

BONNEVILLE POWER ADMINISTRATION
ADMINISTRATOR’S RECORD OF DECISION AND RESPONSE TO COMMENTS
FOR
NORTHERN IDAHO MEMORANDUM OF AGREEMENT
BETWEEN
THE STATE OF IDAHO AND THE BONNEVILLE POWER ADMINISTRATION
FOR
WILDLIFE HABITAT STEWARDSHIP AND RESTORATION

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I. INTRODUCTION

The Bonneville Power Administration (**Bonneville**) plans to enter into a long-term agreement with the State of Idaho (**Idaho**) to foster a cooperative partnership; to permanently resolve many long-standing issues regarding the protection, mitigation, and enhancement of wildlife habitat affected by the construction and operation of Albeni Falls Dam in northern Idaho; and to provide for fish habitat protection. Bonneville will provide funding and other support to Idaho which Idaho will use to provide mitigation and mitigation stewardship for the impacts of Albeni Falls Dam.

This Record of Decision (**ROD**) describes the backdrop that led to this Northern Idaho Memorandum of Agreement for Wildlife Habitat Stewardship and Restoration (**MOA** or **agreement**), what the MOA contains, and how Bonneville provided for public review of the MOA and is responding to comments it received. This ROD also describes why Bonneville has decided to enter into the MOA and how entering into it complies with the Pacific Northwest Electric Power Planning and Conservation Act (**Northwest Power Act**). Finally, this ROD provides Bonneville's review and analysis of the MOA under the National Environmental Policy Act (**NEPA**).

The MOA will permanently resolve any and all interests that Idaho has in wildlife mitigation and mitigation funding needed to meet federal agency responsibilities to mitigate wildlife affected by Albeni Falls Dam in a manner consistent with the Northwest Power and Conservation Council's (**Council**) Columbia River Basin Fish and Wildlife Program (**program**). The program specifically encourages such resolutions, as discussed below.

A. **Bonneville's Mitigation Responsibility in Northern Idaho**

Bonneville is obligated under the Northwest Power Act to protect, mitigate, and enhance fish and wildlife affected by the construction and operation of federal dams in the Columbia River Basin from which Bonneville markets commercial power.¹ This mitigation must be done in a manner consistent with the Council's program and the other purposes of the Northwest Power Act. In northern Idaho there is one federal Columbia River Power System (**CRS**) dam—Albeni Falls Dam—constructed and

¹ 16 U.S.C. § 839b(h)(10)(A). This document uses "mitigate" to represent the concept to "protect, mitigate, and enhance."

operated by the U.S. Army Corps of Engineers (**Corps**) and from which Bonneville markets commercial power.

B. Background of Albeni Falls Dam Mitigation

Beginning in 1997, Bonneville entered into a programmatic mitigation agreement with the Idaho Department of Fish and Game (**IDFG**) to mitigate for the impacts of Albeni Falls Dam. The agreement outlined the process the parties would follow to protect habitat (typically through fee acquisition), manage and improve the habitat, and credit the mitigation against Bonneville's legal obligations, often called "debt."

Under the 1997 agreement, IDFG used Bonneville funding to acquire and manage nearly 4,225 acres of habitat to mitigate for the construction and inundation ("**C&I**") impacts of Albeni Falls Dam. The new MOA will replace the 1997 agreement entirely. Additionally, in 2012, Bonneville and Idaho entered into a letter agreement (**the 2012 letter agreement**) in which Bonneville agreed to fund and Idaho agreed to implement habitat restoration² work at the Clark Fork Delta as operational impact mitigation for Albeni Falls Dam. Under the 2012 letter agreement, Idaho restored 624 acres of habitat affected by Albeni Falls Dam operations.

C. Overview of the Agreement

1. *Parties.* The parties to the MOA are the State of Idaho and Bonneville. IDFG will be the lead representative for the State, but all State government agencies, boards, and commissions will be bound by the agreement's terms.³

2. *Geographic Scope.* Because this MOA is with the State of Idaho, it only addresses impacts within the State. Albeni Falls Dam is located within Idaho's borders and the upstream inundation of the reservoir behind the dam is also wholly within Idaho. Therefore, all C&I impacts from Albeni Falls are within the State.

Similarly, fluctuations in the elevation of Lake Pend Oreille—and resulting shoreline habitat impacts—associated with Albeni Falls Dam operations likewise occur only

² The MOA uses the terms "restore" and "restoration" synonymously with the enhancement mandate in the Northwest Power Act, which is simply a form of "offsite protection and mitigation." 16 U.S.C. § 839b(h)(8)(A). As such, as used in this record of decision, "restoration" has the same meaning as "enhance" or "enhancement".

³ MOA §§ I.B, III.C.1.

within the State of Idaho. As to operational impacts, the agreement addresses only those impacts within the State. It does not address downstream operational impacts beyond Idaho's borders.

3. *Obligations Resolved.* The MOA takes a comprehensive approach to federal mitigation responsibility. In it, the parties permanently resolve any and all rights, claims, or interests Idaho has in wildlife-related mitigation for the C&I impacts of Albeni Falls Dam.⁴ The agreement also resolves any and all rights, claims, or interests the State has in wildlife-related mitigation for impacts of Albeni Falls Dam operations for a period of at least 30 years.⁵ The federal mitigation obligations that the MOA resolves include those arising under the Northwest Power Act and other applicable laws related to Albeni Falls Dam.⁶

In the MOA, Idaho will agree that there is no remaining federal mitigation responsibility for the C&I impacts of Albeni Falls Dam,⁷ and that the C&I mitigation properties that Bonneville has funded IDFG to acquire have permanently resolved any interest Idaho has in wildlife-related construction and inundation mitigation for the dam.⁸

Idaho will agree that the only remaining federal mitigation responsibility within the State is for the operational impacts of Albeni Falls Dam.⁹ Idaho will agree to use funds provided by Bonneville to mitigate those impacts on Bonneville's behalf, thereby fully resolving any State interest in operational impact mitigation for at least 30 years.¹⁰

4. *Term and Reopener.* For C&I impacts, the term of the MOA is permanent because the agreement fully resolves any and all interests that Idaho has in wildlife-related mitigation for the C&I impacts of Albeni Falls Dam.¹¹ For operational impacts, the agreement fully resolves any and all interests that Idaho has in wildlife-related mitigation for the operational impacts of Albeni Falls Dam for a term of at least 30

⁴ *Id.* § I.A.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.* § II.C.3.

⁸ *Id.*

⁹ *Id.*

¹⁰ *See id.* § II.C.3, § II.A.

¹¹ *Id.* § II.A.

years.¹² The parties will implement their funding and restoration commitments over a 10-year period.¹³

After 30 years from the effective date of the MOA, the parties will reopen discussion of operational impacts to conduct a good-faith assessment of whether circumstances at that time warrant additional operational mitigation.¹⁴ During the reopener, the parties will consider: changes to Albeni Falls Dam operations and resulting operational impacts, if any; the totality of fish and wildlife protection, mitigation, and enhancement work accomplished with Bonneville funding in the Pend Oreille basin; the long-term resiliency of the restoration work funded through this Agreement and the 2012 letter agreement; the larger regional context of the Federal Energy Regulatory Commission's relicensing of operations at the two upstream non-federal dams, Cabinet Gorge and Noxon;¹⁵ and other unanticipated circumstances affecting operational impacts.¹⁶ At the conclusion of the reopener, the parties will expeditiously amend or restate the agreement if additional operational mitigation is needed.¹⁷

5. *Operational Mitigation.* IDFG will use habitat restoration as the primary mitigation tool to address operational impacts under the agreement.¹⁸ Specifically, these restoration projects will reflect an in-place, in-kind approach to operational mitigation, taking restorative actions where operational impacts occur in an effort to recreate the kind of habitat and habitat function that has been adversely affected.¹⁹ The parties expect that in-place, in-kind restoration projects will not only provide benefits to wildlife, but will also enable significant benefits to fish, cultural resources, the public, and other resources by protecting and restoring ecosystem structure and functional links between ecosystem elements, including reconnected floodplain habitat.²⁰ The

¹² *Id.* § I.A.

¹³ *Id.* § II.A.

¹⁴ *Id.* § IV.E.

¹⁵ See discussion of Cabinet Gorge and Noxon in section II.B.2, below.

¹⁶ MOA § IV.E.

¹⁷ *Id.*

¹⁸ *Id.* § I.E, II.D. 1.

¹⁹ *Id.*, § II.D.1.

²⁰ *Id.* § II.E.

parties agree that restoration projects will be selected, designed, implemented, and managed to achieve such ecosystem benefits.²¹

Despite the MOA's prioritization of restoration as the best means to mitigate operational impacts, IDFG and Bonneville recognize that in certain limited circumstances, land acquisition and protection may also be appropriate for operational mitigation, such as when acquisition of a real property interest is necessary to complete a restoration project.²² Acquisition might also be appropriate if IDFG is unable to implement planned restoration projects and cannot find suitable replacements;²³ however, the State will make every effort to achieve the operational impact mitigation through habitat restoration projects.²⁴ If the parties determine that acquisition is appropriate under this agreement, Idaho will follow the acquisition procedures detailed in the Southern Idaho Wildlife Mitigation Agreement.²⁵

6. *Project Stewardship.* Under the MOA, Bonneville will provide **stewardship funding** for Idaho to permanently operate and maintain State-implemented construction and inundation mitigation as well as mitigation for Albeni Falls Dam operations.

a. Construction and Inundation Stewardship. Under the agreement Idaho assumes the responsibility to provide stewardship in perpetuity for all 4,225 acres of C&I properties and restoration projects the State acquired with Bonneville funds under the 1997 MOA and for the new restoration projects funded under the agreement.²⁶ Bonneville will deposit a one-time payment directly into a Stewardship Account owned by Idaho (see c, below).²⁷

b. Restoration Stewardship. The MOA also provides for adequate funding for perpetual stewardship of the restoration projects that IDFG completes as mitigation for the operational impacts of Albeni Falls Dam.²⁸ Instead of a one-time payment,

²¹ *Id.* §II.D.3.

²² *Id.* § II.D.5.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* § II.D.5. The Southern Idaho Wildlife Mitigation Agreement is on file at Bonneville.

²⁶ *Id.* § II.F.4.m.

²⁷ *Id.* §§ II.F.1, II.F.4.

²⁸ *Id.* § II.F.4.m.

Bonneville will provide stewardship for restoration projects as IDFG completes them, including an initial payment for stewardship of the 624 acres that the State previously restored under the 2012 letter agreement.²⁹

c. Stewardship Management. The MOA requires Idaho to establish a Stewardship Account that will contain two separate funds, one for the construction and inundation stewardship money (“**C&I Stewardship Fund**”) and another for the restoration stewardship money (“**Restoration Stewardship Fund**”).³⁰ Idaho’s Endowment Fund Investment Board will manage the Stewardship Account; the board already manages the stewardship funds for the Southern Idaho Wildlife Mitigation Agreement.³¹ Idaho will track the Stewardship Account, and the two funds within it, separately from other State funds,³² and report to Bonneville and the Council on the Stewardship Funding annually, so long as Idaho accepts annual funding from Bonneville to administer the Northern Idaho Wildlife Mitigation Project.³³ Bonneville may inspect Idaho’s records for the Stewardship Account at any time upon reasonable notice.³⁴ The IDFG Director will have sole discretion to determine the amount of the earnings to distribute from the fund.³⁵ If funds in the Stewardship Account are inadequate to address the stewardship needs for which they were provided, Bonneville has no obligation to provide additional funding.³⁶

Idaho’s primary responsibility regarding the C&I Stewardship Fund is to use it in a manner that preserves or enhances conservation values permanently on project properties.³⁷ The MOA includes an extensive but non-exclusive list of typical stewardship activities—for both C&I mitigation and restoration projects—Idaho will be undertaking with the funds in the Stewardship Account.³⁸ In addition to these activities, through FY 2027, Idaho may use funds in the Stewardship Account for restoration and

²⁹ *Id.* § II.F.3.

³⁰ *Id.* § II.F.4.h.

³¹ *Id.* § II.F.4.e. Idaho will manage the stewardship accounts for southern and northern Idaho separately and not commingle them.

³² *Id.* § II.F.4.f.

³³ *Id.* § III.K.2.

³⁴ *Id.*

³⁵ *Id.* § II.F.3.g.

³⁶ *Id.* § II.F.4.b.

³⁷ *Id.* § II.F.4.i.

³⁸ *Id.* § II.F.4.j.

acquisition activities only after consulting with Bonneville and meeting all environmental compliance conditions and due diligence that Bonneville identifies associated with acquiring real property interests and restoring habitats within the Pend Oreille basin.³⁹ After FY 2027 Idaho may use the funds from the C&I Stewardship Fund, without further consultation with Bonneville, for restoration and acquisition of real property interests, provided that Idaho ensures permanent protection of such real property interests and follows the requirements of the Uniform Relocation Assistance and Real Property Acquisition Policies Act described in section III.B.1 of the MOA.⁴⁰

Idaho may not use funds provided by Bonneville to pay taxes or payments in lieu of taxes.⁴¹ And if Idaho makes any use of the funds provided by Bonneville for any purpose other than those specified in the MOA, Bonneville may cease making any further payments and demand custody and control of the Stewardship Account until Idaho reinstates all funds used in violation of the agreement’s terms.⁴²

7. *Funding Commitments.* Bonneville will provide four separate types of funding to Idaho through the MOA, each with distinct conditions attached and each serving a unique purpose. Funding that accrues benefits to current and future ratepayers beyond the current rate period will be capitalized and recovered in future rates in accordance with Bonneville’s capitalization policy. The total funding that Bonneville will provide is \$23,895,590.00, adjusted for inflation, as described below.

Table 1: Total Agreement Funding

C&I Stewardship	\$6,759,712
Operational Mitigation (Restoration)	\$12,991,878
Restoration Stewardship	\$1,144,000
Administrative	\$3,000,000
Total	\$23,895,590

³⁹ *Id.* § II.F.4.k.i.

⁴⁰ *Id.* § II.F.4.h.i.

⁴¹ *Id.* § II.F.4.k.ii.

⁴² *Id.* § II.F.4.k.iii.

- a. Construction and Inundation Stewardship. After signing the MOA, Bonneville will provide Idaho a one-time payment of \$6,759,712.00 to address the stewardship of all C&I mitigation properties that Idaho acquired with Bonneville funding.⁴³
- b. Restoration Funding for Operational Mitigation. Over the 10-year period for implementing the parties' restoration and funding commitments of the agreement, Bonneville will provide Idaho with \$12,991,878.00 for restoration projects mitigating the operational impacts of Albeni Falls Dam.
- c. Restoration Stewardship. After signing the MOA, Bonneville will provide an initial payment of \$360,000.00 to address the stewardship needs of the 624 acres of restoration that Idaho has already completed for operational mitigation.⁴⁴ Bonneville will then provide an additional \$784,000.00 for stewardship of operational mitigation in proportional increments as Idaho completes new restoration work over the 10-year implementation period of the agreement.⁴⁵ The total restoration stewardship amount will be \$1,144,000.00.
- d. Administrative Funding. Over the 10-year period for implementing the parties' restoration and funding commitments of the agreement, Bonneville will provide Idaho with \$300,000.00 annually, totaling \$3,000,000.00 after 10 years, through annual contracts to fund Idaho's administration of the Northern Idaho Wildlife Mitigation Project.⁴⁶ Idaho may deposit up to \$250,000 of administrative funding for FY 2018 into the C&I Fund of the Stewardship Account.⁴⁷
- e. Budget Adjustments. Beginning in FY 2020, Bonneville will increase annual administrative funding and remaining and unobligated restoration funding by 2.5% each year through FY 2022 of the Agreement. When negotiations began for this agreement in 2014 the parties had been using a 2.5% inflation rate since 2008. It remains the starting negotiated inflation rate through FY 2022 under the agreement.

⁴³ *Id.* § II.F.1.

⁴⁴ *Id.* § II.F.3.

⁴⁵ *Id.*

⁴⁶ *Id.* § II.F.5.

⁴⁷ *Id.* § II.F.5.b.

The parties will renegotiate the inflation rate for FY 2023 to FY 2027 based on future economic conditions.⁴⁸

f. Potential for Additional Funding. The agreement allows for the possibility of additional funding in the future, but does not require such additional funding or make any commitments to that effect. Specifically, the parties have agreed to evaluate the operational impact mitigation after 30 years to determine whether circumstances at that time warrant additional operational mitigation, and Bonneville may agree to fund such mitigation as needed.⁴⁹

8. *Budget Flexibility*. Much like agreements that Bonneville has entered into with other parties, including the Columbia River Fish Accords, the Willamette Wildlife Agreement, and the Southern Idaho Wildlife Mitigation Agreement, the parties included budget and fund management provisions in this MOA. Annual budgets may fluctuate plus or minus 20 percent relative to the budget commitments in the MOA to allow for shifting funds between years, subject to the availability of funds and Bonneville's ability to accommodate such fluctuations.⁵⁰

9. *Contract Management*. To simplify contract management, after signing the MOA Bonneville will consolidate all annual contracts currently in place with IDFG for northern Idaho mitigation and issue a single new contract to IDFG that will cover the entire Northern Idaho Wildlife Mitigation Project.⁵¹

The parties intend to expend all funds provided in this Agreement, except those held in trust in the Stewardship Account, by the end of FY 2027. If at that time those monies, except those held in trust in the Stewardship Account, remain unexpended, the parties will either (i) extend the time for their expenditure through FY 2047, or (ii) provided Idaho has restored at least 1,378 acres, which represents what the parties agree are the remaining, unmitigated, operational impacts at the time of the agreement (see below), deposit the unexpended balance into the Restoration Stewardship Fund in the Stewardship Account.⁵² Idaho may, however, use the unexpended balance

⁴⁸ *Id.* § II.F.8. If the parties do not reach agreement on a new rate, the 2.5% rate will continue to apply for the duration of the agreement's 10 year implementation period. *Id.*

⁴⁹ *Id.* § IV.E.

⁵⁰ *Id.* § II.F.7.

⁵¹ *Id.* § I.D.

⁵² *Id.* § II.F.9.

deposited into the Restoration Stewardship Fund for additional restoration work and restoration stewardship only after the parties determine whether to provide for funding or implementation of additional operational mitigation at the time of the reopener.⁵³

10. Additional Provisions

- a. Secure Funding. For its part, Bonneville will take reasonable steps to secure the funds promised and ensure it can fulfill its commitments as stated in the MOA.⁵⁴
- b. Relating to Real Property Interests. If Idaho acquires any interests in real property using funding provided by this agreement, Idaho will provide for permanent protection of such property or will manage it in perpetuity for the public purposes of mitigation, permanent protection and enhancement of wildlife and wildlife habitat.⁵⁵ Idaho will hold properties acquired under the MOA in trust for the public and fish and wildlife.⁵⁶ This does not preclude other uses of the acquired habitat, but such uses must be compatible with and not impair the wildlife mitigation purposes. Public recreational and educational use of habitat acquired under this MOA is an identified value, and is encouraged so long as it does not interfere with the purposes of wildlife mitigation.⁵⁷

Idaho will assume full responsibility for any real property interests it acquires and not seek any additional contributions from Bonneville for incidents of ownership that arise, such as taxes, assessments, hazardous waste or fire response, cultural or historic resource mitigation, or tort liability.⁵⁸

In the future, Bonneville may seek to construct, locate, operate maintain and access future transmission facilities within one or more project properties.⁵⁹ If it does so, the parties will negotiate the terms and conditions, but Bonneville will owe Idaho no additional consideration.⁶⁰ Bonneville has the right to access all project properties.⁶¹

⁵³ *Id.*

⁵⁴ *Id.* § III.A.

⁵⁵ *Id.* § III.B.1.

⁵⁶ *Id.* § III.B.2.

⁵⁷ *Id.* § III.B.3.

⁵⁸ *Id.* § III.F.

⁵⁹ *Id.* § III.G.

⁶⁰ *Id.*

⁶¹ *Id.* § III.D.

The parties agree to sunset the 1997 IDFG MOA and to replace it with this MOA. The existing project properties that Idaho owns in fee, shown in MOA Attachment 1, are covered by a recorded future interest called an executory interest. To ensure permanent protection for these properties, Bonneville will execute and record an extinguishment or amendment of its executory interests and Idaho will execute and record covenants to replace or amend the executory interests on these properties.⁶²

c. Dispute Resolution. Consistent with a collaborative approach, the MOA provides for informal dispute resolution as the primary tool to resolve disputes.⁶³ If the parties cannot resolve a dispute through informal discussions, however, then the parties must submit the dispute to non-binding mediation before the initiation of any legal proceedings.

D. Three Mitigation Agreements in One

Functionally, the provisions described above operate as a single MOA that includes three distinct sub-agreements relating to wildlife mitigation or project administration, each with a separately distinguishable scope, cost, and value.

1. *Stewardship for Resolved C&I Mitigation.* The first sub-agreement provides stewardship funding for the wildlife habitat acres that Idaho previously acquired with Bonneville funds as C&I mitigation for Albeni Falls Dam. Idaho agrees that the C&I acres that it previously acquired fully resolves any and all interest the State has in C&I mitigation for Albeni Falls Dam.

The parties agree that the C&I stewardship funding provided in the MOA will cover Idaho's operation and maintenance costs for its C&I mitigation acres in perpetuity, thus eliminating Bonneville's annual O&M contract costs for those acres after Bonneville transfers the one-time stewardship payment.

The cost of the C&I stewardship under the MOA—\$56 per acre—is the same as the C&I stewardship provided in the Southern Idaho Wildlife Mitigation Agreement between the parties. The parties have found through experience that this level of funding is highly likely to prove adequate to operate and maintain the properties in

⁶² *Id.*

⁶³ *Id.* § IV.C.

perpetuity, thereby providing permanent protection of Bonneville ratepayer's initial investment in the C&I mitigation properties.

2. *Operational Mitigation.* The second sub-agreement provides for implementation and stewardship of habitat restoration projects that will address any and all interest Idaho has in wildlife mitigation for the operational impacts of Albeni Falls Dam, for a period of at least 30 years. As described further in Section II.B.2 below, Idaho has identified 2,002 acres of operational impacts from Albeni Falls Dam at the Clark Fork Delta and Priest River Delta. Bonneville has already funded Idaho to restore 624 acres of those impacts under the 2012 letter agreement, and under the MOA now agrees to provide Idaho with funding to restore the remaining 1,378 acres of operational impacts at the delta.

The restoration component of the operational impact mitigation funding was negotiated based on IDFG's cost estimates for enhancing 1,378 acres, and reflects the parties' past experiences with large scale restoration projects of similar size, scope, and complexity. The parties anticipate that Bonneville's firm commitment of restoration funding over a decade will attract substantial cost-sharing from other entities interested in Clark Fork Delta restoration, just as the earlier projects did. By providing adequate funds to complete the restoration projects, Bonneville ensures that the identified operational impacts will be fully mitigated through the MOA.

Additionally, the MOA provides stewardship funding for all 2,002 acres of restoration that Idaho will implement as mitigation for the operational impacts of Albeni Falls Dam. Once the restoration projects have been completed, the restoration stewardship funding will protect Bonneville ratepayers' investment by ensuring secure funding to maintain the value of the restoration projects as operational impact mitigation for Albeni Falls Dam. Stewardship of the restoration projects also decreases the likelihood Bonneville will need to provide additional operational mitigation funding after 30 years because it will help stabilize the benefits and promote long-term resiliency of the restoration.

The cost of restoration stewardship under the MOA—\$20 per acre—is considerably less than the per-acre cost of C&I stewardship, based on the parties' expectation that operation and maintenance of restoration projects will be less expensive than operation and maintenance of Idaho's fee-owned C&I properties. In addition, where the planned

restoration projects occur on land owned by other public entities, Idaho will not have responsibility for routine property ownership costs.

3. *Project Administration.* The final sub-agreement provides funding for IDFG to administer and implement all aspects of the Northern Idaho Wildlife Mitigation Project,⁶⁴ including the C&I stewardship and implementation and stewardship of restoration projects discussed above. IDFG's use of this administrative funding may include things such as personnel, services and supplies, equipment, and professional services; restoration and habitat management actions; intergovernmental coordination; management of the Stewardship Account; preparation of reports and management plans; and environmental compliance.⁶⁵

II. BONNEVILLE'S RATIONALE FOR THE MOA

A. Agreement between Bonneville and Idaho

The agreement is between Bonneville and the State of Idaho only. It builds on the collaboration and success of the 2014 Southern Idaho Wildlife Mitigation Agreement between the parties, and likewise serves as an effective implementation tool for fulfilling Bonneville's Northwest Power Act obligations to mitigate wildlife habitat affected by construction, inundation, and operation of Albeni Falls Dam. Rather than relying on off-site mitigation measures, an in-place, in-kind approach to operational impact mitigation focuses on actions that address the true, observable effects of dam operations in the locations where such effects actually occur.⁶⁶

The State of Idaho, through IDFG, is ideally situated to facilitate an in-place, in-kind mitigation approach within the State's borders. Because of its location at the Idaho-Washington border, the operational impacts of Albeni Falls Dam within the State of Idaho are concentrated along the shoreline of Lake Pend Oreille, the upstream reservoir behind the dam. IDFG currently manages wildlife habitat on several thousand acres of

⁶⁴ *Id.* § II.F.5.

⁶⁵ *Id.* § II.F.6.

⁶⁶ *Id.* §§ I.E, II.C.2, II.D.

Army Corps of Engineers land around Lake Pend Oreille.⁶⁷ This established, wildlife-focused presence in the area of Albeni Falls Dam's upstream operational impacts puts IDFG in an excellent position to administer additional wildlife habitat mitigation for such impacts.

Additionally, the agreement with Idaho builds on operational impact mitigation that IDFG has already implemented at Lake Pend Oreille. As stated above, Idaho restored 624 acres of wildlife habitat affected by Albeni Falls Dam operations using funding provided under the 2012 letter agreement. The 2012 letter agreement also provided that Bonneville and Idaho would work towards a long-term settlement for mitigation of construction, inundation, and any operational impacts on fish and wildlife resources attributed to Albeni Falls Dam.

Unlike the Southern Idaho Wildlife Mitigation Agreement between Bonneville and Idaho, this MOA does not address a specified Idaho proportion or share of mitigation for the impacts of Albeni Falls Dam relative to other entities because there is no allocation agreement among those entities interested in receiving Bonneville funding for Albeni Falls mitigation. Consequently, the agreement does not address or resolve stewardship of other Bonneville-funded C&I mitigation properties held by other entities. The agreement also does not preclude further agreements with the tribes to resolve long-term C&I and stewardship funding of Bonneville mitigation properties which they own or operational impacts outside the boundaries of the State of Idaho.⁶⁸ Nor does it serve as binding precedent for any such future agreements.⁶⁹

B. Explanation of Albeni Falls Dam Impacts

1. Construction and Inundation Impacts. The parties agree that construction of Albeni Falls Dam impacted 6,690 acres of wildlife habitat.⁷⁰ Those 6,690 acres includes the combined loss of 4,376 acres of herbaceous wetland and 2,314 acres of deciduous

⁶⁷ See Department of the Army, Supplemental Agreement No. 3, License No. DACW67-3-84-4, Albeni Falls Dam, Idaho (Nov. 3, 2008) (authorizing IDFG's continued use of approximately 4046 acres of federal land for wildlife management purposes at the Albeni Falls Dam Project area).

⁶⁸ MOA § I.F.

⁶⁹ *Id.* §§ I.F, IV.K.

⁷⁰ *Id.* § II.C.

forested wetland, 6,617 acres of which are attributable to inundation by the reservoir behind the dam.⁷¹

2. *Operational Impacts.* Unlike construction and inundation impacts, there is not a definitive assessment indicating a precise quantification of the operational impacts of Albeni Falls Dam. However, existing data, studies, and analyses of operational impacts informed Bonneville and Idaho's overall consideration in arriving at the negotiated figure for mitigation of 2,002 acres. The Council's program endorses this negotiation approach, stating that "[m]itigation agreements should be considered to settle operational losses in lieu of precise assessments of impacts."⁷²

As described below, Bonneville and Idaho reviewed data and analysis from numerous sources concerning the location of Albeni Falls Dam operational impacts on wildlife, the scale of such impacts, additional sources of impacts, and practical and economic considerations. With a holistic view of these various factors, and recognizing the absence of a precise assessment of operational impacts, the parties agreed that the selected restoration projects, totaling 2,002 acres,⁷³ would provide reasonable mitigation for the operational impacts of Albeni Falls Dam within the State of Idaho. The 30-year reopener serves as an opportunity to review whether this amount combined with any additional restoration Idaho completes with funds provided under the agreement continues to be a legally adequate level of mitigation: Bonneville expects that it will be.

⁷¹ See Martin et al., *Albeni Falls Wildlife Protection, Mitigation, and Enhancement Plan*, at vi, 17 tbl. 1 (1987).

⁷² 2014 Columbia River Basin Fish and Wildlife Program at 72 [hereinafter 2014 Council Program]. Bonneville does not think that section 4(h)(10)(A) of the Northwest Power Act compels mitigation for operational impacts accruing prior to passage of the act. In considering the mitigation requirements of the Federal Power Act provisions for non-federal hydroelectric dams, the Ninth Circuit Court of Appeals has found that "it defies common sense and notions of pragmatism" to develop a 50-year-old baseline in an attempt to guide present day decision making. *American Rivers v. FERC*, 187 F.3d 1007, 1018 (9th Cir. 1999). Similarly, another court rejected pre-project baselines, finding that the statutory words "fish and wildlife . . . affected" by the project seems to refer to the fish and wildlife currently existing [and . . .] surely cannot refer to the animals inhabiting the area in 1899, when the project came into being. *Conservation Law Foundation v. FERC*, 216 F.3d 41, 46 (D.C. Cir. 2000).

⁷³ This figure includes the 624 acres of restoration work that IDFG has already completed with Bonneville funds at the Clark Fork Delta. This agreement would provide for an additional 1,378 acres of restoration.

a. Location of Operational Impacts to Wildlife

As discussed in the Flexible Winter Power Operations Final Environmental Assessment,⁷⁴ the upstream geographic area of potential effect for Albeni Falls Dam operations, based on the hydrologic footprint of the operations, includes Lake Pend Oreille, the reach of the Pend Oreille River between the lake and the dam, and adjacent shorelines.⁷⁵ Operational impacts to wildlife habitat are due primarily to erosion along the Lake Pend Oreille shoreline “that negatively affects riparian vegetation and wetland habitat used by many wildlife species.”⁷⁶ Additionally, these operational impacts are concentrated at the Clark Fork Delta, which is highly susceptible to erosion, and where functional wetlands, including attendant habitat, have largely disappeared.⁷⁷

To best mitigate the effects of dam operations on wildlife, the parties agreed to restore and protect habitat areas where wildlife is most impacted. Therefore, acknowledging that the primary wildlife habitat impacts are concentrated at the Clark Fork Delta, Idaho and Bonneville decided that completing IDFG’s restoration work in the Clark Fork Delta would provide the most effective mitigation for operational impacts to wildlife.

b. Sources of Wildlife Impacts

In terms of Albeni Falls Dam operations, the most significant factor affecting Clark Fork Delta erosion and wetland impacts relates to recreation: it is the length of time and the elevation at which Lake Pend Oreille is held over the summer (2062.5 feet), which is exacerbated by non-operational factors such as wind-generated waves and boat wakes.⁷⁸ As to wildlife habitat specifically, the sources of impacts around the lake are

⁷⁴ Albeni Falls Dam Flexible Winter Power Operations Bonner County, Idaho Final Environmental Assessment (Oct. 2011) available at https://www.bpa.gov/efw/Analysis/NEPADDocuments/nepa/AFD-FWPO/AFD_FWPO_Final_EA.pdf [hereinafter “FWPO EA”].

⁷⁵ *Id.* at 3-1.

⁷⁶ *Id.* at 3-22. See also *id.* at 4-29 (identifying loss of wildlife habitat due to lake shore erosion as the “primary wildlife concern” associated with flexible winter power operations at Albeni Falls Dam).

⁷⁷ *Id.* at 3-12, 3-20.

⁷⁸ *Id.* at 3-12. See also Parametrix, Inc., Assessment of Geomorphic Processes Clark Fork Hydroelectric Projects Relicensing Phase 1 Report at ix (1998) [hereinafter Parametrix] (identifying summer lake elevation and wind waves as the biggest factor affecting the Clark Fork Delta). This finding is “consistent with the [System Operation Review] EIS which states ‘erosion of reservoir shores is most severe and costly in terms of habitat and facility losses when reservoirs are at full pool.’” *Id.*

much the same: sustained summer lake elevation for recreation and subsequent drafting for flood risk management.⁷⁹

However, additional factors—other than Albeni Falls Dam operations or recreation on Lake Pend Oreille—also influence the severity of erosion at the Clark Fork Delta. A study completed by Parametrix, Inc. in 1998 focused on the impacts on the delta of two non-federal projects upstream from Lake Pend Oreille—Cabinet Gorge and Noxon Rapids dams—which are owned and operated by Avista. Parametrix’s report identified four primary factors affecting the delta.

First, and having the biggest impact, is the summer elevation of Lake Pend Oreille and wind waves.⁸⁰ Second, is the loss of sediment delivery to the delta resulting from impoundment at upstream non-federal dams.⁸¹ Notably, the Flexible Winter Power Operations Environmental Assessment also noted impoundment of sediment and large woody debris at upstream dams on the Clark Fork River (Cabinet Gorge, Noxon Rapids, and Thompson Falls) as a source of erosion impact at the delta.⁸² The third factor Parametrix identified is natural flooding, and the fourth is the unique nature of the glacial sediment present in the river system.⁸³ Of these four factors affecting the Clark Fork Delta, the first is the only one that can be attributed to the operation of Albeni Falls Dam.

c. Scale of Operational Impacts

Bonneville and Idaho decided that a precise quantification of operational impacts attributable to Albeni Falls Dam to address in the MOA would be impractical and costly. Therefore, consistent with guidance in the Council’s program and relying on

⁷⁹ *Id.* at 6-7 (“The primary driver for effects on wildlife habitat around Lake Pend Oreille is the continued operation of [Albeni Falls Dam] to maintain a summer lake elevation of 2062.5’ followed by drafting for flood risk reduction in the winter.”).

⁸⁰ Parametrix at ix.

⁸¹ *Id.*

⁸² FWPO EA at 3-12. As the Parametrix report points out, it was Cabinet Gorge that “effectively shut off bedload sediment supply [to the Clark Fork Delta] from upstream sources.” Parametrix at vi. Prior to completion of Cabinet Gorge Dam, there was at least moderate sediment delivery to the delta. Parametrix at 58. Thus, Cabinet Gorge insulates the delta, in a sense, from the impacts, if any, of Thompson Falls Dam upstream. For its part, Thompson Falls Dam, a run-of-the-river project, “offers negligible storage as the reservoir is limited in extent and is predominantly filled with sand and gravel.” Parametrix at 27.

⁸³ Parametrix at ix.

existing data, Bonneville and Idaho reached negotiated agreement on a reasonable amount of operational impact mitigation rather than a precise impact assessment.⁸⁴

At the start of negotiations, IDFG proposed nine restoration projects around Lake Pend Oreille to address the remaining mitigation responsibility for upstream operational impacts with a combined footprint of 1,674 acres.⁸⁵ Adding the operational impact mitigation under the 2012 letter agreement, which restored 624 acres in the Clark Fork Delta, together with IDFG's proposal of 1,674 acres of restoration would have resulted in 2,298 acres of operational impact mitigation.

Bonneville countered IDFG's proposal selecting some, but not all, of the projects so as to reasonably account for wildlife impacts attributable to other sources that do not give rise to federal mitigation responsibility (as discussed above). The final compromise reduced IDFG's proposal by 269 acres but retained projects in the two critical areas—the Clark Fork Delta and Priest River Delta—to cover 1,378 acres. As provided in the MOA, implementing 1,378 acres of restoration associated with the Clark Fork Delta and Priest River Delta projects, added to the 624 acres completed previously, brings the total upstream impacts from operation of Albeni Falls Dam to 2,002 acres, or approximately 87.1 percent of Idaho's proposal of 2,298 acres.

The reduction from IDFG's proposal approximates the share of impacts to wildlife habitat caused by sources other than Albeni Falls Dam operations, and closely aligns with available data and studies that have estimated the proportional influence of those other sources. For example, in studying hydroelectric facility impacts on the Clark Fork Delta, Parametrix concluded that approximately 15 to 25 percent of habitat impacts in the delta are the result of the Avista's two Clark Fork Project dams.⁸⁶

⁸⁴ See 2014 Program at 72. The Southern Idaho Wildlife Mitigation Agreement and the Willamette Wildlife Agreement also included negotiated operational impact settlements.

⁸⁵ IDFG's initial operational mitigation proposal included projects to restore 1,624 acres at the Clark Fork Delta (in two phases), the Priest River Delta, Albeni Cove, Hoodoo Creek, Hornby Creek, Riley Creek, Morton Slough, and Carey Creek. After the initial proposal, IDFG also noted potential for restoration of 50 acres at the Pack River Delta. Although the agreement includes funding only for the Clark Fork and Priest River projects, it does contemplate implementation of the others as potential replacement restoration projects if, for any reason, IDFG is unable to complete all of the Clark Fork Delta and Priest River Delta restoration work. See MOA att. 3.

⁸⁶ *Parametrix* at 72. See also Federal Energy Regulatory Commission, Final Environmental Impact Statement Cabinet Gorge and Noxon Rapids Hydroelectric Projects Idaho and Montana (FERC 2058-014

In determining which projects to include in the MOA, Bonneville relied on its in-place, in-kind approach to operational mitigation and also considered which projects would provide the greatest benefit to impacted wildlife habitat. Because the greatest impacts to wildlife habitat occur at the Clark Fork Delta, the parties concentrated their mitigation efforts in that location. This approach builds on the restoration work already completed under the 2012 letter agreement, remedies impacts to wildlife habitat in the location where they are most severe, and provides the majority of operational mitigation in an aggregated, contiguous habitat area.

At nearly 100 acres, the Priest River Delta restoration project was also prioritized as it too would focus on in-place, in-kind operational mitigation and would result in a relatively large contiguous area of wildlife habitat.

C. Status of C&I Mitigation in Northern Idaho

The construction of Albeni Falls Dam impacted 6,690 acres of wildlife habitat. To date, Bonneville has funded 14,087 acres of mitigation to address the C&I impacts. As a result, the MOA memorializes the agreement between Bonneville and Idaho that no further C&I mitigation is needed. Accordingly, Bonneville will not provide any additional C&I mitigation funding under this agreement, but rather is providing stewardship money for C&I property that Idaho already acquired.⁸⁷

III. BONNEVILLE'S AUTHORITY AND CONSISTENCY WITH THE COUNCIL PROGRAM

A. Consistency with Council's Program and Purposes of the Northwest Power Act

The Council's Program outlines elements that it encourages Bonneville to use in long-term wildlife agreements such as this one. Section III.E of the MOA explicitly tracks how it is indeed consistent with the Council's guidance.

and 2075-014), at 4-35 (Feb. 2000). A 2009 study that Ducks Unlimited conducted for IDFG regarding erosion in the Clark Fork Delta and habitat restoration potential also cited to the conclusions of the Parametrix report. See Ducks Unlimited, *Clark Fork River Delta, Idaho Bank Erosion and Habitat Restoration Alternatives*, at 6 (Oct. 11, 2009) [hereinafter Ducks Unlimited].

⁸⁷ The MOA does not affect the Kalispel Tribe of Indians' Accord—or the interests of any other entity—because as discussed in section V below, Responses to Comments, there are no remaining C&I wildlife losses to settle in northern Idaho.

- *The MOA uses acres as a measureable objective.* The program originally identified losses and recommended that crediting be tracked in habitat units, but ultimately the Council recognized “that wildlife mitigation agreements may use a different metric for mitigation.”⁸⁸ The program supports alternatives to the habitat evaluation procedures methodology, which includes the habitat units metric, where, as here, the application of that methodology would produce flawed results.⁸⁹
- *Consistency with the policies and objectives of the strategies in the 2014 Program.* Implementing the MOA helps meet the objectives and strategies in the program by assuring adequate funding for permanent stewardship for all project properties and providing in-place enhancements to mitigate operational impacts.
- *30-year reopener.* While not amending them into the program, the Council accepted the recommendation from its Wildlife Advisory Committee, including the suggestion that operational impact agreements that are not based on loss assessments allow for reopening the agreements.
- *Adherence to open public process.* The parties adhered to an open public process by consulting or conferring with the Council, Bonneville customers, and the tribes in addition to posting the draft MOA and taking public comment for 30 days. Idaho’s project selection process for use of MOA funds will be public working through the Idaho Fish and Game Commission.
- *Protection of riparian habitat benefitting both fish and wildlife.* The MOA embraces the habitat-based ecosystem approach to mitigation by reaffirming Idaho’s commitment to address wildlife habitat losses in northern Idaho in a manner that also protects and improves fish habitat.⁹⁰
- *Incentives to ensure effective implementation with periodic monitoring and evaluation or a periodic audit.* Idaho will report annually so the Council and Bonneville can review the effectiveness of MOA implementation. Specifically, Idaho will report on expenditures from the Stewardship Fund through FY 2047. In addition, for as long as it receives annual funding from Bonneville, Idaho will prepare an annual

⁸⁸ 2014 Council Program at 148, app. C (identifying other settlement agreements in which Bonneville and another party “have quantified and mitigated for [wildlife habitat] losses in acres of land,” including for Dworshak Dam, the Willamette dams, and the Southern Idaho dams—roughly half the dams for which Bonneville has mitigation responsibilities).

⁸⁹ See *id.* at 72

⁹⁰ MOA § II.E.

report for Bonneville and the Council for mitigation funded through the MOA and track the project using Columbia Basin Fish.

- *Complements existing and future activities of the region’s fish and wildlife agencies and tribes.* The restoration projects prioritized in the agreement complement the work IDFG and Avista have already completed in Phase I of Clark Fork Delta restoration as part of the Clark Fork Project Settlement (see App. O).
- *Enhancement as off-site mitigation and protection.* Tracking Bonneville’s in-place, in-kind operational mitigation strategy,⁹¹ the restoration projects implemented through the agreement are concentrated at the geographic location associated with the most severe operational impacts on wildlife habitat, *i.e.*, at the Clark Fork Delta, and are appropriately sized to address those impacts.

B. Authority to Enter into the MOA

Bonneville’s authority and ability to enter into this MOA is based in federal statutes. Since Bonneville’s inception, Congress has afforded the Bonneville 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 Bonneville’s statutory purposes.⁹² This includes the express authority to make payments from the Bonneville Fund to implement Bonneville’s legal responsibilities under the Northwest Power Act—such as fish and wildlife mitigation.⁹³ Bonneville is imbued with considerable flexibility and discretion when entering into arrangements such as this MOA, provided that Bonneville uses that flexibility and discretion to fulfill one or more of its statutory responsibilities.

IV. RESPONSES TO COMMENTS

Bonneville posted a draft of the agreement for public comment on its website on January 23, 2018. Prior to that online posting, Bonneville staff met with tribal

⁹¹ See, e.g., Letter from L. Bodi, Bonneville Power Administration, Vice President of Environment, Fish and Wildlife, to B. Bradbury, Northwest Power and Conservation Council, Chair, at 14 (Nov. 20, 2013) available at <http://app.nwccouncil.org/uploads/2013amend/files/5543e168-8593-426d-a7cd-827c3c65bbf8/AmendmentCommentsLtr11202013.pdf> (indicating Bonneville’s support for mitigation of operational impacts through actions that address affected ecosystems).

⁹² 16 U.S.C. § 832a(f).

⁹³ 16 U.S.C. §§ 838i(b), 838i(b)(12).

representatives in Coeur d'Alene, Idaho on November 14, 2017 to discuss the planned agreement. In addition, on January 9, 2018, Bonneville and Idaho staff briefed the Council's F&W Committee on the agreement. At the February 13, 2018 Council meeting in Portland, IDFG staff and managers, along with Idaho Councilmember Booth and Bonneville staff, provided an hour-long presentation to the public on the draft agreement. During the 30-day comment period, 7 comments were submitted. No entities sought additional time to review and comment.

Four of the comments from Bonneville power customers, and one from Washington Councilmember Karier and Council staff, provided substantive commentary on the scope and cost of the draft agreement. The power customer comments largely echoed—or explicitly incorporated—substantive themes and issues that Mr. Karier's comments raised. Bonneville staff discussed Mr. Karier's thoughts on the draft agreement in two separate telephone conversations with him during the comment period. The Council's staff also emailed comments questioning the scope and legal adequacy of the draft agreement.

A. Differences Between the Proposed Agreement and the Southern Idaho and Willamette Agreements

Comparing the proposed agreement to those for southern Idaho or the Willamette Valley in Oregon is neither intuitive nor easy: the geography, number and kinds of dams involved, and the extent of past mitigation make such comparisons inaccurate and unhelpful. There are two significant differences between northern Idaho and other areas where wildlife mitigation has been settled for both C&I and operations. First, Albeni Falls Dam operations have shown substantial impacts on riparian and shallow water habitats at and above the full pool level. Neither the Willamette dams nor the southern Idaho dams had reliably documented substantial impacts occurring above the full pool level—that is, above the zone of impacts already addressed through C&I mitigation efforts. Second, because of the challenging application of habitat evaluation procedure and the region's inability to confirm actual habitat units mitigated as habitat was being acquired, which is discussed below, Bonneville may have over-mitigated for C&I impacts at Albeni Falls.

B. There is No Formula or Guidance for Sizing Operational Loss Agreements

One comment expressed concern that, “the formula used to estimate the *operational* impacts measured in acres from Albeni Falls is higher than previous agreements by a factor of ten.” The premise of this concern is unfounded because there is no standard formula or ratio for sizing the operational loss mitigation obligation, or agreements to address those obligations, required by the Northwest Power Act, recommended by the Council, or adopted by Bonneville. The Council itself, through its Wildlife Advisory Committee, attempted to find a rational, transparent, and consistent means to address operational impacts but was unable to do so. This absence of actionable guidance left Bonneville to develop this agreement based on earlier studies and observations, not precise formulations, and responds to the federal ratepayer share of actual operational impacts.

In this same way, this MOA addresses the mitigation responsibilities unique to Albeni Falls Dam and is not beholden to any prior agreement. Potential future agreements concerning other dams would be negotiated to fulfill Bonneville’s mitigation responsibilities, not to parallel the Albeni Falls or any other agreement. Again, there is no standard formula. The exposure that remains in the future is limited and will vary depending on the level of mitigation completed to date, the extent of impacts remaining unmitigated, the nature and location of those impacts, and any past agreements between the entities involved.

A related concern was that the cost of operational loss mitigation for Albeni Falls Dam is higher than C&I losses in previous settlements. Bonneville does not understand this concern, because the Program distinguishes between C&I and operational losses. There is nothing that says the two must cost the same to mitigate.⁹⁴ In this agreement, the effects on habitat from C&I of Albeni Falls Dam vary considerably from its operational impacts. The operational impact mitigation proposed with Idaho in this agreement does two things: it protects existing habitat from further degradation from operations, and it enhances the habitat quality. There is no legal, economic, or biological basis compelling Bonneville to compare this kind of mitigation approach for operational impacts to mitigation for habitat lost through construction and inundation.

⁹⁴ There is no established mathematical relationship in the program, law, or reality between construction and inundation impacts on the one hand and operational losses on the other.

Another comment worried the operational impact mitigation under the agreement would cost an average \$9,428 per acre, which is significantly more than allowed in either the Willamette or southern Idaho agreements. Bonneville negotiated a fixed price habitat enhancement component in this agreement based on the amount IDFG estimated it would cost to enhance 1,378 acres based on project design reports. Idaho based its estimates on the planned action, work environment, and recent experience completing restoration work on the Clark Fork Delta. The stewardship costs of the restored habitat will, however, be only \$20 per acre—considerably less than the \$56 per acre for IDFG’s fee owned C&I mitigation sites.

C. Crediting Ratio

Bonneville entered into negotiations with Idaho working from its long-standing policy of a 1:1 mitigation crediting ratio. Disputes over crediting ratios have been a program-wide issue for decades. So in 2002, Bonneville issued a final decision selecting a 1:1 crediting ratio.⁹⁵ Indeed, Idaho and Bonneville have been implementing wildlife mitigation in northern Idaho at a 1:1 crediting ratio under a 1997 MOA between Bonneville and the State.⁹⁶ Some comments on the draft agreement questioned whether the agreement approached C&I crediting at a ratio closer to 2:1, based on the comparison between documented C&I impacts and the amount of C&I mitigation Bonneville has funded in northern Idaho to date. As explained above, and as the agreement indicates, the total C&I impacts of Albeni Falls Dam equal 6,690 acres of habitat while the total C&I mitigation Bonneville has funded in northern Idaho is 14,087 acres.⁹⁷

⁹⁵ See Letter from S. Wright, Bonneville Power Administration, Administrator, to L. Cassidy, Northwest Power and Conservation Council, Chairman (regarding wildlife crediting) (Mar. 5, 2002) (on file at Bonneville).

⁹⁶ Idaho confirmed its commitment to 1:1 crediting in 2004, stating that “Idaho recognizes and supports Bonneville taking full credit for wildlife mitigation funded through [the 1997 MOA]. Idaho understands this means one credit for each habitat unit acquired or improved under the agreements” Letter from S. Huffaker, IDFG, Director, to T. Lamb, Bonneville Power Administration, Vice President Environment, Fish and Wildlife (Mar. 24, 2004). The Shoshone Bannock Tribes sent a nearly identical letter in 2007. Letter from A. Coby, Fort Hall Business Council, Chair, to G. Delwiche, Bonneville Power Administration, Vice President Environment, Fish and Wildlife (Apr. 10, 2007). The Shoshone Paiute Tribe’s MOA recognizes “one credit for each HU acquired” 2009 MOA § V.A.2.

⁹⁷ See MOA § II.C.1, Tbl. 1.

Any disparity between Bonneville’s 1:1 crediting policy and the amount of mitigation that Bonneville has funded for C&I mitigation in northern Idaho arises from the well-documented difficulties of applying the Habitat Evaluation Procedure (HEP) and the use of habitat units (HUs) as a mitigation metric, and at Albeni Falls Dam in particular. The Council’s 2009 Program recognized the problems with using habitat units and the inconsistent application of habitat evaluation procedures associated with Albeni Falls Dam.⁹⁸ Underlying the problems in Albeni Falls crediting was the inability of the four entities performing mitigation work for Bonneville to agree on a single habitat unit crediting formula that complied with standard habitat evaluation procedure principles. Consequently, depending on which entities were involved, two projects of identical size and habitat attributes could result in drastically different amounts of C&I mitigation credit—and neither amount would meet habitat evaluation procedure standards.⁹⁹ An independent review found the result of the habitat unit

⁹⁸ See 2009 Columbia River Basin Fish and Wildlife Program at 21, n.6 (citing Paul R. Ashley, Habitat Unit Stacking White Paper (Feb. 19, 2008) *available at* http://cfw.nwcouncil.org/Committees/WAC/meetings/2008_0522/Ashley_Habitat_Unit_Stacking_White_Paper.doc?wb48617274=OIRNNDM4MDtCVUQuOIBBLkdPVjsxMC4zLjEzOC45MzcxNTE4NDgyMDA2O5RkKXNrSFbUMvs/z+Q9inSuLX8jZgTFI6ScSR807ydYRe0GZRYCvTKXTIxBwwmWBaH0kisEQw99r2IwjliyAx7s9+L0NMXA9u7YTsRg+smDvBpHQpb4QjhcmqlwYj3wI/c5AbTWALiYvYbpGyRmhHWUMzMEOIvwgYTOJ4Y1+gve) [hereinafter Ashley, Habitat Unit Stacking]. Thus it fell to the Regional Habitat Team to demonstrate that the HEP process as used by the four entities working on mitigation in northern Idaho was so deeply flawed and conflicted that the habitat unit credit was grossly understated.

⁹⁹ Anticipating his retirement and the closing of the Regional Habitat Team in 2015, Mr. Ashley wrote a series of papers on Northwest Power Act wildlife mitigation and crediting, one for each subregion of the Columbia River Basin. In the paper that included a discussion on Albeni Falls Dam, Mr. Ashley described how HEP was broken and did not work in northern Idaho:

For over a decade, the RHT [Regional Habitat Team] has consistently observed that when appropriate stacking and HEP models are used, compensation sites HU to acre ratios are similar to loss assessment HU to acre ratios. This suggests that loss and gain acres should be similar and comparable to projects elsewhere in the Region. [Albeni Falls] Work Group Members have adopted practices that result in unreliable HEP crediting reports on compensation sites that significantly underreport the amount of mitigation completed and credit available for Bonneville to take. Not applying proper stacking generally results in the skewed acre data

. . .

The RHT firmly believes that the biologically based HEP process is no longer the appropriate “tool” for crediting C&I HU gains at Albeni Falls. Rather than spend additional time, effort, and funding to find an equitable biologically based HEP resolution (which is extremely unlikely), the Program would benefit more, and likely be less expensive, if remaining unmitigated HU losses and questions were resolved in negotiated settlement discussions.

issues and inconsistent habitat evaluation procedure application was mitigation credit that came in “lower than expected.”¹⁰⁰

In response to the crediting challenges in northern Idaho, Bonneville pursued a negotiated solution with a more consistent crediting approach.¹⁰¹ The proposal was to multiply the number of acres already protected as C&I mitigation for Albeni Falls Dam by 2.25 habitat units. This approach would help right-size the under-reported HUs.¹⁰² It was also a conservative approach when compared to the multiplier of 4.3 habitat units per acre that the Regional Habitat Team’s analysis suggested as appropriate.¹⁰³ However, the wildlife managers working on Albeni Falls mitigation could not reach consensus on this as an appropriate solution. Left with no other alternatives, Bonneville turned to acres as the metric for tracking Albeni Falls losses and mitigation. By this point, however, the wildlife managers had spent years pursuing habitat units under what ultimately proved to be an inconsistently applied and flawed methodology, and the resulting number of acres acquired as C&I mitigation in northern Idaho already exceeded the total acres impacted by construction and inundation of Albeni Falls Dam.¹⁰⁴

To address this abundance of mitigation, Bonneville has taken two steps and plans a third. First, beginning in 2012, the pace of new land acquisitions was slowed to minimize and avoid over mitigation. At that time, Bonneville made its last

Paul R. Ashley—Regional [Habitat Evaluation Procedures] Team, RHT Final Assessment and Analysis of the NW Power Act [Wildlife Mitigation] Funded by BPA, Upper Columbia Sub-region at 19-20 (April 28, 2015) (footnotes omitted) *available at* <http://www.streamnet.org/wp-content/uploads/2015/11/Upper-Columbia-HEP-Discussion-Final-20150428.pdf> [hereinafter Ashley, RHT Final Assessment].

¹⁰⁰ Ashley, Habitat Unit Stacking at 5. *See also* Ashley, RHT Final Assessment at 13, 19 (describing inconsistent use of HEP principles that resulted in habitat unit gains for Albeni Falls mitigation being “understated” and “largely inaccurate or under-reported”).

¹⁰¹ *See* Ashley, RHT Final Assessment at 19 (describing Bonneville’s “effort to bring consistency to wildlife mitigation crediting at Albeni Falls Dam”).

¹⁰² *See id.* at 19-20 (“[Bonneville] staff discussed/negotiated with the Work Group members to set aside the biologically based HEP approach in favor of Work Group Members agreeing to a guarantee of 2.25 [habitat units] credit for each acquired/protected acre.”)

¹⁰³ *Id.* at n.20 (“The Albeni Falls [habitat unit] per acre ratio is 4.3 [habitat units] per acre.”).

¹⁰⁴ Not long ago the Council’s staff said that, “the use of the regional HEP process has come to a useful end.” Memorandum from M. Fritsch and P. Paquet, Council Staff, to Northwest Power and Conservation Councilmembers (Nov. 10, 2015) (providing rationale for recommending that Bonneville close out the contract for the Regional Habitat Team) *available at* https://www.nwcouncil.org/sites/default/files/3_24.pdf .

commitments for new C&I mitigation for Albeni Falls Dam in northern Idaho.¹⁰⁵ Next, using the 2012 letter agreement, Bonneville repurposed budgets that had been planned for C&I acquisitions and shifted them to enhance the Clark Fork Delta for in-water and riparian habitat enhancement work to mitigate for operational losses. And finally, Bonneville will likely consider any over-mitigation for C&I as a factor offsetting the need for any additional operational impact mitigation at the time of the 30-year reopener.

The agreement does not provide specific funding for additional C&I acquisitions. Any acquisitions for operations mitigation would be incidental to and necessary to complete the agreed upon habitat restoration projects.¹⁰⁶ Therefore, to the extent Albeni Falls C&I may be over mitigated when compared to Bonneville's 1:1 crediting policy, the overage occurred in the past and would not be exacerbated by the proposed agreement.¹⁰⁷

One commenter suggested Bonneville minimize the financial effect of this overabundance of habitat by not funding stewardship for C&I acreage in excess of Bonneville's 1:1 C&I mitigation ratio. This would have the undesirable consequence of stranding those mitigation investments and writing them off as a financial loss. Instead of depriving fish and wildlife resources the benefits of that habitat, and to give ratepayers credit for funds invested on their behalf, Bonneville will continue with its proposal to fund the stewardship for those acres and would likely take credit for a portion of that excess C&I mitigation against future operational loss obligations as needed. This will, however, be a matter of future negotiations and agreement as Idaho has not agreed to this approach.

¹⁰⁵ The last Bonneville-funded land acquisition for Albeni Falls C&I mitigation with IDFG was in 2010; the last with the Kootenai Tribe of Idaho was in 2012. The Kalispel Accord in 2012 also finalized C&I issues for Albeni Falls and the Kalispel Tribe.

¹⁰⁶ See MOA § II.D.5.

¹⁰⁷ Northwest Requirements Utilities (NRU) commented that Bonneville should consider divesting itself of certain power facilities instead of continuing to fund mitigation for them. That proposal is beyond the scope of this agreement and, as NRU notes, raises significant unsettled questions about the legal authority needed to stop marketing power and funding mitigation for a CRS project.

D. The Nature of Bonneville’s Northwest Power Act Wildlife Mitigation Duty

Two comments questioned the legality of Bonneville addressing its Albeni Falls C&I mitigation duties in the proposed agreement with Idaho when the Kalispel Tribe, Kootenai Tribe of Idaho, and the Coeur d’Alene Tribe had also been involved in wildlife mitigation as part of the Albeni Falls Work Group.

Broadly speaking, Bonneville has an obligation to fish and wildlife affected by the development and operation of Albeni Falls Dam.¹⁰⁸ There is no statutory mitigation duty to any particular entity. Nevertheless, throughout the region Bonneville fulfills its mitigation duties by working primarily with the state and federal agencies that have expertise in managing fish and wildlife habitat and Indian tribes that share that expertise and also have a special trust relationship with the United States.

Under this agreement, Bonneville continues to assert what it has for almost a decade: there is no legal mandate for doing more C&I mitigation for Albeni Falls Dam.¹⁰⁹ This assertion applies not just to Idaho but to all entities and processes that engage Northwest Power Act wildlife mitigation issues. This is Bonneville’s long-standing publicly stated position; it is not some new term arising for the first time in this agreement with Idaho.

For its part, under the agreement Idaho would accept that the completed C&I mitigation, combined with the stewardship funding promised for the future, fully and permanently mitigates any interest Idaho has in C&I impacts from Albeni Falls Dam. No other entity is bound by Idaho’s agreement that C&I mitigation is complete or that operational impact mitigation within the State of Idaho is legally adequate. Bonneville, therefore, is not settling all of its Albeni Falls C&I obligations with just the State of Idaho. Instead, Idaho is now simply agreeing that the habitat protection needed to fulfill the C&I obligation is indeed complete and settled.

Council staff commented that the draft agreement discussed the completion of C&I mitigation in “absolute and not proportional” terms, “implying that the entire impact

¹⁰⁸ 16 USC § 839b(h)(10)(A).

¹⁰⁹ See e.g., Bonneville Comments on Draft 2014 Program at 10-12 (July 24, 2014) (“wildlife mitigation has been completed for almost all [CRS] dams for construction and inundation impacts”) available at <http://app.nwccouncil.org/uploads/2013amend/files/92ab509f-42b6-40c9-9821-4998d94c58b8/AmendmentLtr07252014.pdf>.

and mitigation has been converted here to acreage, and concluding that ‘there is no remaining federal mitigation responsibility for C&I impacts from Albeni Falls.’”¹¹⁰ The starting and ending point of the agreement for Bonneville is the absolute certainty that, by any reasonable reading of its legal obligations, it has fulfilled C&I mitigation for Albeni Falls Dam. By signing the agreement Idaho will be agreeing with that. Again: the agreement isn’t needed to fulfill Bonneville’s C&I obligations—they are already fulfilled. Any entity except Idaho can challenge that.¹¹¹

The Council staff also thought the agreement needed a clear expression of “proportionality,” presumably to leave a “share” of the remaining mitigation for other members of the Albeni Falls Work Group. There is no statute or agreement directing or binding Bonneville to mitigate certain amounts in certain places with certain entities. Proportionality agreements, such as the one between Idaho and two tribes for southern Idaho dams,¹¹² make reaching agreements like this easier—but they do not bind Bonneville legally. The Council, moreover, has itself already considered the proportionality question and explained that the program is not “a vehicle to guarantee funding for a particular project, entity, or individual.”¹¹³ This legal certainty persists even if the program includes a specific funding measure that “does not by itself constitute a funding obligation” for Bonneville.¹¹⁴

Washington Councilmember Karier raised a proportionality question in reviewing the southern Idaho wildlife agreement in 2014. The Council’s legal staff responded with a short memorandum saying, “Bonneville has the authority to decide how to

¹¹⁰ Email from J. Shurts, Northwest Power and Conservation Council, General Counsel, to J. Allen, Northwest Power and Conservation Council, Idaho Office, Director and Policy Analyst (Jan. 26, 2018) [hereinafter Email from Shurts to Allen].

¹¹¹ Council staff recently made it even harder for prospective challengers, though, by presenting their calculation that Albeni Falls is just 60 habitat units shy of fully mitigated. Given the documented undercounting of habitat unit credit in the reports the staff relied on, there’s still no realistic argument that any C&I mitigation duty for Albeni Falls Dam remains. *See* Council Staff, Wildlife Losses, Program Mitigation and Remaining Loss Ledger at 9 (Feb. 5, 2018).

¹¹² *See* Southern Idaho Wildlife Mitigation Memorandum of Agreement between the State of Idaho and Bonneville Power Administration, attachment 2.

¹¹³ 2014 Program at 112.

¹¹⁴ *Id.*

implement the mitigation to address the wildlife losses from the federal dams. . . .”¹¹⁵ There is no mandate in the Act or provision in the program calling for proportionality, which is appropriate because the focus is to protect, mitigate, and enhance *fish and wildlife*, not specific entities. It doesn’t matter who does the work as long as appropriate mitigation consistent with the program and the purposes of the Act gets done.

A final concern expressed by Council staff was Bonneville converting “the whole HU loss to acres and declar[ing] that settled here”¹¹⁶ As noted above, Council staff has agreed that mitigation cannot be feasibly tracked using habitat units any longer.¹¹⁷ And since at least 2014 Bonneville has made public its view that with the exception of southern Idaho the agency has completed all C&I wildlife mitigation.¹¹⁸ This agreement sets no new precedents in its use of acres as a unit of measure or in declaring Albeni Falls C&I mitigation complete.

E. Overall Value of the Agreement

To assess the value of the agreement, Bonneville anticipated what its costs for Albeni Falls mitigation, through IDFG, would likely be without the proposed new agreement. Over the past five years Bonneville paid IDFG an average of \$1.64 million annually to implement Albeni Falls mitigation. This level of funding allowed IDFG to operate and maintain the C&I mitigation properties it owns and manages, restore 624 acres on the Clark Fork Delta, and cover administrative costs. With the Council’s 2014 program amendments adding a new emphasis on operational impact mitigation now that C&I

¹¹⁵ Memorandum from J. Shurts, Northwest Power and Conservation Council, General Counsel, to Councilmembers Booth and Karier at 2 (Aug. 29, 2014) (regarding “Questions about Council and about Power Act mitigation re draft Southern Idaho Wildlife Mitigation MOA”).

¹¹⁶ See Email from Shurts to Allen.

¹¹⁷ See *supra* note 105 and accompanying text.

¹¹⁸ At the conclusion of the Council’s Wildlife Crediting Forum, Bonneville wrote to the Council and said: Bonneville has almost fully addressed all the effects on wildlife from the construction of the CRS dams and habitat inundation by their reservoirs. Based on documentation in the final report of the Wildlife Crediting Forum, and subsequent mitigation work, Bonneville thinks only a portion of four southern Idaho dams remain in need of construction and inundation mitigation. In other words, of the 29 CRS dams covered by the Act’s mitigation mandates, the construction and inundation effects from 25 dams are fully mitigated.

Letter from P. Key, Bonneville representative, to M. Fritsch and P. Paquet, Council staff, at 2 (Oct. 23, 2015) available at http://www.nwcouncil.org/media/7149705/102315bpa2015-10-23_ltr-to-mark-and-peter-with-attachments.pdf.

mitigation is nearly complete throughout the region, Bonneville expects a substantial if unspecified amount of ongoing funding would be called for to address those operational impacts. Eventually inflation would also increase those costs.

Under the agreement, the average cost for stewardship, restoration, and administration during the 10-year payout period will be about \$2.4 million annually. However, there will never be any more C&I stewardship funding for operations and maintenance and no more restoration funding for at least 30 years.

The decision to capitalize portions of the agreement will be made when costs are incurred in accordance with Bonneville's capitalization policy. Currently, Bonneville anticipates capitalizing C&I stewardship (\$6,759,712) and restoration stewardship (\$1,144,000). Bonneville will fund restoration work for operational mitigation (\$12,991,878) and administrative costs (\$3,000,000) using expense dollars, and based on the current 5-year average funding rates, the expense portion of agreement will pay for itself in approximately 10 years. That is, without the agreement, if Bonneville continued to pay \$1.64 million annually, the expense cost would be \$16.4 million over 10 years; with the agreement, the 10-year expense cost is \$16.0 million. At the end of the agreement's 10-year implementation period, when Bonneville has finished funding operational mitigation and administrative costs, the expense budget will drop to zero, resulting in savings to the F&W Program. On the capital side of the agreement—funding for C&I stewardship and restoration stewardship—Bonneville has budgeted for a one-time payment of \$7,119,712 (\$6,759,712 for C&I stewardship plus \$360,000 for completed restoration stewardship) in the FY18 budget. The remainder of the restoration stewardship will be provided in proportional increments as Idaho completes new restoration work. These capital costs will be amortized over a period of 15 years.

The paragraph above describes the investment value of the agreement. Ultimately, in each of the net present value analyses that Bonneville considered, the agreement cost less over 30 years than the status quo alternatives.¹¹⁹ With the agreement, stewardship

¹¹⁹ In his comments Mr. Karier calculated that the payback period could stretch out 34 years. He appears to reach this conclusion by comparing the total \$24 million cost for all three components of the agreement against the cost of a single component, the current level of funding that Bonneville provides to IDFG to operate and maintain its ratepayer-funded Albeni Falls mitigation properties. In addition to omitting the restoration and administration costs in his calculations, Mr. Karier also overlooked the inevitable effect of inflation over three decades. Coincidentally, where Mr. Karier calculated the amount

for all the C&I properties would be entirely funded and become Idaho's responsibility forever, and mitigation for dam operations would be covered for at least 30 years. Without the agreement, there would be no perpetual stewardship fund, no agreed to end of C&I mitigation, and no alignment on an appropriate level of mitigation for operational impacts. There would also be no agreement from Idaho that C&I or operations mitigation requirements have been met.

One commenter expressed concern at the agreement's inclusion of a 2.5% inflation rate, and suggested using a formula-based inflation approach with a cap of 2.5%. Bonneville has explained above that during negotiation of the agreement, which began in 2014, the parties agreed to continue using the 2.5% inflation rate that they had used since 2008.¹²⁰ To the extent that future actual inflation rates may be lower than the negotiated 2.5% provided in the agreement, the agreement mitigates that risk by providing no inflation adjustments until year three of the agreement's 10 year implementation period. Additionally, the parties will renegotiate the inflation rate for years six through 10 based on future economic conditions. So although the agreement does not use a formula-based approach to inflation as suggested by the commenter, it does provide a mid-point opportunity to assess current inflation rates and negotiate corresponding adjustments.

Several comments questioned the finality and financial certainty that the agreement would provide, and specifically whether it authorized unspecified costs in the future, such as additional administrative funding after 10 years. The provision in the draft agreement regarding further administrative funding allowed for the possibility of such funding, but did not require it. The extent of Bonneville's commitment in that provision was to *consider* providing such additional funds and make reasonable effort to negotiate the matter with Idaho, taking into account future project administration needs, if any. Therefore, while the provision left the door open for the possibility of additional administrative funding, it stopped short of a substantive commitment for added funds in the future.

However, in response to the commenters' concerns about additional administrative funding, and in the interest of ensuring the financial certainty provided by the

of capital needed to provide stewardship for existing acreage in perpetuity, he arrived at a value of \$7,756,800. For the same work the agreement would provide \$6,759,712.

¹²⁰ See *supra* part I.C.7.E.

agreement, Bonneville and Idaho discussed the additional administrative funding provision to determine whether there was a compelling need to retain it. Together, the parties concluded that because the agreement provides a buffer period of approximately three years between the expected completion of the restoration work and the expiration of annual administrative funding, the agreement sufficiently addressed any concerns associated with unexpected delays in restoration implementation. And because the need for administrative funding would largely disappear after the restoration work is complete, the Parties agreed that the provision regarding additional administrative funding after 10 years was unnecessary and deleted it from the final agreement.

In a related matter, one of the objectives of Bonneville’s recently released 2018-2023 Strategic Plan is to “hold the sum of program costs, by business line, at or below the rate of inflation through 2028.”¹²¹ This objective extends to Bonneville’s fish and wildlife program costs, which Bonneville also intends to keep “at or below inflation, inclusive of new obligations and commitments.”¹²² However, the general terms of this MOA with Idaho—including the inflation provision for restoration and administrative funding—were negotiated and agreed to by the parties well in advance of the Strategic Plan. Therefore, notwithstanding new agency objectives regarding inflation, the parties agreed to retain the inflation provision of the MOA as part of the bargain that they negotiated earlier. Bonneville intends to absorb the full cost of this agreement within its existing overall fish and wildlife program budget, while still keeping the program’s overall costs at or below the rate of inflation.

Finally, Bonneville’s financial status allows the agency to begin funding the agreement in FY 2018, including nearly \$7 million for stewardship, and to do so without affecting other fish and wildlife projects, the agency’s financial reserves, or requiring an increase in rates. Choosing not to execute the agreement would leave ongoing cost pressures hovering over the program indefinitely. And in the future capital may no

¹²¹ See Bonneville Strategic Plan at 12, available at <https://www.bpa.gov/StrategicPlan/Pages/Strategic-Plan.aspx>.

¹²² *Id.* at 39.

longer be available for these types of stewardship endowments as Bonneville's borrowing authority continues to tighten due to costs of constructing new hatcheries.¹²³

F. Other Comments

Bonneville received two additional comments about the agreement through the public comment website. One asked why geothermal energy sources are not discussed more; this comment is beyond the scope of the MOA. The other comment expressed an opinion questioning whether the agreement would provide sufficient value to the State of Idaho. Bonneville appreciates the commenter's opinion and interest in the agreement.

V. NATIONAL ENVIRONMENTAL POLICY ACT ANALYSIS

Under NEPA,¹²⁴ Bonneville has assessed the potential for environmental effects related to entering into the MOA. Bonneville reviewed its Fish and Wildlife Implementation Plan Environmental Impact Statement (FWIP EIS)¹²⁵ and the FWIP Record of Decision (ROD)¹²⁶ to determine if participation in the agreement falls within the scope of the FWIP EIS and its Preferred Alternative. Bonneville has determined that the decision to enter into the MOA is adequately covered within the scope of the FWIP EIS and ROD. Entering into this MOA would not result in significantly different environmental effects from those examined in the FWIP EIS. Bonneville therefore has decided to tier its decision under NEPA for the MOA to the FWIP EIS and ROD.

A. Bonneville's Fish and Wildlife Implementation Plan EIS and ROD

Bonneville developed the FWIP EIS and ROD to establish a comprehensive and consistent policy to guide the implementation and funding of Bonneville's fish and wildlife mitigation and recovery efforts. The FWIP EIS supports a number of decisions

¹²³ One comment by Cowlitz County Public Utility District advocated for independent economic analysis of the agreement. Bonneville has shown the reasonableness and cost-effectiveness of this agreement, and lacking any obligation or precedent for having third parties provide economic analysis of its draft contracts Bonneville did not do so.

¹²⁴ 42 U.S.C. § 4321, *et seq.*

¹²⁵ FWIP EIS available at <https://www.bpa.gov/efw/Analysis/NEPADocuments/Pages/Implementation-Plan.aspx>

¹²⁶ FWIP ROD available at https://www.bpa.gov/efw/Analysis/NEPADocuments/nepa/Implementation_Plan/RODforEIS0312.pdf

related to these efforts, including decisions related to funding fish and wildlife mitigation and recovery efforts; funding Bonneville's share of the Council's program; funding fish and wildlife research, monitoring, and evaluation; entering into regional funding agreements; and funding habitat protection and enhancement activities.¹²⁷

The FWIP EIS considered a wide range of potential Policy Direction alternatives for Bonneville's fish and wildlife mitigation efforts. The Final FWIP EIS identifies and evaluates the following alternatives that span the full range of reasonably foreseeable directions for fish and wildlife policy: Natural Focus, Weak Stock Focus, Sustainable Use Focus, Strong Stock Focus, Commerce Focus, and the PA 2002 Preferred Alternative Policy Direction (essentially a blend of the Weak Stock and Sustainable Use Alternatives). In addition, the EIS includes a Status Quo alternative that serves as a baseline against which all alternatives can be compared.

The analysis in the FWIP EIS compares the potential environmental impacts for the possible range of implementing actions for fish and wildlife mitigation and recovery under each Policy Direction with the Status Quo. By considering the numerous potential fish and wildlife actions in the region, the FWIP EIS provides a cumulative assessment of potential environmental impacts from Bonneville's funding and implementation of these actions. The FWIP EIS also collects and sorts the many and varied proposed and on-going actions for fish and wildlife mitigation in the region.¹²⁸ These actions, referred to as Sample Implementation Actions, are organized in the FWIP EIS in tables for each Policy Direction alternative. These actions are representative of the types of actions that are consistent with the various alternatives.

The FWIP EIS also incorporates by reference Bonneville's Wildlife Mitigation Program EIS¹²⁹ and Watershed Management Program EIS.¹³⁰ Bonneville's Wildlife Mitigation Program EIS provided a comprehensive analysis of different program alternatives for addressing Bonneville's wildlife mitigation projects, including land acquisitions and management; habitat enhancement through restoration and

¹²⁷ FWIP EIS, Section 1.4.2; FWIP ROD, Section 7

¹²⁸ FWIP EIS, Volume III

¹²⁹ Wildlife Mitigation EIS *available at*

<https://www.bpa.gov/efw/Analysis/NEPADocuments/Pages/Wildlife-Mitigation.aspx>

¹³⁰ Watershed Management EIS *available at*

https://www.bpa.gov/efw/Analysis/NEPADocuments/Pages/Watershed_Management.aspx

improvements; installation of watering devices and riparian fencing; and other conservation actions. In the Wildlife Mitigation Program ROD, Bonneville decided to implement a program to support this wide range of potential wildlife mitigation actions. Similarly, the Watershed Management Program EIS provided a comprehensive analysis of different program alternatives for addressing Bonneville's watershed management projects, such as riparian restoration and other vegetation management techniques; in-channel modifications and fish habitat improvement structures; and various land management techniques. In the Watershed Management Program ROD, Bonneville decided to implement a program to support this wide range of potential actions intended to benefit fish, fish habitat, and aquatic ecosystems in the region.

Subsequent to completion of these programmatic EISs and their associated RODs, Bonneville prepared over 340 environmental analyses for site-specific actions under the Watershed Management Program and Wildlife Mitigation Program EISs. Each of these analyses 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.

Through the FWIP ROD, Bonneville adopted PA 2002 as its policy direction for funding and implementing its fish and wildlife obligations. PA 2002 focuses on improving 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.¹³¹ Actions that are consistent with PA 2002 include actions taken to replace wildlife habitat lost to hydro development, as well as to increase improvement of fish habitat (e.g., through protecting high-quality habitat, increasing tributary stream flow, removing passage barriers, and screening irrigation diversions) to improve fish productivity.¹³² The FWIP ROD also adopts the strategy identified in the FWIP EIS for making subsequent fish and wildlife policy decisions based on the FWIP EIS and within the scope of PA 2002.¹³³

¹³¹ FWIP ROD, Section 3.

¹³² FWIP ROD, Section 8.

¹³³ FWIP EIS, Section 1.4.1 and Figure 1-6; FWIP ROD, Figure 1, p. 15.

B. Environmental Analysis for the Albeni Falls Wildlife Mitigation MOA

The MOA would commit Bonneville funding to protect and enhance wildlife habitat to meet Federal mitigation obligations for wildlife impacts caused by the Albeni Falls Dam in Northern Idaho. As discussed below, Bonneville has evaluated whether entering into the MOA is consistent, at a policy level, with the PA 2002 Policy Direction adopted by Bonneville in the FWIP ROD, as well as whether the types of projects and their associated environmental impacts that are expected to take place under the MOA are consistent with the types of projects analyzed and considered in the FWIP EIS and ROD.¹

Policy-Level Evaluation. The MOA focuses on providing funding for continued habitat protection, enhancement (restoration) and stewardship to address operational impacts of Albeni Falls Dam, and for stewardship of lands previously acquired by Idaho and funded by Bonneville to mitigate the impacts from construction and inundation. The focus is consistent with the focus of PA 2002 protecting and improving habitat through actions to offset habitat lost to hydro development and operations and increase the value of that habitat to fish and wildlife. By providing funding to Idaho for continued habitat improvement, the MOA is consistent with PA 2002's goals of developing and implementing mechanisms for carrying out Bonneville's wildlife mitigation obligations with the government and people of the region. The MOA is precisely the type of regional funding agreement for habitat improvement activities that the FWIP EIS and ROD are intended to support. Accordingly, the objectives of the MOA are consistent with the purposes and goals of PA 2002, and overall, the MOA is consistent, at a policy level, with PA 2002.

2. Project-Level Evaluation. The FWIP EIS describes potential impacts of actions that could occur as a result of each of the Policy Directions considered in the EIS.¹³⁴ The habitat restoration, stewardship, protection and management activities within the framework of the MOA are expected to result in short- and long-term benefits to fish and wildlife by increasing terrestrial and riparian habitat values. Overall benefits to wildlife would occur as a result of implementing the MOA through the restoration of wildlife habitat and continued stewardship of previously acquired lands to maintain their habitat values and ensure habitat availability for fish and wildlife species in the future. Human populations would also benefit from habitat improvements as part of future actions under the MOA, as opportunities for recreation are maintained and aesthetic values are preserved.

¹³⁴ Section 5.3 of the FWIP EIS and, more specifically for PA 2002, in Section 3A.3 of the FWIP EIS.

Previously acquired lands managed with the stewardship funding provided under the MOA would continue to be protected from future development, which would avoid impacts related to development such as increased surface runoff, soil erosion, and vegetation disturbance.

Habitat improvement, restoration, and stewardship may in some instances provide additional protections for cultural resources, and vegetation management techniques would help to control invasive plant species and aid in the reestablishment of native plant species. Potential negative environmental impacts of the projects under the MOA would be limited. Some resources such as soils, vegetation, and water bodies on and near these lands could be affected by removal of structures, fences, and other human-introduced features, clearing of non-native vegetation, and other habitat restoration activities. These impacts, however, would be temporary and localized in nature and would be necessary to return the land to a more natural state. Negative impacts to human populations relating to removal of land from commodity production would affect a relatively small portion of the lands available for those uses in Idaho. In sum, ongoing habitat protection and enhancement through restoration and stewardship funding contemplated in the MOA are the same type of projects that were considered in the FWIP EIS and that are included as part of PA 2002. In addition, while there could be some short-term localized impacts from the projects implemented under the MOA, the MOA will result in net benefits to fish and wildlife, water quality, and other natural resources. These impacts and benefits were recognized and considered in the FWIP EIS. The types of projects under the MOA and their expected impacts thus are consistent with the FWIP EIS and ROD, as well as PA 2002.3. Further Project-Specific Environmental Review. While the FWIP EIS NEPA analysis addresses the policy decision to enter into the MOA, there may be a need for further NEPA review of individual habitat mitigation actions before they can be implemented.¹³⁵ All projects undertaken pursuant to the MOA must be in compliance with all applicable federal, state, and local laws and regulations, which may require additional environmental permitting or approvals before a particular habitat project can be implemented. For each action, Bonneville will determine whether further project-specific environmental review is required, and if so, the appropriate level of NEPA analysis and documentation—categorical exclusion, environmental assessment (EA), EIS,

¹³⁵ See MOA §§ II.F.2, II.F.5.

supplement analysis or tiering to existing NEPA documents, or use of a validation process to the FWIP EIS, as appropriate.

Regarding actions undertaken with the Stewardship Funding, the known near-term stewardship actions Idaho will implement are long-standing, routine operation and maintenance activities that have been found not to significantly affect the human environment.¹³⁶ Idaho will use Stewardship Funding for operation and maintenance of previously acquired properties, and also to maintain new restoration work that Idaho will implement under the MOA. Bonneville does not consider these routine operation and maintenance actions to be an ongoing Federal action and further environmental review by Bonneville would not be required. However, the MOA allows that, after approximately 10 years, and in certain circumstances after 30 years, Idaho may also use Stewardship Funding to undertake additional actions not currently part of the routine operation and maintenance work described in the MOA.¹³⁷ At the time that Idaho proposes to use Stewardship Funding for actions that are not considered routine operation and maintenance work, Bonneville will determine the appropriate level of environmental review, if any, required for such actions.

For actions using the Restoration Funding or Administrative Funding, Bonneville has well-established processes for providing environmental review and compliance for the kinds of mitigation actions Idaho will implement with these funds. For routine habitat protection and enhancement projects that have predictable environmental effects already analyzed in the FWIP EIS, Watershed Management EIS, or Wildlife Mitigation Program EIS, Bonneville may use a validation process to ensure all applicable tribal, federal, state, and local laws and regulations, in addition to NEPA, have been addressed prior to implementation. (For example, the validation process

¹³⁶ Bonneville issued a Finding of No Significant Impact based on the South Fork Snake River/Palisades Wildlife Mitigation Project Environmental Assessment (DOE/EA-0956, September 1995, *available at* http://energy.gov/sites/prod/files/EA-0956-FEA-1995_0.pdf). In this Environmental Assessment, Bonneville evaluated the environmental effects of its funding for a programmatic management plan that provides a combination of habitat protection and enhancement measures to permanently protect certain sections of riparian wildlife habitat along the South Fork Snake River. Additionally, Bonneville has found that routine operation and maintenance activities typically fit within classes of actions that the U.S. Department of Energy (DOE) has determined do not individually or cumulatively have a significant effect on the human environment and are therefore categorically excluded from further NEPA review pursuant to the DOE NEPA regulations that apply to Bonneville. *See* 10 CFR 1021, Subpart D.

¹³⁷ *See* MOA § II.F.4.h.i-iv.

includes addressing impacts, if any are identified, pursuant to the National Historic Preservation Act.) Results of the validation process are tracked and can be accessed through CBFish, a web-enabled software application that assists Bonneville and its fish and wildlife program participants in managing projects throughout the Columbia River Basin.¹³⁸

In the MOA, the Clark Fork and Priest River deltas have been identified as priority mitigation areas for mitigating operational impacts of Albeni Falls Dam. Several smaller-scale alternative restoration areas were also identified should the priority projects face challenges with implementation. Based on a prior Finding of No Significant Impact and the Environmental Assessment for Clark Fork Delta restoration work, Bonneville expects that the near-term restoration actions Idaho will implement using the funding in the MOA will likewise not significantly affect the human environment.¹³⁹ However, to confirm this expectation, prior to implementation, each restoration project under this MOA will undergo additional environmental compliance specific to that project. Bonneville will determine the appropriate environmental review and will work with Idaho to ensure that all applicable requirements have been met and are appropriately documented. The best management practices, restrictions, and mitigation measures imposed through regulatory processes 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 minimize impacts.

Bonneville may determine that for some actions an EA or EIS is appropriate. Decision factors may include controversy over effects on resources, 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.

¹³⁸ Validation process results appear under the project work element tab for environmental compliance (WE ID 165) available at <https://www.cbfish.org/WorkElement.mvc/Landing/WorkElements>.

¹³⁹ Bonneville issued a Finding of No Significant Impact on the Clark Fork River Delta Restoration Environmental Assessment (DOE/EA-1969 https://www.bpa.gov/efw/Analysis/NEPADocuments/nepa/ClarkForkRiverDelta/Clark_Fork_4D_FONSI_Mitigation_Plan.pdf). In this Environmental Assessment, Bonneville evaluated the effects of its funding for restoration of wetland and riparian habitat, and to reduce effects of Albeni Falls Dam operational erosion in the Clark Fork River delta.

For such projects, Bonneville will coordinate with the State of Idaho to ensure an appropriate strategy to comply with NEPA.

VI. CONCLUSION

Based on the foregoing background and analysis, I have decided to sign the MOA. Executing the MOA is a final action under 16 U.S.C. § 839f(e)(5) since it obligates Bonneville to fund Idaho to restore, protect, and maintain property for fish and wildlife in Idaho. As reflected in that analysis, the MOA will help mitigate the effects of the Albeni Falls Dam and operations, with actions that are expected to produce significant and measurable biological benefits. The MOA will provide greater certainty and stability in Bonneville's mitigation funding commitments, which will encourage cost-sharing with other entities and help Bonneville manage its financial risks. The MOA supports a broader, more permanent, collaborative approach to mitigation with the State of Idaho.

Executing the MOA helps fulfill the Northwest Power Act's purpose of providing for an adequate, efficient, economical, and reliable power supply. The obligations in the MOA provide greater certainty of costs and borrowing needs by establishing long term funding commitments that can be managed prospectively, thus benefitting ratepayers and the region by helping to keep rates stable. The agreement permanently resolves wildlife mitigation obligations associated with the construction and inundation of Albeni Falls Dam with the State of Idaho. The agreement also resolves wildlife mitigation for Albeni Falls Dam operations for a minimum of 30 years. Finally, the MOA ensures permanent stewardship of acquisitions and restoration projects, protecting ratepayer investments in these mitigation actions. For these reasons I believe it is sound business and in the interest of both customers and wildlife to sign the MOA and settle the mitigation for the Albeni Falls Dam construction, inundation, and operation.

Bonneville briefed the Council, potentially affected Indian tribes, and customer groups about the nature of the agreement and how it would be funded and accounted for, and responded to all comments received.

Based on a review of the FWIP EIS and ROD, I have determined that entering into the MOA falls within the scope of the PA 2002 alternative evaluated in the FWIP EIS

and adopted in that ROD. This decision is a direct application of PA 2002, and is not expected to result in significantly different environmental impacts from those examined in the FWIP EIS. The agreement will assist Bonneville in accomplishing the goals related to PA 2002 that are identified in the FWIP ROD. Therefore, the decision to implement the MOA is tiered to the FWIP ROD.

Issued in Portland, Oregon, August __, 2018.

/s/ Elliot E. Mainzer

Elliot E. Mainzer

Administrator and Chief Executive Officer