiating table, but that proved unworkable. As a result, the negotiations for each Accord were conducted separately, although the Confederated Tribes of the Umatilla Indian Reservation, the Confederated Tribes of the Warm Springs

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<sup>5</sup> The State of Washington was supportive of the MOAs in concept, but did not view an MOA as necessary to address its concerns. Similarly, the Kootenai Tribe of Idaho indicated it did not view an MOA as necessary to address its concerns. The Spokane Tribe did not move forward with agreement negotiations.

Reservation of Oregon, the Confederated Tribes and Bands of the Yakama Indian Nation, the Nez Perce Tribe, and the Columbia River Inter-Tribal Fish Commission joined together in negotiations with the Action Agencies. Ultimately, negotiations were successful with the parties to these Accords. BPA remains open to discussions with the other tribes and states for future agreements based on the same objectives as the Accords.

### **3.0 MUTUAL COMMITMENTS OF THE ACCORDS**

Under the terms of the Accords, the parties are committing to implement projects for the benefit of fish affected by the FCRPS, to be funded primarily by BPA. The focal point of the agreements is to provide actions to help ocean-going (anadromous) fish listed under the Endangered Species Act. The agreements also provide actions to help other fish in the Basin, including non-ocean-going (resident) stocks in Montana such as the listed bull trout, as well as for non-listed anadromous and resident species in the Basin, such as Pacific Lamprey. The agreements are intended to work in concert with draft Biological Opinions for the FCRPS and Upper Snake developed by NOAA Fisheries and released for public review on October 31, 2007, and with the final versions of those Biological Opinions set for release on May 5, 2008. Although the focus of mitigation in the Accords is on fish, the agreements also contain several commitments for the benefit of wildlife impacted by the FCRPS. In addition, projects for the benefit of fish often carry wildlife benefits. As a result, although named the “Fish Accords,” the Accords should be considered of benefit to wildlife species as well.

In general, each agreement has four components: (1) a statement of the purpose and guiding principles; (2) mutual commitments regarding hydrosystem operations and related efforts, including research, monitoring and evaluation; (3) mutual commitments regarding habitat, hatchery, and harvest actions; and (4) mutual commitments with respect to legal matters. The agreements were negotiated independent of each other, and so while each agreement reflects some common core commitments (in similar if not identical language), each also contains commitments unique to the agreement to reflect the different interests of the participating parties. The agreements were made available for public review. The purpose here is not to describe the agreements in detail, but to summarize some of the key provisions, including provisions unique to each agreement. When describing “parties” throughout, BPA is referring to the parties entering into the agreement or agreements being discussed.

#### **3.1 Purpose and Principles**

In the introductory sections of the agreements, the parties describe the intent of the agreements to address direct and indirect effects of the construction, inundation, operation and maintenance of fourteen hydropower projects of the FCRPS and Reclamation’s Upper Snake Projects on fish resources of the Columbia River Basin for a period of ten years. In addition, the agreements aim to resolve issues between the implementing parties regarding compliance by the federal agencies under specific



statutes—the Northwest Power Act,<sup>6</sup> the ESA, and the Clean Water Act,<sup>7</sup> and to address the parties’ mutual concerns for certainty and stability in funding for implementation of projects. The agreements are also intended to foster a cooperative and partnership-like relationship in implementation of the mutual commitments. In the Colville MOA and the Montana MOA, additional agreement principles were identified, reflecting those upper river sovereigns’ interests in affirming that the Action Agencies will consider operations and mitigation holistically.<sup>8</sup>

## **3.2 Hydro Commitments**

### *3.2.1 Performance standards and adaptive management*

Under the agreements, the parties confirm and concur in the use of hydro performance standards, targets and metrics as described in the draft FCRPS BiOp.<sup>9</sup> This includes, for example, juvenile dam survival as the overarching performance standard for operation of the system—96% dam passage survival for yearling Chinook and steelhead and 93% for subyearling Chinook, based on empirical survival data.<sup>10</sup> The MOAs go further, however, and clarify how the hydro performance standards will be considered in relation to other performance indicators, such as spill passage efficiency and delay. This additional information will be gathered and considered in the performance check-ins.

The parties also acknowledge and support the adaptive management approach proposed by the Action Agencies in their August 2007 Biological Assessment and in their draft FCRPS and Upper Snake BiOps. This adaptive management includes two comprehensive reviews of the status and performance of each evolutionarily significant unit (ESU). The parties will participate in the design and analysis of those comprehensive reviews. If performance is not on track, the parties will discuss options for corrective action. Also, as part of the Three Treaty Tribes MOA, the Action Agencies have affirmed that modifying John Day operations to lower the reservoir to the minimum operating pool is a contingency—a possible operation to address performance problems—as a product of the second comprehensive review and diagnostic evaluation of any performance issues.<sup>11</sup>

### *3.2.2 Research, monitoring, and evaluation<sup>12</sup>*

The parties also acknowledge the importance of maintaining and improving research, monitoring, and evaluation (RM&E) programs to make informed decisions on population

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<sup>6</sup> Pacific Northwest Electric Power Planning and Conservation Act, 16 U.S.C. § 839 *et seq.*

<sup>7</sup> Federal Water Pollution Control Act, 33 U.S.C. § 1251 *et seq.*

<sup>8</sup> See, e.g., Section I.D of the Colville MOA and Section II.D.2 of the Montana MOA.

<sup>9</sup> Section II.A.1 and II.A.2 of the Three Treaty Tribes, Idaho, and Montana MOAs and Section II.A.1.a, and Section II.1A.1.b of the Colville MOA.

<sup>10</sup> See Attachment A to Three Treaty Tribes MOA.

<sup>11</sup> Section II.A.2, “John Day Pool Operations,” of the Three Treaty Tribes MOA.

<sup>12</sup> See Section II.A.3 of the Three Treaty Tribes, Idaho, and Montana MOAs, and Section II.A.1.c of the Colville MOA.

status assessments and improve management action effectiveness. The parties acknowledge that the combined BiOp and agreement commitments provide that RM&E program. The Action Agencies committed to extensive RM&E in the RPA in the draft BiOps.<sup>13</sup> BPA is committing to additional RM&E activities in these agreements. The additional RM&E will help evaluate and monitor the hydrosystem and its effects on fish in the mainstem and tributaries, as well as other activities which impact the health of the fish runs. These RM&E activities include:

- Monitoring of fish stocks and harvest management, including status and trend monitoring, catch sampling rates analysis, development of escapement goals, and development of genetic studies;
- Monitoring of artificial production;
- Assessing flow and temperature;
- Management scenarios for climate change; and
- Additional monitoring of habitat project effectiveness.

### *3.2.3 Fish Passage Center*

For the tribal parties, the continued use of the Fish Passage Center is of vital importance particularly for assistance in monitoring and verification. BPA agreed to provisions to address the Fish Passage Center's role, and to provide for protection of the tribes' interests in monitoring and verification activities should the Council, through a Program amendment process, alter the Fish Passage Center's role.<sup>14</sup>

### *3.2.4 Spill and transport*

In general, the parties agree to support the spill and fish transportation measures proposed in the draft BiOps, which are driven by information on fish survival and by the performance standards and metrics.<sup>15</sup> In the Three Treaty Tribes MOA, the parties negotiated additional specific provisions to address desired changes in spill and transport protocols to ensure sufficient improvements in steelhead survival (current data indicate steelhead survival is lower without transportation). These include provisions to adjust the initial spring transportation protocols in order to benefit adult returns of spring and fall Chinook while taking into account Group B steelhead survival.<sup>16</sup> Another modified provision includes an alternative approach to summer spill adjustments, which provides a more conservative approach than previously proposed.<sup>17</sup> The Action Agencies have proposed these changes to NOAA Fisheries for the final FCRPS Biological Opinion.

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<sup>13</sup> Draft FCRPS BiOp (NOAA Fisheries, October 31, 2007), RPA 50-70.

<sup>14</sup> See Sections II.A.3 and II.D of the Three Treaty Tribes MOA.

<sup>15</sup> See Section II.B of the Three Treaty Tribes, Idaho, and Montana MOAs, and Section II.A.1.d of the Colville MOA.

<sup>16</sup> Section II.B.

<sup>17</sup> Section II.C.

### *3.2.5 Montana operations*

All of the agreements affirm the proposed operations reflected in the draft FCRPS BiOp at Libby and Hungry Horse dams in Montana designed to stabilize flows out of those dams, and keep more water in the reservoirs in the months of July, August and September to benefit resident fish.<sup>18</sup> In the Montana MOA, the Action Agencies also expressly reaffirm their commitment to support any Montana operations proposed in any 2008 “in season” management decision emerging from the regional forum for evaluating such requests.<sup>19</sup>

### *3.2.6 Summer drafting and other Dry Year operations*

The Confederated Tribes of the Colville Reservation have a particular concern about how dry year (low water year) operations of the FCRPS will be conducted, as such operations affect survival of endangered Upper Columbia spring Chinook and steelhead, and they also affect Lake Roosevelt, which inundates a portion of the Colville’s reservation. In the Colville MOA, the parties provide additional details as to how summer drafting and other dry year operations studies will be carried out, and provide expressly for the inclusion of the Colville Tribes in those analyses.<sup>20</sup>

### *3.2.7 Forecasting*

The Action Agencies commit in the draft FCRPS BiOp to annual forecast performance reviews looking at in-place tools for seasonal volume forecasts and to report on the effectiveness of experimental, developing, or emerging technologies and procedures.<sup>21</sup> In the Three Treaty Tribes MOA, the parties negotiated additional actions to improve forecasting methods, including convening a forecast and data committee to include technical representatives from these tribes.<sup>22</sup>

### *3.2.8 Canadian Treaty negotiations*

BPA and the Corps have committed to pursuing negotiations with Canada for annual agreements under the Columbia River Treaty of 1964. In the Three Treaty Tribes and Colville MOAs, the parties developed additional commitments regarding how BPA and the Corps would consult with these tribes about annual operations under the Treaty, potential future non-Treaty storage use, and BPA and Corps actions related to possible future U.S.-Canada discussions of post-2024 matters under the Treaty.<sup>23</sup>

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<sup>18</sup> See section II.G of the Three Treaty Tribes MOA; Section II.A.1.e.vii of the Colville MOA; Section II.D of the Idaho MOA; and Section II.D.1 of the Montana MOA.

<sup>19</sup> Section II.D.1 of the Montana MOA.

<sup>20</sup> Section III.A.1.e(i) and (ii) of the Colville MOA.

<sup>21</sup> Draft FCRPS BiOp, RPA No. 7.

<sup>22</sup> Attachment E of the Three Treaty Tribes MOA.

<sup>23</sup> Attachment F of the Three Treaty Tribes MOA.

### 3.2.9 Lamprey actions

The Pacific Lamprey, though not a listed species, are of considerable importance to the Three Treaty Tribes, who use the fish for food and medicine. The parties agreed upon a suite of actions to address concerns about the decline in lamprey populations both to address the tribal interests and to help avoid a listing of the species in the future. BPA's commitment to the lamprey effort includes funding of up to \$18.66 million in projects over the term of the Agreement.<sup>24</sup> In addition, because the Corps also has made commitments to address lamprey passage issues at Corps-managed facilities,<sup>25</sup> BPA would expect to repay to the Treasury the power share of any capital construction changes the Corps implements through Congressional appropriations to address lamprey.

### **3.3 Habitat/Hatchery/Harvest Commitments**

In each agreement, the implementing tribe or state has identified projects for the benefit of fish (listed and non-listed, anadromous and resident fish), and BPA commits to funding the project for the term of the Agreement with a specific budget.<sup>26</sup> The project commitments vary by agreement, but some examples are summarized below.

#### 3.3.1 Habitat protection and restoration for fish

In the agreements, the parties are committing to projects to improve spawning and rearing habitat to increase productivity of specific population groups of listed salmon and steelhead. Projects will be focused in the upper Columbia tributaries, as well as the Grande Ronde, John Day, Umatilla, Yakima and Walla Walla rivers. Under the Idaho MOA, habitat protection and restoration is targeted in the Upper Lemhi River area. In the Montana MOA, the focus is on bull trout habitat to address the affects of the FCRPS dams on that listed species.

The types of projects BPA is funding include:<sup>27</sup>

- Designing and building in-channel pool forming structures in tributaries to improve spawning and juvenile rearing habitat;
- Riparian plantings to improve cover and shade for fish-bearing streams;
- Providing new culverts under roads, designed to be more fish-friendly and allow or improve access to quality habitat;
- Decommissioning roads to decrease sedimentation into fish-bearing streams;
- Reconnecting off-channel habitats to tributaries;

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<sup>24</sup> Section II.H of the Three Treaty Tribes MOA.

<sup>25</sup> *Id.*

<sup>26</sup> The projects will be implemented following successful completion of necessary environmental compliance requirements, see discussion under "General Provisions," that follows.

<sup>27</sup> Section III.A of the Three Treaty Tribes and Montana MOAs; Section III.A.2 of the Idaho MOA, and Section II.A.2 of the Colville MOA.

- Protecting fish habitat permanently through fee title or conservation easement acquisitions; and
- Improving instream flows in fish bearing streams through purchase or lease of water rights.

In the Three Treaty Tribes MOA, the Tribes have summarized all of the habitat projects that will provide benefits to listed ESUs.<sup>28</sup> The Tribes estimated the benefits using the methodology linked to limiting factors developed in the remand collaboration. The Colville Tribes have estimated the benefits of their habitat projects in Attachment B to their MOA. For example, the estimated benefits from their suite of habitat restoration actions in the Okanogan Subbasin include the potential for an over sixty-percent increase in Okanagon steelhead survival.<sup>29</sup>

In Idaho, the State is seeking to permanently protect and restore Chinook and steelhead habitat in the Lemhi River watershed. The goal is to reconnect access to up to 84 miles of previously inaccessible spawning and rearing habitat, among other things, bolstering the already identified increase in survival for Chinook salmon and steelhead for expected BiOp actions.<sup>30</sup>

In Montana, the State would take steps to protect important spawning and rearing habitat for ESA-listed bull trout, and other important resident fish species.<sup>31</sup>

### 3.3.2 *Group B steelhead actions*

The Three Treaty Tribes MOA provides particular focus for the listed Group B steelhead. Additional projects are summarized in attachment C to that MOA (but are captured in terms of funding and implementing entity in the MOA spreadsheets). BPA-funded actions aimed to provide substantial survival benefits to this stock include:

- Kelt management including reconditioning (capturing mature fish migrating downstream after spawning, and rearing them to allow for repeat spawning). These additional MOA actions will be taken in concert with Corps operations, and are estimated to yield an average 6% survival improvement.
- Nutrient enhancement—selected Snake River basin streams will be given additional nutrients as a food source for fish.
- Conservation law enforcement—support for enhanced law enforcement efforts has been correlated to increased compliance rates in non-Indian and Indian fisheries, which results in better protection for listed fish that are not to be harvested, estimated to provide up to a 1% benefit.
- The transportation changes noted above.

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<sup>28</sup> Attachment G of the Three Treaty Tribes MOA.

<sup>29</sup> Colville MOA, Attachment B, Project 1 description.

<sup>30</sup> Attachment B of the Idaho MOA.

<sup>31</sup> Section III.A.2 of the Montana MOA.

### 3.3.3 Hatchery actions

BPA is making available for a wide variety of hatchery actions. As a starting point, BPA is affirming for ten years its commitment to hatchery operation and maintenance and RM&E for existing hatcheries operated by the tribes. This includes hatcheries in the Grande Ronde, Umatilla, Hood River, and Yakima/Klickitat basins.<sup>32</sup> This also includes commitments to the planning and development of the Chief Joseph Hatchery to be operated by the Colville Tribes.<sup>33</sup>

BPA is also making funding available for new hatchery actions, including improvements to existing hatchery facilities (capital improvements), as well as capital for the construction of new hatchery facilities, ranging from relatively “low tech” acclimation facilities for spring Chinook and steelhead, to new hatchery facilities. BPA is committing to providing the planning, and operation and maintenance funding for these facilities as well.<sup>34</sup>

Hatchery actions to be funded by BPA include actions to meet FCRPS BiOp requirements and to provide additional benefits to listed salmon and steelhead. Examples include:

- Snake River sockeye conservation hatchery development;
- Kelt reconditioning for Upper Columbia River and Snake River Steelhead;
- Safety-net hatchery programs to protect populations from extinction risk;
- Reintroduction of Upper Columbia River spring Chinook in the Okanogan; and
- Acclimation facilities for Upper Columbia spring Chinook and steelhead and Mid-Columbia steelhead.

Hatchery actions to be funded by BPA also include actions to provide improvements to production to meet FCRPS mitigation responsibilities in a manner consistent with the FCRPS BiOp (e.g., ensuring that such hatchery actions do not impede recovery of listed fish). Examples include:

- Mid-Columbia coho restoration;
- Yakama/Klickitat Fisheries project; and
- White River supplementation program.

As discussed further in the “General Provisions” section below, before proceeding with new or expanded hatchery actions, the activity must have a NOAA determination that the action will not impede, and where possible will contribute to recovery. In addition, new and in some cases expanded actions will undergo additional site-specific NEPA and other environmental compliance review.

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<sup>32</sup> Attachment Section II.B.B.2 of the Three Treaty Tribes MOA.

<sup>33</sup> Attachment B, item 8 of the Colville MOA.

<sup>34</sup> Section III.B.2 and Attachment B of Three Treaty Tribes MOA; Section II.A.3.a of the Colville MOA.

### 3.3.4. Harvest actions

In these agreements, the tribes are committing to efforts to analyze and manage harvest activities. BPA is committing funding to support these efforts, which include:<sup>35</sup>

- Enhancement to tribal conservation enforcement (both the Three Treaty Tribes and Colville MOAs);
- A range of research, monitoring and evaluation efforts, particularly with CRITFC, including expanded tribal catch sampling and analysis of catch sampling rates; and
- Evaluation of selective harvest gear and deployment of selective gear (Colville Tribes).

By supporting enhanced harvest analysis and management, BPA is assisting tribal managers in reducing impacts of harvest on listed fish. BPA is also helping improve the reliability of information on the status of fish abundance on which fisheries management actions rely. Accurate and effective harvest management is important in the management of mixed-stock (ESA-listed and non-ESA-listed) fisheries.

### **3.4 General Provisions Related to BPA-Funded Projects**

Under the terms of the agreements, the parties agreed to certain general provisions for BPA funded projects. First, that all the projects funded are consistent with the Council's Program, applicable ESA recovery plans, BPA's *in lieu* policy, and the data management protocols incorporated in the project contracts.<sup>36</sup> The implementing parties are expected to continue reporting the results of their activities annually via BPA's PISCES database (or other appropriate databases).<sup>37</sup> BPA expects to issue implementing contracts to the parties, containing scopes of work and deliverables, as it does in any BPA-funded project for its direct program for implementing the Council's Program.

For non-hatchery projects identified as providing benefits to listed ESA fish, the implementing parties agree to:<sup>38</sup>

- Provide estimated habitat quality improvement and survival benefits from the project (or suite of projects) to a population or populations of listed salmon and steelhead based on key limiting factors;
- Refine the estimates during the course of the Agreement if it appears benefits may significantly deviate from the original estimates; and
- Support these estimates of habitat improvement and survival benefits in appropriate forums.

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<sup>35</sup> Section II.A.3 of the Colville MOA Attachment B of Three Treaty Tribes MOA.

<sup>36</sup> Section III.C of the Three Treaty Tribes and MOA, Idaho and Montana MOAs; Section II.C of the Colville MOA.

<sup>37</sup> *Id.*

<sup>38</sup> Section III.A.1 of the Three Treaty Tribes, Idaho and Montana MOAs; Section II.A.2.b of the Colville MOA.

For hatchery projects, the implementing parties agree to:<sup>39</sup>

- Continue to make available identified biological benefits associated with a hatchery projects included in this Agreement, and support those biological benefits;
- Obtain a NOAA determination that the hatchery project will not impede and where possible will contribute to recovery; and
- Secure or assist in securing all legally necessary permits for hatchery construction and operation.

In the Three Treaty Tribes MOA, the Tribes have also agreed that, with a few exceptions, the Action Agencies commitments as to hatchery projects are adequate for 30 years, such that no new requests for hatchery actions will be forthcoming.<sup>40</sup>

In addition, the parties agree to coordinate their RM&E projects with each other and with regional RM&E processes (particularly those needed to ensure consistency with the FCRPS BiOp RM&E framework).<sup>41</sup> As some of the habitat work is proposed to occur on federal lands managed by other federal agencies, the implementing parties have affirmed that they will consult with the federal land managers and obtain necessary permits and approvals.<sup>42</sup>

#### *3.4.1 Council and Independent Science Review Panel (ISRP) review*

Throughout these negotiations, the parties recognized the importance of making their commitments track the Northwest Power Act processes for review of projects to implement the Council's Program, including review by the Independent Science Review Panel (ISRP).<sup>43</sup> BPA also gave particular consideration to the Council's February 21, 2007, letter expressing the criteria important to the Council for any possible long-term agreements.<sup>44</sup> As a result, the agreements expressly acknowledge the continuing role of the ISRP and Council in review of projects.<sup>45</sup> The parties agree to actively participate in ISRP review of BPA-funded projects under these agreements, and to make reasonable adjustments to the projects to address that review and Council recommendations.<sup>46</sup> In

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<sup>39</sup> Section III.C.3 of the Three Treaty Tribes, and Idaho MOAs; Section II.A.3.c of the Colville MOA.

<sup>40</sup> Section IV.B.2 of the Three Treaty Tribes MOA. One of the exceptions is that these tribes may request additional funding in year 15 if new information or changed circumstances indicate that additional hatchery actions are needed. Such requests will not be a violation of the Agreement, and the Action Agencies are not obligated by the Agreement to fund such requests.

<sup>41</sup> Section III.C.5 of the Three Treaty Tribes MOA; Section II.C of the Colville MOA, Section III.C.4 of the Idaho MOA; and Section III.B.3 of the Montana MOA.

<sup>42</sup> Section III.C.6 of the Three Treaty Tribes MOA; Section II.C.5 of the Colville MOA, Section III.C.5 of the Idaho MOA and Section III.B.5 of the Montana MOA.

<sup>43</sup> 16 U.S.C. § 839b(h)(10)(D).

<sup>44</sup> Letter from Tom Karier, Chair, Northwest Power and Conservation Council, to Steve Wright, BPA Administrator, February 21, 2007.

<sup>45</sup> Section III.D of the Three Treaty Tribes and Idaho MOAs; Section II.D of the Colville MOA; Section III.C of the Montana MOA.

<sup>46</sup> *Id.*



regards to hatchery projects, the proponents of any new hatchery project will participate in then-applicable ISRP and Council 3-step review processes.<sup>47</sup>

BPA and the tribes are interested in finding ways to streamline the applicable processes, in coordination with the Council, so that Council and ISRP reviews are focused on new activities, and perhaps grouped by subbasin. As result, in the tribal MOAs, the parties agree to work with the Council to streamline and consolidate project reviews by recommending that the ISRP:<sup>48</sup>

- Review projects collectively on a subbasin scale;
- Focus reviews of on-going or longer-term projects on future improvements/priorities; and
- Minimize or abbreviate re-review of on-going projects unless there is a significant project scope change since the last ISRP review.

### 3.4.2 *Replacement projects and adaptive management*<sup>49</sup>

In regards to non-hatchery projects funded by BPA (e.g., habitat projects), the parties recognize that as projects proceed a wide variety of factors may prevent the projects from being implemented as originally conceived. These factors could include:

- Problems arising during regulatory compliance processes for the individual project (e.g., ESA consultation, National Environmental Policy Act or National Historic Preservation Act review, or Clean Water Act permitting);
- New information regarding the biological benefits of the project (e.g., new information indicating a different implementation action is of higher priority, or monitoring or evaluation indicates the project is not producing its anticipated benefits);
- Changed circumstances (e.g., completion of the original project or inability to implement the project due to environmental conditions or other reasons, such as lack of access, or water); or
- Substantive non-compliance with the implementing contract.

In order to maintain the substantive biological benefits committed to in these agreements, should a project not be implemented or completed because of such factors, the parties will negotiate a replacement project. The replacement project would be subject to the terms of the agreements, and would be the same or similar to the project it replaces in terms of target species, limiting factors addressed, mitigation approach, geographic and/or subbasin, and biological benefits provided. The replacement project concept does not apply to hatchery actions as a general matter. If a hatchery project is not able to be implemented because of physical infeasibility or inability to be modified in manner that meets regulatory requirements, BPA's funding commitment to that hatchery action is

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<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> Section III.E of the Three Treaty Tribes, and Idaho MOAs; Section II.E of the Colville MOA; Section III.D of the Montana MOA.

discharged, subject to provisions that allow for a five year extension of capital funding under certain circumstances.<sup>50</sup>

In addition to replacement projects, the parties also may mutually agree to adapt the agreements on a broader scale based on new information or changed circumstances.<sup>51</sup> For example, if in year 5 of implementing the agreements, the parties conclude that more effort for on-the-ground work is appropriate, they can agree to shift the funding commitments from other areas (such as RM&E projects) to habitat restoration and protection.

### *3.4.3 BPA budgeting and planning requirements<sup>52</sup>*

Because the management of the BPA funding commitments under these agreements is complex, the parties have agreed to some general principles for managing and tracking them.

To address inflationary pressures, BPA will provide an annual inflation adjustment of 2.5 percent per project in the agreements beginning in fiscal year 2010.

The parties recognize that it is unlikely that all the new and expanded projects will expend their annual average budget in fiscal years 2008 and 2009 due to start-up issues. New work, and in some cases expanded work, requires additional BPA contracting, permitting, and environmental review. Given that the agreements are being executed with over half of the 2008 fiscal year gone, “ramp up” provisions were needed. As a result, BPA is committing to funding in fiscal year 2008 approximately one-third of the average planning levels shown for each project, and up to 75 percent of that level in fiscal year 2009. Full planning levels are expected to be implemented starting in fiscal year 2010. These ramp up provisions apply only to expanded and new projects, and of the expanded projects, the ramp up is only to the expanded portion of the budget. There are a few identified exceptions to this rule (e.g., no ramp up limits are applied to certain Colville projects<sup>53</sup>).

The parties recognized that, historically, there is a difference between BPA’s planned expenditures for implementing projects as part of its direct program for fish and wildlife, and the actual spending (what BPA is invoiced for), of approximately seven percent on average. BPA will plan to fund 100 percent of the funding agreed to across the agreements, but if the actual spending by the implementers averages 93% in the aggregate (per MOA), BPA remains in compliance with its commitments under that MOA.

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<sup>50</sup> See, e.g., Section IV.B.2 of the Three Treaty Tribes MOA.

<sup>51</sup> Section III.E.3 of the Three Treaty Tribes and Idaho MOAs; Section II.E.3 of the Colville MOA; and Section III.D3 of the Montana MOA.

<sup>52</sup> Section III.F of the Three Treaty Tribes MOA and Idaho MOAs; Section II.F of the Colville MOA; and Section III.E of the Montana MOA.

<sup>53</sup> See annotations to Attachment A of the Colville MOA.

One of the most complicated aspects of managing long-term project funding is what happens when a project is either under-spending its planned budget, or seeks to exceed that budget. Carrying over funding from year-to-year is a problem for BPA because it means that the important work designed to address biological benefits is not being implemented in the expected timeframe. Carrying over funding can also create a financial “bow wave,” where work is not performed for several years, and then suddenly all of the work comes due at once. This can present unacceptable financial pressures for BPA. As result, the parties have agreed to a general framework for managing “carry overs”—including descriptions of annual project budget flexibility, and the limits on how long unspent funding can be carried over (two contract years) before it will no longer be available. The parties also developed special rules for carry over of the ramp up year funding.

### **3.5 Legal Commitments**

Fundamentally, the Accords represent the parties’ agreement that the Action Agencies’ BiOp actions and the additional actions committed to in the Accords is a reasonable plan that all the parties support to protect and recover fish affected by the FCRPS and meet the legal mandates of the ESA, Northwest Power Act, and Clean Water Act for the next ten years. The parties mutually developed an ambitious and comprehensive set of actions that will bring significant biological benefits to fish species. The parties have agreed to work to implement these actions as partners, rather than as adversaries, sharing in the monitoring and adaptation of actions towards a common goal. While no one is assuming guaranteed success, all are committed to the mutual effort and believe there is a high probability of success. The legal commitments reflect these central principles.

#### *3.5.1 Forbearance*<sup>54</sup>

For BPA, one of the chief benefits of the Accords is obtaining a measure of peace with the parties. This peace will allow all parties to put their energies toward implementation of actions to protect and restore the listed and unlisted species affected by the FCRPS, and will provide some cost predictability for BPA ratepayers. As expressed in the forbearance sections of these agreements, the parties have resolved their differences and decided to focus on implementation of actions to benefit fish rather than litigate with each other.

Specifically, the tribes and states will not initiate, join in, or support in any manner ESA, Northwest Power Act, Clean Water Act or Administrative Procedure Act suits against the Action Agencies or NOAA regarding the legal sufficiency of the FCRPS and Upper Snake BiOps. Nor will they initiate, join in, or support in any manner ESA, Northwest Power Act, Clean Water Act, or APA suits against the Action Agencies or NOAA regarding the effects on fish resources and water quality (relating to temperature and total

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<sup>54</sup> Section IV of the Three Treaty Tribes, Idaho and Montana MOAs; Section III.A of Colville MOA.

dissolved gas) resulting from the operations of the FCRPS dams. The tribes and Idaho also agree that their participation in on-going and future BPA rate proceedings will be consistent with the terms of their agreement. The parties specifically acknowledge that they will not directly or indirectly support the implementation of FCRPS dam breaching for the duration of the agreement.

For the tribes and states, their commitments not to initiate, join in, or support lawsuits are predicated on the Action Agencies implementing the commitments in the BiOps and the MOAs. For the Three Treaty Tribes, their forbearance is also predicated on reciprocal commitments from the Action Agencies not to support in any manner suits that challenge the legal sufficiency of the 2008-2017 *U.S. v. Oregon* Management Plan, which includes the harvest plan developed by the tribes, states, and federal regulators that co-manage the Columbia River fisheries. In addition, the Three Treaty Tribes' commitment not to advocate for dam breaching during the term of the Agreement is based on acknowledgment by the Action Agencies that nothing in their agreement can be interpreted or represented as any tribe rescinding or altering their positions regarding breach of federal dams. It is also based on an acknowledgment that if after the second comprehensive review (see adaptive management discussion under hydro commitments, above), the status of Snake River ESUs is not improving and contingent actions are needed, these Tribes may advocate that actions to implement Snake River dam breaching after 2017 should be initiated.

For the states, it was important that their agreements acknowledge that in forbearing from litigation under the Clean Water Act, the states were not precluded from enforcing state water quality statutes generally. The states agree that Clean Water Act requirements for total dissolved gas and water temperature are met as long as operations are consistent with the draft FCRPS BiOp. In addition, the parties agreed to recognize and not address on-going litigation regarding the Libby Project in Montana, so that litigation is expressly excluded from Montana's forbearance.<sup>55</sup>

### 3.5.2 *Affirmation of adequacy*<sup>56</sup>

In addition to agreeing to refrain from litigation, the tribes and states also took the additional step of affirming with the Action Agencies that the package of actions contained in the draft BiOps and their individual MOAs are an adequate combined response of these entities to address the federal government's duties to mitigate for the FCRPS effects under applicable environmental laws and regulations for the duration of the agreements, and to so affirm in appropriate forums, including NOAA's administrative record.<sup>57</sup> For BPA, this affirmation is critical, as it secures an understanding that at least as to these parties, no additional BPA funding is needed for the duration of the agreements in order for BPA to meet its obligations to mitigate for fish. The Three Treaty

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<sup>55</sup> Section IV.A.2.b of the Montana MOA.

<sup>56</sup> Section IV.B of the Three Treaty Tribes, Idaho and Montana MOAs; Section III.B of the Colville MOA.

<sup>57</sup> See Section IV.B.4 of the Three Treaty Tribes MOA.

Tribes asked for and received a reciprocal affirmation, that the United States would continue affirmative support of the *U.S. v. Oregon* Management Plan and BiOp.

The tribes and states did reserve some areas where they might continue to seek BPA funding. For the Three Treaty Tribes and Colville Tribes, the area reserved was wildlife mitigation. The parties were unable to resolve their differing perspectives on what is needed for BPA to mitigate for wildlife affected by the FCRPS during the term of the agreement, and so BPA and the Three Treaty Tribes agree that wildlife mitigation is “carved out” of the agreements.<sup>58</sup> Similarly, BPA and the Colville Tribes agreed that BPA funding for operational losses to wildlife are “carved out.” Thus, in both these cases, these tribes may request additional funding from BPA, and BPA may agree or decline, without violation of the agreements. The Colville Tribes also identified other specific reservations of claims not addressed by their agreement, including harvest rights unrelated to the FCRPS and Upper Snake projects, claims regarding boundaries of the Colville reservation, and claims regarding their federally reserved rights to the Columbia or Okanogan rivers.<sup>59</sup>

For the states, the issue was different, and had to do with whether or not to include on-going projects—those already committed to by BPA for the period from 2007 through 2009—in the agreements, thus extending commitments for the duration of the agreements. The states ultimately determined they did not want include all their on-going projects in the agreements (Idaho included a few; Montana did not include any). As such, they may continue to seek BPA funding for projects not included in the agreements through the Council and BPA processes. Because the states have affirmed the adequacy of BPA’s efforts under the relevant laws, however, BPA and the states have agreed to some limits on those subsequent funding requests, as detailed in the agreements.<sup>60</sup>

### *3.5.3 Who is covered by the commitments*

For BPA, it was important to be clear about expectations that forbearance, and particularly affirmations of adequacy, were applicable to all the representatives of the parties entering into these agreements. As a result, the agreements specify how the entities are covered. For the Action Agencies and tribes, the commitments apply to these parties, their staff, any persons hired or volunteering for them, any representative or organization under their guidance or control, and any person or entity that acts as an agent for a party.<sup>61</sup> As noted previously, the Columbia River Inter-Tribal Fish Commission is included in this, such that its staff is also bound by the commitments in the Agreement.<sup>62</sup>

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<sup>58</sup> Section IV.B.4 of the Three Treaty Tribes MOA.

<sup>59</sup> Colville MOA, Section IV.I.

<sup>60</sup> See Section III.D.3 of the Idaho MOA and Section III.C.3 of the Montana MOA.

<sup>61</sup> Section V.F of the Three Treaty Tribes MOA; Section IV.E of the Colville MOA.

<sup>62</sup> Section I of the Three Treaty Tribes MOA.

For the states the coverage is similar—it applies to state agencies, boards, commission or other Executive Branch entities, and any person that acts as an agent or representative of the same. However, the states have excluded their Council representatives, to the extent that such exclusion is necessary, to enable these state appointees to perform their responsibilities under the Northwest Power Act.<sup>63</sup>

#### *3.5.4 Council Program amendments*<sup>64</sup>

As the parties negotiated these agreements, they recognized the Council was preparing to develop amendments to the Fish and Wildlife Program, as it does in advance of Power Plan amendments on generally a five-year cycle. As recommendations from fish and wildlife managers are given deference by the Council in developing Program amendments, it was important to BPA that the parties match their recommendations and comments to the Council with the agreed-upon commitments in the MOAs. Thus, all the agreements provide for this consistency. In the Three Treaty Tribes MOA, the parties negotiated specific recommendation language, reflecting the parties' mutual desire that the Council recognize the MOA actions as a whole, rather than broken up as individual projects outside the context of the mutual commitments. Because recommendations to the Council were due before these agreements could be executed, the parties were not bound by these commitments when they submitted their recommendations. Nonetheless, the tribal parties expressly recognized the MOAs and included them in their recommendations for Program amendments to the Council. The Three Treaty Tribes further indicated that any conflicts between their other recommendations (e.g., supporting the Columbia Basin Fish and Wildlife Authority's (CBFWA) recommendations) would be addressed to ensure MOA provisions prevail. For example, the Yakama Nation, in making its recommendations to the Council, noted that should the Council identify or perceive any conflict between the MOA and the CBFWA component, the MOA recommendation supersedes and overrides the CBFWA component.<sup>65</sup>

#### *3.5.5 Good faith implementation and support*<sup>66</sup>

All the parties have agreed to good faith implementation—that they will work together, in partnership, to implement the mutual commitments in the agreements. Because this represents a fundamental change in the relationships between some of the parties, the agreements recognize that there may be disagreements as implementation proceeds. The agreements set up processes to communicate and coordinate with one another to address any problems. This explicitly includes best efforts to consult with each other prior to taking any action that could reasonably be interpreted as inconsistent with any part of the agreements, and taking actions to redress the point(s) of concern.

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<sup>63</sup> Section IV.A.2.e of the Idaho and Montana MOAs.

<sup>64</sup> Section IV.C of the Three Treaty Tribes, Idaho, and Montana MOAs; Section III.C of the Colville MOA.

<sup>65</sup> Letter from Yakama Nation to the Council, April 3, 2008, available at:

<http://www.nwppc.org/fw/program/2008amend/view.asp?id=107>.

<sup>66</sup> Section IV.D of the Three Treaty Tribe, Idaho, and Montana MOAs; Section III.H of Colville MOA.

### 3.5.6 *Changed circumstances, renegotiation/modification, dispute resolution and withdrawal*<sup>67</sup>

Consistent with the theme of the collaborative relationship commitments, the agreements all provide for informal dispute resolution—including voluntary mediation, if desired—should disputes arise during implementation.<sup>68</sup> The general commitment is to preserve the agreement, and to negotiate mutual resolutions or modifications as needed to resolve disputes.

The parties have agreed that, in some cases, a party may withdraw from the agreement. Upon withdrawal, the party would no longer be subject to the commitments in the agreement. For example, if any of the tribes withdraw, they would be free to litigate matters that they otherwise agreed to forbear litigating. If BPA withdraws, it would no longer be obligated to actions agreed to in the MOA, including funding commitments consistent with the MOA. BPA has agreed, however, that should it withdraw, it will maintain funding it determines (along with the other Action Agencies) is necessary for FCRPS BiOp implementation, and will also fund any other actions that it separately agrees with the other parties to continue funding.<sup>69</sup>

The parties identified the option of withdrawal for several circumstances, principally: in the event of material non-compliance with the agreements not resolved by dispute resolution, in the event of material effects relating to BiOp litigation, in the event of a “force majeure” affecting a Party’s performance,<sup>70</sup> or in the event one party withdraws under one of these provisions, the other parties may also consider withdrawal. In addition, the parties may, by mutual agreement, consider negotiation or withdrawal for changed circumstances other than those enumerated in the agreements.

The provision regarding material effects relating to BiOp litigation (whether FCRPS, Upper Snake, or, for the Three Treaty Tribes, the *U.S. v. Oregon* BiOp) signals the importance to all parties of receiving BiOps that are upheld in any subsequent litigation. From BPA’s perspective, this is of importance for supporting the implementation of the agreements—BPA will have to re-examine the significant financial commitments in these agreements, if as a result of BiOp litigation, BPA is obligated to undertake additional actions that are financially material. However, withdrawal is not a decision to be taken lightly by BPA or any other party, given the value of the agreements.

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<sup>67</sup> Section IV.E of the Three Treaty Tribes, Idaho, and Montana MOAs; Section III.F of the Colville MOA.

<sup>68</sup> Section IV.F of the Three Treaty Tribes, Idaho, and Montana MOAs; Section III.G of the Colville MOA.

<sup>69</sup> Section IV.E.5 of the Three Treaty Tribes MOA; Section IV.E.7 of the Idaho and Montana MOAs, and Section III.F.5 of the Colville MOA. BPA might agree to continue with some projects for support of Northwest Power Act commitments, for example, although not necessarily for the same scope, duration, or at the same budget levels.

<sup>70</sup> Section V.I.2 of Three Treaty Tribes MOA, Section IV.H.2 of the Colville MOA; and Section V.H.2 of the Idaho and Montana MOAs.

Under the terms of the agreements then, if a court subsequently rules against any of the BiOps and orders (directly or through a resulting amended BiOp, whether through court-ordered mediation or not) additional actions that are either financially material to an Action Agency, or that materially constrain the Corps or Reclamation from meeting FCRPS purposes, or, in the case of the Three Treaty Tribes MOA, that materially constrains the actions in the *U.S. v. Oregon* Management Plan, the parties must meet to review those actions, and determine an appropriate response. If renegotiation is not successful, withdrawal is allowed. The parties discussed, but ultimately decided not to define “material.” As a result, what is “material” will be determined in the specific context and circumstances in which it may arise.

### *3.5.7 Binding effect and judicial review*

For the tribal parties in particular, assurances that BPA’s commitments were binding such that they would become part and parcel of BPA’s responsibilities, regardless of who the Administrator may be, was critical. BPA views the Three Treaty Tribes and Colville MOAs as akin to BPA executing a programmatic contract: the mutual commitments between BPA and the tribes were developed with bargained for consideration, and BPA expects to implement them as such. To provide additional assurance to the tribes of its commitments, BPA agreed that in addition to the remedy of withdrawal, the tribes may challenge in any appropriate forum asserted non-compliance with the terms of the Agreement, including judicial review of BPA’s actions.<sup>71</sup> The judicial review provision was expressly limited to BPA in recognition of its unique authority amongst the Action Agencies to make binding funding commitments, not contingent on appropriations from Congress (although BPA’s budget submission and certain capital projects remains subject to further Congressional review).<sup>72</sup>

BPA views these agreements as akin to programmatic contracts for goods or services. BPA believes that any judicial review of unresolved disputes regarding implementation of the terms of the agreements would be most appropriately resolved as other government contracts claims are—in actions for damages before the Board of Contract Appeals, or the Court of Federal Claims.<sup>73</sup> The appropriate court will ultimately depend, however, on the nature of the claim and the relevant court’s jurisdiction.

### *3.5.8 Miscellaneous other provisions*

All of the agreements recognize that all activities undertaken pursuant to the agreements must be in compliance with all applicable laws and regulations,<sup>74</sup> such as NEPA and the ESA. In addition, there is a specific recognition that actions of the Corps and

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<sup>71</sup> Section IV.E.4 of the Three Treaty Tribes MOA; Section III.F.4 of the Colville MOA.

<sup>72</sup> 16 U.S.C. sections 838b(d), 838i(a), and 839b(h)(10)(B).

<sup>73</sup> BPA is not designating a Contracting Officer at this time, but will do so should it become necessary in response to a claim unresolved by the parties to the tribal MOAs.

<sup>74</sup> Section V.B of Three Treaty Tribes, Idaho, and Montana MOAs; Section IV.B of Colville MOA.



Reclamation are subject to the availability of appropriated funds from Congress.<sup>75</sup> The term of the agreements are a little over ten years—through fiscal year 2018 (from date of signature through midnight on September 30, 2018).<sup>76</sup> There are two exceptions to this term relating to hatchery commitments in the Three Treaty Tribes MOA. First, should a hatchery action proposed in that agreement not begin construction by the last year of the agreement, BPA will continue to make the hatchery funding available for an additional five years.<sup>77</sup> Second, the Three Treaty Tribes agree that they will not seek additional funding for hatcheries from the Action Agencies for 30 years from the effective date of the agreements, subject to a few exceptions in recognition of unique circumstances.<sup>78</sup>

### **3.6 Changes made to the final MOAs**

Following the release of the negotiated agreements for public review, the parties modified the agreements in the final form adopted here. The changes were primarily minor, and generally of a technical and administrative nature, which included filling in the “Notice” provisions of each agreement and assigning signature blocks; correcting typographical errors, formatting errors, grammar edits and the like. In addition, there were the following more substantive changes.

#### *3.6.1 Three Treaty Tribes MOA*

At the time of posting for public review on April 7, the Tribes had not yet finalized the attachment identifying the survival benefits to listed populations of the actions being funded. That attachment has since been finalized<sup>79</sup> and is included in the MOA. The attachment had been discussed in detail between the parties, such that BPA was confident there had been a meeting of the minds on what was to be included. As a result, BPA determined it was not necessary to delay the public review period until the attachment could be provided.

#### *3.6.2 Colville MOA*

Similarly, at the time of publication on April 7, 2008, the Colville Tribes’ abstracts for the projects committed to had a few areas where additional information was needed. This was provided and the revised Attachment B posted on line on April 23, 2008.<sup>80</sup> In addition, following review of the Three Treaty Tribes MOA, the Colville Tribes saw provisions of interest to them in that MOA, and requested their inclusion in the Colville MOA as well. The provisions the parties agreed to include in the final Colville MOA were: additions to the hydro commitments section to be similar to the Three Treaty

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<sup>75</sup> Section V.I.3 of Three Treaty Tribes MOA; Section IV.H.3 of Colville MOA; Section V.H.3 of the Idaho and Montana MOAs.

<sup>76</sup> Section V.A of the Three Treaty Tribes, Idaho, and Montana MOAs; Section IV.A of Colville MOA.

<sup>77</sup> Section IV.B.2 of Three Treaty Tribes MOA.

<sup>78</sup> *Id.*

<sup>79</sup> The benefits were made available at [www.salmonrecovery.gov](http://www.salmonrecovery.gov) on April 23, 2008.

<sup>80</sup> [www.salmonrecovery.gov](http://www.salmonrecovery.gov).

Tribes MOA (including the Colville Tribes as part of the meeting to discuss existing information regarding John Day reservoir operations; adding similar forecasting and Canadian Treaty commitments, adding commitments regarding the Fish Passage Center) and conforming the changed circumstances language to the language contained in the other MOAs. These changes did not affect the funding commitments in the Colville MOA.

### *3.6.3 Idaho MOA*

For clarity, the reference to commitments to the Montana operations was modified in this MOA to make clear the focus was operations for the Libby and Hungry Horse projects.<sup>81</sup>

### *3.6.4 Montana MOA*

To address particular concerns raised by the Confederated Salish and Kootenai Tribes (CSKT) of the Flathead Nation, language was added to the final Montana MOA to confirm that nothing in the Montana MOA was intended to alter, disrupt, or otherwise re-arrange existing mitigation programs or funding for fisheries habitat acquisition already established between Montana, BPA, and the CSKT.<sup>82</sup> Other changes included some additional clarifications regarding the referenced Montana operations,<sup>83</sup> and future funding requests regarding habitat acquisitions.<sup>84</sup>

## **3.7 Integration with the FCRPS/Upper Snake BiOps**

The Action Agencies believe their proposed action for the draft BiOps, including the RPAs, will avoid jeopardy and will place the listed stocks on a trend toward recovery. The actions BPA is committing to fund under the agreements provide greater specificity and detail for the actions already proposed, but also include additional actions to benefit listed fish. The Action Agencies have provided NOAA with this information in a supplemental Biological Assessment to be considered by NOAA for the final BiOps.

The actions committed to in the MOAs provide specificity as to the project, implementing entity, and funding for projects that fulfill an identified RPA activity. For example, under RPA No. 35, the Action Agencies propose to fund and implement projects to achieve population-specific habitat quality improvements by 2018.<sup>85</sup> In the Three Treaty Tribes MOA, BPA will provide the Umatilla Tribe \$200,000 per year to protect and restore the Tucannon watershed, and improve habitat for the Tucannon River population of Snake River spring/summer Chinook. This project will help achieve the 17 percent habitat quality improvement commitment for the Tucannon River population.<sup>86</sup>

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<sup>81</sup> Section II.D of the Idaho MOA.

<sup>82</sup> Section III.A.2 of the Montana MOA.

<sup>83</sup> Section II.D.1 of the Montana MOA.

<sup>84</sup> Section III.C.3 of the Montana MOA.

<sup>85</sup> Draft FCRPS BiOp (NOAA Fisheries, October 31, 2007), Appendix: Proposed RPA Table, Table 5.

<sup>86</sup> See Attachment G to the Three Treaty Tribes MOA.

As another example, in the Three Treaty Tribes MOA, BPA will fund the Yakama Nation an average of \$404,000 annually to implement seven new projects to improve habitat quality for the Entiat populations of Upper Columbia steelhead and spring Chinook. These projects will help the Action Agencies’ meet their commitment for habitat improvements for these populations of 8 and 22 percent, respectively.<sup>87</sup> Other actions committed to in the MOAs that provide greater specificity include, for example, habitat improvement actions in other subbasins, hydro performance standards and metrics, efforts to improve and evaluate water management, and Snake River sockeye production.

The agreements also add new efforts to those included in the draft BiOps, providing additional insurance for listed species. For example, BPA is currently implementing projects to improve habitat in an area used by the Middle Fork John Day River populations of Mid-Columbia steelhead. BPA expects that the habitat quality improvement objectives for this population will be fully met in 2009 with the implementation of existing projects. Under the Three Treaty Tribes MOA, however, BPA will continue to fund approximately \$2.3 million per year for the Confederated Tribes of the Warm Springs Reservation to implement five projects that will improve habitat used by this population. The continuation and expansion of habitat quality improvement actions in this watershed provided by the MOA will provide additional benefits to this population, above and beyond the implementation required in the BiOp. Other examples of additional actions that exceed draft BiOp targets include Snake River kelt reconditioning to improve steelhead productivity, conservation law enforcement to aid fish survival for multiple stocks, and changes in summer spill triggers and fish transportation protocols. Additional actions like these provided for in the agreements will improve the probability of success for future regional recovery efforts.

**3.8 Funding Commitments for BPA, and relationship to ratemaking**

A summary of the approximate total funding commitments BPA is making in entering into these agreements is displayed in Table 1, below.

Table 1. BPA Funding Commitments, Total, Over Term of Agreements, in millions of dollars

	EXPENSE	CAPITAL	TOTAL
THREE TRIBE	\$516	\$132	\$648
COLVILLE	\$158	\$46	\$204
IDAHO	\$52	\$13	\$65
MONTANA	\$0.05	\$16	\$16
<b>TOTAL</b>	<b>\$726</b>	<b>\$207</b>	<b>\$933</b>

This summary was developed by “rolling up” and rounding the annual BPA funding totals identified in the MOAs and associated project spreadsheets (it does not supersede

<sup>87</sup> *Id.*

the specifics of the MOAs themselves). This summary does not take into account factors such as: the prescribed ramp up period in fiscal year 2008 and 2009 (in which funding amounts from BPA are expected to be less than the described annual budgets for these projects in those years); the inflation adjustment of 2.5% beginning in fiscal year 2010; the potential for shifts between expense and capital categories; the timing of capital investments and when payment of debt service begins and ends, including BPA's repayment to the Treasury of any power-share costs attributable to Corps or Reclamation actions in support of the Accords. Absent the prescribed inflation adjustments, however, this does illustrate the maximum BPA expects to provide in direct support of the projects committed to in the agreements.

BPA will begin implementing the agreement commitments immediately. BPA expects to fund commitments in fiscal year 2008 out of existing budgets, and reserves if needed. BPA expects that MOA commitments in fiscal year 2008 will not affect rates for fiscal year 2008 because with the start of implementation after mid-year of the fiscal year, the bulk of the work will be in support of the on-going project commitments which are already budgeted for. The ramp up for new and expanded projects is what may require additional funding in fiscal year 2008. BPA expects that unspent fish and wildlife program direct funding (not utilized by project proponents) and reserves as needed will support these new and expanded projects adequately. If they do not, execution of these MOAs is a Trigger Event under the NFB Adjustment clause of the existing rate design, and BPA can recover needed costs.<sup>88</sup>

After fiscal year 2008, BPA expects to include its costs of implementing the agreements as part of its revenue requirements in its wholesale power rates. For fiscal year 2009 expenditures, BPA will forecast the costs of implementing the agreements (along with BPA's other fish and wildlife commitments), and vet that forecast in a workshop open to the public. That workshop is expected to be held in May 2008. Following the workshop, BPA will refine the forecast as appropriate, and then include the forecast costs in its revenue requirements for the final rates proposed for fiscal year 2009.

Similarly, for the fiscal year 2010 and 2011 rate period, BPA will forecast the costs of implementing the agreements (along with BPA's other fish and wildlife commitments) and vet that forecast in a workshop open to the public. Again, BPA will use that information in developing its proposed revenue requirement for rates. BPA expects to use a similar approach for the remaining rate periods of the agreements (the length of the rate periods have not been identified yet).

#### **4.0 PUBLIC REVIEW & COMMENT**

The key concepts underlying this agreement, including a holistic approach to addressing the needs for fish affected by the FCRPS and the kinds of projects appropriate for

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<sup>88</sup> BPA 2007 General Rate Schedule Provision, Section II.D.6, page 86. Available at: [http://www.bpa.gov/power/PFR/rates/2007-09\\_Power\\_Rates.pdf](http://www.bpa.gov/power/PFR/rates/2007-09_Power_Rates.pdf).

mitigation, have been developed over many years in a variety of public forums. Those public processes include the Council's 2000 Fish and Wildlife Program and BPA's programmatic fish and wildlife policy direction (addressed in the Fish and Wildlife Implementation Plan Environmental Impact Statement, or FWIP EIS and adopted in a 2003 record of decision, or ROD). In addition, many of the habitat, hatchery and other non-hydro projects to be implemented pursuant to these agreements had their genesis in the Council's and BPA's 2007-2009 solicitation processes, which included multiple opportunities for public review. Similarly, efforts to mitigate specific to ESA-listed fish have been included in the BiOp remand collaboration, in which many regional sovereigns have been extensively engaged, and which have included opportunities for public review. And, finally, tying these things all together are the agreements themselves, which BPA released for public comment in April. All of these forums provided opportunities for public review and public comment, and are summarized below.

#### **4.1 Processes Leading to the Accords**

##### *4.1.1 The Council's 2000 Fish and Wildlife Program*

In preparing the 2000 Fish and Wildlife Program, the Council solicited recommendations from the region's fish and wildlife agencies, tribes, and others, as required by the Northwest Power Act. After reviewing the recommendations, the Council prepared a draft Program and then conducted an extensive public comment period before finalizing the Program in December 2000. Since 2000, the Council has amended its program twice, once with the mainstem amendments in 2003, and again with the subbasin plans in 2005. In preparing the mainstem plan, the Council solicited recommendations from the region's state and federal fish and wildlife agencies, tribes, and others. The Council conducted an extensive public comment period on the draft mainstem plan before finalizing these program amendments. The Council also solicited recommendations for Program amendments in the form of subbasin plans so that they could adopt more specific biological objectives and measures for tributary subbasins and specific mainstem reaches. In May 2004, the Council received proposed subbasin plans for 57 subbasins of the Columbia River. These subbasin plans were developed collaboratively by state and federal fish and wildlife agencies, tribes, local planning groups, fish recovery boards, and Canadian entities where the plans address transboundary rivers. The planning effort was guided by the Council and funded by BPA. The public was given an opportunity to review and comment on the draft subbasin plans.

##### *4.1.2 BPA's FWIP EIS public processes*

As discussed in more detail in the NEPA section of this Record of Decision, BPA prepared the Fish and Wildlife Implementation Plan (FWIP) EIS to help BPA establish a comprehensive and consistent policy to guide the implementation and funding of the agency's fish and wildlife mitigation and recovery efforts in the region. As part of developing the FWIP EIS, BPA conducted extensive public outreach to help determine the spectrum of fish and wildlife issues in the region, as well as the various regional

proposals that had been suggested to aid in mitigation and recovery efforts over the years. Preliminary scoping for the FWIP EIS began in 1998 with the Council's Multi-Species Framework Project. Formal scoping for the EIS began in October 1999. The scoping process for the FWIP was then incorporated into the public meeting sessions for the Federal Caucus, and a total of 16 public scoping meetings were held throughout the Pacific Northwest in February and March 2000. BPA also participated in many ongoing processes concerning fish and wildlife that were occurring at the time of EIS preparation, such as the development of the Council's 2000 Columbia River Basin Fish and Wildlife Program.

For the FWIP EIS, BPA developed alternative policy directions based on multiple existing initiatives in the region. BPA also worked with the public and the agencies to identify the key issues that are necessary to address for any comprehensive fish and wildlife mitigation and recovery plan to be successful. These key issues were used to organize much of the analysis in the FWIP EIS (FWIP EIS, Section S3.3).

After public release of the Draft FWIP EIS in June 2001, BPA held six public meetings and workshops across the region to receive comments. During the comment period, BPA received approximately 400 individual comments. BPA arranged for opportunities to interact directly with interested members of the public and share ideas on specific aspects of the Draft EIS. These comments were responded to in the final FWIP EIS (FWIP EIS, Section 8.1) and considered in the Administrator's decision to implement the PA 2002 Policy Direction.

#### *4.1.3 2007-2009 BPA-Council solicitation*

Many of the projects proposed by the parties for implementation as a part of these agreements were initially proposed as part of the Council's 2007-09 project solicitation process. In October 2005, the Council, in coordination with BPA, solicited proposals from regional entities for projects that would protect, mitigate and enhance fish and wildlife affected by the development and operation of the FCRPS consistent with the Fish and Wildlife Program. All proposals, submitted by January 10, 2006, were posted on the Columbia Basin Fish and Wildlife Authority website and available to the public.<sup>89</sup> The proposals were reviewed by the ISRP for scientific merit and consistency with the program, after which project sponsors were given an opportunity to respond to ISRP comments and questions.<sup>90</sup> Proposals were then sent to local groups for review; the extent to which these local reviews were open to the public varied by location.<sup>91</sup> Upon reviewing ISRP and local reviewer comments and deliberating at various Council public meetings, the Council released draft recommendations in mid-September 2006 on which projects should receive BPA funding. Those recommendations were open for public review and comment through October 6, 2006. In making its final project recommendations to BPA in November 2006, the Council considered the public

<sup>89</sup><http://www.cbfa.org/solicitation/components/forms/Allproposals.cfm>.

<sup>90</sup><http://www.nwcouncil.org/library/isrp/isrp2006-6.htm>.

<sup>91</sup><http://www.nwcouncil.org/fw/budget/2007/Default.asp>.

comments on its draft along with the project proposals, the review report of the ISRP, the public comments on the panel's report, the prioritization recommendations from the various review groups organized by the Council, and other comments and information in the Council's administrative record. BPA relied on the ISRP review and Council recommendations in making its own FY 2007-2009 program funding decisions in February of 2007.<sup>92</sup>

#### *4.1.4 BiOp remand collaborative process*

The BiOp remand collaborative process, including associated technical work groups involved hundreds of meetings over the past two years, with over 150 participants. While the collaboration itself was not open to public review, the public was represented by the various participating sovereigns (including states, tribes, and federal agencies). The results of the collaboration—the draft FCRPS and Upper Snake BiOps—were made public and comments solicited on October 31, 2007.<sup>93</sup>

## **4.2 Public Review of the MOAs**

After negotiations with each of the parties was completed, the proposed agreements were announced through press releases, a press call, and posting on the government's salmon recovery website, [www.salmonrecovery.gov](http://www.salmonrecovery.gov). The Three Treaty Tribes MOA and Colville MOA were posted on April 7, 2008; the Idaho MOA on April 9, and the Montana MOA on April 11, 2008. BPA sought public comment on the proposal to enter into the agreements as negotiated, through April 23, 2008. BPA also sent notice to its entire BPA Journal mailing list (approximately 3500 members) and posted an updated to the Journal website on April 16, 2008.

BPA received 39 sets of letters or e-mail comments in response to its request for comments. Comments were received from a wide variety of sources throughout the Basin, including from individual citizens, tribes, the State of Oregon, utility groups and other BPA customer organizations, and environmental organizations. Some expressed opposition to the agreements, others expressed support, and still others were unsure but had concerns. Comments can be viewed at the BPA website: <http://www.bpa.gov/applications/publiccomments/closedcommentlisting.aspx>. Following the close of the comment period, BPA reviewed all of the comments, sorted them by general theme or concern, and consulted with the other agreement parties about them as needed. All comments were considered by BPA in its decision whether to sign on as a party to the Accords. In the following section, BPA addresses comments that are not otherwise addressed in this Record of Decision, comments that were common or frequent, or comments that expressed substantive concerns about BPA's proposal to enter into the Accords.

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<sup>92</sup><http://www.efw.bpa.gov/IntegratedFWP/policyframework.aspx>.

<sup>93</sup>[www.salmonrecovery.gov](http://www.salmonrecovery.gov).

### **4.3 BPA Analysis of Comments**

#### *4.3.1 Comments regarding the Agreements overall*

Some commenters express concern that although the habitat and other mitigation efforts may be appropriate, the effort remains insufficient without additional changes to the hydrosystem.<sup>94</sup> Other commenters noted that the hydro system had already borne most of the funding for mitigation despite evidence that many factors contribute to weak returns of stocks.<sup>95</sup> As BPA discusses in more detail in Part 5 of this Decision, BPA and the parties to these Accords believe that the package of actions committed to in the BiOps and the MOAs provides the best opportunity for success for the listed fish over the next ten years, improving survival through hydro, habitat, hatchery and harvest management actions.

The MOAs support the structural improvements, performance standards, and the passage and initial transportation strategies in NOAA Fisheries' draft FCRPS BiOp, which are not "status quo" but are focused on improved fish survival. These actions are based on extensive dam-by-dam analysis, including modeling of fish survival, and are guided by the best available science.<sup>96</sup> The agreements specifically address hydro actions, confirming dam performance standards that require the Action Agencies to achieve 96% average survival for spring migrating juvenile fish and 93% survival for summer migrating fish. These performance standards are a key feature of the BiOps, but the MOAs provide additional clarifications and considerations of other performance metrics, such as delay. In addition, a number of specific changes have been made in the balance between spill and transportation, investigations to improve water management, and summer spill triggers. For example, in the draft FCRPS BiOp, summer spill would end when less than 1000 fish passed for three consecutive days. Actions confirmed in the Three Treaty Tribes MOA provide additional protection by lowering the threshold from 1000 to 300 fish.

The hydro actions referenced in the MOA reflect the federal agencies' commitment to increase fish survival. The Action Agencies will be investing approximately \$500 million in dam modifications to make dam passage and other dam features more effective and efficient for the fish. The goal is not more spill for its own sake, but spill and other passage targeted at optimum fish survival. Juvenile fish survival today is higher than it was in the 1960s when there were only four dams in place. To make further significant modifications to the hydrosystem may not provide significant viability benefits to fish, but is likely to produce significant costs and impacts to other resources.

Some commenters suggested that BPA should use the funding committed in the MOAs to remove the four Lower Snake Dams instead.<sup>97</sup> The existing record and best available

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<sup>94</sup> See, e.g., comments of the State of Oregon; comments of Save Our Wild Salmon Coalition.

<sup>95</sup> See, e.g., comments of Northwest RiverPartners.

<sup>96</sup> The COMPASS model used has received multiple reviews by the ISRP.

<sup>97</sup> See, e.g., comments of Save Our Wild Salmon Coalition.



science suggests otherwise. In a seven-year, independent, peer-reviewed study, the U.S. Army Corps of Engineers concluded that breaching the dams by itself would not recover the listed stocks of salmon and steelhead, would take the longest time to benefit the fish, and would be the most uncertain to implement. Breaching the four lower Snake River dams would provide no benefit for 9 of the 13 listed stocks in the Columbia River Basin. Instead, the study recommended major improvements to fish passage at the dams,<sup>98</sup> improvements that are being implemented by the Action Agencies through the BiOps.

In addition, independent analysis by the Council demonstrated that removal of the dams would require replacement power, most likely with natural gas. This would result in *increased* carbon dioxide production, at a time when the region is seeking ways to *reduce* production of climate-warming gasses. The Council study found that removing the dams and replacing the power with the most likely fossil-fuel resource would add 5.4 million tons of carbon dioxide every year to the region's air. The Council concluded that meeting the region's carbon reduction goals will be very challenging and that removing the lower Snake River dams would be "counterproductive."<sup>99</sup>

The MOAs were developed to improve survival and deal with problems for all fish stocks. Most of the ESA listed stocks are below the Snake River dams. Also many unlisted stocks like Hanford Reach, Deschutes, Umatilla, and Yakima Chinook exist below the Snake River dams. The broad hydro, habitat, and hatchery plan in the MOAs will help salmon wherever they are in the Columbia Basin. Breaching the four Lower Snake dams would not.

Some commenters expressed concern that the MOAs provided little or no additional biological benefits over the status quo since many on-going projects were included.<sup>100</sup> The MOAs include a mixture of on-going projects (projects that were recommended by the Council and funded by BPA for the 2007-2009 period), expansions of those on-going projects, and new projects. Approximately 40 percent of the funding committed to by BPA will support on-going projects for ten years, thereby providing stability and certainty to the projects and their benefits, preserving their priority for an extended length of time and in some cases providing additional benefits through improvements to project design. Approximately 60 percent of the funding committed to by BPA will go to support new activities (expanded on-going projects and new projects) including activities that the Action Agencies' included in their proposed action for the BiOps. With the commitments in the MOAs, BPA is identifying the specific implementer, the budget, and binding itself to supporting them for ten years. In so doing, BPA is making them reasonably certain to occur. Other projects that do not directly benefit ESA-listed species

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<sup>98</sup> Lower Snake River Juvenile Salmon Migration Feasibility Report/Environmental Impact Statement; U.S. Army Corps of Engineers; February 2002; [http://www.nww.usace.army.mil/lsr/final\\_fseis/study\\_kit/studypage.htm](http://www.nww.usace.army.mil/lsr/final_fseis/study_kit/studypage.htm).

<sup>99</sup> Carbon Dioxide Footprint of the Northwest Power System; Northwest Power and Conservation Council; November 2007; <http://www.nwcouncil.org/library/2007/2007-15.htm>.

<sup>100</sup> See, e.g., comments of Save Our Wild Salmon Coalition.

will nonetheless help BPA meet its obligations under the Northwest Power Act, for which the parties are also providing forbearance.

Some commenters expressed concern about the level of funding committed to by BPA in the Accords, particularly since the Accords will not preclude additional funding requests from non-MOA parties, or because the agreements may provide funding for projects beyond those necessary to mitigate for the FCRPS.<sup>101</sup> While the funding commitments are significant for BPA and its ratepayers, BPA believes the commitments are appropriate and reasonable under the circumstances, and are in support of BPA's mitigation obligations. BPA is receiving specific deliverables from tribal and state fish and wildlife partners including identified projects on-the-ground with real biological benefits to help BPA meet its fish and wildlife responsibilities. The agreements provide greater certainty regarding costs associated with BPA's responsibilities, thus helping BPA manage its financial risks. BPA recognizes that there will be pressures to further increase BPA's funding commitments for fish and wildlife mitigation, but these agreements help address uncertainties regarding future hydrosystem operations where BPA customers faced the greatest financial exposure. As discussed further in Part 5 of this ROD, weighing multiple factors BPA has concluded the Accords are a good value for the region.

Some commenters expressed concern that the Agreements were simply a purchase of the tribes' interests.<sup>102</sup> To the contrary, the Agreements represent a mutual commitment by the parties for BPA to fund and the tribes to deliver benefits to targeted fish species. The projects to be implemented have been vetted by tribal scientists, are linked to biological needs and benefits, and reflect the tribes' substantial expertise. The tribes have long pursued a comprehensive, holistic approach to fish recovery. Their success here, in confirming the Action Agencies' support of that approach and obtaining BPA's firm commitments for stable funding to support it, is a testament to their dedication.

Some commenters indicated that the MOAs themselves did not meet ESA standards for avoiding jeopardy,<sup>103</sup> or that the MOAs provide insufficient benefits to address the needs of Snake River ESA-listed species.<sup>104</sup> The Biological Opinions are the documents that provide the jeopardy analysis of FCRPS actions for listed species, including the Snake River ESA-listed species. As discussed in Part 3.7 of this Record of Decision, the actions committed to in the MOAs are contributing to the NOAA jeopardy analysis by making some actions more specific and certain through defined projects and budget commitments. In addition, the agreements provide biological benefits beyond those included in the draft FCRPS BiOp through additional ESA actions that will enhance the species' trend to recovery.

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<sup>101</sup> See, e.g., comments of the Pacific Northwest Generating Cooperative.

<sup>102</sup> See, e.g., comments of Robert Neal.

<sup>103</sup> See, e.g., Comments of the Wild Fish Conservancy.

<sup>104</sup> See, e.g., comments of the Shoshone-Bannock Tribes.

Some commenters questioned how regional coordination on ESA implementation would occur beyond the MOA Parties.<sup>105</sup> The Action Agencies have committed to continue the collaboration started under the judicial remand of the 2004 FCRPS BiOp. The Action Agencies will continue to confer with states and tribes to assist and advise the Action Agencies on our ESA implementation over the 10 year term of the BiOps.

Some commenters were concerned that these agreements present an inequitable allocation of funding to the MOA parties relative to other regional interests,<sup>106</sup> or an inequitable allocation in relation to upriver and downriver natural resources.<sup>107</sup> These MOAs resolve ESA and Northwest Power Act issues as between the parties to the agreements. While the focus was on ESA-listed species, there are significant benefits to non-listed species as well, including resident fish, and in some cases, wildlife. The MOAs are not intended to identify all of the activities BPA will be committing to for its fish and wildlife obligations. BPA's responsibility is to use the Bonneville Fund for the protection, mitigation and enhancement of fish and wildlife affected by the FCRPS. BPA is not obligated to fund specific entities or to ensure parity of funding between fish and wildlife resources. As discussed further in Part 5 of this Record of Decision, these MOAs contribute to BPA's responsibilities under the Northwest Power Act.

Some commenters were uncertain about how project commitments in the MOAs may impact existing projects funded by BPA but not included in the MOAs.<sup>108</sup> BPA's funding commitments for new and expanded projects in the MOAs are new and additive to on-going 2007-2009 project funding commitments. BPA will be proposing, in the next month, increased Fish and Wildlife Program budgets for the fiscal years 2009, 2010 and 2011 to reflect the cost of the MOAs. See Part 3.8 of this Decision for further details.

Some commenters were concerned that science review for projects agreed to under the Accords would be truncated, *pro forma*, or avoided altogether.<sup>109</sup> As discussed in detail in Part 3.4.1 of this Record of Decision, the parties recognized the importance of science review by the Independent Science Review Panel (ISRP), and expressly acknowledged that process. The parties may seek refinements to the ISRP review process, in coordination with the Council (which is also exploring similar refinements), but these would be to focus and streamline those processes while still assuring adequate science review. Similarly, where it is important to get new activities going quickly, the parties may seek expedited review by the ISRP. There is no basis to assume that ISRP review will be truncated or otherwise *pro forma*. The parties recognized that ISRP review could require changes to projects, and so the parties developed processes for resolving ISRP issues, including finding a replacement project that can address or avoid problems identified by the ISRP if reasonable modifications can't be agreed upon.

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<sup>105</sup> See, e.g., comments of Pacific Northwest Generating Cooperative.

<sup>106</sup> See, e.g., comments of the Shoshone-Bannock Tribes.

<sup>107</sup> See, e.g., comments of the Confederated Salish and Kootenai Tribes of the Flathead Nation.

<sup>108</sup> See, e.g., comments of Stefan Wong.

<sup>109</sup> See, e.g., comments of Northwest RiverPartners.

Some commenters were concerned that the agreements affirm the continuation of the Fish Passage Center, which some consider an advocacy rather than a science organization.<sup>110</sup> Through the agreements, BPA acknowledges the Center is important to the tribes, and that the tribes utilize the services of the Center for monitoring and verification work regarding FCRPS impacts. BPA has committed to funding the Center with funds for a manager and for technical and clerical support in order to perform the functions of the Center as stated in the Council's 2003 Mainstem Amendment for the duration of the Agreement. Should the Council decide through a Program amendment process to alter the Center's role in a way that affects the tribes' ability to obtain monitoring and verification help, BPA will work with tribes to provide such services, either by funding the tribes directly for the work, or through an agreed-upon third party.<sup>111</sup> The Action Agencies will not support in any manner actions that undermine the Fish Passage Center provisions agreed to in the MOA.<sup>112</sup> The Action Agencies will continue to use the best available science from all sources in monitoring and verifying the performance of the FCRPS.

#### *4.3.2 Comments specific to hydro commitments*

Some commenters expressed concern about support for the Montana operations.<sup>113</sup> The Montana operation for listed sturgeon and other resident fish species is included in the MOAs, but also is included and explained in more detail in the Action Agencies Biological Assessment for the FCRPS. The Montana operations issue involves balancing the needs of resident listed species and anadromous listed species, and BPA believes that the operation described in the draft FCRPS BiOp and affirmed in the MOAs strikes the correct balance. In addition, the operations are part of the Council's Fish and Wildlife Program, and were evaluated by the Independent Scientific Advisory Board (ISAB). The ISAB concluded that the proposed operations were unlikely to show downstream effects to salmon because the annual variability in flow and salmon survival is much larger than the effects of the proposed operations.<sup>114</sup>

Some commenters identified concerns about consideration of operating John Day at minimum operating pool (MOP),<sup>115</sup> or expressed interest in the existing information regarding current operations to be discussed with the tribes.<sup>116</sup> BPA acknowledges the potential adverse impacts to river users from the possible contingent action of lowering John Day reservoir to MOP. No decisions have been made on this action and all relevant environmental and economic issues would be considered if this action were ultimately considered for implementation should the contingency be triggered. BPA supports

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<sup>110</sup> See, e.g., comments of Northwest Requirements Utilities, comments of James Buchal.

<sup>111</sup> See Section II.D of the Three Treaty Tribes MOA.

<sup>112</sup> See Section IV.A.3.b of the Three Treaty Tribes MOA.

<sup>113</sup> See, e.g., comments of the Save Our Wild Salmon Coalition.

<sup>114</sup> ISAB Finding from the Reservoir Operations/Flow Survival Symposium, ISAB 2004-2 (December 10, 2004), available at: <http://www.nwcouncil.org/library/isab/isab2004-2.htm>.

<sup>115</sup> See, e.g., comments of the Inland Ports and Navigation Group.

<sup>116</sup> *Id.*; see also comments of Northwest RiverPartners.

sharing the existing information on current operations of John Day with other interested entities, in addition to the commitment to do so with the tribes under the MOAs.

Some commenters asked for details regarding the reporting, adaptive management, and comprehensive review processes referenced in the hydro sections of the MOAs.<sup>117</sup> These provisions build upon RPA requirements in the FCRPS BiOp and the Action Agencies' Biological Assessment. In brief, the Action Agencies will issue annual and comprehensive progress reports detailing progress in implementation, performance metrics, fish status, research results, and changes through adaptive management. As part of the MOAs, the tribes will be a part of the analysis and discussion of appropriate modifications to operations based on the data. In addition, the Action Agencies will be reporting on climate change research and developments as part of this process. All of these documents will be available to regional parties.

Some commenters questioned the rationale behind reducing the threshold for summer spill curtailment from 1000 fish to 300 fish over a three day period in August, and expressed concern over the potential increased costs of additional spill.<sup>118</sup> The Action Agencies have proposed to curtail summer spill on the Snake River in August only if the number of fish drops below a numeric threshold.<sup>119</sup> The numeric threshold is designed to provide assurance that nearly all of the Snake River subyearling Chinook that might be expected to out-migrate during the summer months have already passed through the system before summer spill ends. The 1000 fish threshold was initially proposed to address data indicating that during the past three years, there has been a shift in the timing of out migration of sub-yearling Chinook salmon in the Snake River. In 2005-2007, less than or equal to 1.2 % of the total run passed Lower Granite dam during August compared to 5.9% on average in 1997-2004. The 300 fish threshold agreed to by the Action Agencies in the Three Treaty Tribes MOA and proposed to NOAA was selected as an even more conservative threshold, providing additional assurance that subyearlings have moved downstream. In terms of economic effects of this change, the total number of spill days expected as a result of changing the trigger from 1000 fish to 300 fish should not be significantly different. This solution adapts Snake River summer spill operations to the observed timing of the subyearling Chinook salmon out-migration, rather than choosing a specific date to end spill on the Snake River that may not align well with fish passage timing for a given year.

Some commenters expressed concern that the MOAs do not address issues identified in the draft BiOp regarding planned spill and flow, referencing in particular a NOAA

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<sup>117</sup> See, e.g., comments of the Pacific Northwest Generating Cooperative.

<sup>118</sup> See, e.g., comments of the Public Power Council.

<sup>119</sup> In addition to the numeric threshold, the earliest date when spill could be shut off is staggered, so that fish that are actively migrating past Lower Granite Dam in early August will have time to migrate over spillways past the remaining Snake River dams. There are also built-in safeguards to allow spill to continue through August if the migration is protracted. In years where spill was shut off due to low fish passage, spill would restart if fish numbers increase. Spill will continue through August at McNary, John Day, The Dalles, and Bonneville dams at volumes consistent with recent Court ordered levels.

Fisheries memo from John W. Ferguson to Bruce Suzumoto regarding survival estimates of August 31, 2007 (Ferguson memo).<sup>120</sup> The Ferguson memo relates specifically to spring *in-river juvenile* survival rates. The proposed hydro operations in the draft BiOp, and affirmed through the MOAs, propose to maximize transportation (i.e. reduce spring spill) only at transport projects on the Snake River (Lower Granite Dam, Little Goose Dam, and Lower Monumental Dam) and only during a limited period in May when high in-river survival rates *do not* equate to increased adult return rates of Snake River steelhead and no, or only minimal, increases for Snake River spring/summer Chinook salmon. Except in the most severe drought years, spring spill levels on the Columbia River and at Ice Harbor dam remain consistent with the Court ordered spill levels that have been in place since 2005. This operation is based on the best available science, yet may be modified as new information is gathered through ongoing research. We still do not know what adult returns will be from juveniles that migrated in 2005-2007, but if new data point to alternative strategies to improve adult returns then the proposed operations may be reassessed.

In addition to spill volumes, the Ferguson memo also hypothesizes that surface passage via the removable spillway weirs at Lower Granite and Ice Harbor dams may have contributed to increased spring in-river juvenile survival rates. The Action Agencies have reaffirmed in the draft FCRPS BiOp their commitment to aggressively pursue additional surface passage facilities in the lower Snake and Columbia Rivers to improve survival. Indeed, since the Ferguson memo was written, new surface passage routes have been installed at John Day, and Lower Monumental Dams. Surface passage routes will be tested at McNary Dam in 2008, and surface passage is scheduled for installation at Little Goose Dam in 2009.

#### *4.3.3 Comments specific to habitat commitments*

Some commenters expressed concern about the value of nutrient enhancement projects in Idaho, indicating they have little value or otherwise distract from actual limiting factors.<sup>121</sup> Nutrient enhancement has been recommended by regional fish and wildlife managers previously in the Fish and Wildlife Program and projects have been reviewed by the ISRP. As to its use in Idaho, BPA is relying on the judgment of Idaho's expert agencies that nutrient enhancement is one method for improving stocks in the Salmon/Clearwater Basins that will serve to complement the overall recovery strategy.

Some commenters expressed concern that the commitments to habitat protection in the Montana MOA violates the terms of an existing MOA to which the State of Montana, BPA, and the Confederated Salish and Kootenai Tribes are parties.<sup>122</sup> Nothing in any of the MOAs is intended to, or will interfere with the existing program for resident fish mitigation described in that existing MOA. BPA expects to continue with the on-going program, and when that MOA expires by its terms, to work with the Salish Kootenai and

<sup>120</sup> See comments of Save Our Wild Salmon Coalition.

<sup>121</sup> See, e.g., comments of the Save Our Wild Salmon Coalition.

<sup>122</sup> Comments of the Confederated Salish and Kootenai Tribes of the Flathead Reservation.

the State of Montana to develop a subsequent programmatic MOA, either together, or separately as those parties desire.

Some commenters indicated it would be appropriate that the funding for the acquisitions of interests in water (for providing instream benefits) could be done through the existing Columbia Basin Water Transactions Program.<sup>123</sup> BPA would support use of the Water Transactions Program for implementation, but it is up to the sponsor of the project to decide what would be the most appropriate means of implementation.

#### *4.3.4 Comments specific to hatchery commitments*

Some commenters expressed concern over the significant investment in hatcheries in the MOAs.<sup>124</sup> As discussed in Part 5.1.3 of this Decision, BPA is well aware of the debate over use of hatcheries to address the recovery of listed salmon and steelhead. BPA recognizes the use of artificial production as being valuable as a tool to aid in the recovery of weak stocks but also sees potential risks to natural spawners if used indiscriminately, such as without appropriate attention to genetic factors. State-of-art facilities that use best management practices have been shown to provide benefits for depressed stocks. BPA's commitment to fund additional artificial production is dependent on NOAA Fisheries' concurrence on ESA compliance, to ensure that the hatcheries do not jeopardize listed salmon and steelhead. Also, BPA funding of hatcheries is tied to the 3-Step Process under the Council's Fish and Wildlife Program, which addresses both independent science review and environmental compliance. In summary, BPA's hatchery actions are intended to strike a balance between use of hatcheries to aid recovery by jump-starting weak stocks, management of risks associated with supplementation, and to enable continuation of fisheries that are critically important to tribes and others.

Some commenters expressed concerns that the funding of a sockeye conservation hatchery in Idaho was not scientifically sound.<sup>125</sup> Snake River sockeye populations were severely depressed prior to their listing in the early 1990s. Captive rearing was, and continues to be, a fail-safe measure to avoid immediate extirpation by preserving genetic material and sustain the population. An ISRP report recently suggested that previous strategies to recover Snake River sockeye have not been successful and should be abandoned. BPA, NOAA Fisheries, and Idaho are not willing to halt on-going efforts to recover Idaho's sockeye salmon. Instead, the federal government and Idaho have expanded sockeye production to enable multiple, sophisticated recovery strategies (beyond captive brood) to increase sockeye distribution and abundance, allow natural selective forces and natural adaptation to operate and improve genetic diversity, and improve survival and trend to recovery.

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<sup>123</sup> See comments of the Columbia Basin Water Transactions Program.

<sup>124</sup> See, e.g., comments of the Native Fish Society.

<sup>125</sup> See, e.g., comments of Save Our Wild Salmon Coalition.

#### 4.3.5 Comments specific to harvest commitments

Some commenters expressed concern regarding the large MOA funding commitments when harvest impacts are asserted to be unaddressed.<sup>126</sup> The ability to harvest salmon remains a very important economic, cultural, and spiritual activity for Northwesterners, and fisheries managers have taken many steps to assure that harvests minimally impact listed species. BPA is providing funding via the MOAs to assist with the management of harvest, particularly in support of conservation law enforcement. In addition, BPA is funding work related to selective fisheries management (see the description in Part 3.3.4 of this Record of Decision for further details). These efforts help to minimize impacts to listed species, while supporting tribal and other harvest activities.

The Three Treaty Tribes MOA also recognizes an interrelationship between analyzing harvest effects and the effects of the FCRPS on listed fish. In the draft FCRPS and Upper Snake BiOps, NOAA relied on a single comprehensive analysis for the FCRPS and Upper Snake proposed actions, providing a source document for the best available data and analysis that is common to the simultaneous biological opinions being issued for these actions. BPA anticipates that NOAA will also utilize this comprehensive analysis in issuing a biological opinion regarding the 2008-2017 *US v. Oregon* Management Plan. The Three Treaty Tribes MOA reflects this interrelationship by its reciprocal provisions assuming BiOps will be issued for the FCRPS, Upper Snake, and *US v Oregon* actions, and that challenges to any of those BiOps could affect a Party's commitments to continue with the MOA.

#### 4.3.6 Comments regarding legal commitments

Some commenters questioned how the MOAs could resolve BPA's obligations under the Northwest Power Act since fish and wildlife managers have frequently asserted that the federal government has provided insufficient funds to implement the Council's Program.<sup>127</sup> The Accords represent these parties' conclusion that with the BiOps and the Accords, the Action Agencies are meeting their responsibilities for a specific ten-year term. The Accords do not bind any other parties to that conclusion.

Some commenters indicated the MOAs were inconsistent with the Northwest Power Act because they focus on mitigation activities for species listed under the ESA.<sup>128</sup> BPA has obligations under the ESA as well as the Northwest Power Act, and seeks to implement them in harmony. When BPA prioritizes its funding to support the needs of listed species in conformance with its ESA responsibilities, BPA is not *ergo* violating the Northwest Power Act. BPA continues to provide mitigation for non-listed species through the Accords, as well as its funding for activities outside of the MOAs under the Council's Program.

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<sup>126</sup> See, e.g., comments of Darryll Olsen, Frank Haw, and Northwest Requirements Utilities.

<sup>127</sup> See, e.g., comments of the State of Oregon.

<sup>128</sup> See, e.g., comments of the Confederated Salish and Kootenai Tribes.



Some commenters expressed concern that requirements relating to *U.S. v. Oregon* are predecisional and inappropriate because they have not yet been finalized.<sup>129</sup> Although the Action Agencies are not a party to the *U.S. v. Oregon* proceedings, BPA understands through discussions with some participants to those proceedings that a new management plan has been developed and agreed to amongst the parties, and that it will be evaluated by NOAA Fisheries in a BiOp to be released simultaneous with the FCRPS BiOp. The Action Agencies did not need to review the agreement to know that it was of central importance to the tribes involved in developing it. Similarly, we understood that the United States concurs in the new management plan, even if it has not yet been formally adopted and approved by the court. Taken together, BPA is confident in the language addressing *U.S. v. Oregon* matters in the Three Treaty Tribes MOA.

#### *4.3.7 Comments regarding the public comment period*

Some commenters expressed concern over the length of time allowed for public review and comment on the proposed agreements.<sup>130</sup> There is no minimum time requirement prescribed either by statute or regulation for BPA's public processes such as the one conducted for the proposed MOAs. BPA provided as much time as reasonably possible given schedule constraints of negotiating the Accords. The Action Agencies sought to conclude their negotiations so that any agreed-upon commitments could be considered in the context of, and in support of, the new FCRPS Biological Opinion scheduled for issuance on May 5, 2008. Working backward from that, BPA needed to provide time for public comments, and review and consideration of those comments, but not prematurely release the proposed agreements before negotiations were concluded. BPA appreciates the efforts regional interests took in reviewing and commenting on the Accords, and believes that, given the breadth and quality of the input it did receive, there was time enough for entities to register their significant concerns. In sum, BPA made a good faith effort at engaging public review and comment while meeting timeframes necessary for completing the Accords.

#### *4.3.8 Comments relating to BPA's NEPA Analysis*

Some commenters suggested that BPA needed to prepare an environmental impact statement (EIS) before entering into the proposed MOAs.<sup>131</sup> As discussed in detail in Part 6 of this Record of Decision, BPA already has in existence a programmatic, policy-level EIS, the Fish and Wildlife Implementation Plan (FWIP) EIS, that assesses the potential environmental impacts associated with its fish and wildlife related actions, and that is intended to support subsequent BPA decisions concerning fish and wildlife mitigation and recovery efforts. In addition to analyzing the effects on fish and wildlife from human activities, the FWIP EIS analyzes the effects on humans from actions taken for fish and wildlife mitigation and recovery. The FWIP EIS process included extensive

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<sup>129</sup> See, e.g., comments of Northwest RiverPartners.

<sup>130</sup> See, e.g., comments of the Confederated Tribes of the Grand Ronde Community of Oregon; comments of Charles Pace.

<sup>131</sup> See, e.g., comments of the Wild Fish Conservancy.

public participation. As a result of the FWIP EIS process, BPA prepared a ROD that announced BPA's selected policy direction (PA 2002) and a strategy for supporting future decisions, including implementation and funding of a variety of fish and wildlife mitigation and recovery efforts. Because the Accords involve commitments related to BPA's fish mitigation and recovery efforts, BPA has reviewed the FWIP EIS and ROD to determine if BPA's participation in the Accords can be tiered to the FWIP EIS and ROD under NEPA, consistent with BPA's documented strategy for tiering subsequent fish and wildlife decisions to the FWIP EIS and ROD. As discussed in the NEPA Analysis section of this ROD, below, BPA has decided to tier its NEPA Record of Decision for the Columbia Basin Fish Accords to the FWIP EIS and ROD, but BPA also will conduct additional NEPA analysis and environmental review as appropriate for specific activities to be funded by BPA under the Accords.

Some commenters expressed a belief that NEPA regulations require that BPA conduct formal government-to-government consultation when federal actions may impact Treaty or aboriginal rights.<sup>132</sup> BPA does not understand this to be a regulatory requirement under NEPA. BPA does, however, respect the tribal interests in and concerns about its proposed federal actions; under BPA's 1996 Tribal Policy, BPA has committed to consulting tribal governments to assure that tribal rights and concerns are considered prior to BPA taking actions, making decisions, or implementing programs that may affect tribal resources.<sup>133</sup>

In addition, some commenters stated that the NEPA regulations at 40 CFR §1502.16(c) require BPA to consider established tribal policies during the NEPA process.<sup>134</sup> This regulation requires that EISs discuss possible conflicts between a proposed action and the objectives of land use plans prepared by federal, regional, state, local, and tribal entities. For proposed projects under the agreements, BPA intends to ensure that appropriate environmental review is carried out prior to implementation and, to the extent applicable, that any such land use plan conflicts are identified in the environmental documentation prepared for the individual projects (see NEPA Analysis section of this ROD, below).

#### *4.3.9 Request for an MOA with customer groups*

Some commenters requested that BPA negotiate an MOA with them, in order to address how their concerns and interests would be taken into account when implementing the proposed agreements.<sup>135</sup> BPA acknowledges that its customers, who will ultimately fund these Accords through BPA's rates, have specific issues and concerns about how BPA will implement these Agreements, and how implementing these Agreements will affect other on-going efforts. While BPA has established a special relationship with the Accord

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<sup>132</sup> See, e.g., comments of the Shoshone-Bannock Tribes.

<sup>133</sup> This comment was raised by the Shoshone-Bannock Tribes, with whom BPA has been consulting regarding implementation of actions by the Tribes for the benefit of ESA-listed stocks under the draft BiOps, and BPA expects to continue those consultations.

<sup>134</sup> See, e.g., comments of the Shoshone-Bannock Tribes.

<sup>135</sup> See, e.g., comments of Northwest Requirements Utilities, and Northwest RiverPartners.

parties, this does not preclude BPA from engaging with customers and other regional interests on key matters addressed by the agreements. BPA will continue in its efforts to be transparent in its decision making, and looks forward to working with its customers to ensure BPA is considering their interests as it implements these agreements.

#### **4.4 Opportunities for Future Public Review of Site-Specific Project Implementation**

As the parties begin implementing the projects committed to in these agreements BPA and/or the project sponsor may also engage in further public involvement activities for new site-specific actions. For example, while BPA is committing to making funding available for new hatcheries in these agreements, the planning, siting, design, and construction of the hatcheries must still undergo development and associated regulatory and compliance reviews, such as site-specific NEPA analysis. The degree of public involvement for a site-specific action such as hatchery development will be commensurate with the relative environmental impacts of, and public interest in, the proposed action. BPA and/or the project sponsor will make diligent efforts to discover potentially interested and affected parties, and will solicit information when appropriate. Interested and affected parties may include nearby landowners or other individuals, interest groups, tribes, and city, county, state, federal and regional agencies. Options to inform the public about project related actions include mailings, public notices, public meetings and workshops, notification in local papers and BPA's monthly newsletter, postings on the internet and radio advertisements, and one-on-one meetings. BPA will document site-specific public involvement as part of the validation process (described further in the NEPA section, below). Activities requiring additional NEPA documentation may have public involvement obligations as outlined in the NEPA regulations.

### **5.0 WHY BPA HAS DECIDED TO ENTER INTO THESE AGREEMENTS**

#### **5.1 The Agreements Fulfill BPA's Mission and Strategic Objectives**

These agreements represent an unprecedented commitment of the Bonneville Fund to the protection and recovery of fish species in the Basin—BPA is making specific, decade-long commitments to provide funding for the benefit of fish in a contract-like fashion directly with tribes and a state. BPA is doing so because these commitments will help BPA meet its mission and related strategic objectives.

BPA's mission includes providing mitigation of the FCRPS' impacts on fish and wildlife and providing an adequate, efficient, economical and reliable power supply.<sup>136</sup> Although not mutually exclusive, achieving this mission requires BPA to balance the competing interests and requirements in emission-free and economically valuable hydropower

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<sup>136</sup> See "BPA Mission," part of BPA's strategic direction for 2008-2014, published in July 2007, and available at [http://www.bpa.gov/corporate/about\\_BPA/Strategy.cfm](http://www.bpa.gov/corporate/about_BPA/Strategy.cfm).

produced by the FCRPS, and in the protection and recovery of the fish and wildlife affected by that hydropower production.

#### *5.1.1 The Accords protect and recover fish*

BPA believes that a collaborative and comprehensive approach to mitigating salmon and steelhead delivers the best opportunity for success. While there remain those that believe that continued litigation is the only sure path, these Accords demonstrate otherwise. In collaboration with the parties to the Accords, BPA is providing significant benefits to fish in a comprehensive program that addresses habitat, hatcheries, harvest and hydro operations. These actions are in addition to the measures included in the Action Agencies' proposed action analyzed in the draft FCRPS BiOp. With a holistic approach that supports fish in all these aspects of their lifecycle, BPA believes it can better meet its mission. The MOAs address hydrosystem operations, adding measures and steps to improve survival and monitor performance beyond the draft FCRPS BiOp. The MOAs also add details and commitments that make off-site actions identified for FCRPS BiOp implementation more reasonably certain to occur, provide additional actions that assist in recovery of ESA-listed salmon and steelhead species, and fund protection for other listed and non-listed fish species. With the commitments in the MOAs, the Action Agencies have enhanced their ability to meet their ESA and other responsibilities, such that the tribes, Idaho and the Action Agencies collectively agree that the Action Agencies will meet their statutory responsibilities for the ten year term.

#### *5.1.2 The Accords support an adequate, efficient, economical and reliable power supply*

BPA provides for an adequate, efficient, economical and reliable power supply, one of the purposes of the Northwest Power Act,<sup>137</sup> in multiple ways. BPA seeks to keep rates as low as possible given sound business principles, and to manage the power aspects of the FCRPS to meet reliability standards and the other purposes of the system. BPA's decision to enter into the 2008 Columbia Basin Fish Accords is consistent with these purposes. Although the funding commitments BPA is making here are large by any measure, they bring to BPA and its customers a greater level of certainty about BPA's fish costs over a longer time than ever before. Instead of every two or three years encountering open-ended requests for fish funding from these parties, there is now more certainty and stability to the funding that BPA can plan for. This helps BPA manage its financial risks.

BPA's preliminary estimates are that the costs of these agreements may translate into wholesale power rates approximately 2-4 percent higher than they would otherwise be, all other things being equal. While BPA seeks to avoid increasing power rates at all, and a 2-4 percent increase is to be avoided if reasonably possible, BPA believes that the value of these agreements in providing measurable benefits for fish, providing certainty of funding expectations and obtaining collaborative support for a holistic, comprehensive

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<sup>137</sup> 16 U.S.C. § 839(2).

package of hydro operations and mitigation projects with the parties make the agreements worth the increased costs to ratepayers. BPA considered that alternative approaches, such as additional modifications to hydrosystem operations, would be less biologically sound, would negatively impact reliability, and would likely be more costly than entering into the Accords.

BPA will refine the estimates of the costs of the agreements as part of a public workshop to address changes in its fish and wildlife costs since initiation of the 2007-2009 rate case, for purposes of the fiscal 2009 rates currently under development. Based on the workshop, scheduled for May 2008, BPA will forecast the cost of implementing the agreements and include that cost in its revenue requirements for its fiscal year 2009 rates. Subsequent workshops will be held in advance of the 2010-2011 rate case to help refine the estimates of agreement implementation costs for the 2010 and 2011 rates.

### *5.1.3 BPA's compromises to reach agreement are reasonable*

As is the nature of such accords, the parties had to make some compromises in their respective positions and objectives to reach agreement. For BPA, the compromises came in agreeing to support some activities that BPA might otherwise assign a lower priority for funding. While all the activities proposed for implementation are consistent with the Council's Program (and are thus in compliance with BPA obligations under the Northwest Power Act), this does not mean that the activities would otherwise have been a priority for BPA. For example, in the 2007-2009 Council solicitation process, the Three Treaty Tribes sought a variety of projects for lamprey research, which BPA generally declined as not an FCRPS priority.<sup>138</sup> Through the course of negotiations, BPA was persuaded that the health of lamprey populations are of such critical importance to the Tribes that agreeing to support lamprey work was essential to reaching agreement, and BPA was willing to compromise to support that work. The parties also believed it would be beneficial to undertake this work to help preclude a future listing of the species as endangered or threatened.

As another example, BPA has also agreed to fund many additional research, monitoring and evaluation (RM&E) activities, on top of those already committed to in the Program and draft FCRPS BiOps. BPA has been concerned for several years about the significant growth of RM&E funding requests to BPA in proportion to the amount of funding fish and wildlife managers seek to implement on-the-ground activities—those that provide direct benefits to species. In its decisions to implement Council-recommended projects for fiscal years 2007-2009, for example, BPA noted that increasing reliance on BPA to provide RM&E funding for activities traditionally done by others (and funded independently by federal and state appropriations) was compromising the delivery of Council Program performance as measured by biological benefits—the focus has been

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<sup>138</sup> Letter from Greg Delwiche, VP Environment, Fish and Wildlife/BPA to Dr. Karier, Chair, Northwest Power and Conservation Council, February 9, 2007; Enclosure 1 at page 10. Available at: <http://www.efw.bpa.gov/IntegratedFWP/policyframework.aspx>.

drifting away from on-the-ground activities that directly benefit fish and wildlife.<sup>139</sup> BPA repeated these concerns in its recent recommendations to the Council for amendments to the Fish and Wildlife Program.<sup>140</sup> BPA is willing to support the additional RM&E commitments contained in these agreements even though BPA might otherwise have concluded these were of low priority for BPA funding. BPA is willing to do so because of the significant reciprocal commitments from the parties in return, including forbearance and affirmation of adequacy.

Some may view BPA's funding for new hatchery actions, particularly the extensive commitments in the Three Treaty Tribes MOA, as contrary to FCRPS priorities and the best available science. BPA's decision to support a robust set of hatchery actions is based on a variety of factors. There is an on-going scientific debate occurring in the region regarding the use of hatcheries in support of ESA-listed stocks and for production for harvest generally. That debate is not resolved, and BPA is not the federal agency with regulatory jurisdiction over hatchery development and production. Moreover, hatchery production is a mainstay of providing for tribal and non-Indian fisheries. BPA's commitment for funding hatchery actions will help protect severely depressed stocks (safety-net actions) and "jump-start" depressed populations in their natural habitat (supplementation); will help support reforms to address hatchery best management practices; will introduce fish where they are currently extirpated; and will support harvest by tribes and others. BPA determined that, with the protections provided for in the agreements—including that parties undertaking hatchery actions will obtain a NOAA determination that the hatchery project will not impede and where possible will contribute to recovery, and that the Three Treaty Tribes generally forbear from additional requests for hatchery actions for thirty years—BPA was reasonably able to support the Tribes' requests.

In terms of what was not resolved by these agreements—such as resolution regarding wildlife mitigation funding—BPA believes that its current commitments and approach to addressing its mitigation responsibilities are appropriate under the law, as has been thoroughly explained in prior BPA decisions and analyses.<sup>141</sup> BPA does not believe that the inability to resolve such issues with the parties in these agreements unduly increases the risks to BPA of entering into these agreements.

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<sup>139</sup> *Id.* at pages 2-3, and pages 8-11 of Enclosure 1.

<sup>140</sup> Letter from Greg Delwiche, BPA Vice President for Environment, Fish and Wildlife, to Bill Booth, NW Power and Conservation Council Chairman, regarding proposed amendments to the Fish and Wildlife Program (April 4, 2008); see also Enclosure 1: Memorandum Supporting BPA's Recommendations to the Council for Amending the Program at pages 7-9 (April 4, 2008). Both documents are in the BPA zip file at <http://www.nwppc.org/fw/program/2008amend/view.asp?id=116>.

<sup>141</sup> See, e.g., letter from Stephen Wright, BPA Administrator/CEO, to Larry Cassidy, NW Power Planning Council Chairman, regarding wildlife mitigation law and policy (March 2, 2002) at <http://www.efw.bpa.gov/IntegratedFWP/WildCredMar02.pdf>

## **5.2 The Accords Are Consistent with and Support BPA’s Legal Obligations**

BPA’s authority and ability to enter into these agreements is provided by federal statutes. Since BPA’s inception, Congress has afforded the BPA Administrator broad discretion to enter into “such contracts, agreements and arrangements . . . upon such terms and conditions and in such manner as he may deem necessary” to fulfill BPA’s statutory purposes.<sup>142</sup> This includes the express authority to make payments from the Bonneville Fund to implement BPA’s legal responsibilities, including its legal responsibilities under the ESA and the Northwest Power Act.<sup>143</sup> BPA is imbued with considerable flexibility and discretion when entering into arrangements such as these Accords, provided that BPA uses that flexibility and discretion to fulfill one or more of its statutory duties. In this section, BPA describes how the Accords are both consistent with and help BPA fulfill its federal obligations.

### *5.2.1 Treaty and trust responsibilities to tribes*

The relationship between the federal government and the tribes of the Columbia River Basin are governed by a series of treaties, statutes, regulations, executive orders, and judicial decisions. Many tribes in the Basin reserved rights to hunt, fish, and gather traditional foods and medicines, not only on the lands now within their established reservations but on the lands of the territory considered to be open and unclaimed by non-Indians at the time as well. In addition, tribes in several treaties (the “Stevens treaties”)—including tribes in the Three Treaty Tribes—reserved the right to take fish at usual and accustomed grounds in recognition of the primacy of salmon in their lives. Treaties are federal laws that BPA is bound to observe and to uphold.

In addition to the recognition of treaty and other reserved rights, the federal government also has a trust responsibility to Indian tribes. A specific enforceable trust responsibility may arise when a federal agency receives statutory direction to manage tribal resources. Absent a specific responsibility, agencies have a general responsibility influenced by the treaties and internal policies and guidance, such as BPA’s Tribal Policy (1996), and Executive Orders such as Executive Order 13175 (2000) regarding consultation and coordination with Indian tribal governments.

BPA fulfills its treaty and trust responsibilities with tribes by meeting the statutory obligations prescribed in general statutes applicable to all federal agencies, such as the National Environmental Policy Act, and in statutes tailored specifically to BPA’s activities, such as section 4(h)(10)(A) of the Northwest Power Act. BPA seeks to give special consideration to tribal views and concerns pursuant to BPA’s Tribal Policy,<sup>144</sup>

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<sup>142</sup> 16 U.S.C. § 832a(f).

<sup>143</sup> 16 U.S.C. § 838i(b) and § 838i(b)(12).

<sup>144</sup> [http://www.bpa.gov/corporate/About\\_BPA/tribes/link](http://www.bpa.gov/corporate/About_BPA/tribes/link).

through government-to-government consultation and careful review of tribal concerns when making decisions that could affect tribal resources.<sup>145</sup>

The Columbia Basin Fish Accords represent a watershed event in BPA's relationship with the participating tribes, and demonstrate BPA's commitments to supporting tribal treaty interests and the government's general trust responsibility to tribes. In general, BPA's commitment to these agreements supports tribal resources and tribal communities. BPA's implementation decision includes a wide variety of hatchery, habitat, research, monitoring, and evaluation, and coordination proposals that help protect and restore anadromous and other stocks that support tribal subsistence, ceremonial, and commercial harvest. BPA is also committing to continue its collaborative relationship with the tribes developed over the course of negotiations, involving the tribes in the monitoring and evaluation of our mutual implementation efforts. In addition, BPA's financial and technical support of tribal resource management expertise promotes tribal participation in mitigation activities which in turn provides economic opportunities and support to tribal sovereignty. While the agreements do not resolve treaty issues, the parties recognize that the mutual commitments are consistent with the tribes' treaty or reserved rights and the United States' trust obligation.<sup>146</sup>

### *5.2.2 Endangered Species Act*

The Accords collectively make commitments of operational modifications and BPA funding intended to benefit ESA-listed and non-listed fish. All actions contained in the Accords are expected to be of positive benefit to the listed salmon and steelhead of the Basin, or if not addressed specifically to such species, will be neutral in effect to them. Implementation of specific projects will undergo additional environmental compliance, including consultation with NOAA Fisheries as appropriate, and will assure that all actions to be implemented with BPA funding will be consistent with the needs of the listed species.

### *5.2.3 Northwest Power Act*

Under section 4(h)(10)(A) of the Northwest Power Act, BPA must use the Bonneville Fund and BPA's other authorities to protect, mitigate, and enhance fish and wildlife to the extent affected by the development and operation of the hydro system in a manner consistent with the Council's fish and wildlife program, the Council's power plan, and the purposes of the Act.<sup>147</sup> In this section, BPA explains how its decision to enter into the Columbia Basin Fish Accords meets these standards and other elements of the Act.

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<sup>145</sup> For a detailed discussion of BPA's trust responsibility, see section 2.8 of the Administrator's Record of Decision for the 2003 Safety-Net Cost Recovery Adjustment Clause Final Proposal; see also the NEPA Record of Decision for BPA's Fish & Wildlife Implementation Plan Final EIS, [http://www.efw.bpa.gov/environmental\\_services/nepadocs.aspx](http://www.efw.bpa.gov/environmental_services/nepadocs.aspx).

<sup>146</sup> Three Treaty Tribes MOA at V.D; Colville MOA at III.E.

<sup>147</sup> 16 U.S.C. § 839b(h)(10)(A).



### 5.2.3.1 Consistency with the Council’s Fish & Wildlife Program

These agreements would not have been possible without the Council’s Fish and Wildlife Program to guide the development of the implementing projects. The Program provides the framework for all of the projects proposed for BPA’s funding under these agreements. All the projects are intended to provide biological benefits addressing limiting factors for fish species identified in the Council’s Program, including its sub-basin plans, or to fulfill other Council Program goals, such as RM&E and data collection. As a result, BPA believes the MOA projects as proposed are all consistent with the Council’s Program. BPA’s duty to mitigate “in a manner consistent with” the Council’s Program is a programmatic requirement that applies to BPA’s overall efforts and is not required for every project. Nonetheless, the parties to these MOAs sought to bring support to their commitments by adopting this project-specific consistency approach. Indeed, many of the projects have already been reviewed and recommended by the Council. Regardless, consistency with the Council’s Program is a requirement of the MOAs—should a project be found not to be consistent, BPA and the implementing entity will work to address the inconsistency, or find an alternative project.

In addition to consistency with the Program, the projects will also be reviewed in accordance with Northwest Power Act review processes, including independent science review by the Independent Science Review Panel (ISRP) and the Council.<sup>148</sup> Again, some projects have already undergone such review. Expanded and new projects will also undergo these reviews as needed. BPA expects to work with the agreement parties, and the Council, to help refine review processes to avoid duplication of effort, and to focus the reviews.

### 5.2.3.2 Consistency with the *In Lieu* Provision of the NW Power Act

Under section 4(h)(10)(A) of the Northwest Power Act, Congress expressly limited BPA’s authority to provide protection, mitigation, and enhancement in the “in lieu” provision, which states:

Expenditures of the Administrator pursuant to this paragraph shall be in addition to, not in lieu of, other expenditures authorized or required from other entities under other agreements or provisions of law.<sup>149</sup>

As explained by the House of Representative’s Interior Committee, “other fisheries efforts outside this Act . . . are expected to continue and to be funded separately.”<sup>150</sup>

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<sup>148</sup> 16 U.S.C. § 839b(h)(10)(D).

<sup>149</sup> 16 U.S.C. § 839b(h)(10)(A).

<sup>150</sup> H.R. Rep. No. 976, 96th Cong., 2d Sess., pt. 2, at 45. See also 126 Cong. Rec. H9846 (daily ed. Sept. 29, 1980) (Rep. Lujan: section 4(h)(10)(A) would “insure that the program will not call for measures already being implemented to protect, mitigate, and enhance fish and wildlife”).

Thus, if another entity is authorized or required under other agreements or provisions of law to undertake an activity, BPA cannot fund the activity under the authority of section 4(h)(10)(A) unless BPA's funding is in addition to, not in lieu of that other entity's funding. The *in lieu* provision helps ensure that BPA's funding for fish and wildlife protection, mitigation and enhancement under section 4(h)(10)(A) is additive to on-going and future mitigation conducted by others, and is not simply supplanting other efforts outside of the Northwest Power Act.

Under the terms of the agreements, projects to be implemented must meet BPA's *in lieu* policy. That policy was most recently updated with BPA's 2007-2009 fish and wildlife funding decision, in which BPA provided express ratings and a ratings key for all projects proposed for BPA funding.<sup>151</sup>

As a part of that decision, BPA offered to explore with any fish and wildlife managers alternatives to project-specific cost sharing as a means to demonstrate compliance with the Northwest Power Act's *in lieu* provision. BPA explicitly suggested that agreements to address parallel or complementary funding activities could be considered (an idea initially proposed by the Council).<sup>152</sup>

In the Three Treaty Tribes MOA, BPA and the Tribes are using that suggested approach in one of the first efforts to apply it. With the MOA, and the accompanying documentation of parallel and complementary funding,<sup>153</sup> BPA concludes that the projects for BPA funding under the Three Treaty Tribes MOA meet the *in lieu* provision. As the first effort to use the parallel and complementary funding concept, BPA is willing to explore more programmatic demonstrations of parallel and complementary funding than it might otherwise agree to in its future *in lieu* policy absent the additional consideration provided by the Tribes in this agreement.

#### 5.2.3.3 The Agreements Support Equitable Treatment for Fish and Wildlife

The Northwest Power Act requires that BPA exercise its FCRPS management responsibilities "in a manner that provides equitable treatment for. . . fish and wildlife with the other purposes for which such system and facilities are managed and operated."<sup>154</sup> The Council describes equitable treatment as "meet[ing] the needs of salmon with a level of certainty comparable to that accorded the other operational purposes."<sup>155</sup> Historically, BPA has provided equitable treatment on a system-wide basis primarily by implementing the Council's integrated fish and wildlife program and

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<sup>151</sup> Letter from Greg Delwiche, VP Environment, Fish and Wildlife/BPA to Dr. Karier, Chair, Northwest Power and Conservation Council, February 9, 2007, and *in lieu* table attachment. Available at: <http://www.efw.bpa.gov/IntegratedFWP/policyframework.aspx>.

<sup>152</sup> *Id.*

<sup>153</sup> Attachment H to the MOA. This attachment will be finalized by the Tribes on or before May 15, 2008, based on existing, readily available regional data sources discussed with BPA.

<sup>154</sup> 16 U.S.C. § 839b(h)(11)(A)(i).

<sup>155</sup> Council Program 1992, Vol. II. p. 9.

relevant Biological Opinions related to FCRPS operations.<sup>156</sup> The Columbia Basin Fish Accords continue this tradition. They support and expand on BPA’s commitments in the draft FCRPS Biological Opinion. They also go beyond mitigation for ESA-listed species and include commitments to other species of interest affected by hydro operations, such as Pacific lamprey. Overall, the Accords in combination with the BiOps provide a higher level of financial and operational certainty for fish, further solidifying BPA’s efforts to manage the FCRPS equitably for both fish and power.

#### 5.2.3.4 Consistency with the Council’s Power Plan

In its most recent Power Plan the Council recommended that “Bonneville should continue to fulfill its obligations for fish and wildlife.<sup>157</sup>” As the Council noted in describing this recommendation:

These obligations will be determined in a manner consistent with the requirements of the Northwest Power Act and the Council’s Columbia River Basin Fish and Wildlife Program, and are not affected by the recommended changes in Bonneville’s role [referring to recommended changes in Bonneville’s role regarding the regional power supply].<sup>158</sup>

As previously discussed, BPA’s decision demonstrates its continuing efforts to meet its obligations to address the impacts to fish from the construction and operation of the FCRPS consistent with the Northwest Power Act in a manner consistent with the Council’s program. As such, BPA’s decision is consistent with the Council’s specific fish and wildlife recommendation to BPA in the Council’s Power Plan.

#### *5.2.4 Clean Water Act*

The agreements will provide additional support for state and tribal water quality standards, particularly though the habitat actions proposed. For example, with the agreements, BPA will support a variety of actions that will directly benefit water quality in the Basin, including funding for purchase and lease of water rights to improve stream flow and water quality, funding for improving irrigation delivery and use of water (again, to improve instream flows), and a variety of watershed restoration projects that will help to improve water quality in fish-bearing streams, such as culvert replacements, riparian

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<sup>156</sup> See, e.g., BPA, System Operation Review Environmental Impact Statement Record of Decision, page 14 (Feb. 21, 1997) (selecting an FCRPS operating strategy in which “[c]onflicts between power and fish are resolved in favor of the fish, providing equitable treatment of fish and wildlife with the other purposes for which the FCRPS is operated”); BPA, Fish and Wildlife Implementation Plan Environmental Impact Statement, pages 2-33 to 2-36 (Apr. 2003) (summarizing how BPA provides equitable treatment in FCRPS management); FCRPS Action Agencies, Biological Assessment for Effects of FCRPS and Mainstem Effects of Other Tributary Actions on Anadromous Salmonid Species Listed under the ESA, pages 1-9 to 1-15 (Aug. 2007) (describing the FCRPS’ overhaul—structural and operations changes for fish since 1994).

<sup>157</sup> The Fifth Northwest Electric Power and Conservation Plan, Document 2005-7 (May 2005), Action Plan, Action BPA-4 at page 23. Available at: <http://www.nwppc.org/energy/powerplan/plan/Default.htm>.

<sup>158</sup> *Id.*

habitat protection and enhancement (plantings). In addition, BPA is funding projects to evaluate water quality concerns affecting fish, including, for example, assessing potential areas of refuge from warmer waters in tributary habitat. All of these help support BPA's commitments to protecting and enhancing the water quality of the Basin.

Some projects that BPA is funding may also produce temporary impacts to water quality due to instream work. As discussed in more detail in the NEPA section below, evaluations and permits necessary to protect water quality will be a part of implementation of site-specific projects.

#### *5.2.5 National Historic Preservation Act (NHPA)*

BPA already supports a substantial program for addressing the power-related impacts of the FCRPS on historic resources (including cultural resources) of the Columbia River Basin consistent with the National Historic Preservation Act, known as the FRCPS Cultural Resources Program. This program is implemented as part of the direct funding BPA provides to the Corps and the Bureau for the power share of operations and maintenance of the FCRPS. Nothing in these Columbia Basin Fish Accords is intended to alter or affect that program or its associated funding. In addition, as described below in the NEPA section, as projects are implemented pursuant to these agreements, BPA will consider and address the effects of the actions on cultural and other historic resources pursuant to the NHPA.

## **6.0 NATIONAL ENVIRONMENTAL POLICY ACT ANALYSIS**

Pursuant to the National Environmental Policy Act (NEPA),<sup>159</sup> BPA has assessed the potential for environmental effects related to entering into the Columbia Basin Fish Accords.

Because the Accords involve commitments related to BPA's fish mitigation and recovery efforts, BPA has reviewed the Fish and Wildlife Implementation Plan Environmental Impact Statement (FWIP EIS) (DOE/EIS 0312, April 2003), and the Fish and Wildlife Implementation Plan Record of Decision (FWIP ROD, October 31, 2003) to determine if BPA's participation in the Accords falls within the scope of the FWIP EIS and ROD. As discussed in more detail below, BPA has determined that the decision to enter into the Accords is adequately covered within the scope of the FWIP EIS and the Preferred Alternative (PA 2002) Policy Direction that was adopted by BPA in the FWIP ROD, and that entering into the Accords would not result in significantly different environmental effects from those examined in the FWIP EIS.

BPA therefore has decided to tier its NEPA Record of Decision (NEPA ROD) for the Columbia Basin Fish Accords to the FWIP EIS and ROD. As part of this decision, BPA

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<sup>159</sup> 42 U.S.C. § 4321 *et seq.*

will conduct additional project-specific NEPA analysis and environmental review as appropriate for the activities to be funded by BPA under the Accords, particularly for new activities, and in some cases, for expanded activities. This additional review will be conducted prior to the implementation of the BPA-funded activity.

### **6.1 Fish and Wildlife Implementation Plan EIS and ROD**

BPA developed the Fish and Wildlife Implementation Plan EIS in response to fish and wildlife administration issues that were identified in the 1995 Business Plan EIS (Business Plan EIS, DOE/EIS-0183, June 1995, and Business Plan ROD, August 15, 1995).<sup>160</sup> The underlying need for the FWIP EIS was to establish a comprehensive and consistent policy to guide the implementation and funding of the agency's fish and wildlife mitigation and recovery<sup>161</sup> efforts under existing statutes and policies. The FWIP EIS is intended to support a number of decisions related to fish and wildlife mitigation and recovery necessary to comply with BPA's responsibilities, including decisions by BPA related to: funding fish and wildlife mitigation and recovery efforts; funding BPA's share of the Council's Fish and Wildlife Program; funding capital improvements at FCRPS projects related to fish; funding fish and wildlife research, monitoring, and evaluation; and funding cultural resources mitigation (FWIP EIS, Section 1.4.2).

The FWIP EIS recognizes that reaching regional consensus on a solution for addressing fish and wildlife mitigation and recovery efforts is an extremely difficult task. The EIS discusses the many factors contributing to this difficulty, including uncertainty and disagreement regarding the science in support of mitigation and recovery, competing resource demands, and differing values and priorities among various groups in the region (FWIP EIS, Section 1.1). The EIS also describes how various regional policies have created conflicting priorities for fish and wildlife mitigation and recovery efforts (FWIP EIS, Section 2.3.2.3). These conflicting priorities are based in part on differing views and uncertainty concerning the science underlying these efforts. Nonetheless, the EIS recognizes BPA's need to move forward with a policy for fish and wildlife mitigation and recovery efforts so that it can efficiently proceed with funding and implementing these efforts in a comprehensive manner (FWIP EIS, Section 1.2).

To help BPA develop such a policy, the FWIP EIS considered a wide range of potential Policy Direction alternatives for BPA's fish and wildlife mitigation policy. Five basic alternatives were identified and evaluated in the Draft FWIP EIS: Natural Focus, Weak

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<sup>160</sup> In the Business Plan EIS and ROD, BPA adopted a market-driven approach to guide its overall business practices. In accordance with this approach, BPA fully participates in the competitive market for power transmission, and energy services, and uses success in the market to ensure the financial strength necessary to fulfill its numerous and varied mandates and obligations. BPA also operates in a manner that is more cost-conscious, customer-focused, and results-oriented. As part of its market-driven approach, BPA has been working towards "reinventing" its fish and wildlife program to emphasize better results, effectiveness, and efficiency.

<sup>161</sup> BPA uses the phrase "mitigation and recovery" to address its responsibilities to fish and wildlife under the Northwest Power Act ("mitigation), the ESA ("recovery"), and other laws.

Stock Focus, Sustainable Use Focus, Strong Stock Focus, and Commerce Focus. These five basic Policy Direction alternatives span the full range of reasonably foreseeable directions for fish and wildlife policy, ranging from policies perceived as favoring the natural environment to those that may be perceived as favoring the economic and social environments. In addition, the EIS includes a Status Quo alternative that serves as a baseline against which all alternatives can be compared. Developed from within the range of the five basic Policy Direction alternatives, the Final FWIP EIS also includes a preferred alternative, the Preferred Alternative Policy Direction (PA 2002).

The FWIP EIS assesses the environmental consequences on the natural, economic, and social environments of adopting a variety of policy directions. By design, the analysis in the FWIP EIS is a policy-level evaluation, and thus is more qualitative than quantitative. The analysis is based on relatively predictable relationships between changes to the environment (air, land, and water) and the consequences for fish, wildlife, and humans (FWIP EIS, Section 5.3.1.2). The analysis in the FWIP EIS compares the potential environmental impacts for the possible range of implementing actions for fish and wildlife recovery under each Policy Direction with the Status Quo as of 2002. By considering the numerous potential fish and wildlife actions in the region, the FWIP EIS inherently provides a cumulative assessment of potential environmental impacts from BPA's funding and implementation of these actions.

The FWIP EIS incorporates by reference many of the Federal documents that have addressed, either directly or indirectly, fish and wildlife mitigation and recovery actions in the region (FWIP EIS, Section 1.3.3). One of these documents is the Columbia River System Operation Review Environmental Impact Statement (SOR EIS) (DOE/EIS-0170, November 1995), which evaluates a range of system operating strategies for the multiple uses of the FCRPS. In its SOR ROD (February 1997), BPA selected a system operating strategy to: support recovery of fish species listed under the Endangered Species Act by storing water during the fall and winter to meet spring and summer flow targets; protect other resources by managing detrimental effects caused by operations for ESA species by establishing minimum summer reservoir levels; provide public safety through flood protection and other actions; and provide for reasonable power generation. The FWIP EIS builds upon and updates information in the SOR EIS concerning generic fish impacts, hydro operations, multiple river uses, and cultural resource data.

The FWIP EIS also collects and sorts the many and varied proposed and ongoing actions for fish and wildlife mitigation and recovery in the region (FWIP EIS, Volume III). These actions, referred to as Sample Implementation Actions (SIAs), are organized in the FWIP EIS in tables for each Policy Direction alternative. These sample actions are representative of the types of actions that are consistent with the various alternatives.

#### *6.1.1 Watershed Management and Wildlife Mitigation Program EISs*

The FWIP EIS incorporates by reference BPA's Watershed Management Program EIS (DOE/EIS-0265, July 1997) and Wildlife Mitigation Program EIS (DOE/EIS-0246,

March 1997). These two programmatic EISs were the result of an examination by BPA in the mid-1990s of the environmental consequences of its routine fish and wildlife program activities, including implementation of projects to carry out the Council's Program. The Watershed Management Program EIS provided a comprehensive analysis of different program alternatives for addressing BPA's watershed management projects, including riparian restoration and other vegetation management techniques; in-channel modifications and fish habitat improvement structures; various land management techniques; and other watershed conservation and rehabilitation actions. In the Watershed Management Program ROD (August 1997), BPA decided to implement a program to support this wide range of potential actions intended to benefit fisheries, fish habitat, and aquatic ecosystems in the region.

Similarly, BPA's Wildlife Mitigation Program EIS provided a comprehensive analysis of different program alternatives for addressing BPA's wildlife mitigation projects, including land acquisitions and management; habitat restoration and improvements; installation of watering devices and riparian fencing; and other conservation actions. In the Wildlife Mitigation Program ROD (June 1997), BPA decided to implement a program to support this wide range of potential wildlife mitigation actions.

In these programmatic EISs and their associated RODs, BPA chose to adopt a set of prescriptions to standardize the planning and implementation for the majority of its projects. In accordance with these prescriptions, BPA completed a NEPA document called a Supplement Analysis for each site-specific action under the appropriate programmatic EIS. In each Supplement Analysis, the agency considered the environmental consequence of a proposed activity and made a determination concerning whether the activity was generally consistent with the programmatic EIS. By adopting the prescriptions, BPA was able to implement its numerous watershed and wildlife projects with greater efficiency and consistency.

In approximately a ten years period, BPA has prepared over 340 Supplement Analyses under the Watershed Management and Wildlife Mitigation Program EISs. Each of these documents has confirmed that the environmental consequences for routine fish and wildlife mitigation activities are predictable and that, although there can be short term adverse effects from these activities, they continue to have net positive and increasingly beneficial impacts to fish and wildlife across the basin. The Supplement Analysis process provided legally required environmental analysis while simultaneously expediting direct on-the-ground benefits to fish and wildlife and also saving ratepayers' funds.

#### *6.1.2 BPA's Adoption of a Policy Direction from the FWIP EIS*

Through the FWIP ROD, BPA adopted the Preferred Alternative 2002 (PA 2002) as its policy direction for funding and implementing its fish and wildlife obligations. PA 2002 focuses on enhancing fish and wildlife habitat, modifying hydroelectric power operations and structures, and reforming hatcheries to both increase populations of listed fish stocks

and provide long-term harvest opportunities (FWIP EIS, Section 3A). PA 2002 is essentially a blend of the *Weak Stock* and *Sustainable Use* Alternative Policy Directions that were identified in the FWIP EIS. The Weak Stock Alternative emphasizes *human intervention to support recovery* of weak fish stocks and wildlife populations that are listed or proposed for listing under the Endangered Species Act (ESA) or that have other legal protections. The Sustainable Use Alternative emphasizes *human intervention as part of a goal to rebuild and maintain* sustainable fish and wildlife populations to promote expanded harvest and recreation opportunities.

The PA 2002 Policy Direction incorporates both BPA's mitigation obligations and ESA obligations. Sample Implementation Actions for PA 2002 can be found in the SIA tables for the Weak Stock Focus and Sustainable Use Focus alternatives (FWIP EIS, Volume III). PA 2002 reflects regional fish and wildlife policy guidance and considers extensive public input. It is also consistent with the fish and wildlife component in BPA's earlier Business Plan decision.

### *6.1.3 Tiering From the FWIP EIS and ROD*

As previously mentioned, the FWIP EIS was intended to support a number of decisions related to BPA's funding and implementation of fish and wildlife mitigation and recovery efforts (FWIP EIS, Section 1.4.2). In adopting the PA 2002, BPA demonstrated a commitment to support subsequent decisions involving the funding and implementation of fish and wildlife mitigation and recovery efforts that specifically support the PA 2002. The FWIP EIS and ROD document a strategy for making subsequent fish and wildlife policy decisions (FWIP EIS, Section 1.4.1 and Figure 1-6; FWIP ROD, Figure 1, page 15). This strategy connects program or site-specific projects (once their details and impacts are known) to the policy-level analysis in the EIS (FWIP EIS, Section 3.4.3). For each subsequent decision as appropriate, BPA reviews the FWIP EIS and ROD to determine if the proposed action is adequately covered within the scope of the PA 2002 evaluated in the EIS and adopted in the ROD. If the action is found to be within the scope of this alternative, the Administrator may make his decision for the proposed action under the FWIP EIS and ROD. This approach to decision making allows the BPA Administrator to implement decisions concerning fish and wildlife mitigation and recovery actions in a timely, comprehensive manner (FWIP ROD, page 13).

Using this tiering approach, in February 2007 BPA prepared a NEPA ROD<sup>162</sup> tiered to the FWIP EIS and ROD for its Fiscal Year 2007-2009 Fish and Wildlife Project Implementation Decision (07-09 F&W Decision). This tiered ROD addressed BPA's decision to implement certain new and ongoing fish and wildlife projects for fiscal years 2007 through 2009. The projects included in the 07-09 F&W Decision were designed to help meet BPA's responsibilities to protect, mitigate and enhance fish and wildlife affected by the development and operation of the Columbia River Basin hydroelectric

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<sup>162</sup> BPA's NEPA ROD is available at: [http://www.bpa.gov/corporate/pubs/RODS/2007/FY07-09\\_FW\\_Record\\_of\\_Decision\\_Final.pdf](http://www.bpa.gov/corporate/pubs/RODS/2007/FY07-09_FW_Record_of_Decision_Final.pdf).



dams from which BPA markets power. In the tiered NEPA ROD, BPA found that the majority of the projects included in the 07-09 F&W Decision were routine actions requiring no further NEPA documentation, but that would be subject to a “validation” process. Through this process, BPA committed to reviewing each project to ensure all applicable tribal, local, state, and federal laws and regulations in addition to NEPA have been addressed prior to implementation. For non-routine projects (e.g., new artificial production projects) included in the 07-09 F&W Decision, BPA intends to prepare additional NEPA documentation as appropriate.

## **6.2 Environmental Analysis for the Columbia Basin Fish Accords**

BPA’s decision to enter into the 2008 Columbia Basin Fish Accords will provide BPA funding and implementation commitments for actions and resource objectives to support the protection and recovery of ESA-listed salmon and steelhead. These commitments will support other anadromous and resident fish within the Columbia River Basin, and wildlife as well. Activities funded under the Accords can be grouped into roughly three categories of projects: ongoing, new, and expanded. The projects that are ongoing have been through ISRP review; have been reviewed under NEPA through the NEPA ROD for the 07-09 F&W Decision. Prior to implementation, these projects are required to proceed through the validation process, as outlined in that ROD. These ongoing projects thus have already been reviewed under NEPA by BPA, and a decision has already been made concerning these projects through the 07-09 F&W Decision NEPA ROD. New projects, on the other hand, were not included in the 07-09 F&W Decision, and thus were not addressed in the 07-09 F&W Decision NEPA ROD. Expansions of existing projects may, in some circumstances, be within the scope of that analysis, but other expansions are assumed to not have been addressed in the 07-09 F&W Decision NEPA ROD. The NEPA analysis for these Accords thus addresses the new projects included in the Accords, as well as the expanded projects that were not included in the 07-09 F&W Decision.

BPA has considered its decision both at a policy level and at the project-specific level. At the policy level, a review of the FWIP EIS shows that the general environmental impacts that could occur as a result of entering into the Accords are adequately covered by this EIS. At the project-level, a review of the FWIP EIS shows that potential environmental effects associated with the types of projects to be funded under the Accords would not be significantly different from those described in the EIS. In addition, the types of projects to be funded under the Accords are consistent with and thus within the scope of the PA 2002 that was adopted in the FWIP ROD. A further discussion of these evaluations follows.

### *6.2.1 Policy Level Evaluation*

Chapter 5 of the FWIP EIS describes potential impacts of fish and wildlife actions that could occur as a result of each of the Policy Directions considered in the EIS. Overall environmental impacts associated with each Policy Direction are discussed in Section 5.3

of the FEIP EIS. Environmental impacts associated with PA 2002 – the Policy Direction ultimately adopted by BPA in the FWIP ROD – are identified in Section 3A.3 of the FWIP EIS.

Under the Columbia Basin Fish Accords, BPA will fund the implementation of over a hundred individual projects within the Columbia River Basin. These projects will have long-term, overall beneficial effects on fish and wildlife by increasing habitat values within the Columbia River Basin and increasing and sustaining fish populations. Individual projects will range in size from fractions of an acre to several hundred acres or more. These actions may also have associated side effects that are not the primary objective of the action but that occur nonetheless. Although these side effects likely would be relatively minor at individual sites (particularly for smaller-scale projects), when all of the individual projects under the Accords are considered together, these impacts would occur over many hundreds of acres. These types of aggregate impacts were considered in Chapter 5 of the FWIP EIS, and more specific to the PA 2002, in Section 3A of the FWIP EIS.

Impacts from the projects under the Accords could add to past, present and future negative impacts occurring from other human activities in the region. For example, reduction in timber production at new mitigation sites could aggravate existing and reasonable foreseeable reductions in available timber. Mitigation projects may also add to the reduction in available grazing lands in the region. Prescribed burning at mitigation lands might add to existing or future regional air quality problems. To the extent to which projects would create or aggravate negative existing effects on any given resource, they would be mitigated for as described in general terms in the FWIP EIS. Federal, state, tribal and local laws and regulations will be followed, and coordination with appropriate federal and state agencies, tribes and private landowners will be performed for all projects.

Overall, the projects throughout the Columbia River Basin included in the Accords would provide net benefits to water quality, fish and wildlife habitat, and other natural resources such as soils and vegetation. These resources would be positively affected through projects involving streamflow generation, sediment transport, large woody debris recruitment, and temperature regulation. These projects, as well as the many other projects described in the Accords, also would be expected to result in overall benefits for both listed and non-listed fish and other aquatic species in the region. Although there continues to be uncertainty concerning the science underlying fish mitigation and recovery as was described in the FWIP EIS, the biological benefits identified in the agreements demonstrate that the Accords will enhance overall fish restoration efforts in the region. BPA also expects that mitigation for the hydro system will be made significantly more effective through a common approach under the Accords. Commitments related to hydro operations regarding adaptive management, spring spill and transport, and summer spill will result in cumulative benefits for listed fish by aiding in migration and increasing long-term population sizes, and opportunities are provided for aiding non-listed fish on an as-needed basis. While the ongoing uncertainty

concerning the role of hatcheries that was described in the FWIP EIS continues, the net cumulative effect to listed species from hatchery-related actions under the Accords is expected to be beneficial because of the role of hatcheries in aiding recovery of weak stocks, and because of efforts included in the Accords to minimize or avoid impacts to natural spawners. Cumulative benefits to fish also would include improved spawning habitat and easier access to all habitats through the modification or removal of obstructions, and the provision of more suitable habitat for both listed and non-listed fish and other aquatic species. These types of net benefits from fish projects were recognized in the FWIP EIS (see Sections 3A.3, 5.2, and 5.3).

Overall benefits to wildlife also would occur as a result of implementing fish mitigation actions under the Accords. The process of acquiring and managing lands will protect existing habitat values and ensure habitat availability for fish and wildlife species in the future. Human populations would also benefit from lands acquired as part of future actions under the Accords, as opportunities for recreation are maintained (e.g., wildlife viewing) and aesthetic values are preserved. Potential negative impacts to human populations such as removal of land from human use from the projects under the Accords would affect only a small portion of the lands available for such uses within the Columbia River Basin. Land acquisitions may in some instances also provide additional protection for cultural resources. Vegetation management techniques would help to control invasive species that are currently limiting vegetation diversity. The reestablishment of native plant species would benefit fish and wildlife, as well as traditional Native American cultural uses.

Both anadromous and resident fish have great cultural significance to Native American Indian peoples. Salmon are a major food source and trading commodity for most Columbia Basin tribes. Tribal harvest, especially for anadromous fish, has been substantially reduced from historic levels. Most of the upriver anadromous fishing opportunities no longer exist. PA 2002 would likely have a beneficial effect on resident and anadromous fish by increasing their population levels through protection and enhancement of listed species habitat, reformation of hatcheries, and changes in hydro operations/facilities. Tribal fish harvest would improve as the naturally-spawning and hatchery-produced fish populations increased (FWIP EIS Section 3A.3.3). In the long-term, entering into the Columbia Basin Fish Accords would be expected to result in these same beneficial effects. The Accords will provide for habitat protection and enhancement activities for weak stocks/populations, increasing listed species, as well as other plant and animal species that are important to tribal health, spirituality, and tradition.

BPA's ratepayers would fund the agency's share of the costs related to implementation of the Accords. Levels of funding for the Fish and Wildlife Program and uncertainties surrounding fish and wildlife mitigation requirements (e.g. court-related actions related to the FCRPS Biological Opinion) continue to be a major concern for many regional entities. The economic effects associated with these types of projects are described in Section 3A.3.2 of the FWIP EIS. BPA expects to provide a total of \$933 million dollars

(plus the 2.5 percent inflation adjustment beginning in fiscal year 2010) in direct support of the projects committed to in the agreements. BPA expects to fund implementation commitments for the Accords in fiscal year 2008 from existing budgets, and reserves if needed. Fiscal year 2008 expenditures will support on-going project commitments that have been budgeted for and will not affect current rates being paid by power and transmission customers. Beyond fiscal year 2008, BPA expects to include its costs of implementing the Accords as part of its revenue requirements in its wholesale power rates. BPA will forecast the costs of implementing the agreements and vet that forecast in a workshop open to the public. The Accords provide for a long-term plan that would provide BPA's customers more certainty for fish costs and power rates, and ensure predictability and stability in funding and accountability for results of project implementation.

Entering into the Accords would not be expected to have negative implications related to climate change. If anything, the projects under the Accords would likely have beneficial effects concerning climate change, as these projects would provide riparian and other habitat enhancement and greater shade cover. Actions under the MOAs related to hydropower operations to benefit listed species are not expected to significantly factor into climate change because any replacement power generation that may be required as a result of these actions would not result in significant changes in overall air emissions on a regional basis.

In the *Comprehensive Analysis of the Federal Columbia River Power System and Mainstem Effects of Upper Snake and Other Tributary Actions* (August 2007),<sup>163</sup> the Action Agencies recognize that climate change could pose an additional threat to the survival and recovery of ESA listed salmon and steelhead in the Columbia River Basin. The Action Agencies considered this potential impact as part of term of the FCRPS and Upper Snake River Biological Opinion (BiOp) processes. To a significant extent, the existing proposed BiOp Reasonable and Prudent Alternative (RPA) already addresses potential impacts of climate change in its provisions for dry year strategies, predator management, and habitat protection and improvements. In addition, under the adaptive management approach, the Action Agencies will continue to monitor and assess potential climate change impacts on hydrological and fish conditions and provide a mechanism to implement additional actions if appropriate. Entering into the Columbia Basin Fish Accords, which provide additional measures for the benefit of fish, will further provide support for populations in the face of impacts of climate change, particularly through efforts to open up additional habitat and stream access, to provide for water flows and riparian habitat enhancement (providing greater shade cover), and also by funding further analysis of management options in a time of climate change.

PA 2002 emphasizes human management, in a least-cost manner, to recover listed species and restore and maintain sustainable populations for fish and wildlife while recognizing that ultimately the fate of the listed species may be significantly determined

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<sup>163</sup> [http://www.salmonrecovery.gov/Biological\\_Opinions/FCRPS/BA-CA/CA/CA-Final.pdf](http://www.salmonrecovery.gov/Biological_Opinions/FCRPS/BA-CA/CA/CA-Final.pdf).

by weather and ocean conditions rather than human action (FWIP EIS Chapter 3A-2). The natural environment will likely change in ways that cannot be accurately predicted. Ocean conditions can change with consequent effects on fish and wildlife and are largely beyond human ability to manage. However, it is important to understand and measure the magnitude of marine condition effects on salmon because it is important to understand the partitioning of survival between the freshwater and marine systems and because ocean conditions are recognized as a major cause of poor survival and declining populations. The relative success of restoration efforts in freshwater habitats cannot be accurately estimated if survival in freshwater is confounded with ocean survival. Mortality related to ocean conditions may in fact overwhelm the effects of any action taken in the freshwater portion of the salmon life-cycle, resulting in misinterpretation of the effects of management actions taken in the hydro corridor or Basin tributary streams (FWIP EIS Chapter 3A-2, 5-29).

In sum, while there could be some short-term localized impacts from projects under the Accords, entering into the Accords would provide overall net benefits to fish populations and habitat, water quality, as well as to other natural resources. These impacts and benefits were recognized and considered in the FWIP EIS. The program-level environmental impacts that could occur as a result of entering into the Accords are adequately covered by this EIS.

#### *6.2.2. Project-Specific Evaluation*

Through its experience with completing Supplement Analyses and other NEPA documentation for fish and wildlife projects over the past ten years, BPA has a firm understanding of the adverse environmental consequences associated with individual fish-related mitigation and recovery projects. These associated effects were also identified and evaluated in the FWIP EIS. Section 5.2 of the FWIP EIS provides a comprehensive discussion of potential environmental impacts that can result from implementation of project-specific fish and wildlife actions. This discussion addresses the four primary categories of fish and wildlife projects, otherwise known as the “Four Hs:” hydro operations, habitat, hatcheries, and harvest. Specific impacts associated with fish and wildlife projects under each of these categories are discussed and analyzed in detail in Section 5.2.3 of the EIS, and also covered in a more general sense in Section 5.2.2 of the EIS.

As discussed in the FWIP EIS, some adverse environmental impacts associated with individual fish projects are unavoidable (i.e., cannot be fully mitigated). These adverse impacts, however, are often temporary and short-term. Soils are typically disturbed during the implementation phases of most projects. This can cause sediments to enter adjacent surface waters during project implementation. Ground disturbing activities also have the potential to impact cultural and/or historic resources. In many cases it is not possible to avoid removing some existing vegetation as part of project implementation. Fish and wildlife can be disturbed by noise and human activity in project vicinities. Some loss of local revenue and taxes can occur in cases where commercial land uses are

halted as part of a fish project (e.g. retiring a grazing lease) or land is acquired for the purposes of fish mitigation. Access restrictions and impacts to recreation can also occur in an attempt to protect sensitive habitats or during project implementation. Experience has shown that compliance with federal, state, and local regulatory requirements are central to addressing any adverse effects and minimizing them through best management practices, restrictions, and mitigation measures.

Environmental impacts of individual projects under the Accords would largely be the same as these impacts that were described in the FWIP EIS. The fish projects to be implemented under the Accords are generally of the same type as those considered in the FWIP EIS (see FWIP EIS, Volume III and Appendix H). For specific hydro operation actions under the Accords, potential environmental impacts could include exacerbating water quality issues associated with the hydrosystem operation, and impacts to reservoirs. For specific habitat actions under the Accords, potential environmental impacts could include temporary loss of riparian vegetation; increased water temperature; sedimentation to waterways; local reductions in visibility and air quality due to smoke from prescribed burning; and herbicide use. For specific hatchery actions under the Accords, potential environmental impacts could include impacting fish health and genetic traits of wild fish populations; reducing the reproductive success of ESA-listed fish; altering the quantity of prey species available in natural waterways as the numbers of hatchery fish found in the river systems increases; changing stream water quality due to hatchery effluent mixing with natural water systems; and habitat impacts in areas surrounding new facility construction. For specific harvest actions under the Accords, potential environmental impacts could include direct and incidental fish mortality, possibly leading to a reduction in the genetic diversity of the species, poaching, and economic and social changes due to modifying harvest methods. However, the enhanced harvest analysis and management efforts included in the Accords would be expected to assist tribal managers in reducing long-term impacts of harvest on listed fish. All of these potential impacts are not significantly different than those identified and considered in Section 5.2 of the FWIP EIS.

### 6.2.3 Consistency With The PA 2002

Entering into the Accords and funding the associated projects is consistent with the PA 2002 Policy Direction that has been adopted by BPA in the FWIP ROD for several reasons.

First, the focus of the PA 2002 is to protect weak stocks of fish and achieve biological performance standards, as set forth in the BiOps, while sustaining overall populations of fish (both listed and non-listed) and wildlife for their economic and cultural value.<sup>164</sup> The PA 2002 includes enhancing fish and wildlife *habitat*, modifying *hydro* operation and structures, and reforming *hatcheries* to increase listed stock populations, restore and

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<sup>164</sup> FWIP EIS Section 3A.

maintain sustainable populations of fish and wildlife, and provide *harvest* opportunities in the long-term.<sup>165</sup>

The main purpose of the projects included in the Columbia Basin Fish Accords is to aid in recovery of listed species and restoration and maintenance of sustainable populations of fish in the Columbia River Basin. This will be accomplished through a variety of actions, including modification of hydro operation and structures, enhancement of fish and wildlife habitat, and improvements of hatcheries. The Accords are intended to address legal mandates for the FCRPS and Upper Snake Projects under the ESA, the Northwest Power Act, and the Clean Water Act (CWA); provide greater certainty and stability in the funding and implementation of projects for the benefit of fish and wildlife in the basin; and foster a cooperative and partnership-like relationship in implementation of the mutual commitments in the Accords. In addition, the Accords and their projects are consistent with the fish-related actions that were identified as sample implementation actions for the PA 2002 in the FWIP EIS.

Second, the PA 2002 includes measures to address naturally-spawning native anadromous fish and hatchery-produced native anadromous fish, recognizing that more fish is a better condition than status quo. PA 2002 also supports projects to enhance habitat for anadromous fish in order to increase production and maintenance of harvestable levels of anadromous fish, as well as protecting and enhancing critical habitat for listed anadromous fish. The Accords include hydro measures in addition to those proposed in the draft FCRPS BiOp to modify the hydro system to increase passage survival of anadromous fish (summer spill measures), and to modify spring fish transport as an aid to improving survival. The Accords build upon the draft FCRPS BiOp, which provides for an adaptive management approach to spill in order to enhance fish migration. Hatchery production, operation and new facilities are proposed in the Accords for conservation and recovery and, where applicable and compatible, compensation and supplementation. These projects and activities are consistent with the anadromous fish measures included in the PA 2002.

Third, the PA 2002 provides measures to improve conditions for resident fish and aquatic species, such as protection and enhancement of weak stock habitat, further modification and limits on the hydrosystem, and reforming hatcheries with a focus on conservation. Not only do these measures enhance resident fish populations, but they can further tribal interests and serve to fulfill their cultural needs. The Accords include proposed projects to benefit native resident fish that are consistent with the measures included in the PA 2002. These measures include prioritizing native resident fish over non-native species; providing for undisturbed habitats; enhancing degraded habitats; reducing mortality; and controlling predators.

Fourth, the PA 2002 considers that a balanced management approach for both listed and non-listed fish and aquatic species should be used. This Policy Direction allows for

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<sup>165</sup> The dam breaching aspects under the Weak Stock Focus alternative are not part of the PA 2002.

substantial human intervention to protect habitat and enhance degraded habitat for fish and wildlife, especially in areas designated as critical habitat. The Accords meet this objective by ensuring that both listed and non-listed fish and aquatic species are addressed. Projects under the Accords target fish populations and habitat including both ESA listed species and resident fish. These projects include: habitat acquisition and restoration and other habitat conservation methods; waterway nutrient enhancement; water transaction funding; research, monitoring, and evaluation; hatchery operation, production, and new facilities; harvest; and a comprehensive lamprey improvement program. The Accords include habitat protection and enhancement projects for listed fish and habitat enhancement for non-listed fish. Under the terms of the Accords, Parties will work with the Council and ISRP on project reviews, and in particular BPA and the Tribes will recommend that the ISRP review projects collectively on a subbasin scale. These actions are consistent with the approach to addressing habitat under the PA 2002.

Fifth, the PA 2002 adopted erosion and sedimentation reduction throughout the Columbia River Basin as part of a more active land use and water management strategy. It gives priority to improving water quality and habitat for ESA-listed stocks of fish. The PA 2002 states that habitat protection and enhancement efforts would use a watershed or ecosystem approach – i.e., a more comprehensive look at a subbasin and its biological needs (FWIP EIS pg 3A-11). The PA 2002 addresses instream water quantity and the amount of stream/river habitat by managing to reduce or avoid adverse effects of water withdrawals and increasing instream water quantity. Water habitat benefits are targeted in the projects under the Accords. These projects also will support the PA 2002 water habitat goals for sedimentation by enhancing and managing riparian and stream bank habitats, and will support temperature and dissolved oxygen goals through actions reducing water temperature in tributary waters to the Columbia River. In addition, the Accords will serve to fund water transactions, dedicating the water to instream use to benefit fish and wildlife, especially listed fish species. These actions are consistent with the approach to addressing water quality under the PA 2002.

Finally, the Accords, and the projects they identify, have been designed to be consistent with the Council's Program (including sub-basin plans), as amended; the Northwest Power Act's science and other review processes; applicable ESA recovery plans; and applicable data management protocols adopted by the Action Agencies. Based on current information, BPA believes that the Accords, and the projects identified for implementation, are consistent with the Council's Program. This approach is consistent with the PA 2002's goals of developing and implementing mechanisms for carrying out the BPA's fish obligations with the government and people of the region.

Overall, the 2008 Columbia Basin Fish Accords and the projects to be funded under them are consistent with the PA 2002 Policy Direction analyzed in the FWIP EIS and adopted by BPA through the FWIP ROD. The objectives of the Accords are consistent with the purposes and goals of the PA 2002. In addition, the types of projects included in the Accords are similar to those that were considered as typical projects under the PA 2002.



Finally, the Accords and the projects to be funded generally reflect the SIAs for the PA 2002.

### **6.3 Additional Environmental Review**

While this decision document addresses the policy decision to enter into the Accords, BPA recognizes that additional environmental review will be needed for future implementation of some projects to be implemented under the Accords. All activities undertaken pursuant to these Accords must be in compliance with all applicable federal, state, local, and tribal laws and regulations. For example, the ESA requires federal agencies to minimize or avoid adverse impacts to threatened or endangered plant, fish and wildlife species. In accordance with the Clean Air Act (CAA), project managers conducting prescribed burns are required to coordinate with state officials to ensure that impacts on air quality would be minimal and within state-defined limits. The Clean Water Act (CWA) regulates discharges into surface waters including adjacent wetlands. The National Historic Preservation Act (NHPA) requires federal agencies to take into account the effects of their undertakings on historic properties including cultural resources. In addition, there are a myriad of state and local regulations that protect sensitive resources that are applicable to fish and wildlife project actions. For projects on Indian reservation lands, tribes often have laws and regulations that parallel many federal, state and local laws and ordinances.

Thus, prior to the implementation of any BPA-funded activities under these Accords, BPA will conduct additional NEPA analysis and environmental review as necessary. For ongoing projects included in the 07-09 F&W Decision, BPA will implement its validation process for these projects. As described in BPA's 07-09 F&W Decision NEPA ROD, BPA will review each project through a validation process to ensure all applicable tribal, local, state, and federal laws and regulations in addition to NEPA have been addressed prior to implementation. Examples of typical compliance requirements that could be addressed in the validation process include those of the ESA, NHPA, CWA, CAA, and others.

BPA staff will document compliance with these and other applicable laws and regulations as part of the contract management process. Results of the validation process will be tracked and accessed through Pisces, a web-enabled software application that assists BPA and its fish and wildlife program participants manage projects and their implementation contracts throughout the Columbia River Basin. These results will also be made available to the public on an ongoing basis throughout the period of the decision, as new information about environmental compliance actions becomes available.

Concerning the new projects included in the Accords, as well as the expanded projects where the scope is expanded beyond the 07-09 F&W Decision, many of these projects involve routine land acquisition, watershed management, and other mitigation actions. Because these routine projects have predictable environmental effects that have already been analyzed in the FWIP EIS, the Watershed Management Program EIS, and/or the

Wildlife Mitigation Program EIS, these routine projects will require no further NEPA documentation beyond this decision document prior to implementation. Nonetheless, these projects will be required to go through the validation process described above. BPA staff will work with the Accord signatories to ensure that all applicable requirements have been met and are appropriately documented. The best management practices, restrictions, and mitigation measures imposed through the regulatory process will ensure that any project-specific adverse effects to water quality, habitat access, habitat elements, channel conditions and dynamics, flows, and watershed conditions will be brief, minor, and timed to occur at times that are least impacting.

In addition to these routine projects, there are two types of projects that BPA has determined will require additional NEPA analyses beyond this decision document and the validation processes prior to implementation. The first type includes projects that will always require additional NEPA analysis prior to implementation because they possess at least one of the two following characteristics: (1) they are required to go through the Council's 3-Step Review Process (such as new artificial production facilities, or other large-scale capital-intensive projects); or (2) projects that involve substantial modification to an ongoing artificial production program (for example, expansion of the program to include a new species).

The second type includes projects for which complicating factors emerge as the project develops, necessitating additional NEPA analysis. BPA may determine during the validation process or otherwise that there are complicating factors that make this decision document an inappropriate basis for providing NEPA analysis and documentation for a given project and therefore additional NEPA analysis is required. These complicating factors may include controversy, special regulatory requirements (federal, state or local), the participation of other federal agencies (where environmental review methodologies may differ), unprecedented actions (with accompanying uncertainty in impacts), or extraordinary environmental circumstances. For such projects, BPA will determine the appropriate strategy to comply with NEPA on a case by case basis.

## **7.0 CONCLUSION**

I have decided to sign the 2008 Columbia Basin Fish Accords. This action, which is a final action under 16 U.S.C. § 839f(e)(5), is based on the foregoing background and analysis. As reflected in that analysis, the Accords will help mitigate the impacts of the FCRPS on fish species, particularly salmon and steelhead listed under the Endangered Species Act with projects that are expected to produce significant and measurable biological benefits. The Accords will provide greater certainty and stability to mitigation funding commitments by BPA which helps BPA manage its financial risks. The Accords result in the parties' agreement that the Action Agencies will meet their statutory responsibilities for the ten year term. The Accords will help BPA meet its treaty and trust responsibilities to the tribes. The Accords will foster a new productive, collaborative approach with the parties.

Risks to BPA of signing the Accords are adequately mitigated by the collaborative commitments in the Accords, the legal forbearance and affirmation of adequacy, and the requirement for good faith implementation; by the commitments to regulatory and other review processes for project implementation, and for negotiation of replacement projects as needed; and, in the worst case, by the ability to withdraw from the Accords.

Based on a review of the Fish and Wildlife Implementation Plan Environmental Impact Statement and ROD, BPA has determined that entering into the Columbia Basin Fish Accords fall within the scope of the PA 2002 alternative evaluated in the Fish and Wildlife Implementation Plan EIS and adopted in the Fish and Wildlife Implementation Plan ROD. This decision is a direct application of the PA 2002, and is not expected to result in significantly different environmental impacts from those examined in the Fish and Wildlife Implementation Plan EIS, and will assist BPA in accomplishing the goals related to the PA 2002 alternative that are identified in the Fish and Wildlife Implementation Plan ROD. Therefore, the decision to implement the 2008 Columbia Basin Fish Accords is tiered to the Fish and Wildlife Implementation Plan EIS and ROD.

Issued in Portland, Oregon, this 2<sup>nd</sup> day of May, 2008.

*/s/ Stephen J. Wright May 2, 2008*

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Stephen J. Wright  
Administrator and Chief Executive Officer