

# The Fish and Wildlife Lands Deskbook



## Bonneville Power Administration's Deskbook for Fish and Wildlife Land Acquisition, Enhancement, Monitoring, and Enforcement Projects

Version 1.1, November 2016



## **Dedication**

Dedicated to Jacilyn R. Margeson, Assistant General Counsel, whose guidance and expertise in real property law and policy made possible Bonneville's overwhelmingly successful fish and wildlife habitat protection and enhancement program.

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## Acronyms

<b>BPA</b>	Bonneville Power Administration
<b>BPI</b>	Bonneville Purchasing Instructions
<b>CBWTP</b>	Columbia Basin Water Transaction Program
<b>CE</b>	Conservation Easement
<b>CO</b>	Contracting Officer
<b>COTR</b>	Contracting Officer's Technical Representative
<b>CWA</b>	Clean Water Act
<b>CX</b>	Categorical Exclusion (documenting NEPA compliance)
<b>EA</b>	Environmental Assessment
<b>ECL</b>	Environmental Compliance Officer (for BPA)
<b>EIS</b>	Environmental Impact Statement
<b>ESA</b>	Endangered Species Act
<b>FCRPS</b>	Federal Columbia River Power System
<b>MV</b>	Appraised Market Value
<b>ISRP</b>	Independent Scientific Review Panel
<b>LIS</b>	Land Information System (BPA Internal Software)
<b>LMP</b>	Land Management Plan
<b>LUA</b>	Land Use Agreement
<b>MOA</b>	Memorandum of Agreement
<b>NEPA</b>	National Environmental Policy Act
<b>NHPA</b>	National Historic Preservation Act
<b>NOAA</b>	National Oceanic and Atmospheric Administration
<b>PSA</b>	Purchase and Sale Agreement
<b>ROD</b>	Record of Decision
<b>SHPO</b>	State Historic Preservation Officer
<b>THPO</b>	Tribal Historic Preservation Officer
<b>WAC</b>	Wildlife Advisory Committee (of the Northwest Power and Conservation Council)



## Why this Deskbook?

This deskbook is tailored specifically for projects that involve acquiring an interest in real property as part of the Bonneville Power Administration's ongoing efforts to fulfill its fish and wildlife mitigation responsibilities under the Pacific Northwest Electric Power Planning and Conservation Act and the Endangered Species Act. Successful, cost-effective, and efficient acquisitions further BPA's mission by helping achieve strategic objectives and fulfill mitigation agreements. The unprecedented reach of these mitigation efforts—guided by the Northwest Power and Conservation Council and its Columbia River Basin Fish and Wildlife Program, biological opinions, and numerous long-term agreements with states and tribes—demands that BPA staff be aware of their individual roles as stewards of these precious resources and ratepayer funds. Only with this awareness can BPA collaborate effectively across organizational lines to maximize the value of its efforts. This deskbook is one way BPA hopes to improve how it does business to more effectively deliver on the agency's mission and vision regarding fish and wildlife and maximize the value of this mitigation program.

This deskbook helps guide internal BPA staff in the steps necessary to successfully acquire, manage, monitor, and protect real property interests for the benefit of fish and wildlife. While it was developed for internal agency use, **nothing in this deskbook is protected or privileged information, so any part of it may be shared externally.**

- **Real property** includes lands and anything permanently affixed to lands, such as buildings and anything permanently attached to them, and water rights, with exceptions.
- **Real property interest** means a right in real property held by a certain person or entity. Types of real property interests are varied, and occur in a spectrum between fee title interest (ownership of all rights in real property) and less-than-fee title interest. Less-than-fee real property interests include, among other things, conservation easements, land or water right leases, right-of-way easements, and covenants running with the land.

This deskbook uses “**acquisition**” to refer to the purchase of real property interests, or to the process by which such a purchase occurs. The guidance for acquisition in this deskbook reflects Federal legal requirements, some applicable state statutory requirements, best standards and practices from the land

conservation community and over 25-years experience at BPA funding land acquisitions for fish and wildlife mitigation.

BPA project managers, contracting officers, and contracting officers' technical representatives (**COTRs**) working on a project involving an acquisition funded in whole or in part by BPA – even a small part – should follow the guidance in this deskbook. Whether a project includes 1 acre or 1000, or benefits resident fish, anadromous fish, or wildlife, this deskbook serves as general guidance and provides the underpinnings for BPA to fund acquisitions.

This deskbook guides acquisitions where project sponsors already have a memorandum of agreement (**MOA**) with BPA covering acquisitions and those who don't. For sponsors with an MOA, BPA should rely on the MOA to continue to guide acquisitions, unless amended, and this deskbook should guide anything that has been omitted from or is not clearly stipulated in the MOA. While this deskbook does not change the legal commitments in those existing agreements, it does provide the most up-to-date guidance on the Federal laws and BPA guidelines covering mitigation projects that involve real property interests.

The practices and procedures described in this deskbook do not constitute a final agency action but are instead intended solely as guidance. For projects where the sponsors do not have an MOA with BPA – probably the majority – following the procedures in this deskbook may eliminate the need for an MOA and cover everything necessary to successfully complete an acquisition from pre-acquisition planning to post-acquisition monitoring. And while this deskbook outlines BPA's real property acquisition processes for fish and wildlife projects in written format for the first time, for the most part the substance is not new. Thus, staff members who have worked on real property acquisitions in the past will find most of the guidance familiar.

The deskbook provides BPA staff the information they need when discussing duties and restrictions on property use with project sponsors and property owners. The deskbook includes:

- Templates, including template MOAs and easements, to help reduce project transaction time by clarifying and standardizing document preparation and interpretation.
- Information needed to facilitate data gathering in Pisces, BPA's land information system of records (aka **LIS**), and other appropriate databases, to account for and monitor fish and wildlife acquisitions.





## Reading Tips

- Terms used in this deskbook for the first time will appear in bold font, and will be followed by a definition. Commonly used acronyms are defined in the List of Acronyms, after the table of contents.
- Sections outlined in a box explain specific issues in greater detail, provide detailed explanations or background information, or encourage a best practice.

## Projects Covered by this Deskbook

This deskbook applies to all land acquisitions that BPA funds for fish and wildlife mitigation purposes. Whether the acquisition fulfills a fish or wildlife FCRPS objective, or is consequent of the ESA or Northwest Power Act, the guidelines and processes in this deskbook apply. This deskbook covers all mitigation projects that include BPA securing or acquiring any real property interests including water rights, fee title acquisitions, conservation easements, covenants, and other property interests. It does not apply where BPA funds other habitat-related mitigation activities but does not acquire a real property interest. For example, when BPA funds a culvert replacement, large woody debris installation, or riparian fencing, it generally does so through a contractor, and neither BPA nor the contractor acquires a legal interest in the underlying real property.

The primary real property interests covered in this deskbook include the following:

1. **Fee ownership** means buying the whole property. Fee acquisitions involve BPA funding a sponsor – usually a tribe, state or Federal agency, or non-governmental entity – to acquire property in fee title. Sponsors then grant BPA a conservation easement and access rights to the property.
2. **Conservation easements** are a permanent, non-possessory interest in real property imposing limitations or affirmative obligations on a landowner for conservation purposes. The restrictions remain even when the ownership changes. BPA funds sponsors to acquire easements and in return the underlying land owner grants BPA rights of entry and enforcement.

3. **Covenants** are restrictions placed on a property which are binding on the original landowner as well as successors in ownership. Covenants funded by BPA are conveyed by deed and recorded. Such deeds may include an **executory interest** for BPA. An executory interest vests ownership in BPA if certain conditions arise. For example, an executory interest may be triggered if habitat values fall below a predetermined minimum level.
4. **Life estates** refer to acquisitions in fee title that allow the seller or others to use or remain on the land until his or her death. This right cannot be passed on to an heir or an assign.
5. **Leases** give a person or entity the right to use the land or building for a specific time period, usually in exchange for compensation and create a lessor and lessee relationship.
6. **Water rights** establish the legal right to use water for purposes authorized by law – e.g., instream flow for fish and wildlife habitat – and can be conveyed by both operation of law (i.e., fee title purchase of the appurtenant real property to which the water right is attached) and individual purchase (i.e., purchase of water rights separate or severed from the land).

A **contract** or **MOA** is not a real property interest. BPA typically has a contract in place with sponsors and partners on a mitigation project as a companion document to help structure the transaction, define roles and responsibilities, and establish commitments.

## Existing Policies Remain in Place

This deskbook relies on BPA’s existing policies. The following policies remain in effect and unchanged by this deskbook.

- **Bonneville Purchasing Instructions.**<sup>1</sup> These procurement guidelines control BPA’s acquisition of goods and services. BPA follows the “bip-ee” (**BPI**) in its fish and wildlife contracts providing for pre- and post-acquisition services on fish and wildlife habitat projects.
- **Capitalization Policy.**<sup>2</sup> This policy allows BPA to capitalize land acquisitions where the acquisition retires a known portion of an

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<sup>1</sup> <http://www.bpa.gov/corporate/business/bpi/>

<sup>2</sup> <http://efw.bpa.gov/IntegratedFWP/FW%20Capitalization%20Policy%2011-4-04.pdf>

established fish or wildlife mitigation debt.

- **In Lieu Policy.**<sup>3</sup> This ensures that acquisitions comply with the prohibition in the Northwest Power Act that prevents BPA from funding mitigation that other entities are responsible for.



*A BPA attorney holding a mandible upside down.*

- **Wildlife Crediting Policy.**<sup>4</sup> This applies to wildlife habitat acquisitions unless expressly agreed otherwise. All BPA wildlife agreements either call for 1:1 credit or, in the case of the Willamette Wildlife Agreement, for example, set acreage requirements instead of using habitat units or crediting ratios. Absent other arrangements, this policy applies to all fish or wildlife habitat acquisitions made with BPA funds. In most cases, BPA and the project sponsor expressly address crediting in a letter or agreement related to the acquisition.
- **Tribal Policy.** BPA developed a policy in 1996 for consultation and coordination with federally recognized Indian tribes affected by BPA's work.<sup>5</sup>

## **Taking a Business-Like Approach to Land Acquisitions and Habitat Management**

Land acquisitions comprise a significant portion of BPA's past and continuing fish and wildlife program expenditures. Consequently, BPA is obligated to invest on behalf of ratepayers to ensure what is being purchased provides real and lasting value to fish and wildlife. The positions described below provide a foundation for supporting the land acquisition elements of the fish and wildlife program.

<sup>3</sup> See, e.g., BPA's 2007-2009 Fish and Wildlife Program decision documents.

[http://efw.bpa.gov/IntegratedFWP/docs/2007/FY07-09\\_Decision\\_Enclosure\\_revised\\_2\\_26\\_07.pdf](http://efw.bpa.gov/IntegratedFWP/docs/2007/FY07-09_Decision_Enclosure_revised_2_26_07.pdf)

<sup>4</sup> <http://efw.bpa.gov/IntegratedFWP/WildCredMar02.pdf>

<sup>5</sup> <http://www.bpa.gov/news/Tribal/Pages/BPA-Tribal-Policy.aspx>

- Each land acquisition that BPA funds must provide demonstrable or estimable value for fish or wildlife. Simply put, the Northwest Power Act directs the Administrator to “protect, mitigate, and enhance” fish and wildlife and their habitats, so every acquisition project under the program must help fulfill this obligation.
- Acquisitions should provide for long-term or **permanent habitat protection** and the means for achieving it. Absent a compelling reason to secure a real property interest for some limited duration rather than in perpetuity, acquisitions should include permanent, perpetual protection. BPA’s mitigation responsibility presumably lasts as long as the Northwest Power Act and the **Federal Columbia River Power System (FCRPS)** dams remain. The dams will have a finite life, but we don’t know how long that is. To ensure the mitigation BPA funds today is secure until the agency’s obligations expire or have been fulfilled, land acquisition protections should be permanent.
- The Northwest Power Act calls for mitigation for the effects of the FCRPS on fish and wildlife. These actions often provide both direct and indirect benefits to human communities. While the Northwest Power Act focuses expressly on fish and wildlife, BPA does not ignore the communities, particularly the tribes, deeply affected by the FCRPS dams. BPA embraces land acquisition projects that not only protect and mitigate fish and wildlife but also restore these resources to the communities and tribes that lost them. This approach protects tribal rights and promotes tribal sovereignty and independence.<sup>6</sup>
- Most successful land acquisition projects include public participation. Acquisitions acquired in fee, as well as some easements, often ensure appropriate **public access**. BPA or the sponsor provides **public notice** prior to an acquisition, especially to local governments, agencies, tribes, and local utility customers. Where it doesn’t interfere with the fish and wildlife purposes of the acquisition or its safe and effective management, BPA encourages project sponsors to include public access to the property as an integral part of the land management plan for each acquisition.

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<sup>6</sup> Although tribes are one of the largest sectors of BPA contractors for fish and wildlife mitigation work, the contracts are initiated as fish and wildlife mitigation to help BPA comply with the Northwest Power Act, ESA, and other statutes. Like any contractor, the tribes benefit from the employment opportunities, training, and income BPA projects provide. These projects also provide ancillary value of particular importance to tribes—such as the ability to purchase in-holdings within reservation boundaries or reestablish access to cultural resources. Because these contracts are primarily to protect and enhance fish and wildlife they are not considered contracts “for the benefit of Indians” as such contracts are defined in other statutes, such as the Indian Self-Determination Act, 25 U.S.C. § 450f.

- Land ownership liabilities – that is, the responsibility for all incidents of ownership and indemnity – remain with the entity that owns the real property. Sponsors bring many motivations and interests – beyond simply protecting fish and wildlife habitat – when they propose BPA fund a land acquisition. States and tribes in particular actively seek BPA funding because they derive ancillary social, political, cultural, and economic benefits from owning and managing land and its resources. BPA supports these other values to project sponsors from the acquisitions provided the primary focus of both acquisition and management is to protect fish and wildlife habitat. In addition, as land owners, project sponsors control access and management in ways that can increase liability and the costs of ownership beyond what BPA’s mitigation purposes require. Consequently, sponsors or landowners must assume all liability for all incidents of ownership.

## **Pre-Acquisition Steps**

The steps necessary to close on an acquisition encompass requirements covering both Federal and state law. BPA’s acquisition process reflects sound business practices and follows recommendations from the Council. These steps have become more numerous and detailed over time for two reasons. First, BPA has added steps, such as an initial intake call, to help identify and minimize problems earlier, and maximize the likelihood of a successful acquisition. Second, legal requirements and acceptable industry standards have changed. BPA needed a more formal and consistent approach to both incorporate best management practices and ensure full legal compliance for each transaction. The pre-acquisition steps discussed in this section track and build on Work Element 5 – Land Purchase and/or Conservation Easement found on **PISCES**, BPA’s fish and wildlife contract management database which is available for free to the public.<sup>7</sup>

The table on the following page contains a list of pre-acquisition steps.

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<sup>7</sup> <http://efw.bpa.gov/contractors/pifaqs.aspx>

	Step/Deliverable	Description	Lead Entity	TIMEFRAME IN ONE-MONTH (30-DAY) INCREMENTS													
				1	2	3	4	5	6	7	8	9	10	11	12		
1	Submit completed intake form	Submit intake form and maps/aerial photo of the property	Sponsor														
2	Conduct intake call	Discuss acquisition; identify involved parties and their roles; and review process, timelines, and potential issues	All														
3	Provide copy of Land Acquisition Handbook	Share handbook, appraisal review guidelines, templates or examples with acquisition sponsor	BPA														
4	Submit preliminary title report to BPA	Provide prelim title report	Sponsor														
5	Develop relocation plan, if needed	BPA will develop relocation plan if there are eligible tenants on the property	BPA														
6	Determine if boundary survey is needed	Review legal description and determine if boundary survey is needed	BPA														
7	Conduct boundary survey	If legal description is not adequate or if boundaries will change, conduct survey and submit draft survey to BPA for review	Sponsor														
8	Assign BPA Federal Appraisal Reviewer	BPA assigns a Federal Appraisal Reviewer to answer questions and/or collaborate with appraiser	BPA														
9	Determine how best to acquire water rights	If water rights are in the process of being confirmed, they may need to be purchased in a separate transaction	All														
10	Negotiate MOA, if needed	Develop MOA or revise existing MOA if needed	All														
11	For conversation easement acquisitions, negotiate easement terms and conditions	Negotiate easement	All														
12	Conduct Phase 1 assessment and submit to BPA for review w/ findings	Conduct Phase 1 ELA and submit to BPA. If needed, conduct additional assessments	Sponsor														
13	Site clean-up	Clean up any hazardous waste issues identified in the phase 1 assessment, etc.	Sponsor/ Landowner														
14	Complete appraisal and submit to BPA for review	Submit appraisal to BPA for review. BPA's review process takes approximately 120 days.	Sponsor														
15	Complete voluntary sales agreement	Confirm with landowner that the transaction is voluntary	BPA														
16	Draft purchase and sale agreement	Draft PSA and submit to BPA for review	Sponsor														
17	For fee title acquisitions, negotiate easement terms and conditions	Negotiate no-cost easement to be held by BPA	All														
18	Complete baseline report	Complete baseline and submit to BPA for review	Sponsor														
19	Clear title	Discuss encumbrances and remove as required	All														
20	Conduct NEPA review	Conduct NEPA review, including ESA and cultural resources review	BPA														
21	Complete public notice process	Send notification letters to advise landowners and other interested parties; Run ad in local papers; This step must be completed 15 days prior to closing (preferably earlier)	BPA														
22	Pre-945 Check-in	Check in to make sure that all due diligence is completed or on track for 945 review. Title/legal description certified by BPA Surveyor	All														
23	Conduct final title review (aka 945 Review)	All documents must be final or near final in order for BPA to conduct the 945 review	BPA														
24	Receive authorization to spend funds	Obtain final F&W management approval and arrange for wire transfer	BPA														
25	Submit escrow instructions	Review and submit escrow instructions to title company for closing	All														
26	Close acquisition and record applicable documents	Recording of applicable documents	All														
27	Send copies to BPA	Send certified copies of closing documents, etc to BPA	Sponsor														

**Timing.** Acquisitions using Federal funds are time consuming. Project managers should remind sponsors early in discussions with sellers that they're working with Federal funds and with those funds come numerous procedural steps. Some acquisitions need extra time to clear the title; others have improper or flawed legal descriptions and require a survey. And BPA also uses property acquisition funding as a budget management tool, funding more acquisitions when other projects under perform and fewer when they over perform. A legally binding closing date should be coordinated in advance with BPA and not be established until BPA completes its review of the preliminary title report and approves the appraisal. Sponsors should inform sellers of these conditions early in the process to avoid unrealistic expectations and disappointment about closing.

**A. Contracting.** As applicable, sponsors should ensure that they have a current funding contract with BPA that covers the pre-acquisition. If the pre-acquisition work leads to a purchase, BPA will provide its share of acquisition costs provided through escrow, and not the sponsor's contract, at closing.

**B. Initial Intake Call.** Immediately upon identification of a potential acquisition and an interested seller, and prior to negotiations with the owner, the sponsor and BPA project manager should contact Real Property Services, the BPA environmental lead (environmental compliance and pollution abatement), public involvement, Legal Services, and Tribal Affairs to discuss project details and confirm the acquisition process and steps. Appendix III lists points to cover in an initial intake call.

This call and the checklist will inform early decisions regarding whether to pursue the property or encourage the sponsor pursue other alternatives. Issues that would cause BPA to decide to discontinue the attempt to acquire a property include, but are not limited to, the following examples.

- Properties ineligible for Farm Service Administration funding because of wetland filling or agricultural practices on highly erodible soils.
- Properties with hazardous wastes and toxic contaminants, noxious weeds and invasive species, or cultural resources that would require significant remediation.
- Certain clouds on title – that is encumbrances that would undermine the fish and wildlife purposes of the acquisition.
- Property recommended to mitigate for a dam that BPA has no mitigation responsibility (e.g., Idaho Power Company's Hells Canyon Complex) or has been fully mitigated (e.g., the Dworshak dam).



**Jurisdictional Management.** BPA is a Federal agency within the U.S. Department of Energy. Thus, BPA – like any other Federal agency involved in land acquisition and management – takes only jurisdictional management and control over a property. Actual ownership is vested in “the United States of America and its assigns,” where title is reviewed according to the standards set forth by the U.S. Department of Justice. Consequently, properties already protected by conservation easements or other similar restrictions funded by another Federal agency rarely provide additional demonstrable value to fish and wildlife habitat and the acquisition wouldn’t help fulfill BPA’s statutory mitigation responsibilities or reflect fiduciary responsibility to the rate payers.

**C. Internal BPA Work.** Historically a portion of the sponsor’s project budget provided by BPA is used to fund certain internal tasks that BPA staff perform to facilitate the acquisition process. Those tasks have involved assistance from Real Property Services – title and appraisal review, relocation assistance, and surveying; and Environmental Compliance – NEPA, ESA, environmental land audits, and cultural resources assessments. BPA does not charge the project budget for support from General Counsel, Public Affairs, or the Fish and Wildlife Division. BPA may need to charge the project budget to pay outside contractors assisting in this work. Initially, the BPA project manager works with the sponsor and develops appropriate work orders, contracts, and task orders.

**D. Corporate Finance Review.** Obtain corporate finance review of acquisitions that propose to use capital as opposed to expense dollars. BPA’s Financial Services office decides whether a project meets the agency’s capitalization policy.<sup>8</sup> Project sponsors should work with the project manager to provide Financial Services an accurate description of the project to determine if it meets the capitalization criteria.

**E. Preliminary Title Report.** The preliminary title report provides ownership information, a legal description and a list of recorded encumbrances, such as easements, covenants, liens, and rights of way that affect the real property. It is important to obtain and review the title early on, in conjunction with Real Property Services and sometimes Office of General Counsel, to spot time-consuming issues that could slow or thwart the acquisition. For example, if a property lacks a proper legal description then a survey, boundary line adjustment, or quitclaim deed may need to be

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<sup>8</sup> <http://efw.bpa.gov/IntegratedFWP/FW%20Capitalization%20Policy%2011-4-04.pdf>

performed, prepared, reviewed, and recorded prior to closing to both ensure that the legal description is appropriate and that the encumbrance is lifted from title.

Along with the preliminary title report, sponsors should provide a topographic map showing the project area outlined in a format that allows verification of the legal description. This map needs to include property boundaries in relation to section, township, and range lines and any other features, such as roads, creeks, or lake shores that are part of the legal description. The map also needs to be at a scale sufficient to depict distances and features adequately to corroborate the written narrative description of the property.

**F. Water Rights.** Sponsors should work with the project manager to complete a **water survey form** (Appendix IX) in Pisces, and provide appropriate documentation supporting any water rights certificates, claims, permits, or licenses appurtenant to or applied to the property to support the statements made in the form. The form documents the existence and extent of legal water rights. If any water rights appurtenant to the property are proposed for exclusion from the purchase, BPA will work with the sponsor to assess the effects of not obtaining the water rights. The sponsor should explain why the water rights are not and why an owner's retained use of such rights will not adversely impact the conservation values



BPA is trying to protect. In some cases, an extent and validity determination may be required before acquisition of the water rights. Sponsors may also need to work with Real Property Services and General Counsel to adequately describe the water rights obtained or excluded from the purchase, for purposes of legally describing the water in the deed conveying the land, and in any purchase and sale agreement language.

**Split Transactions for Water Rights.** Properties with water rights critical to their success may need to be split into two transactions, with one closing for the land and one for the water after the water rights have been unambiguously established and documented, preferably by a state agency that oversees water rights.

**G. Site Visit.** Project managers should work with sponsors to ensure that all BPA staff who need to see the property have the opportunity to visit it early in the acquisition process. Staff who usually need to visit sites include Real Property Services, General Counsel, Public Affairs, and Environmental Compliance, as well as the Fish and Wildlife Division project manager.

**H. Land Surveys.** The cornerstone of an acquisition is the property's legal description, and the best legal descriptions are usually based on surveys. Without a legal description that meets U.S. Department of Justice and BPA standards, BPA will not fund an acquisition. BPA's Real Property Services must, at a minimum, review and approve all legal descriptions for proposed acquisitions – the sooner in the process that legal description issues are submitted to BPA for review, the sooner that issues can be spotted and addressed. BPA expects new or updated surveys for all acquisitions involving any of the following:

- Where legal descriptions do not close – i.e., the description does not describe a polygon that goes from point of origin around the property boundary and back to the point of origin.
- Where the title or other evidence indicates that the boundaries are in dispute.
- Where the sponsor contemplates any improvements to the land – e.g., structures, fences, roads, or trails along boundaries.
- Sites where the acquisition involves part of a larger property and new boundaries or tax parcels are being created or changed.
- When the property will be managed in distinct zones or for multiple purposes – e.g., an agricultural use zone and flood plain restoration zone or a building envelope.

The title evidence should include or be accompanied by a plat or plan, based on a survey by a licensed professional surveyor, sufficient for review by an attorney to locate the land described in the title evidence. Any encroachments or rights of way, on or over the land, should be shown or noted on the

survey. Survey work should be performed under the direction of a licensed professional surveyor, and the ultimate product should be suitable for recording as determined by BPA review. Surveys should be done according to county and state standards and should show easements of record and occupation lines. Sponsors should anticipate that BPA will need at least 60 days prior to closing to review any survey depicting land rights in which BPA has, or will have, a legal interest. For a complete list of Survey delivery standards please see Appendix XXIV.



**I. Finalize MOAs, cost sharing arrangements, and other agreements.** An MOA is a contract. Do BPA and a sponsor need a contract for a given project? While this deskbook may eliminate the need for many agreements by explaining the processes related to land acquisition and management, at times an MOA may further the goals of BPA and the sponsor and eliminate confusion about roles and responsibilities. Contact BPA's Office of General Counsel to inquire about developing a new agreement or reviewing an existing agreement for specific requirements of the acquisition.

**BPA Funds Used for Cost-Share.** Project sponsors and other Federal agencies often ask whether BPA can provide the non-Federal cost share in another agency's grant program. The answer will vary based on the Federal agencies involved.

BPA is a Federal power marketing agency within the U.S. Department of Energy. Instead of receiving annual appropriations from Congress, BPA funds its operations with revenue earned from its power and transmission marketing activities. Though these revenues originate from ratepayers rather than taxpayers, BPA's funds are Federal dollars, in part because BPA deposits its revenues into a special fund within the U.S. Treasury.

Many BPA projects involve sponsors who obtain funds from other Federal agencies. The grant programs run by the other Federal agencies typically call for a "non-Federal cost share" to complete the funding package for the project. BPA believes its funds retain their Federal character whether provided directly to another agency by BPA or through a mitigation partner. Only the granting Federal agency, however, can decide if its program accepts BPA funding as non-Federal funds. If the granting agency decides BPA funds are non-federal, then BPA can make its funding available to the mitigation partners to use as the non-Federal cost share.

**WARNING:** Funds provided by BPA do not meet the criteria for non-Federal funds for most programs administered by agencies within the Department of the Interior. To qualify for those programs, a statute must expressly authorize that agency's program to use BPA funding as a non-Federal match. Projects under the North American Wetlands Conservation Act cannot use BPA funds for either a non-Federal cost share or as "pooled" funds. Presently, only two Department of the Interior programs consider BPA funds for non-Federal cost share, based on express statutory language: the Yakima River Water Enhancement Project Act and the Fisheries Restoration and Irrigation Mitigation Act.

**J. Conservation Easements.** Many project sponsors propose conservation easement acquisitions for BPA to fund. Conservation easements vary in the restrictions and affirmative obligations placed on the underlying land owner's use of the property. Some conservation easements approach habitat protection with a **working landscape** perspective which allows timber harvest, farming, or grazing, for example, but in a manner and at a rate that still ensures protection of high quality fish and wildlife habitat. Proceeds are typically used to operate, maintain, and enhance the property. Other easements essentially restrict all activities that would harm or degrade any of

the **conservation values** – the site-specific features that make the property valuable mitigation habitat. The conservation easement may, however, allow activities to restore or enhance habitat that could adversely affect habitat temporarily for the benefit of species in the long-term (e.g., removing a dike to restore floodplain habitat).

Conservation easements become part of BPA’s mitigation portfolio in one of two ways. First, a sponsor can propose a project that calls for the acquisition of a conservation easement, without also acquiring the underlying fee. In such instances, the sponsor or another entity holds the easement and BPA is granted third party enforcement rights. See Appendix VII. Second, a sponsor can propose a project that calls for acquiring fee title of the property. In such instances, the sponsor almost always grants a conservation easement to the United States of America, acting by and through BPA, over the property. See Appendix V.

While not required, BPA may agree to develop a programmatic MOA with sponsors who plan to acquire more than a single conservation easement with BPA funds.

The MOA will make the concept-to-closing steps for the acquisitions clear, define post-acquisition obligations, and also provide a template for future easements customized to that entity and the kind of projects it plans to propose.

While each easement is unique, they all include provisions to protect the ratepayers’ investment in the property as well as the focal fish and wildlife habitat. BPA developed standard protective provisions after studying the easement language recommended by the Land Trust Alliance, an entity that provides advice and support to the land trust community. The Alliance tailors its guidance to meet the Internal Revenue Service’s requirements for tax deductible easement donations.<sup>9</sup> BPA believes that its ratepayers deserve no less value for their dollar or protection of their investment than the taxpayers. In addition, BPA includes provisions that, based on experience, improve the clarity, coverage, or enforceability of the easement. Consequently, each easement should have all of the following elements. The template in Attachment VI illustrates and describes these elements more fully.

1. BPA’s real property interests in the easement – as a grantee or third party with rights of enforcement – must be conveyed to the **United**

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<sup>9</sup> 26 U.S.C. § 1.170A-14(h).

**States of America and its assigns** in a general warranty deed. Deeds should recite the true consideration, contain a legal description pre-approved by BPA of the property and the easement, and not include any reservations, exceptions, or clouds on title unless pre-approved by BPA. All Federal agencies take real property interests in the name of the United States and in accordance with DOJ title standards, and BPA is no exception.

2. The easement should perpetually protect the conservation values (e.g., fish and wildlife habitat) on the property.
3. If a project proposal is characterized as providing dual benefits—i.e., if it benefits both fish and wildlife—then the easement needs to protect both.

**Dual Fish and Wildlife Benefits.** Regardless of whether BPA funds a project using dollars identified for fish or for wildlife, projects often provide dual benefits, that is, they benefit both. If a project provides dual benefits, ratepayers deserve all credit that accrues—even if that credit isn't readily identifiable or agreed to at the outset. Where wildlife projects provide fish habitat attributes that help meet program goals and objectives, ratepayers expect to receive fish credit as appropriate.<sup>10</sup>

4. Easements must protect the conservation values from **material harm or interference**.

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<sup>10</sup> See, e.g., Wildlife Crediting Forum Report on Forum Deliberations January 2011—May 2011 adopted by the Council in September 2011. <http://www.nwcouncil.org/fw/wcf/>

BPA protects the conservation values in part by restricting any activity that would “materially harm or interfere” with them. This is defined as any action “significant



enough that a prudent person would expect [the grantor] to use every reasonable effort to avoid the adverse effects. It will include both permanent negative effects to habitat or on the life cycle of any species” listed as protected in the easement and any action that would violate a statute or regulation, such as the ESA. The term is intended to provide a consistent standard throughout the easement or agreement by which to gauge the significance of activities on the property. It is also intended to avoid confusion about allowable activities, particularly in working landscape easements or when restoration actions are contemplated by the parties to the easement. Restoration actions often temporarily interfere with the conservation values identified in the easement. The material harm standard distinguishes the trade-off between this kind of temporary harm, incurred for the long-term habitat health, and permanent degradation of habitat.

Because the significance of harm caused by an activity could be cause for disagreement between the parties, BPA will have sole discretion when deciding whether a particular harm rises to the level of “material.”

5. The conservation easement should permit **future BPA transmission facility development**. See Appendix VI. When BPA funds a fee acquisition with ratepayer dollars, it should receive the future right to acquire a transmission easement on such property at no additional cost. Why? By paying for the entire value of the property, BPA has already paid for the all the rights associated with the property once, and should not pay again at a later date if it needs a transmission



easement. Moreover, the number of conservation properties that already have transmission facilities show that properly sited and managed transmission facilities are compatible with conservation stewardship.

While these rights are critical to BPA's purposes, some entities worry that granting this right could either conflict with state statutes governing land in conservation or affect a project's Federal tax-exempt status. BPA, however, retains its condemnation authority over the property and in this way ameliorates such concerns. Moreover, the easement language does not increase the likelihood that BPA would site a transmission facility on the property. For these reasons, reserving future transmission rights in a conservation easement does not diminish that easement's value or the protection it provides. To the contrary, the language BPA uses to reserve future transmission rights explains how BPA will work with the fee owner and resource managers. Future facilities would be sited in a manner least intrusive to the conservation values being protected, and BPA will work to mitigate the adverse affects of the new facility. If BPA had to resort to condemnation, the sponsor would have less opportunity to influence how the new facility will be developed and maintained.

Under special circumstances, BPA may decide to forgo or modify the language it uses to reserve future transmission facility rights in an MOA or an easement. These are case-by-case determinations.



6. BPA generally expects that each acquisition or where appropriate, group of acquisitions, should have a **land management plan** that elaborates on how the rights and restrictions on the property will be exercised and honored. The template in Appendix XIII, developed with regional fish and wildlife managers, describes issues that land management plans should consider.

A project might not need a management plan if the easement includes restrictions and retained rights that need no further elaboration. Typically, such projects involve high quality habitat that remains in private ownership and which contemplate no new or different habitat management actions.

BPA retains the right to review and approve draft plans, or draft amended plans, before they become final. Draft plans also usually need to involve the public as described in greater detail in section IV.

**K. Covenants.** Covenants may be acceptable substitutes for conservation easements in rare circumstances. Covenants can be either affirmative or restrictive. Affirmative covenants commit the grantor to do something. Restrictive covenants prohibit certain actions. An affirmative covenant might, for example, commit a duty to protect conservation purposes. A restrictive covenant might prohibit development to single family dwellings. Covenants may be established for a limited duration or in perpetuity. In either case, the covenant binds the landowner and subsequent landowners, heirs, and assigns. Covenants can be included in the deed conveying fee, be recorded as a separate deed, or be a statement on a recorded plat or survey.

Covenants are rarely sufficient for BPA's fish and wildlife habitat mitigation purposes. Covenants are creatures of Old English law, and may have some legal vulnerabilities related to enforceability or survival of the covenant itself (e.g., the "privity of estate" requirement). For example, historically the person benefitting from a covenant had to own land adjacent to the parcel being restricted by the covenant. A covenant protecting the conservation values for BPA could, in some circumstances, be unenforceable if BPA didn't own land adjacent to the burdened property.

Modern legal developments emphasize blending covenants, easements, and servitudes into "equitable servitudes" so that the Old English rules no longer apply. Thus, some states, such as Washington, now treat conservation easements and covenants the same – as long as the less-than-fee interest in question is for conservation and open space purposes. Being cautious while this area of the law settles, BPA strongly favors conservation easements as the first tool in the mitigation toolbox. Given the difference in state laws and specific projects, BPA has not developed a template covenant to use for habitat acquisitions. Habitat project sponsors interested in covenants should be prepared to justify their preference for a covenant and address BPA's concerns. BPA does use covenants on some real property acquired for hatcheries because the parcels tend to be small and have little or no habitat value. Hatchery project sponsors should see Appendix VIII for a sample of a covenant for a hatchery.

**L. Uniform Relocation Assistance and Real Property Acquisition Policies Act (Uniform Act).** When BPA funds land acquisitions for fish and wildlife mitigation purposes, it is providing Federal financial assistance and

thus has certain responsibilities under the Uniform Act. Project managers and project sponsors should work together as early as possible in the first stages of an acquisition and coordinate with BPA's Real Property Services regarding Uniform Act obligations. At a minimum, before appraisals or environmental land audits begin, the project sponsor or the BPA project manager should notify Real Property Services of anyone other than the landowner who lives on or uses the property for any purpose, including grazing, mining, or agricultural use. If necessary Real Property Services will develop a Uniform Act compliance plan.



**M. Complete appraisal to Federal Yellow Book standards.**<sup>11</sup> The project sponsor should select and hire an appraiser familiar with Federal “Yellow Book” appraisal standards, established by the U.S. DOJ, which BPA follows. BPA staff can recommend appraisers in an area if a sponsor desires assistance with selection. For conservation easements, appraisers need special training and must perform the appraisal consistent with guidelines in Appendix IV.

**Purchase and Sale Agreements.** Sponsors that execute purchase and sale agreements before receiving BPA approval of the appraisal do so at their own risk – and the risk is committing to a selling price greater than what BPA will fund. For more information, see Section U below.

<sup>11</sup> Uniform Appraisal Standards for Federal Land Acquisitions at <http://www.justice.gov/enrd/land-ack/Uniform-Appraisal-Standards.pdf>

**N. Review Appraisal.** An assigned BPA Federal appraiser (BPA appraiser) reviews all appraisals submitted for fish and wildlife acquisitions. The reviews follow “Yellow Book” standards and the standards in Appendix IV. Appraisals not meeting these standards will be rejected. BPA appraisers require at least 120 days for an appraisal review – and the 120 days does not include the time it takes to fix any issues with the appraisal. Sponsors hoping to close an acquisition on or before the end of the Federal fiscal year, September 30, must therefore submit appraisals to BPA no later than June 1. Submitting an appraisal by June 1 does not, however, guarantee closing by September 30.

**O. Hazardous Waste.** Project managers need to coordinate with project sponsors to complete an environmental land audit (ELA) – i.e., a hazardous waste assessment. BPA can perform these audits or the project sponsor can hire its own contractor. If BPA does not perform the audit, BPA environmental staff will need to review and approve it. BPA typically does not release funds from escrow to the seller until any hazardous waste remediation activities or other recommendations identified in the audit are certified complete by the sponsor and inspected by BPA.

**P. Environmental Compliance.** BPA conducts environmental review for each acquisition. This includes compliance with requirements and procedures under the **National Environmental Policy Act (NEPA)**, the **National Historic Preservation Act (NHPA)**, the **Endangered Species Act (ESA)**, the **Clean Water Act (CWA)**, and other related laws.

NEPA – Simply funding an acquisition and transferring title doesn’t by itself have the potential to adversely affect the environment. So providing acquisition funds to a sponsor does not represent a commitment to undertake actions that may significantly affect the human environment. Likewise, funding an acquisition does not commit BPA to enable additional fish and wildlife mitigation; whether to fund additional mitigation involves a separate, later decision. At the time of acquisition, there also is often little to no available information concerning the type and nature of potential mitigation that could occur, and this limits BPA’s ability to analyze environmental effects. Consequently, BPA usually conducts NEPA review for the acquisition phase of a project separately from the mitigation and stewardship phases.

1. BPA’s action of providing funding for an acquisition typically falls within a categorical exclusion (CX) under NEPA.<sup>12</sup>

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<sup>12</sup> Under the Department of Energy NEPA regulations, BPA typically applies either category B1.25

2. For each acquisition, a determination that it qualifies for a CX would be documented in an environmental clearance memorandum prepared by BPA's project environmental lead. All such environmental clearance memorandums are posted on BPA's external website and documented in Pisces under the NEPA section.
3. Acquisitions vary, however, as do subsequent mitigation projects, and they can present unique circumstances that may affect the proper NEPA compliance approach for that action; Consequently, BPA examines each proposed acquisition to ensure full NEPA compliance.
4. For any separate and subsequent fish and wildlife mitigation activities on a property that has been acquired by a sponsor, BPA's approach to NEPA compliance depends on the nature, extent, and timing of the proposed activities (see Section IV for more information on NEPA requirements for mitigation activities).

## **Public Notice and Public Involvement**

Projects involving acquisition of real property interests always include public notice and sometimes also include public involvement. Public notice is just that: letting the public know about a forthcoming acquisition. BPA has a practice of providing the public, local governments, and nearby landowners of notice of new acquisitions. This is a good neighbor practice, but it's not legally required. Public involvement—the chance to participate in a decision making process—can be a legal requirement either imposed by BPA in a project sponsor's contract or by NEPA.

The chart and explanatory notes below provide general guidance on when public notice is appropriate and when public involvement is required.

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(specific to property transfers for fish and wildlife habitat protection and management) or B1.24 (general transfer of property where use remains unchanged) to acquisitions. See, Subpart D, 10 C.F.R. § 1021.

	<b>Public Notice</b>	<b>Public Involvement</b>
<b>Acquisition</b>	Yes	No
<b>Land Management Planning</b>	Yes, when complete and posted on PISCES; may also be posted on BPA's public website.	Sometimes, if changes to the existing land use are being proposed and may cause significant effects on the environment.
<b>Stewardship Agreement</b>	Yes, done through environmental compliance (CX) notice	Yes, if any reasonably foreseeable stewardship actions trigger an EA or EIS
<b>Ground disturbing restoration activities</b>	Yes, if the action triggers a CX, an EA or EIS	Yes, if the action triggers an EA or EIS

- Acquisitions do not trigger public involvement because buying land does not create any environmental effects. Acquisitions are generally covered by categorical exclusions or the Fish and Wildlife Implementation Plan Programmatic EIS and its record of decision.
  - BPA posts its categorical exclusions on its external environmental compliance web site and the NEPA validation under the Fish and Wildlife Implementation Plan EIS in PISCES, so there is public notice of the acquisition and the NEPA coverage.
  - BPA also posts letters to adjacent landowners and other interested parties on its external website and purchases display ads in the local papers to notify the public of a forthcoming acquisition.
- Land Management Planning must consider the terms in the underlying agreement and easement for each acquisition, which will almost always require at least resource agency, tribal, and local government involvement. Public involvement should be part of the land management planning process if actions are proposed that may cause significant effects on the environment and thus trigger an EA or EIS to comply with NEPA. In addition, BPA may decide to conduct additional public involvement based on the type and location of the project.

- Stewardship agreements generally perpetuate the status quo and fund routine O&M actions that are included in the Fish and Wildlife Implementation Plan record of decision. If ground disturbing actions are reasonably foreseeable, BPA may either categorically exclude the actions—which may be done simultaneous with the acquisition—or prepare a supplement analysis, EA or EIS. Depending on the action and the NEPA compliance, public involvement may be required.
- Ground disturbing actions such as restoration activities may trigger the need for an EA or EIS. If so, the public will be notified and involved in the planning process.

**Q. Cultural Resources.** BPA must comply with the National Historic Preservation Act, which addresses cultural and historic resources. Historic resources may include, but are not limited to, archaeological sites above or below ground, rock images, structures, or artifacts, as well as cultural resources. Cultural resources include traditional cultural properties, which are associated with practices and beliefs of a living community.

BPA environmental staff lead NHPA compliance efforts. Staff archaeologists, working with information provided by the project sponsor and project manager, conduct a background literature search for the property to determine whether a cultural resources survey of the property will be necessary. Surveys are generally not required in advance of land acquisitions, because there is limited potential for ground-disturbing activity on the site. If a survey is necessary, it is conducted following development of plans or projects funded by BPA that include ground disturbing activity.

If a cultural resource survey is not required, compliance with NHPA is complete and no further action is necessary. If a reconnaissance-level survey becomes necessary, BPA's archaeologist and project manager will coordinate that effort with the sponsor. If a full survey is necessary, sponsors





must cooperate with BPA and its contractors as necessary. If the sponsor is a Tribe, the Tribe's cultural resources staff may contract with BPA to undertake the survey. As the agency proposing the Federal action, BPA remains responsible for review of the information and consultation under the NHPA. BPA makes and effects determination, and identifies appropriate mitigation, in consultation with the parties mentioned above.

**R. Endangered Species Act.** BPA activities involve a range of projects, some which have the potential to "take" or "harm" a species or habitats protected under the ESA. Usually, however, acquisition alone lacks the potential to harm a listed species, so ESA compliance is unnecessary until the land management planning and implementation phase of a project. See Section IV.

**S. Other Environmental Laws.** The location of a parcel, its existing condition, or other sensitivities could trigger the need for BPA to comply with other environmental laws such as the Clean Air Act, the Coastal Zone Management Act, and the Migratory Bird Treaty Act.

**T. Baseline Documentation Report.** The entity holding an easement as grantee should prepare the baseline report. BPA will typically contract with the project sponsor or grantee to prepare the report. For example, if a tribe is buying property in fee and BPA will hold the easement, BPA should prepare the baseline report. Baseline reports must document existing property conditions at the time of acquisition which include natural and man-made features and uses and relevant biological conditions on the land proposed for acquisition. The report should reflect the purposes for which the property is being acquired, and whether, or to what extent, the property currently exhibits the desired conservation values. In addition, the report should identify any existing limiting factors that may adversely affect the potential to maximize or retain its conservation values. Following the outline provided in Attachment XII will streamline and expedite the report drafting and review process. Funding for the report will come from the project budget. Reporting costs rarely exceed more than a few thousand dollars. See also Appendix XIII for a baseline acknowledgement form.

**Documenting Fish Survival Benefits.** For Accord projects, the sponsor and project manager should confer to determine if a fish survival benefit review or assessment needs to be produced.

**U. Purchase and Sale Agreement.** The sponsor should obtain a draft purchase and sale agreement from the seller after BPA approves the appraisal. BPA will review and comment on the draft as appropriate. All

sponsors should consult the template purchase and sale agreement provided in Appendix XII.

Purchase and sale agreements should always be contingent on two things. First, on BPA's processes and reviews, which may include but are not limited to NEPA, cultural resources, environmental land audits, hazardous waste response activities, title review, and permitting. Second, these agreements depend on the availability of funding.

Sponsors with experience securing acquisitions using BPA funds may choose to use their own purchase and sale agreements. Project managers should suggest others follow the sample provided in Appendix XII. BPA recommends that entities seek BPA review of draft agreements. Whether BPA reviews the draft agreement, the sponsor remains solely responsible for the commitments in the agreement.

**Funding guarantees – or not...** BPA will not make a legally binding commitment to fund a particular acquisition until it completes the Department of Justice title review *and* BPA either: (1) accepts, by signature, the conveyance document, or (2) provides a fully executed contract. Sponsors proceed at their own risk when they contract to purchase property, or purchase property, with the expectation of being reimbursed by BPA prior to one of the two conditions, above, being met. It is important for both sponsors and potential sellers of property to understand that BPA funding for pre-acquisition activities is an important step in the property acquisition process but does not guarantee funding for purchasing the property.

**Why BPA doesn't reimburse property tax.** BPA's longstanding position is that it does not fund or reimburse entities for payments to cover property or property-related excise taxes. Property taxes are payments in advance for the use and enjoyment of the property in the coming year, and as such are an incident of ownership that the owner needs to plan to pay for. Excise taxes, such as the one in Washington State, are dictated by statute and apply to all sellers. A project sponsor who agrees in an option or purchase and sale agreement to pay taxes does so at its own risk and should not expect BPA to reimburse these tax payments.

**V. Public Notice.** Public notice should take place a minimum of 15 days prior to closing on an acquisition, but many of the steps take several weeks to complete. Several months before closing, the project manager and environmental compliance staff will begin working with BPA Public Affairs staff and the project sponsor to develop a landowner and interested party

letter and map describing the property and purpose for the acquisition. If the project is unique or otherwise exceptional, then BPA may work with the sponsor to develop a fact sheet describing the purchase, its conservation value, and the partnerships that made it possible.

One of the purposes of the Northwest Power Act is to provide public participation in the development of the fish and wildlife program. This is to ensure that the program provides environmental quality in a cost-effective manner. BPA carries this spirit of public involvement into the program implementation process by coordinating with state, local, and tribal governments on actions that may affect them. Consequently, prior to making an acquisition, the project manager needs to ensure the sponsor is assisting BPA in providing **public notice** of the upcoming action. Acquisitions, however, do not require **public involvement**, e.g., the opportunity to provide input and influence site use and management decisions. Instead, BPA works to assist sponsors in providing public involvement when developing and amending land management plans.

**Time for Public Notice.** To ensure that BPA fulfills its commitments for providing low rates consistent with sound business practices, responsible environmental stewardship, and accountability to the region, BPA's regional relations – including tribal, power, and tribal account executives and staff – need time during the public notice process to contact stakeholders including elected officials, tribal governments and customers in proximity to the acquisition. Project managers and BPA public involvement staff should alert regional relations staff of pending acquisitions several weeks before publishing the public notice.

BPA provides public notice of all acquisitions.<sup>13</sup> This notice informs the public of the proposed acquisition prior to it taking place. There are three primary modes of notice: 1) placement of newspaper ads in the community where the acquisition will take place; 2) mailing letters and maps to adjacent land owners and other interested parties; and 3) posting other information and maps on BPA's website. While BPA's notice does not initiate a public comment period, if anyone provides comments or expresses opinions about an acquisition prior to closing, BPA will consider them.

BPA usually places newspaper ads in two or more local publications at least 15 days before closing. A typical ad identifies BPA, the nature of the

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[http://www.fws.gov/refuges/realty/pdf/DOJ\\_2001.pdf](http://www.fws.gov/refuges/realty/pdf/DOJ_2001.pdf)

acquisition (e.g., fee or easement), the purpose of the acquisition, the sponsor and its partners, and the BPA website where additional information is posted. In the case of an easement acquisition, the ad may also identify the fee holder. Ads also include contact numbers for the project manager and the sponsor.

Letters to adjoining and nearby landowners, along with the map and other information, must be mailed at least 15 days prior to closing. BPA's environmental staff will develop a distribution list including all landowners within one-quarter mile of the property, interested parties, county commissioners, and affected tribes. Sample letters and maps are on BPA's website at <http://efw.bpa.gov/IntegratedFWP> and in Appendix II. Letters should not include personal information about property owners or individuals on the mailing list.

**Coordinate Media Releases.** With the public notice comes the opportunity to prepare for issuing press releases and press packets celebrating a new acquisition. Project managers should serve as a liaison and coordinate sponsors, Public Affairs staff, and environmental compliance staff to develop messages and materials that all participants in the project will use. Projects funded in whole or in part by BPA should highlight BPA's role and contribution in all written and electronic materials as well as in spoken statements. No information should be released to the media without prior BPA review.



### **W. U.S. Department of Justice (DOJ) Title Review.**

Because BPA is obtaining certain real property interests in the name of the United States when it funds fish and wildlife habitat acquisitions – BPA is either obtaining a conservation easement or rights of enforcement and access to a

conservation easement – BPA must confirm that the United States is receiving sufficient title to those interests. This review, which is delegated to BPA by the Department of Justice (“DOJ”) and Department of Energy, involves identifying and eliminating title objections relating to outstanding rights, liens, or claims which, if not eliminated, might possibly defeat or adversely affect the title or cause losses to the United States. Analysis may include, for example, legal access, mineral rights, and other encumbrances to title or

reserved rights in the chain of title. Once the majority of the steps in the acquisition process have been completed and conservation easement is at or near proposed final form, BPA's Office of General Counsel will review the sufficiency of title, with support from BPA's Real Property Services (including proposed deeds, other information in the file, and the title report), and produce a preliminary title opinion in accordance with DOJ Title Review regulations and standards.<sup>14</sup> See Appendix XVIII for a list of documents to provide for DOJ review. BPA has no authority to pay for an acquisition until the DOJ review process is completed and any problems with receiving sufficient title have been addressed. For all acquisitions, the DOJ review needs to include the nearly final draft easement and any draft deed intended to convey fee to avoid delays from repeated reviews.

### **Mineral Rights**

Outstanding mineral interests on a property can be problematic for fish and wildlife acquisitions. They most often exist because property owners do not always hold rights to minerals and related materials (e.g., gravel) on or under the property, as mineral and other subsurface rights can be sold or reserved separately from the land itself. In the Columbia River Basin given historic and current interests in oil, gas, gravels, and hard rock minerals, it is not at all uncommon to have subsurface mineral rights "severed" from the surface ownership and held by a third party. Mineral interests are frequently held by railroads, mining and oil companies, and individuals.

If a title review shows outstanding mineral interests on or under the property, the owner of that interest may have express or implied rights to explore and extract (e.g. drill or dig), and remove those materials from the land without requiring permission from the property owner or easement holder. In addition, the property owner or easement holder may have limited ability to require mitigation or protection of property interests affected by the exercise of those mineral rights. Because the exploration or removal of minerals from a property (or near the property) can adversely affect title and cause loss to the government, plus interfere with the fish and wildlife purposes of the acquisition where there is potential to materially harm the fish and wildlife habitat or conservation values on the property, the project sponsor should undertake the following steps for *every* property proposed for acquisition.

- 1. Identifying outstanding mineral interests.** Valid mineral rights held

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<sup>14</sup> [http://www.fws.gov/refuges/realty/pdf/DOJ\\_2001.pdf](http://www.fws.gov/refuges/realty/pdf/DOJ_2001.pdf)

by others will sometimes be identifiable from the preliminary title report for a property (see Section I.E). But a title search may not always reveal mineral interests, because many are unrecorded or recorded in a place not normally searched by title companies in review of the public record (e.g., BLM Office of Mineral Rights). Field observation to establish whether there are mineral interests associated with a parcel is important for the pre-acquisition and acquisition phases. Project managers, real property staff, and sponsors should confirm firsthand whether a property has any evidence of mining exploration or operations, or whether there is exploration or operation nearby that may affect the property. Knowledge of the history of the area may enable sponsors and managers to identify issues (e.g., coal mining history or gravel mining in recent past in nearby area). Real Property Services and the Office of General Counsel and BPA's staff geologists can help ensure identification of any mineral interests in relation to the property. In addition, BPA's Office of Pollution, Prevention, and Abatement may need to review findings or conduct a joint site visit in order to ensure that historic or current mining activities on or near the property do not pose a liability for remedial action and cleanup. Because identifying and addressing mineral rights can take time and may affect the project's feasibility, mineral rights should be identified as early in the acquisition process as possible.

- 2. Evaluating the effect of outstanding mineral interests.** If mineral rights held by a third party are identified, the Office of General Counsel, staff geologists, and Real Property Services will help the project manager interpret the nature and extent of the mineral rights held by others. The Office of General Counsel will review the field and record evidence as part of the title review inquiry, with assistance from the project manager and Real Property Services, to determine whether the rights, if exercised, could interfere with the conservation purpose of the property acquisition, adversely affect title, or cause loss to the United States. The General Counsel will also work with Pollution, Prevention, and Abatement to determine whether historic or existing exploration or mining on or near the property is an environmental factor that could pose hazardous waste liability for the agency.

If the mineral rights are not of a type or location to impact the fish and wildlife habitat values, and not likely to pose an environmental factor for liability purposes, this can be documented as part of the title review process with the Office of General Counsel (see above, "DOJ Title Review" process), and BPA can in some instances still fund the

acquisition with the mineral right encumbering the property.

If, however, the project manager, in consultation with the General Counsel and Real Property Services, determines that the rights, if exercised, could adversely impact the purposes for which the property is proposed for acquisition, the next step is to evaluate the likelihood that the site would actually be mined.

Where there is inadequate information to draw a reasonable conclusion as to risk, the project manager or Real Property Services, working with General Counsel, should consult BPA's staff geologist, whose services can be obtained through the task order to help undertake additional investigations and evaluate the risks. A sponsor may be required to obtain a mineral remoteness report from an outside contractor.



**3. Addressing risks from outstanding mineral interests.** If it is determined that an outstanding mineral interest, whether or not the right is actively being exercised, has the potential to interfere with the fish and wildlife purposes of the acquisition, BPA considers a variety of options, including:

- Asking the mineral rights holder to voluntarily relinquish its rights.
- Purchasing the mineral rights and prohibiting mining as a condition of BPA funding for the property.
- Entering into a non-disturbance agreement or similar easement with the mineral rights holder.
- Having the sponsor agree to compensate BPA with additional habitat at no cost should the mineral rights be exercised and permanently impair the fish and wildlife values that were intended for acquisition.
- Engaging state agency processes to have the mineral rights extinguished (e.g., this is practiced in Washington State).

- Declining to fund sites where high acquisition costs create a high risk that the value of the ratepayer investment could significantly diminish.

These options and others will be considered on a case-by-case basis and in consultation with the project manager, Real Property Services, and the Office of General Counsel. Depending on the circumstances, General Counsel may need to secure a waiver from DOJ before BPA can close the acquisition.

**X. Obtain Mitigation Credit.** Obtain an estimate of any applicable **mitigation credit** from the project sponsor. This applies whether the crediting currency used is acres, habitat units, stream kilometers, survival benefit units, or other metrics.

### **Ecosystem Service Credit**

Mitigation and recovery actions can create or increase ecosystem services. These services can include things like sequestering carbon dioxide, purifying air or water, and reducing water temperature. An ecosystem services market provides a structure for buying and selling units of environmental benefit, known as credits.

BPA will support other entities cost-sharing on projects and taking an appropriate share of ecosystem service credits. For its investment, BPA will take fish and wildlife credit against its statutory obligations. Other entities may claim, and then trade or sell, other remaining credits.

Projects where ecosystem service credits may come into play should incorporate the cost-share and contribution plans as early in the project development phase as possible but no later than the land management and restoration planning stage. Prospective cost-share partners who seek credit for ecosystem services must provide the necessary maps, photographs, inventories, crediting formulas, and calculations for BPA to make an informed decision on the proposal. BPA will work with prospective cost-share partners to document and certify the credits sought. However, the project sponsor and partner remains solely responsible for securing their credit. BPA assumes no liability for any entity's credit except its own.

In developing proposals for ecosystem service credit projects, project managers should alert cost-share partners to plan on the following:



- Written approval from BPA and any other easement holder on the project.
- Strict compliance with applicable easement and mitigation agreement terms.
- That the cost-share partner will bear the cost, responsibility, and liability related to establishing, documenting, and maintaining its ecosystem service credits.
- No credit may be double counted or in any way jeopardize BPA's credit.

**Y. Escrow instructions** are sent to the Escrow agent approximately a week prior to the closing date agreed to by BPA. BPA will provide escrow instructions to the sponsor and to the escrow company. BPA will provide its own instructions to the escrow company.

**Realtor Commissions and Fees.** Sales commissions and agent fees are often part of real property transactions and are a seller paid cost that BPA does not cover. Employees of sponsors should not receive sales commissions or other compensation besides ordinary salary from BPA-funded acquisitions.

**Z. Payment: Market Value.** BPA uses appraisals to help establish the market value (MV) of properties proposed for acquisition. Sellers often seek more than MV. But BPA does not pay more. Instead, out of consideration to the ratepayers and other buyers in the area whose prices may be affected by overinflated comparable properties, the fish and wildlife program does not pay more than MV for an acquisition. Moreover, even when BPA contributes less than the full purchase price, the total of all contributions should not exceed 100% of the MV.

BPA recognizes that extraordinary circumstances may occasionally necessitate or compel a purchase at a price in excess of MV. These extraordinary circumstances are rare, and BPA will consider each individual project on a case-by-case basis. The decision to pay more than MV is at BPA's sole discretion. All justifications for funding more than MV must be supported by a written justification prepared by a Real Property Services specialist and be approved by BPA's Realty Officer. Generally, such exceptions should be justified by some compelling ecological or biological function of a mitigation strategy that can only be effectively satisfied by the purchase.

**Condemnation of Property for Mitigation.** To foster community support for its mitigation effort, BPA has funded only voluntary acquisitions when purchasing property for fish and wildlife program purposes. To comply with the Uniform Act provisions covering voluntary transactions, BPA or its contractor informs the seller in writing of what it believes to be the property's market value and that BPA will not use its power of condemnation to acquire the property if negotiations fail to result in a voluntary agreement. If a seller and project sponsor believe that condemnation will benefit the project, they should work with the project manager, Real Property Services, and General Counsel to explore whether a friendly condemnation could be appropriate.

**Miscellany at Closing.** By closing, BPA will need to document that the following steps have all been completed.

- 1. Complete Certificate of Inspection and Possession.** As part of its obligations to comply with U.S. DOJ title standards, a BPA representative, typically from Real Property Services, will conduct a site visit to inspect a property, where the results of inspection are documented in a "Certificate of Inspection and Possession." This site visit and documentation of it should occur within six months before closing to inform the DOJ Title Review. If the inspection and report haven't been completed before closing, they should be done at closing.
- 2. Signature Authority.** Project managers must ensure that sponsors provide proof of authority to sign a deed and purchase a real property interest as part of BPA's mitigation program. The mitigation partner should identify any applicable statute, constitution, bylaws, or articles of incorporation that authorize the partner to make the legal commitments necessary to consummate the deal. Then BPA needs the partner to show how it will comply with the applicable law when signing the land acquisition documents. For example, a tribe could provide a web link and citation to its constitution and the chairman's authority to commit the tribe, and then provide a signed council resolution approving the chairman to sign the agreement securing a particular acquisition.
- 3. Complete Acquisition Deliverables** (after funding has been wired to escrow and escrow closes); e.g., **record easement and deliver copy to BPA.** BPA will make a final inspection of the property and

will close and scan the file after all final documentation is obtained; i.e. final closing statement, final title policy, recorded deeds, etc.

- 4. Signatures.** The seller needs to sign the deed exactly as his or her name appears as the grantee in the prior conveyance to him or her; and account for any unavoidable difference by a recital identifying the seller from the previous conveyance. In a community property state, if the seller is married, the spouse needs to sign the deed as well thereby conveying his or her contingent interest to the buyer – even when the spouse is not named on the title – and acknowledge he or she is doing so for the consideration paid.

**SAMPLE LANGUAGE for a purchase and sale agreement where the spouse is not a party to the agreement:**

Spouse of Jane Buck: For good and valuable consideration, and intending to be legally bound, the undersigned, husband of the seller Jane Buck, approves and supports the sale and agrees to join his wife in executing and acknowledging this warranty deed.

*Signed: John Doe, spouse of Jane Buck*

## II. Acquiring Water Rights

BPA funds water rights acquisitions, both surface and ground water, to protect instream flows, provide water for hatcheries and acclimation sites, aid in habitat restoration, and create and protect vegetation and wetlands for wildlife.

BPA typically funds water acquisitions and transfers to apply the rights instream to improve fish habitat. Sometimes BPA purchases and holds water rights in the name of the United States, but more often it funds project sponsors to secure these water rights through contracts with water right holders. For some projects water rights are transferred instream through state agency processes and held in a state trust water system. In other projects the water rights may be held by the owner of the water right or an irrigation district, but may be contractually and legally dedicated to mitigation purposes. In most cases where BPA does not own the water rights, it secures the ability to control the rights through contracts, leases, or easements.

As discussed above in section I, for land acquisitions, sponsors will typically complete a Water Survey form<sup>15</sup> (Appendix IX) and submit appropriate supportive documentation describing any water rights appurtenant to the lands to be acquired and how they plan to use the water rights, particularly if the project sponsor



does not plan to transfer the water rights instream for fish and wildlife purposes. Water rights appurtenant to lands acquired for fish purposes will generally be transferred instream into trust through the applicable state water agency.<sup>16</sup>

### Acquiring Instream Flows

BPA usually secures water rights for instream purposes using Work Element 164<sup>17</sup> for Acquire Water Instream as part of the **Columbia Basin Water Transactions Program (CBWTP)**. It involves the purchase or transfer of water rights for instream purposes, such that the water rights remain in the stream to benefit fish and wildlife. Sponsors seeking to secure water rights instream will coordinate with the CBWTP process which will partner them with an entity qualified through the water transaction program. The project will proceed through the water transaction program review process using criteria approved by the Council through its Independent Scientific Review Panel.<sup>18</sup> There are some exceptions in which the CBWTP might not be used. For example, when water will be donated for instream water rights or when a project transfers water conserved in an irrigation efficiency project into an instream right. Sponsors

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<sup>15</sup> The water survey form is available at: <http://www.efw.bpa.gov/IntegratedFWP/WaterSurveyForm.doc>.

<sup>16</sup> Water is transferred instream through the Oregon Water Resources Department in Oregon, the Washington Department of Ecology in Washington, the Idaho Water Resource Board in Idaho, and the Montana Department of Natural Resources in Montana. BPA utilizes the Columbia Basin Water Transactions Program (CBWTP) qualified entities to enable project implementers to put water instream from BPA funded fish and wildlife projects.

<sup>17</sup> <http://www.cbfish.org/WorkElement.mvc/Summary/164> or [http://efw.bpa.gov/contractors/work\\_categories/work\\_elements/we164.aspx](http://efw.bpa.gov/contractors/work_categories/work_elements/we164.aspx); see also, Work Element 154 for Develop and Negotiate Water Right Transactions.

<sup>18</sup> See Work Element 164 and [www.cbwtp.org](http://www.cbwtp.org) for additional information on water transactions and the Columbia Basin Water Transactions Program.

should coordinate with BPA project managers beginning with the initial intake call to determine the most appropriate means to secure instream water rights for their projects. If the project involves transferring water rights instream, the CBWTP will usually prepare the transaction program checklist and associated documentation.

### **Acquiring Land with Water Rights**

For land acquisitions that also include water rights, as identified in the Water Survey form (Attachment X), the BPA Office of General Counsel will work with the BPA project manager and project sponsor beginning with the initial intake call to describe and quantify the water rights and their planned use in any applicable interagency agreement, conservation easement, and purchase and sale agreement. Typically, these transactions proceed as a part of the land transaction.

If the land transaction includes water rights destined for instream protection and use, BPA will generally require that a qualified entity<sup>19</sup> working under the Columbia Basin Water Transfer Program help assist the project sponsor in completing the transaction checklist<sup>20</sup> and the state agency process to transfer water rights. When a sponsor uses a qualified entity to assist with the water component of an acquisition, BPA funds the qualified entity from the water program project budget or the acquisition project budget, depending on the scope and scale of the work involved. In most land transactions with significant water rights, BPA will expect the appraisal to reflect separate values for the land and the water. In a two part closing, BPA typically funds the land component at closing, and then a subsequent payment is made through escrow when the state completes an extent and validity determination or otherwise recognizes the instream transfer.

### **For All Land Acquisition Projects Including Water Rights:**

- Because the sponsor seeks funds for its project from United States through BPA, the land acquisition project involving water rights must follow all the steps for acquiring a real property interest with Federal funds. In addition, project managers must be sure sponsors complete the following additional steps for water right acquisitions prior to closing.
- Sponsors need to document that the water right and point of diversion exist in the capacity needed to fulfill the underlying purpose of the project. BPA will not make an unconditional, binding funding

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<sup>19</sup> A qualified entity is one pre-certified under the Columbia Basin Water Transaction Project to develop and implement water projects in the fish and wildlife program.

<sup>20</sup> [http://www.cbwtp.org/jsp/cbwtp/partners/FinalChecklist\\_04\\_06\\_09.doc](http://www.cbwtp.org/jsp/cbwtp/partners/FinalChecklist_04_06_09.doc) - Link to CBWTP water transaction checklist form

commitment on a project until it receives satisfactory documentation of the water right and agrees on the planned uses of the water rights. This may include information on the extent of use of the water right.<sup>21</sup>

- If the project needs a change in the time, place, or character of use of the water right, then the sponsor should secure approval for those changes from the applicable state agency prior to closing. These processes usually take several months to complete, so sponsors should incorporate this in their project timelines.
- The sponsor or underlying owner must secure BPA approval before transferring, changing a point of diversion, changing the purpose of use, or otherwise significantly changing any protected property water right.
- The deed for the water rights should include the seller's warranty that he or she has not forfeited, abandoned, or diminished the water rights.
- Sponsors must show that the acquisition will secure all the buildings and equipment needed to exercise the water right and fulfill the purpose of the project. For example, if water needs to be pumped for a habitat restoration project, the sponsor must ensure that the acquisition covers the seller's pump and distribution system.

**WARNING:** Even properly completed appraisals may not provide a firm or verifiable value of the water right. Depending on the nature and complexity of a project, BPA may require more due diligence; e.g., having the seller obtain a finding from a state water agency regarding the validity and extent of a water right. In such circumstances a multi-part process, and carefully drafted purchase and sales agreement, may be necessary to ensure BPA funds remain in escrow until the state agency renders its findings.

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<sup>21</sup> Previous use of the water right, particularly during the previous five years, is an important component in the quantification of the extent of a water right. Evidence of water use, such as gauge records, aerial photos, crop records, etc. for the acreage covered under the water right is important for these determinations.

**State Law Governs Water Rights.** Each Northwest state has different laws determining the acquisition, use, and disposition of water rights. The water related steps in this deskbook build on the states' requirements for water rights and add elements tailored to inform Fish and Wildlife Program project sponsors and better achieve its goals in a transparent, accountable, and cost-effective manner. Nevertheless, sponsors may need to work with Real Property Services and General Counsel to adequately describe the water rights obtained or excluded from the purchase, for purposes of legally describing the water in the deed conveying the land, and in any purchase and sale agreement language.

### III. Acquiring Property In Relation to BPA-Funded Fish Facilities

As a general rule, fish or wildlife mitigation projects involving the transfer or acquisition of a real property interest need to follow this guidance. Some fish projects in particular do, however, present different issues or include different requirements when compared to wildlife projects. For example, permanent hatchery facilities often do not need extensive deed restrictions to protect the habitat in the portions of the property not used for hatchery purposes because the hatchery uses are prescriptively determined by the physical built structures. This section describes several commonly funded facilities and ways to approach their acquisition.

Projects securing real property interests for fish facilities – particularly smaller tracts with little fish or wildlife habitat value – can often forgo the following steps in the acquisition process.

- **Baseline documentation:** If habitat protection is not part of the project, a baseline documentation report isn't necessary. If habitat protection is part of the project, the baseline report may exclude the area occupied by the hatchery facilities.
- **Land Management Plan:** If BPA owns the facility, it will grant use rights to the sponsor or operator through a Land Use Agreement (see a sample at Appendix XXI) or possibly a memorandum of agreement. Where the sponsor or other entity owns the site, BPA will establish or formalize its expectations for management in a MOA or statements of work for the operation and maintenance of the facility. Thus, a separate land management plan is generally unnecessary.

- **Conservation Easement:** For larger permanent facilities, BPA may use a conservation easement focused on hatchery actions. The hatchery easements are usually less detailed than those for habitat protection projects. For other, smaller permanent facilities, a covenant may be adequate.

**Congressional Approval.** Under the Northwest Power Act, fish and wildlife projects involving construction that costs \$2.5 million or more and with an expected life of 15 years or more must receive congressional approval prior to construction. Construction commences when ground is broken. BPA requires these capital construction projects go through the Council's Three-Step Process which may take several years to complete before construction may begin.

## **Water Rights**

Perhaps the most important real property interest related to fish projects, water rights must be secured in the type and amount necessary to operate the facility. BPA General Counsel, Real Property, and Fish and Wildlife staffs work with project sponsors to ensure that any transaction involving water rights will secure all the water necessary to fulfill the project's objectives. Section II above discusses water rights acquisition in detail. By the end of Step 2 in the Council's Three-Step process, the project sponsor needs to show that the water and associated water rights necessary to ensure a project's success are available and can be secured.





### **Fish Hatcheries**

Given the cost to build a hatchery and its expected useful life, BPA usually acquires the site in fee or through long-term renewable leases (e.g. 50 years). The decision depends on many factors. BPA proceeds on a case-by-case basis in coordination with the project sponsor and resource managers to determine the length of the lease.

### **Fish Acclimation Sites**

Fish acclimation facilities may be permanent or temporary and involve extensive construction and infrastructure – or very little. Acclimation sites may be leased, secured by easement, or purchased in fee depending on the size, location, intended use, and landowner willingness to sell or lease. Despite the range of possible site configurations for acclimation, all share similar processes insofar as land acquisition and management are concerned.

Generally, the acquisition process for acclimation sites is the same as for any other project. The real property interests acquired need to be adequate to fulfill the project purposes. For example, a short-term lease may suffice for a site needed for a two-year experiment, but fee title or a long-term easement might be

necessary for permanent facilities associated with a long-term project. Project sponsors and managers should coordinate with Real Property Services to determine the appropriate real property interest necessary for each acclimation site within a project.

### **Fish Screens**

Screening projects, unlike other projects, may require a fairly complex set of interrelated agreements and real property interests, depending on factors such as who owns the point of diversion, who uses the water, and who owns the land. These projects might require permission to enter a site to study the potential for a screen facility; temporary construction staging easements; and permanent easements to access, operate, maintain, repair, and replace the facility.

### **Culvert Replacements**

BPA usually does not secure permanent property rights for culvert replacement projects. Instead, the project sponsor and manager work with any cost-share partners to secure access, staging, and construction rights. As needed, BPA Real Property Services and General Counsel can assist in securing the necessary permissions to enter a property, temporary easements, or leases necessary to implement a project. Once the culvert has been installed operation and maintenance of the structure becomes the obligation of underlying land owner or perhaps the project sponsor, depending on the agreement.

**Culverts under State-Maintained Roads.** In *U.S. v. Washington*,<sup>22</sup> Phase III, also known as the “Culverts Case,” Judge Ricardo Martinez found “that the right of taking fish, secured to the Tribes in the Stevens Treaties, imposes a duty upon the State to refrain from building or operating culverts under State-maintained roads that hinder fish passage and thereby diminish the number of fish that would otherwise be available for Tribal harvest.” The court went on to declare “that the State of Washington currently owns and operates culverts that violate this duty.” The court has not issued its remedy. Consequently, BPA uses caution when considering culvert replacement projects in western Washington, the case area, to avoid violating the in lieu funding prohibition found in the Northwest Power Act. Funding culvert projects found to be the state’s responsibility would violate the prohibition.

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<sup>22</sup> *United States v. Washington*, No. 70-9213, 2013 U.S. Dist. WL 1334391 (W.D. Wash. Mar. 29, 2013).

## Riparian Planting and Fencing

BPA implements many kinds of riparian planting and fencing projects. BPA uses its contracts with project sponsors and partners to set the milestones and associated work elements, but the fencing or planting programs usually have their own rules for participation and compliance. Most rely on contracts and do not involve the acquisition or transfer of real property interests. Instead, they rely on contractual commitments by landowners to follow the program rules for a certain number of years.



*BPA employees enjoy helping wildlife at Cherry Creek.*

## IV. Post-acquisition Responsibilities or Steps and Duties

BPA's fish and wildlife program includes over 800 real property interests, with more being acquired every year. Asset protection monitoring ensures that project sponsors and others follow any conditions BPA placed on them as a condition of bringing the real property interest into the program.

**A. Asset Monitoring and Protection.** In 2009, BPA began a concerted effort to create an inventory of all real property interests counted as fish and wildlife program assets. The inventory and other information about the fish and wildlife real property interests reside in the Land Information System (LIS) administered by Real Property Services and in PISCES.

With LIS and PISCES populated with the appropriate data, BPA developed a three-step protocol for monitoring real property interests. The steps are self-reporting, supplemental observation, and adaptive management.

**Self-reporting.** Many projects already include a requirement for annual reporting. Self-reporting will largely incorporate the information many managers gather for annual reports. Contracts currently without an annual or self-reporting work element may be amended in the future to include one. BPA will work with project

sponsors to tailor the template reporting form found in Appendix XX for each project or site.

For projects with water rights being the only real property interest acquired, BPA will continue to work with the Columbia Basin Water Transaction Program to survey active water transactions, including monitoring by other regional partners and non-BPA funded monitoring work.

**Remote Monitoring.** Currently, BPA uses free satellite and aerial imagery available in the public domain to observe program properties and changes that occur on them over time. In-house technical experts in the Geospatial Services group use ArcGIS tools to analyze changes on program properties. BPA's current goals and practices include remotely monitoring each property at least once every 5 years.



The number of sites visited, and the reasons for selection may vary depending on the nature of the property, its location, and whether problems have arisen there before. BPA tries to remotely monitor 50 properties annually. BPA staff from various offices – including Environmental Compliance, Fish and Wildlife, Real Property Services, and General Counsel – will visit the sites. Depending on the nature of issues discovered in the remote sensing analysis and site visits, projects will continue to be visited annually to follow-up on compliance issues, ownership changes, or large or unusual restoration efforts.

During each visit, the field team will:

- Review easement, management plan, and contract requirements for site management.
- Compare current conditions to those established in baseline documentation. See sample site review form, Appendix XX.
- Ground truth annual reports.
- Reaffirm or establish project manager and stakeholder communication about site purposes and goals.

**Adaptive Management.** As this monitoring effort matures it will be updated and revised. BPA expects to learn from this experience and

improve its practices for site management and effective monitoring. In addition, enforcement actions, if they need to be taken, will likely inform the nature, extent, and frequency of the monitoring needed to assure that fish and wildlife program assets continue to provide the value that ratepayers expected when BPA agreed to fund the acquisition.

## **B. Revenue**

1. Revenue generated from management or use of a property should be used to defray the costs associated with owning the property and implementing the site Management Plan (e.g., weed control, property taxes).
2. All revenue generated from the property shall be separately identified and accurately accounted.
3. Revenue generated from the property may include income from contracts, leases, payments from conservation reserve programs, and other payments derived from management of the property; revenue also includes interest, as well as grants, donations, or other forms of financial assistance.
4. Project managers should expect sponsors to provide annual accounting to BPA for the revenue generated from mitigation properties and expenditure of that revenue. Sponsors must make their accounts available for BPA review upon request.

**Payments in lieu of Taxes.** BPA does not provide funds to pay property taxes or make payments in lieu of taxes for fish and wildlife mitigation properties. Project sponsors must ensure that they can cover tax payments with funds coming from a source other than BPA. Sponsors may use revenue generated from a mitigation site for taxes, payments in lieu of taxes, or other incidents of ownership, provided the revenue generating activity is not prohibited by easement or agreement and has been approved through the land management plan process, if applicable.

**C. Stewardship Funding.** Where it intends to provide funds for a sponsor to operate and maintain an acquisition, BPA increasingly entertains a one-time, permanent stewardship agreement approach to funding. For new projects, stewardship agreements and funding can often be established at closing. For existing projects, sponsors should discuss the possibility of converting from annual operation and maintenance contracts to a one-time, permanent stewardship agreement. Initial indications are that sponsors like

the certainty and control of funds upfront, and BPA appreciates the ability to address obligations permanently and at a known, fixed cost. Appendix XXIII is the stewardship agreement template that BPA currently works from.

**D. Land Management Plans.** Management plans will usually guide management of BPA funded fee title acquisitions and some conservation easements to ensure compliance with underlying mitigation agreements and any conservation easement granted over that property. BPA typically requires management plans for real property interests secured with ratepayer funds, but will acknowledge exceptions expressly on a case-by-case basis. Where BPA funds an easement-only project, the terms of the easement are often sufficient to govern site management so such projects may not need an additional plan.

### **Why Prepare Management Plans?**

Management plans serve several purposes insofar as they become a blueprint for how, when, and where a new property will be used. Project proposals, MOAs, and easements provide broad parameters for how a sponsor manages a site. In most instances these agreements provide less detail than that which is incorporated into the management plan.

Management plans should reference wildlife, fish, or plant species or habitats of interest on the property, known cultural resources (with protections for actual locations – which do not need to be disclosed), prohibitions to the use or conversion of these under the easement, reserved rights and allowable actions, and any restrictions or reservations from applicable MOAs. The management plan should discuss each of those elements and explain how the sponsor will manage for that element. For sensitive species, the plan should state where and when the manager will take specific actions to protect and enhance that species.

Based on the planned actions identified in the management plan, BPA will determine the extent to which additional environmental compliance may be necessary. Once the sponsor identifies what resources may be changed, and how, then BPA can determine if additional NEPA, ESA consultation, or historic preservation compliance is necessary.



BPA allows sponsors to acquire property without public involvement because a change in ownership does not affect the environment. But management actions can alter the access and use of a property. Where sponsors contemplate changing the access and use of a property, BPA believes the public should have an opportunity to review and comment on the plans for the parcel. Project managers should lead the effort to ensure sponsors make draft management plans available to the public for review and comment, unless BPA has already agreed otherwise. In addition, during the early planning stages sponsors should seek the advice of state, federal, and tribal resource managers to take advantage of their expertise, and coordinate their plans. This assures that BPA fulfills its commitment to public participation and that the sponsor can take advantage of local knowledge to improve site planning and management.

The land management planning process should examine a project from an ecosystem-based perspective, if that hasn't occurred already. Thus, a "fish project" of necessity examines potential for also providing benefits to wildlife, and vice versa. This maximizes the mitigation value of each project to fish and wildlife and its cost-effectiveness for ratepayers.

Finally, management plans serve a purpose in compliance monitoring and conservation easement enforcement:

- Monitoring examines whether the sponsor performed any
- mitigation required to fulfill environmental compliance commitments.
- Monitoring ensures that the actions that the sponsor takes on the property were included in the management plan. Monitoring can

show whether the sponsor complied with the limits granted in exceptions to specific prohibitions.

- Monitoring ensures that the sponsor complied with any easement prohibitions and did not violate them.
- When necessary, compliance monitoring can verify that the sponsor has taken corrective action as agreed upon to address easement or agreement violations.

BPA does not fund action effectiveness monitoring on acquired land generally, but will do so when the agency has taken action to fulfill specific needs such as in implementing the 2014 NOAA Fisheries Supplemental Biological Opinion for the operation of the FCRPS.

### **NEPA, Environmental Compliance, and Public Involvement Requirements for Management Plans and Post-Acquisition Actions**

After acquisition, BPA may take one of three approaches to ensure environmental coverage for future actions proposed for a site.

1. If the sponsor proposes no changes in land use and will maintain existing conditions, BPA will use a validation process that relies on the Fish and Wildlife Implementation Plan EIS<sup>23</sup> and will document the results of the validation process in PISCES. ESA and cultural resources will be covered as necessary to comply with applicable laws.
2. If the sponsor proposes habitat restoration or other ground disturbing activities that may adversely affect the environment, and those actions are covered in an existing programmatic EIS, then BPA will proceed as in the preceding scenario.

In addition, BPA will ensure the sponsor includes the public and other interested entities – particularly resource management agencies and tribes, county commissioners, and adjoining landowners – in the development of the management plan for the project. The sponsor must provide public notice of the availability of the draft plan, and hold at least one public meeting on the draft

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<sup>23</sup> See, Supplement Analysis for the Fish and Wildlife Implementation Plan EIS at pages 9-11 (Oct. 5, 2009).

[http://efw.bpa.gov/environmental\\_services/Document\\_Library/Implementation\\_Plan/2009\\_FishWildlifeProgramSA.pdf](http://efw.bpa.gov/environmental_services/Document_Library/Implementation_Plan/2009_FishWildlifeProgramSA.pdf)

The validation process may in turn rely on the impact analysis for mitigation actions covered in the Wildlife Program Final EIS (1997) and Watershed Management Program Final EIS (1997). *Id.* at 10.



plan in order to receive public comment. The final plan should reflect how the sponsor addressed any comments received.

3. If the sponsor proposes a significant change in use that is not covered by BPA's existing programmatic NEPA coverage and BPA plans to fund the change – e.g. building a hatchery – then BPA will comply with NEPA using one of the following approaches:
  - A Supplement Analysis to an existing EIS<sup>24</sup>
  - A Record of Decision (ROD) tiered to BPA's Fish and Wildlife Program EIS
  - A project-specific Environmental Assessment (EA)
  - A project-specific Environmental Impact Statement (EIS)

In all circumstances, BPA needs for the accompanying public involvement to be appropriate to support the NEPA process and federal decision.

### **Endangered Species Act Compliance**

While BPA considers effects to ESA-listed species during all phases of a project, generally the acquisition phase alone does not trigger specific actions that necessitate consultation pursuant to the ESA. Instead, when proposing to fund actions included in a land management plan or statement of work, BPA evaluates the effects on listed species, and if there are effects proceeds to consult under Section 7 of the ESA. Appendix XVI depicts the flow of decision making and action taking needed to comply with Section 7.

### **National Historic Preservation Act Section 106 Compliance**

While BPA considers effects to cultural resources during all phases of a project, generally the acquisition phase alone does not trigger specific actions that necessitate consultation under Section 106 of the NHPA. Instead, when proposing to fund actions included in a land management plan or statement of work, BPA evaluates the potential to cause effects on cultural resources, and if there are effects proceeds to consult under Section 106.

### **Planning Overview**

Project managers whose sponsors are acquiring fee title or easements with

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<sup>24</sup> For a description of a supplement analysis, see the Department of Energy NEPA regulations, 10 C.F.R. 1021, subpart C § 1021.314.

an active restoration phase should typically complete a draft management plan for BPA and public review within 18 months after closing. To ensure compliance with the ESA, NEPA, NHPA, and other laws, sponsors should not take or authorize ground disturbing activities until the alternatives and potential effects have been analyzed. The plan should follow and comply with BPA's applicable NEPA documents, particularly BPA's Wildlife Mitigation Program, Watershed Management Program, and Fish and Wildlife Implementation Plan Final EISs and Records of Decision.<sup>25</sup> Plans should address management methods and, if necessary, mitigation for all resources addressed in the pertinent NEPA document. The management plan should identify activities the project manager believes are necessary to restore, rehabilitate, or enhance the property, and the activities necessary to maintain the habitat values of the property.

**Stewardship and Routine O&M.** BPA generally considers routine operation and maintenance the same as stewardship, which includes the following:

- Maintain boundaries;
- Monitor and address surrounding land uses;
- Maintain roads, gates, fences, locks and signage;
- Control public access or use;
- Prevent encroachment and mitigate risk of catastrophic wildfire;
- Outreach to neighbors, stakeholders, local governments and volunteers;
- Mowing and other vegetation management; and
- Reporting.

Restoration differs from stewardship in that restoration is typically larger scale, often includes earthmoving activities or construction, and occurs only once or at most infrequently.

Plans will often have three distinct phases. In the initial phase, the plans should describe any immediate stewardship actions, sometimes called **stabilization**, needed after acquisition to prevent damage to the conservation values and to keep long-term restoration costs down. For instance, the project manager may need to fence boundaries early on to prevent trespass grazing or treat noxious weed infestations. This initial

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<sup>25</sup>Wildlife Program EIS:

[http://www.efw.bpa.gov/environmental\\_services/Document\\_Library/Wildlife\\_Mitigation/](http://www.efw.bpa.gov/environmental_services/Document_Library/Wildlife_Mitigation/)

Two other EIS incorporated into the Fish and Wildlife Implementation Plan EIS may provide additional guidance.

Watershed Program EIS:

[http://www.efw.bpa.gov/environmental\\_services/Document\\_Library/Watershed\\_Management/](http://www.efw.bpa.gov/environmental_services/Document_Library/Watershed_Management/)

F&W Plan EIS:

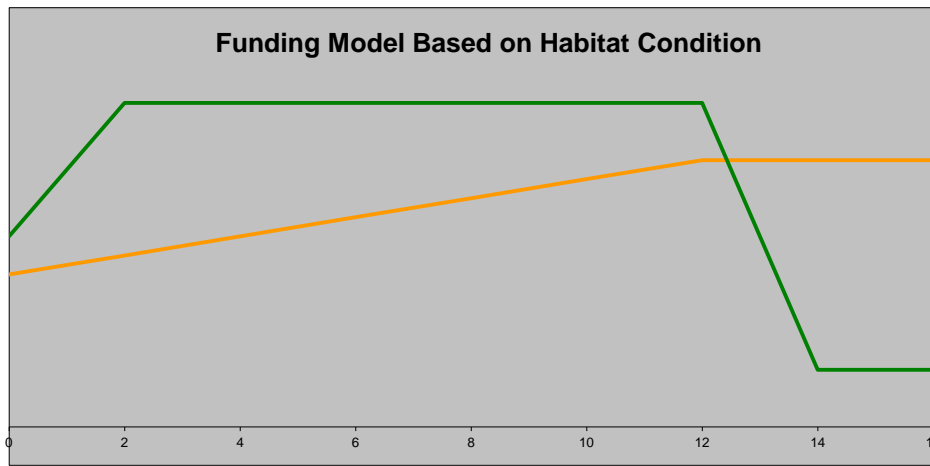
[http://www.efw.bpa.gov/environmental\\_services/Document\\_Library/Implementation\\_Plan/](http://www.efw.bpa.gov/environmental_services/Document_Library/Implementation_Plan/)

phase lasts until BPA approves the management plan.

The second phase typically spans the next 10 to 20 years and captures the main restoration and habitat enhancement efforts needed to attain the agreed upon desired future conditions on a site.

**Don't Buy an Invasive Species Problem.** The flora and fauna composition of the Columbia River Basin has changed dramatically with the advent of human habitation and accelerated with the Euro-American settlement in the last two hundred years. Many of today's landscapes include primarily non-native plant and animal species. Feral animals such as horses and pigs, noxious invasive weeds such as cheatgrass and yellow star thistle, and other invasive species like bull frogs and Himalayan blackberries are ubiquitous and permanent residents in the basin. Project managers should urge sponsors to consider how they will manage and pay for managing habitats with these non-native species present. BPA's duty is to mitigate fish and wildlife affected by FCRPS dams, but it cannot be expected to undo the ten thousand years of anthropogenically introduced changes to the West.

The final phase captures long-term operation and maintenance to ensure protection of the conservation values on a property. With restoration actions complete, project managers should prepare sponsors who received restoration funding from BPA to plan on reduced funding from that covers only basic management for activities such as road and fence maintenance. The accompanying graph summarize this approach—essentially, funding in the early years of a project covers active habitat restoration and management but drops in later years as restoration work takes hold and management becomes more passive.



**Time (Years)**

In the chart above, management costs, as represented by the dark line, decrease over time, as habitat value, represented by the light line, remains relatively stable.

Each plan should generally include the information included in Appendix XV, Template for Land Management Plan.

**Management Plans Do Not Create Budget Commitments.** Management plans will inform but not drive BPA’s contract budgets for operating, maintaining, and enhancing an acquired parcel. While the plans must include all the actions the sponsor proposes, BPA is not obligated or able to fund all of them. BPA uses separate processes coordinated with the Council to address project management budgets.

If the sponsor has more than one similarly situated BPA mitigation site, then project managers may support the sponsor’s efforts to prepare a **programmatic management plan** for all the related sites. The programmatic plan should cover routine management for sites with similar characteristics. Site specific plans may then tier from the programmatic plan to address any unique characteristics, needs, and prohibitions for individual projects. Because this programmatic management plan concept is similar to the programmatic ESA and NEPA documents that BPA uses, BPA’s environmental compliance staff may, upon request, be available to assist sponsors in designing a programmatic management plan.

### **Amended Management Plans**

Over the life of a project, sponsors will usually need to prepare at least two management plans and maybe no more. The initial plan will organize and schedule the desired restoration and transitional actions necessary to establish more self-sustaining native habitats – while recognizing invasive

weed colonies and other non-native influences may make it impossible to cost-effectively establish and maintain native habitats. In most cases it may take up to 20 years to complete the initial active maintenance and restoration work. With the initial plan complete, the project manager should have the sponsor develop a second plan targeting passive long-term management focused on maintaining established habitat features and values. Depending on site dynamics, plan usefulness, available budgets, and compliance monitoring results, BPA expects to review long-term plans with sponsors every five to ten years.

### **BPA’s Right to Approve All Management Plans and Amendments**

BPA established its right to review and approve draft management plan and subsequent amendments to ensure conformance with applicable MOAs, pertinent procurement contracts, environmental requirements, and any conservation easement or other deed restrictions either held by the sponsor or the United States (BPA). This applies to plans for sites managed directly by a state agency or tribe as well as for sites where the project sponsor holds an easement and BPA holds a third party right of enforcement.

BPA will consult with the sponsor regarding concerns about the draft or proposed amendments to a plan prior to making a decision about whether to approve the amended plan, and will provide its decision in writing if requested. BPA will base its decision on whether the plan fulfills the purposes stated in the conservation easement and any applicable MOAs. If BPA does not approve a management plan or proposed amendment, it will work with the sponsor and other entities to resolve any specific issues.

As BPA continues to gain experience in funding acquisitions and their management, new issues arise. These can often be addressed as needed in management plans and their updates.

### **Wild Horses**

The Wild and Free-Roaming Horses and Burros Act of 1971 (“Act”)<sup>26</sup> charges the Department of the Interior (Bureau of Land Management) and Department of Agriculture (Forest Service) to manage and protect wild horses and burros on public lands, as well as those that wander off of public lands. The Act does not distinguish between “feral,” “non-native,” or “native” animals—all wild horses

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<sup>26</sup> 16 U.S.C. § 1331.



and burros receive the same federal protections. Additionally, only Interior and Agriculture have express authority under the Act to determine which animals are “excess” and thus can be removed. In the Pacific Northwest, these departments also assist in managing wild horses and burros on tribal lands. For example, the Northwest Tribal Horse Coalition—comprised

of the Yakama, Umatilla, Warm Springs, Colville, and Shoshone Bannock tribes—works with Interior and Agriculture to manage the problem of excess wild horses and burros on tribal lands.<sup>27</sup> Because removal of excess wild horses and burros is a problem throughout the West and Congress has authorized Interior and Agriculture to address it, BPA does not fund sponsors to remove excess wild horses and burros from mitigation lands.



### **Firearms Use on Mitigation Properties**

Using firearms on mitigation properties may be the continuation of a tradition that enjoys the support of many Fish and Wildlife Program sponsors and constituents. When considering any activity, including firearms use on

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<sup>27</sup> CONFEDERATED TRIBES AND BANDS OF THE YAKAMA NATION, WILDLIFE, RANGE & VEGETATION RESOURCES MANAGEMENT PROGRAM, *Northwest Tribal Horse Coalition: Managing Excess Feral Horses in the Inland Northwest*, <http://www.ynwildlife.org/Wildhorsecoalition.php>.

mitigation properties, BPA looks at three issues:

- Protection and enhancement of fish and wildlife populations and their habitats
- Public health and safety
- Liability and the costs associated with the activity

BPA funds habitat acquisition and enhancement projects to mitigate for fish and wildlife adversely affected by the FCRPS dams. Sponsors should therefore manage those projects first and foremost for fish and wildlife. Other uses, such as hunting, gathering, and recreational shooting, can be allowed—but only to the extent they do not decrease, or threaten to decrease, the primary value of the project to fish and wildlife and their habitats.

Lawful hunting in compliance with all applicable federal, state, and tribal regulations may be compatible with the fish and wildlife purposes of properties acquired under the program. But some practices related to recreational access and firearms use can pose unnecessary threats to the conservation values a project is meant to protect. Fires can start unexpectedly from shooting bullets, driving vehicles in dry conditions, a cigarette butt, or an inadequately extinguished warming fire. Recreational shooting—target shooting, plinking, non-game shooting, or clay pigeon shooting—can deposit high levels of lead on sensitive habitats, increase risk of injury to other users of the project area, and increase fire risk and liability.

Project managers should consider the following when discussing how a proposed property would be managed, reviewing draft management plans, or inspecting projects for easement and agreement compliance:

- Ensure firearms use on the property does not decrease or threaten to decrease the conservation values on the property.
- Ensure firearms use guidelines for the property that at a minimum require all recreational shooting be done with non-toxic ammunition in well-defined designated areas only.
- Ensure all hunting follows applicable federal, state, and tribal regulations including seasons, bag limits, appropriate weapons, and appropriate ammunition.
- Ensure non-game animals and their habitat are protected and that the sponsor adequately describes appropriate conditions for shooting them, if there are any, in an applicable land management plan.

- Ensure that access plans consider fire danger posed by vehicles and bullets in areas subject to fire.
- Prohibit target or recreational shooting in the vicinity of wetlands, water ways, roads, trails, structures and other areas that would put other site users or fish and wildlife at risk.
- Clearly post signs at all applicable access points to ensure adequate public information as to firearms and other use restrictions and policies that apply to the property.

BPA project managers should also be aware that the sponsors and landowners have liability for the incidences of ownership. That means if someone gets hurt or if there's a fire, or if firearms use degrades the conservation values, then the land owner—usually the sponsor—is financially responsible for the damages, including restoring the property to the baseline condition under the easement.

Although BPA has, from time to time, provided such financial support, BPA generally has no legal obligation to assist sponsors in meeting the costs of such liabilities.

**Management Plan Approval.** BPA's review considers whether the plan or amendment is consistent with the agreements, easements, and law applicable to the project. BPA's approval or acceptance simply means that the plan is consistent with the sponsor's commitments governing the project. Review and acceptance does not indicate BPA's support or responsibility for any particular action. The plan may cover actions the sponsor wishes to take but are not related to BPA's mitigation responsibilities; e.g., developing recreational or educational opportunities, experimental management techniques, or public outreach. Consequently, BPA's acceptance does not in any way imply or create a federal responsibility for the costs or liabilities of the actions discussed in the plan. Responsibility and liability may only arise for BPA when it funds activities—i.e., enters into or amends a contract or statement of work for specific activities.

### **BPA's Process for Reviewing Draft Land Management Plans**

1. The sponsor submits its draft plan to the BPA project manager.
2. BPA's project manager reviews the draft plan for consistency with terms and conditions of the easement.



3. If necessary, the project manager coordinates with the sponsor to clarify the draft plan.
4. The project manager summarizes the draft plan – highlighting questions and concerns – and presents it at an internal monthly Land’s Team meeting.
5. Legal and Realty provide comments and edits to the project manager.
6. The project manager works with the sponsor to address Legal and Realty issues.
7. Once all comments are resolved, Legal and Realty provide email acceptance email to the project manager.
8. The project manager prepares an acceptance letter and sends it to his or her implementation manager for signoff.
9. Project manager sends BPA’s acceptance letter to sponsor.
10. Project manager uploads the plan into PISCES/TARUS.



Prior to BPA’s acceptance of the initial management plan, sponsors should not undertake any ground-disturbing activities, unless reviewed and approved by BPA in advance or expressly allowed by an easement or

other agreement. However, sponsors may undertake ground-disturbing activities (without prior BPA review or approval) if they determine that prompt action is necessary to deal with an emergency; for instance, response to a hazardous waste release. See also the section on Land Use Agreements below.

**Transmission Facilities and Habitat.** Transmission facility maintenance and maintenance of habitat values are not mutually exclusive. This is evidenced by the numerous mitigation sites purchased with pre-existing high voltage distribution lines. Management plans should include provisions accommodating these facilities. Where BPA has transmission facilities on a mitigation property, it will seek to promote both transmission system reliability and habitat protection. The North American Electric Reliability Corporation sets standards that BPA must follow regarding vegetation height and distance from transmission lines. To meet these standards and fulfill its responsibilities to fish and wildlife, BPA will work with site managers to include provisions for both sets of attributes in management plans. With a focus on shared interests, such as improved safety and reduced costs, BPA will strive to work with site managers to avoid conflicts between two very important missions.

### **Agreement and Easement Control if the Plan Conflicts**

Inevitably, somewhere, sometime, a conflict will arise between a management plan and an underlying MOA or easement. Typically, MOAs and easements expressly establish the legal parameters that the management plans must work within. Management plans must follow MOAs and easements in both time and priority. Plans do not expressly or impliedly amend or terminate underlying MOAs or easements. Take for example an easement that prohibits grazing “except as provided in the management plan.” In this case, if the sponsor and BPA determine that limited grazing to control weeds would benefit the protected values of the site, then the sponsor can graze the site and not violate or contradict the easement. Any grazing beyond that approved for the site would violate the easement and be prohibited.

### **Land Use Agreements**

At times, it may be necessary for a sponsor, seller, or others to obtain BPA’s permission to take an action that would otherwise violate the rights of the United States under the easement. In these situations, BPA can approve and authorize the action through a **land use agreement** customized to address the specific site and circumstances.

The need for a land use agreement typically arises in two circumstances. Sometimes a seller needs additional time to vacate her property after closing, and her continued presence violates the easement. For example, a rancher sells her ranch. At closing, the buyer records the conservation easement which prohibits grazing. But in the purchase and sale agreement, the seller retained the right to graze her cattle on the property for another three months after closing. The sale agreement conveyed the right to graze from the buyer, but the sale agreement wouldn't bind BPA or exempt the grazing from the easement restrictions. To fix this, the seller needs to obtain a land use agreement from BPA authorizing the grazing. Otherwise, the grazing violates the easement and the seller could be liable for damage to the conservation values.

The need for a land use agreement may also arise on projects with no land management plan or in the time between when a plan is being drafted but hasn't been completed or approved. There the easement prohibitions apply without the clarifications that a plan can add. If an entity wants to use the site in a manner that might violate the easement, it needs to secure a land use agreement from BPA or face the legal risks inherent in violating an easement held by the United States. See Attachment XIX, Sample Land Use Agreement (for Non-Conforming Uses).

### **Asset Monitoring Checklist**

Land management plans also provide the basis for developing a compliance monitoring checklist. Developing the plan provides sponsors and BPA project managers the opportunity to identify what should and should not happen on a mitigation site. The list serves as the starting point for periodic compliance reviews and monitoring site management and use. Appendix XIX provides a sample compliance monitoring checklist that project managers should develop prior to site visits.

### **Future conveyance of real property interests**

Most properties acquired with BPA fish and wildlife program funds are owned by states, tribes, and other entities. Occasionally these program property owners need to transfer, sell, or exchange the property; for example, exchanging property with an adjoining landowner to consolidate holdings or resolve a boundary dispute.

A transfer or sale typically involves the United States' property interests in one of three ways. In the first, an entity either wants to sell or trade a property over which the United States, through BPA, holds a conservation easement. In such cases, BPA can probably agree to extinguish the United States' conservation easement. If the sponsor is securing another mitigation property, it needs to work with BPA to execute a new conservation easement to protect the new acquisition.

In other instances an entity wants BPA to convey the fee title held by the United States. BPA can transfer the property to another Federal agency – such as to the Bureau of Indian Affairs to be held in trust for a tribe as discussed in section V – with relative ease, although the process is often time consuming. In such cases, BPA will seek to ensure the priority of any rights it needs to the property, whether for mitigation protection or transmission services. Each transaction will be different, but often they include executing both conservation easement and transmission right of way documents that bind the agency and sponsor assuming title to the land.

Proposals that include conveyance of fee title from BPA to a non-federal entity can raise costly, time-consuming, legally challenging issues that are best avoided. If a sponsor hopes to have BPA dispose of the United States' fee interest in a property, the sponsor and BPA will need considerable time and extensive coordination to try and develop a legally supported approach to the disposal.

What if a sponsor does not want to take fee title to a mitigation property at the outset of a project but wishes to in the future? In those cases BPA will work with the sponsor and the seller to carefully structure the transaction. In particular, BPA will need to assure the rights of the United States are not affected by the doctrine of **merger**. Merger occurs automatically when an entity with a partial interest in property becomes the fee owner – then the lesser the interest automatically “merges” and all that’s left is the fee interest. So if a sponsor starts a



project by holding an easement on a property with third party rights of enforcement in the United States, then later the sponsor obtains the property in fee, the easement merges with the fee and BPA's enforcement rights disappear. When a sponsor proposes to acquire an easement, it should contact the Office of General Counsel and Real Property Services early in the acquisition process to structure the project so the United States' interests are protected regardless of who owns the property.

**Land Purchased with Project Revenue.** BPA can permit sponsors to use revenue generated from a mitigation property to buy additional properties. However, if the United States will receive a conservation easement or other real property interest as a consequence of the purchase, the sponsor needs to adhere to processes in this deskbook to guide that acquisition.

### **Changed Circumstances and Selling Assets**

If an easement holder or grantee wants to amend the conservation easement, the parties to the easement should carefully review the easement language—particularly that regarding amendment and termination—and the law of the state governing the property. The parties should document a careful and transparent process to determine that the objectives of the original easement are either impossible or that changed circumstances will make it highly impractical or unwise to continue to uphold the terms of the easement.

Assets secured with BPA fish and wildlife funding that will be sold or conveyed through the amendment or termination process need to be accounted for and, unless otherwise committed by contract or other operation of law, be returned to BPA's custody or control upon BPA acceptance of them. So, for example, if BPA provided funding for a fee acquisition that included land and structures, but later the project sponsor wishes to sell or otherwise divest itself of the structures, then BPA must still receive the benefit from the structures. That benefit could be using the income or sales proceeds to displace restoration or operations and management funding BPA might otherwise have provided. Each circumstance will likely be unique, so project sponsors should begin discussions well in advance of when they desire to actually divest themselves of fish and wildlife program assets.

## V. Special Issues Related to Tribes

BPA leaves to each tribe the task of obtaining Bureau of Indian Affairs approval under 25 U.S.C. § 81, if applicable, for agreements or real property interests being bought or conveyed into trust. BPA will assist as needed, largely by providing information.

When a project involves **Indian allotments**, BPA requires that the interests of all allottees be extinguished prior to providing ratepayer funds for the acquisition. That is, for individual Indian lands (allotments) proposed for acquisition, the Tribe must acquire 100 percent of the allotment shares.

Bureau of Indian Affairs regulations govern the transfer of fee lands into trust on behalf of a tribe.<sup>28</sup> BPA will usually not oppose a tribe's application to transfer title of a mitigation property into trust for the benefit of the tribe provided the terms of the easement or applicable agreement doesn't prohibit it and the tribe fulfills and agrees to the provisions below.

If BPA knows there could be a problem in supporting future fee to trust requests by a tribe, BPA will try to ensure its position is clear well before closing and expressly stated in any deed recorded with the property. To date this issue has arisen only in the Willamette Basin under the Willamette Wildlife Program, and the resolution is that the tribes involved understand that acquisitions in the Willamette are not appropriate for fee to trust transfer. BPA will examine the transfer to trust question on a case-by-case basis and to ensure the transfer complies with all BPA's agreements and policies.

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<sup>28</sup> See 25 CFR Part 151.

**Taking Mitigation Land into Trust.** BPA and the Department of the Interior’s Regional Solicitor’s Office have concluded that a conservation easement protecting fish and wildlife habitat in perpetuity does not create a restraint on alienation or otherwise restrict tribal use of the property in a manner that’s inconsistent with the tribe’s interests. Therefore, mitigation properties with conservation easements on them may be taken into trust. Where a property has an executory interest or covenant, the tribe may need to grant BPA a conservation easement and have BPA relinquish the other restrictive interest before the property can be taken into trust.

Issues BPA will cover in fee to trust process include:

- Ensure the fish and wildlife purposes of the acquisition in perpetuity.<sup>29</sup>
- Clarify BPA’s existing rights, if any, and establish their priority in the future.
- Ability to pursue future transmission facility development.



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<sup>29</sup> Or other appropriate duration agreed to during contracting.

**Notes:**



# **Appendices**

## **Fish & Wildlife Lands Deskbook**

## Appendix I

### Definitions

<b>Asset Monitoring</b>	Site monitoring to ensure the property, a mitigation program asset, remains in the condition called for in any applicable agreements, easements, covenants, etc.
<b>Baseline Documentation Report</b>	A report prepared by the easement grantee detailing the condition and features of a property at or near the time of acquisition or the completion of a restoration project.
<b>Bonneville Purchasing Instructions</b>	Procurement guidelines controlling BPA's acquisition of goods and services.
<b>Capitalization Policy</b>	The financial policy that allows BPA to capitalize land acquisitions where the acquisition retires a known portion of an established fish or wildlife mitigation debt.
<b>Conservation Easement</b>	A less-than-fee real property interest that places restrictions or affirmative obligations on an owner's use of the underlying property to further fish and wildlife purposes and protect fish and wildlife conservation values of the property, typically in perpetuity. Because a conservation easement is a real property interest and a recorded deed, the restrictions remain on the property even if there is a change in ownership.
<b>Conservation Values</b>	The natural features and characteristics of a property, including the flora and fauna, warranting its protection.
<b>Corporate Finance Review</b>	Review of the proposed funding characterization—i.e., capital or expense—by BPA's Financial Services for a project.
<b>Covenant</b>	An agreement or promise in a deed which is recorded. Covenants usually create a less-than-fee interest that places certain restrictions or affirmative obligations on an owner's use of the underlying property. Covenants can run with the land and bind both the original land owner and his or her successors in ownership.

<b>DOJ (Department of Justice) Title Review</b>	The review performed by BPA Office of General Counsel, under authorization by the U.S. Department of Justice, to ensure the proposed acquisition meets all requirements for the Federal government acquiring an interest in real property. Formerly known as a “945 review.”
<b>Ecosystem Services Credit</b>	Credit BPA, a sponsor, or funding entity may take for marketable environmental attributes, such as wetlands reserved or carbon sequestered, through a project.
<b>Environmental Compliance</b>	A catch-all phrase encompassing the environmental issues that must be addressed prior to an acquisition (e.g., NEPA, NHPA, etc.).
<b>Escrow Instructions</b>	The instructions provided by the sponsor and BPA to the escrow company to direct closing.
<b>Executory Interest</b>	A future real property interest, sometimes included within a covenant, that vests ownership in BPA if certain conditions arise.
<b>Fair Market Value</b>	The value of a property as documented in an appraisal, after analysis of comparables.
<b>Federal Columbia River Power System</b>	The federal dams on the Columbia River and its tributaries that BPA sells surplus power from.
<b>Fee Ownership</b>	Complete ownership of a piece of land.
<b>Fish and Wildlife Program</b>	The Columbia Basin Fish and Wildlife Program, established under the Northwest Power Act, to guide BPA’s efforts to protect, mitigate, and enhance fish and wildlife affected by the development and operation of the FCRPS. The program integrates the Endangered Species Act biological opinions covering the operation and maintenance of the Federal Columbia River Power System, as implemented by BPA.
<b>In Lieu Policy</b>	Policy to ensure that acquisitions comply with the prohibition in Northwest Power Act section 4(h)(10)(A), 16 U.S.C. § 839b(h)(10)(A) that prevents BPA from funding mitigation that other entities are responsible for.
<b>Indian Allotments</b>	Lands once allotted to individual Indians and now held in trust for the original allottee’s heirs and assigns which can number in the dozens or more for a single tract.

<b>Initial Intake Call</b>	A formal, structured meeting between the project sponsor and BPA staff held as early as possible in the acquisition process to discuss the project and identify issues related to the proposed acquisition.
<b>Land Management Plan</b>	Plan prepared by site managers and approved by BPA which provides detailed description of how the property will be managed.
<b>Life Estate</b>	A temporary right retained by a seller or others to remain for the rest of his or her life on the land even though fee has been conveyed to others.
<b>Memorandum of Agreement</b>	A contract with BPA to perform mitigation actions.
<b>Merger</b>	Where a greater estate and a lesser estate coincide and meet in one person, without any intermediate estate, the lesser is merged in the greater.
<b>Mineral Rights</b>	Interests in oil, gas, gravels, and hard rock minerals which are often severed from the surface estate and held by a third party.
<b>Mitigation Credit</b>	Credit BPA takes against its legal obligations under various Federal laws such as the Endangered Species Act or the Northwest Power Act.
<b>Permanent Habitat Protection</b>	Ensuring a real property interest is protected primarily for fish and wildlife on a long-term basis, typically for 99 years or longer.
<b>Pre-Acquisition Steps</b>	The steps BPA and a project sponsor must complete to acquire a property.
<b>Preliminary Title Report</b>	An offer of insurance from a title company which includes the legal description and all recorded encumbrances.
<b>Project Sponsor</b>	The entity proposing and performing the duties of securing a real property interest for the Fish and Wildlife Program.
<b>Public Access</b>	Use of a program mitigation property by the general public
<b>Public Involvement</b>	The opportunity for the public to participate in the development of a project or components of a project such as a management plan.
<b>Public Notice</b>	Notice to the general public of a pending acquisition.

<b>Real Property Interests</b>	Means a right in real property held by a certain person or entity.
<b>Review Appraisal</b>	The review BPA's appraisers conduct of appraisals performed outside the agency.
<b>Uniform Act</b>	The Uniform Relocation and Assistance and Real Property Acquisition Policy Act, 42 U.S.C. section 61 et. seq, is the law governing certain responsibilities and policies of Federal agencies using Federal funds to acquire property from private owners.
<b>Water Rights</b>	The rights to use water for purposes authorized by law.
<b>Water Rights Survey Form</b>	BPA's form for project sponsors to complete to inform decisions related to water on a property during the acquisition process.
<b>Wildlife Crediting Policy</b>	BPA's 1:1 credit requirement applied program-wide for wildlife projects not covered by a settlement agreement.
<b>Working Landscape Project</b>	A mitigation project managed to permit ongoing commercial use, such as grazing or logging, in a manner compatible with improving and maintaining the fish and wildlife habitat and conservation values.
<b>Yellow Book</b>	Federal appraisal standards.

## Appendix II

### BPA F&W Land Acquisition

#### Steps to Complete Environmental Requirements and Public Notice

*Updated October 2015*

1. *Gathering background information on the property*
  - a. The KEW COTR will notify the KEC environmental compliance lead (ECL), public affairs and lands about an upcoming land acquisition at the initial intake call (approximately 6 months prior to closing date), but no later than when the purchase and sale agreement is signed, the appraisal is complete, or **at least two months prior to closing**. *It is important to note that ECLs do not receive SOW review requests for land acquisitions, so the ECL is responsible for checking with their KEW COTR about potential acquisitions under a new contract.*
  - b. The KEW COTR will provide a copy of the property baseline inventory report to the EC lead to review as appropriate.
  - c. When the Public Affairs lead is notified about a potential land acquisition, they will inform Tribal Affairs of the project. Tribal Affairs will be provided with the general description of the proposal, understanding that more accurate information will be made available to them in the form of a land owner notification letter and map, and possibly a fact sheet when they are complete.
  - d. As soon as feasible, the ECL should obtain the following information from the project manager or project proponent much of which is captured in the land acquisition intake form:
    - Desired closing date
    - Property location information, including:
      - a shapefile or map with the property boundaries clearly indicated,
      - parcel tract ID number
      - the Township, Range and Section(s),
      - county and state,
      - name of the USGS Quad map, and
      - an aerial photograph or image with property boundaries clearly indicated.
    - Property description including size, habitat types, species present (including threatened, endangered, or other sensitive species and

- critical habitat), nearby rivers or streams, structures on-site, prior land use, nearest city or landmark, and any other notable features.
  - Determine whether there is an existing land management plan this property will be added to or a new land management plan will be developed.
  - Confirm if stewardship funding will be provided as part of the acquisition, and addressed in the NEPA document.
  - Interim management activities that may occur before a new land management plan is finalized.
  - e. The ECL should coordinate with the COTR and Lands for any visits to the property.
  - f. The ECL will initiate the GIS Map Request process:
    - Obtain a shapefile of the property boundary from the project proponent.
    - Email this shapefile to survey staff at TERM-TPP. They will make necessary edits, and will email shapefile back to the ECL.
    - ECL will submit the shapefile within the [Public Notification](#) GIS Map Request on Share Point.
    - KEC GIS Analyst will create and send the public notification map to the ECL.
  - g. The ECL is responsible for obtaining and verifying a list of landowners and addresses within a ¼ mile radius of the proposed acquisition. **Use the same form in 1(e)** to request a list of landowner names and addresses within ¼ mile radius of the land acquisition. If the parcel information is not in eGIS, then the eGIS staff will contact the appropriate person in the lands office and request this information. Once received the EC shall verify that the landowner list was developed from recently obtained data and request the data be updated if it is older than 2 years. NOTE: If there is an irrigation diversion on the property serving other landowners downstream, notify downstream landowners as well.
2. *Cultural Resource Compliance*
- a. The ECL will submit a [Cultural Resource Request Form](#) on Share Point, and an Archaeologist will be assigned to your project. The Archaeologist will conduct a background literature search for the property. Based on the results of the literature search and analysis of the maps, the Archaeologist will make a recommendation on whether a survey is required. An intensive survey will generally not be required if the Archaeologist determines that the land acquisition and any identified management actions have no potential to cause effects to historic/cultural resources,

assuming such historic properties were present. However, in some cases a reconnaissance-level survey may be required. The ECL, Archaeologist, and COTR coordinate to determine whether surveys will be conducted and the timing of the surveys.

- b. If a survey is required, the ECL will coordinate with the COTR and Archaeologist to determine if a cultural resource survey will be completed by BPA or contracted out. The ECL and Archaeologist will coordinate and prepare an initial consultation letter with the APE map to be sent to the SHPO and applicable Tribes and/or the THPO. The SHPO and/or THPO and the Tribes have 30 days to respond. Once the survey and survey report are completed, the ECL and Archeologist will send the report and final determination letter to the SHPO and applicable Tribes and/or the THPO. The SHPO, THPO and/or the Tribes have 30 days to respond. SHPO concurrence should be received prior to purchase.
- c. If a survey is not required, a notification letter will be sent to the SHPO for states where BPA has executed a programmatic agreement (PA) for fish and wildlife projects. For states where there is no PA, no further action is required and compliance with the NHPA is considered complete.

3. *Write a Categorical Exclusion (CX) for purchase of the property*

The ECL will write the CX and fill out the CX checklist (a template for these documents may be found by opening MSWord and selecting: *File>New>My Templates>08 Land Acquisition Templates>Land Acquisition Memo CX Checklist*). Please remember to save this document as a separate file name after opening. To ensure consistency among the different documents created as part of this process, use the following naming convention when titling this CX: "property name CX". If the acquisition is for fee title, the ECL will consult with the COTR to identify any anticipated ground-disturbing activities that may occur on the property before the development and approval of a management plan. These activities should be included in the CX. Save this file to SharePoint and email the SharePoint file path to KEC Administrative staff to process for review. They will submit it to the NEPA compliance Officer (NCO) for review and signature. (If a CX is not sufficient for the particular acquisition, consult with NCO).

After the NCO and ECL (if CFTE ECL, then KEC Supervisor, BFTE ECL, or KEC Manager must also review, see [guidance](#)) sign the CX, KEC Administrative staff will update the CX in Share Point and post the CX on the NEPA documents website. The CX must be signed prior to finalizing public notice ad, and public letter (Step 4 below), including posting it to the web site.



#### 4. *Public Notification Process*

- a. The ECL will draft the public letter based on information provided by the project proponent about 5-8 weeks before closing (the template for this letter may be found by opening MSWord and selecting: *File>New>My Templates>08 Land Acquisition Templates>Land Acquisition Public Letter*). KEC Admin staff can provide a hyperlink to the web site.
- b. The ECL will email the draft public letter to the project team (COTR, project sponsor, Public Affairs lead, and, General Counsel, for review). The ECL should request that edits be returned within one week.
- c. The ECL will revise the public letter based on edits provided by the project team.
- d. The ECL will coordinate creation of the mailing list with the COTR, project sponsor, KEC staff, and Public Affairs lead. Each mailing should at a minimum go to landowners within ¼ mile of the property, county commissioners, and affected tribes, in addition to any other interested parties identified by the project team. The Public Affairs lead will provide names obtained from Constituent, Tribal, Power and Transmission Account Executives. The ECL shall provide the project sponsor the opportunity to review the mailing list so the sponsor may conduct outreach to entities that have a strong interest in the acquisition prior to the formal public notification process.
- e. The ECL will send revised public letter and map to the Public Affairs lead who will use this information to draft the public notice newspaper ad, coordinate the ad publication notice and consider whether this acquisition warrants the development of a fact sheet. The Public Affairs Lead will send the draft newspaper ad to the ECL for final review four weeks prior to closing.
- f. The Public Affairs lead will coordinate fact sheet design/production (if needed) and posting of information on the BPA public website, and send a PDF of the final fact sheet to the ECL. The ECL will work with KEC Administrative staff to include the fact sheet in the mail out.
- g. The Public Affairs lead will coordinate the ad design and placement, and will place ads in local newspapers at least 15 days before the proposed closing. The Public Affairs lead will email ad placement plan to ECL, COTR, and project sponsor.
- h. The ECL will coordinate with KEC Admin Staff to mail the public letters (including the map and fact sheet, if applicable) to all mail list contacts gathered. The EC lead will upload the final mail list to share point prior to mail out. **Public letters should be mailed three weeks prior to closing and at least three days before the public notice is published in the paper**

(this date should be provided by the PA lead) and the CX must be posted to the website prior to mail out..

- i. Prior to the closing date, the ECL will contact the COTR, project proponent, and the PA lead to determine if any issues or concerns regarding the land acquisition were raised. The ECL will share this information with all potentially interested BPA staff. If issues that could affect the closing have been raised, discuss how they will be addressed. ECL will document consideration of these issues in Pisces under the EC tab in the Public Involvement box.
- j. Lands lead will notify the ECL, COTR, and the Public Affairs lead when the transaction closes.
- k. The Public Affairs lead will prepare a short write-up on the transaction for the BPA Journal. The Public Affairs lead will work with media and project team to determine if the transaction should be publicized further.

#### 5. *Final Steps*

- a. The ECL will complete the Pisces tab for NEPA, ESA, Sec 106, and public involvement. Land acquisitions are tracked via internal contracts in Pisces (at the project level, these are listed under the “internal work” tab in the “Project Work” window; reference number format is BPA-XXXXXX). Include any pertinent information in the notes column. For example cite the appropriate CX category – “B1.25 Real property transfers for cultural resources protection, habitat preservation, and wildlife management”; for public involvement list the names of newspapers where ads were placed and dates they ran; etc.
- b. The ECL will save administrative record documents into appropriate SharePoint site including the mail list, public letter, location map, newspaper ad, etc.

## Appendix III Land Acquisition Intake Form

This form aids BPA in understanding and tracking new acquisitions. Please complete and return to your BPA F&W Project Manager. Upon receipt, the BPA F&W Project Manager will schedule an Intake Phone Call to discuss the details of the acquisition and next steps.

<b>Sponsor's Contact Information</b>	
1.	Date form completed:
2.	Sponsor organization:
3.	Contact name:
4.	Email:
5.	Address:
6.	Phone number (land line and cell):
7.	Preferred closing date:

<b>BPA Project Information (this section to be completed by BPA)</b>	
8.	BPA COTR/Land PM:
9.	Project Number:
10.	TBL Task Order:
11.	BiOp association:
12.	Accord/Settlement:
13.	Capital/Expense:
14.	Stewardship funding request:
15.	Main mitigation for Wildlife / Anadromous fish / Resident Fish
16.	Hydro project:

<b>General Project Information</b>		<b>NOTES</b>
17. Functional name/alias for property (do not use the landowner's name):		
18. Type of transaction	Fee title Easement	
19. If fee title acquisition, who will own the property after purchase?		
20. If easement acquisition, who will hold easement after purchase?		
21. Short description of acquisition purpose and benefit:		

<b>Mitigation Type &amp; Species Information</b>	
22. List key wildlife species currently using the property:	
23. List key fish species currently using habitat on or adjacent to the property:	
24. List any federal or State ESA-listed species (plants included) that use the habitat on the property:	
25. List key habitat types on the property:	
<b>Property Information</b>	
26. Property Size (total acres):	
27. Physical Address of Property:	
28. Property County (main):	
29. Property Location - State:	
30. Property Lat/Long (Centric point of the property)	
31. Nearest Population Center:	
32. Date Appraisal was ordered:	
33. Projected date appraisal to be received by BPA:	

34. Are there any concerns in the appraisal (i.e. hypothetical conditions or extraordinary assumptions)?	
35. Are there carve-out management areas?	
36. Will the property need to be divided, or will an area need to be excluded? Or will the entire property be acquired?	
37. For fee title purchases: Does the owner desire to keep any of the property in a life estate or retain another form of rights to the property (i.e. continued access for recreation)?	
38. If there is a section of the parcel being retained by the owner, has a legal boundary adjustment/partition plat been done, if necessary?	
39. For conservation easements, what rights/activities does landowner want to retain (e.g., building envelope, grazing, farming, and mining)?	
40. Will a subdivision, partition plat, boundary adjustment, etc. be needed for this transaction?	
41. Is there a threat of this property going to auction or foreclosure?	
<i>Please include a property map(s) with the vicinity as well as the specific parcel</i>	
<b>Acquisition Funding</b>	
42. Estimated Acquisition Cost:	
43. Is BPA providing 100% of the acquisition funding? If no, provide cost share partners' proportions and status of funding (i.e., secured or requested).	
44. Are there any conditions (requirements for funds received) to funding from the cost-share partner?	
<b>Other Property Considerations</b>	
45. Does legal access to the property exist?	
46. What have been the historic uses of the land?	

47. Does the property have any buildings you estimate to be 50 years or older, regardless of their condition?	
48. What are planned actions that may occur within 24-months after closing (restoration, property management, building alterations/demo)?	
49. Does anyone live on or occupy the property besides the owner and immediate family?	
50. Does anyone use the property (either paid or gratis – e.g., grazing/leasing/crop share)?	
51. Is this property already protected, or in another process to be protected with a conservation easement, or other form of property protection, such as deed restrictions, or through programs such as Wetlands Reserve, Conservation Reserve, or Forest Stewardship Trust?	
52. Do any known environmental encumbrances exist, such as toxic contaminants, underground storage tanks, or other related issues?	
53. Do all mineral rights accompany the property?	
54. If the landowner does not currently hold all of the mineral rights, what steps are being taken to extinguish the severed rights?	
55. Are there any above or below-ground utility rights-of-way on the property and will these interfere with the contemplated use of the property (i.e. restoration, etc.)?	
56. Are there levee rights or other types of flood protection rights held by a third party? Do these rights include the ability to use materials from the property?	
<b>Water Rights</b>	
57. Are water rights associated with the property? Pick all that apply: None Surface Well	

58. Will the water rights be excluded from the acquisition? If so, please explain why.	
59. If water rights will be secured with the property acquisition, what is the amount of water (acre-feet/year and periodicity)?	
60. What are the historic use(s) of these water rights? (e.g., instream, aquaculture, domestic, municipal use, irrigation, stock watering, manufacturing, mining, hydropower, recreation, other)	
61. What are the planned water rights use(s) after acquisition?	
62. Have the water rights been used within the last 5 years? How?	
63. Please provide all water right certificate/permit numbers, acre-feet and associated periodicity.	
64. If the water rights will be transferred instream, how much flow will return to the stream (in cubic feet per second	

**Other**

65. Any other parcel-specific issue that might affect the property value or the ability to close by the requested date?



## Appendix IV

### **Definitions, References and Requirements For All Appraisals Submitted For Funding to the Bonneville Power Administration (BPA) Fish and Wildlife Program**

#### **I. COMPLIANCE DATE FOR THE ENCLOSED REQUIREMENTS AND GUIDELINES:**

The requirements and guidelines set forth in this transmittal take effect on April 1, 2010. Appraisal reports under contract before April 1, 2010 will be accepted for review by the BPA under the contract terms agreed to with the appraiser.

#### **II. COMPLIANCE WITH FEDERAL REQUIREMENTS AND GUIDELINES:**

All definitions and requirements to be included in the appraisal must be consistent with the following publications:

1) Uniform Appraisal Standards for Federal Land Acquisitions (UASFLA)  
"YellowBook"

(<http://www.justice.gov/sites/default/files/enrd/legacy/2015/04/13/Uniform-Appraisal-Standards.pdf>).

2) Uniform Relocation Assistance and Real Property Acquisition Regulations for Federal and Federally Assisted Programs (49 CFR Part 24), revised in January 4, 2005 (Public Law 91-646)

([http://www.fhwa.dot.gov/real\\_estate/uniform\\_act/index.cfm](http://www.fhwa.dot.gov/real_estate/uniform_act/index.cfm)).

3) The Uniform Standards of Professional Appraisal Practice (USPAP)

(<http://www.uspap.org/>)

#### **III. SPECIFIC MINIMUM APPRAISAL REPORT COMPLIANCE ITEMS REQUIRED IN ALL REPORTS PREPARED FOR BPA USE:**

1. Proper documentation of the landowner contact and an invitation to the landowner to accompany the appraiser on the property inspection must be included in each appraisal report. Verification of the contact information can be included as a separate section/heading in the body of the report or in the appraiser's Certification. Public Law 91-646 [49 CFR Part 24.102(f) Basic Acquisition Policies] and UASFLA "The Yellow Book", Section D-14 Pages 100-101.

2. Definition of "Market Value": UASFLA "The Yellow Book", Section A-9 Page 13.
3. Highest and Best Use must be based on an *economic use*: UASFLA "The Yellow Book", Section A-14 Page 18.
4. The appraisal valuation conclusion must be based on an *economic use* and not a Public or Special Interest Use Value premise.
5. A ten-year sales history of the subject property(is) together with the last sale of the property irrespective of the date and any listings or prior offers within said time period are required: UASFLA "The Yellow Book," Section A-13e Page 15.
6. Note: "Comparison of USPAP and the Uniform Appraisal Standards for Federal Land Acquisitions:" UASFLA "The Yellow Book," Section D-1 Pages 77-79.
7. Reference linking the "Estimate of Value to a Specific Exposure Time" shall not be included in the appraisal report: UASFLA "The Yellow Book," Section A-9 Page 13, Section D-1(b) Page 78.
8. Scope of Work: The applicability of all standard approaches to value shall be discussed and the exclusion of any approach to value shall be explained: UASFLA "The Yellow Book," Section A-8 Page 12.
9. All comparable sale data shall comply with the UASFLA "The Yellow Book" requirements cited under B-4 pages 37-40 and Section A-17 pages 20 to 22.
10. Comparable sales (to and/or for other government agencies) requiring Extraordinary Verification and Treatment must be addressed in an appropriate manner: UASFLA "The Yellow Book," Section D-9 Page 84.
11. The Date of Value shall be the Date of Physical Inspection of the subject property by the appraiser.
12. Submit appraisal report (s) to The BPA for review and approval through The BPA Project Manager.
13. The larger parcel shall be identified and the impact of the acquisition on the larger parcel needs to be analyzed: UASFLA "The Yellow Book," Section B-11, Pages 47 through 41 and Section B-13 Pages 53 through 55.
14. Color photographs of the subject and all comparable properties, together with a location map clearly exhibiting all sales in relation to the subject, must be included in all copies of the appraisal report. The photo caption should identify the subject of the

photo, name of person taking the photo and date taken: UASFLA "The Yellow Book," Section A-17 Pages 21-22. The location map must have appropriate distinguishing landmarks to assist the appraiser during a field inspection.

15. A GPS coordinate or Quarter Section, Township, Range, legal description is required for the subject property(s) as well as for all comparable sales used in the report. The BPA will be using these coordinates and/or legal descriptions in completing a field review of the report.
16. Discussion relative to the comparable properties used in the appraisal report shall include individual narrative comments and adjustment conclusions as to the value each comparable property indicates for the subject, together with an overall summary conclusion. **If** an adjustment grid tabulation is used, it shall be clearly presented containing all adjustments and supported through market sources: UASFLA "The Yellow Book," Section A-17 Pages 21-22.
17. The Appraisal Certification shall include a statement indicating the contract appraiser has personally inspected the appraised property and all comparable sale properties used in arriving at the estimate of value.
18. The Appraisal Certification shall include the appraiser's opinion of the market value of the property appraised and the date of valuation. The appraisal will be rejected if these items are not present: UASFLA "The Yellow Book," Section A-4 Pages 9-10.
19. The enclosed checklist must be filled out and located in the addenda of the appraisal report. Failure to include this completed checklist will cause immediate rejection of this report.

#### **IV. DOCUMENTATION**

The appraiser(s) will provide an appraisal report both in hard copy and PDF electronic format to comply with the rules and regulations described by reference in this transmittal. BPA needs to be listed as either the client or an intended user of the report. It is further recommended that the phrase "For the United States Government Agencies and Bureaus (attention: The Bonneville Power Administration) use." The appraisal employment contract including the appraisal instructions and fee for appraisal services must be included in the addenda of the appraisal report. The BPA Appraisal Department will accept appraisals with dates of value within six months of the time of receipt in the department. Reports with dates of value exceeding six months may or may not be accepted without an update.

#### **V. APPRAISER REQUIREMENTS**

The principle appraiser must be a Certified General Appraiser in the State where the subject property is located or hold a Certified General Appraiser license in another state that will be granted reciprocity by the state licensing agency governing the location of the subject property (s).

As of October 1, 2010: All appraisers providing easement related appraisals for The BPA Fish and Wildlife program will be required to show proof of attendance and passing either the Appraisal Institute's or American Society of Farm Managers and Rural Appraiser's Valuation of Conservation Easement Certificate Program course. In addition, All appraisers are required to have taken a UASFLA "The Yellow Book" course/seminar sponsored by an Appraisal Sponsor of the Appraisal Foundation and passed the appropriate examinations. Reports received after this date will be rejected if evidence of the Valuation of Conservation Easement Certification and the UASFLA "Yellow Book" course of study are not present by reference or exhibit in the report.

## **VI. VALUATION METHODS TO BE USED**

Valuation Methods to be used are to be determined by the appraiser(s) and must be consistent with the prior referenced Federal Requirements in Section I. If conflicts arise between the requirements of UASFLA "The Yellow Book," Public Law 91-646 (49 CFR Part 24), revised in January 4, 2005 and USPAP, the BPA Appraisal Staff assigned to the project will instruct the appraiser(s) regarding which requirements are to be followed. The BPA Appraisal Staff are available to respond to questions by the appraiser(s) regarding appraisal methodology and procedures.

## APPRAISAL REQUIREMENT CHECKLIST

BPA REQ. #	APPRAISAL REPORT PAGE(S) #	MINIMUM / SPECIFIC APPRAISAL REQUIREMENTS
III-01		Documentation of the landowner contact
III-02		Market Value Definition
III-03		Highest and Best Use
III-05		Subject Sales History
III-07		Exposure Time is <b>not</b> to be included in the report
III-08		Scope of Work
III-10		Use of Extraordinary Verification of Sales
III-13		Larger Parcel Identification
III-14/15		Subject Photos
III-14/15		Comparable Photos
III-14		Sale Map
III-16		Sales Data Compliance with UASFLA
III-16		Sales Analysis
III-16		Adjustment Grid
III-16		Adjustment Analysis
III-11		Date of Value
III-17		Appraisal Certification with UASFLA Requirements
III-15		BPA GPS Requirements
V		Valuation Conservation Easement Certificate

## Appendix V

### Template Conservation Easement (Washington) Where the Sponsor Acquires in Fee and BPA Receives an Easement

[State law governs most aspects of real property transactions, so  
easement language will vary somewhat depending on the state in  
which the property is located.]

**AFTER RECORDING, RETURN TO:**

Bonneville Power Administration  
Real Property Services, TERR  
Re: [Insert BPA Tract No.]  
P.O. Box 3621  
Portland, OR 97208-3621

#### DEED OF CONSERVATION EASEMENT

THIS DEED OF CONSERVATION EASEMENT is executed by [*Insert name of sponsor, description of sponsor, and address of sponsor*](“Grantor”), in favor of the United States of America (“United States” or “Grantee”), acting by and through the Department of Energy, Bonneville Power Administration (“BPA”), headquartered in Portland, Oregon, at P.O. Box 3621, Portland, OR 97208-3621. The Grantor and Grantee together are referred to as the “Parties.”

#### I. RECITALS

A. BPA is a power-marketing agency having legal obligations under the Pacific Northwest Electric Power Planning and Conservation Act, 16 U.S.C. §§ 839-839h (“Northwest Power Act”) to protect, mitigate, and enhance fish and wildlife, including related spawning grounds and habitat, affected by the development and operation of Federal hydroelectric projects of the Columbia River and its tributaries, in a manner consistent with the purposes of the Northwest Power Act, the Fish and Wildlife Program adopted by the Pacific Northwest Electric Power and Conservation Planning Council under subsection 4(h) of the Northwest Power Act (16 U.S.C. § 839b(h)), and other environmental laws, including the Endangered Species Act, 16 U.S.C. §§ 1531-1544 (“ESA”). BPA has the authority pursuant to the Northwest Power Act,

16 U.S.C. §§ 839b(h) and 839f(a), the Federal Columbia River Transmission System Act, 16 U.S.C. § 838i(b), or the Bonneville Project Act, 16 U.S.C. §§ 832a(c) through (f), to acquire real estate or to assist in the acquisition and transfer of real property interests.

- B. Grantor is [insert grantor description]
- C. BPA and the Grantor entered into [*insert name and date of governing MOA*] (“**MOA**”), in which BPA agreed to fund the acquisition of real property interests to permanently protect and enhance important fish and wildlife habitat, where it either currently exists or at one time existed, in exchange for supporting BPA’s partial fulfillment of Northwest Power Act and ESA obligations, and in exchange for rights of enforcement, entry, and inspection to the United States and its assigns.
- D. BPA in accordance with the mutual commitments of the **MOA**, a copy of which is available from the BPA Manager, Real Property Services, P.O. Box 3621, Portland, OR 97208-3621, provided funding to the Grantor to acquire fee title ownership of certain real property, the [*Insert the name of the property as used in the acquisition process – not including the landowner’s name, e.g., “West Creek Ranch Property”*] (“**Protected Property**”) in [*County, State*]. The Protected Property has important features that help BPA meet its statutory obligations to the public under the Northwest Power Act and other environmental laws.

## II. AGREEMENT

- A. **Conveyance and Consideration.** The Grantor, for and in consideration of the funding in the amount of ([*Insert the dollar amount provided by BPA for the purchase of the property*]) in U.S. dollars which BPA provided to acquire fee title ownership of the Protected Property, hereby voluntarily conveys and warrants <sup>1</sup> to the United States of America and its assigns a perpetual easement for conservation purposes (“**Conservation Easement**”) in, over, under, upon and across the Protected Property, legally described in **Exhibit A** (Legal Description)[*Note: the legal description must include a description of any water rights accompanying the property in the transaction*], together with access to the same, and shown in **Exhibit B** (Map), created and implemented under applicable state and federal law, and creating an interest in property intended to be a conservation easement under [*cite applicable state law*]. The Parties

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<sup>1</sup> Language of conveyance will vary by state.

intend this Conservation Easement to be a perpetual and irrevocable easement in gross, and further intend that its terms and conditions, set forth below, create equitable servitudes and covenants running with the land, binding the Grantor and the Grantor's successors and assigns for the benefit of the United States.

**B. Purpose.** The purpose ("**Purpose**") of this Conservation Easement is to protect and conserve, and as appropriate, to allow for the restoration or enhancement of the **Conservation Values** (Section C, below) of the Protected Property. As such, the Purpose of this Conservation Easement includes the prevention of any use of the Protected Property that will materially harm or materially interfere with any of the Conservation Values of the Protected Property. The Grantor intends that this Conservation Easement will confine the use of the Protected Property to activities that comply with the Conservation Easement, including the final Management Plan. BPA shall have the right, but not the obligation, to enforce any and all terms of this Conservation Easement. The Grantor shall only conduct activities on the Protected Property which are consistent with the Purpose of this Conservation Easement. In the event that there is a conflict between the Grantor's uses or activities and the Purpose of Conservation Easement, the Purpose of the Conservation Easement shall be construed broadly and shall prevail over any conflicting uses or activities of the Grantor.

**C. Conservation Values.** The Protected Property, in its present state, comprises approximately [*insert number of acres*] including [*insert summary of important habitat or other features, e.g., "riparian forest, floodplain, and side channel habitat important to ESA-listed fish species"*]. The Parties agree that the Protected Property includes other important species, habitat, and other important ecosystem attributes. The Conservation Values of the Protected Property that currently exist specifically include the following, recognizing that such Conservation Values may periodically fluctuate or trend toward long-term change, due to natural events such as wildfire, floods, interdecadal climate events, and long-term climate change, as well as human-initiated enhancement or restoration actions:

1. [*Insert important species on or targeted for the property—specifically identify the ESU for any BiOp or Accord-funded projects*]
2. [*Insert important habitat types—f restoration or enhancement work is expected, briefly mention the opportunity this property provides to do that work*]
3. [*Insert as applicable other features that made the property important to acquire*]



*for BPA's Fish/Wildlife program purposes, e.g., if it's adjacent to other protected habitats, association with other planned restoration work, public benefit, etc.]*

- D. Water Rights.** *[If water/water rights accompany the purchase, then note the nature and extent of the water rights at the time of acquisition and how the Grantor will preserve and use those rights to benefit the protected property.]* To the extent Grantor has or after-acquires water rights, Grantee shall ensure that the Grantor shall not abandon any of the water rights appurtenant to the Protected Property by virtue of non-use and that the Grantor may not transfer, change the point of diversion, change the purpose of use, or otherwise significantly change any Protected Property water right without receiving prior written approval from BPA.
- E. Baseline Documentation.** The Grantor and BPA agree that the characteristics and conditions of the Protected Property at the time of this grant are documented in a **Baseline Documentation Report**, signed and acknowledged by the Parties; the acknowledgment is **Exhibit C**.
- F. Reserved Uses.** The Grantor reserves, for itself and its successors and assigns, the right to use the Protected Property in any and all ways which are consistent with the Purpose of this Conservation Easement and which are not otherwise prohibited by this Conservation Easement, including but not limited to: the right to record title, the right to convey, transfer, and otherwise alienate title to these reserved rights in accordance with Sections K(14) and Q; the right of quiet enjoyment of the rights reserved in Protected Property; and the right to prevent trespass and control access.
- G. Management Plan.** Within 18 months of the Effective Date, the Grantor shall develop a Management Plan for the Protected Property to describe the uses and activities that the Grantor expects to undertake or allow to be undertaken on the Protected Property, including any restoration, enhancement, operation and maintenance, or any other activities or uses. The Grantor shall include in the Management Plan any limitations or prescriptions for these uses and activities necessary to ensure the Purpose of this Conservation Easement. The Grantor shall also identify in the Management Plan the allowable use and access by the public of the Protected Property if public access is appropriate.

In developing the draft Management Plan, Grantor will solicit and incorporate as Grantor deems appropriate the views of interested natural resource management agencies, local governments, and parties. Grantor will submit documentation showing the nature and extent of such coordination with any draft plan to BPA. BPA shall review that Management Plan and any

proposed amendments for consistency with the Purpose of the acquisition, this Conservation Easement, any other agreement between the Parties and applicable law. BPA must complete its review and the Parties must agree on a final Management Plan or any amendments prior to its implementation. Prior to review of the Management Plan by BPA, the Grantor shall not undertake any ground-disturbing activities on the Protected Property without prior notice to and written consent from BPA. The Grantor shall make the final Management Plan, and any final amendments, available to the public.

**H. Public Access.** The Grantor shall provide reasonable access to the Protected Property (for example, for undeveloped recreational uses, such as hiking, bird watching, hunting and fishing) to the general public, unless the Grantor and BPA determine such access may materially impair one or more of the Conservation Values of the Protected Property. The Grantor will address access to the Protected Property in the Management Plan.

**I. Annual Report.** The Grantor shall annually submit a report to BPA that describes, at a minimum any: changes in real property interests (including water rights) in the Protected Property; uses or activities undertaken, in progress, or planned; violations or threatened violations of the Conservation Easement; and enforcement action taken. The Grantor shall provide the initial annual report in the fifteenth month after the closing date of the acquisition of the Protected Property, and then annually on that initial report date anniversary thereafter, unless otherwise agreed by BPA.

## **J. Rights Conveyed to Grantee**

**1. General Rights.** The Grantor has conveyed this Conservation Easement to the United States. BPA is the acquiring federal agency having jurisdiction and control over this Conservation Easement. Subject to valid existing rights of record and those rights specifically reserved to the Grantor at the time of this conveyance, all development rights associated with the Protected Property are vested in Grantee. In addition to any other rights granted to the Grantee pursuant to this Conservation Easement, Grantee has the right to:

- a) Access and inspect the Protected Property at all reasonable times upon reasonable notice (which may be by phone or electronic mail) to assure compliance with this Conservation Easement;
- b) To access the Protected Property upon reasonable notice (which may be by phone or electronic mail) to survey the fish and wildlife

habitat and evaluate the status of the Conservation Values;

- c) Prevent any activity on the Protected Property inconsistent with this Conservation Easement, and to require the restoration of areas or features of the Protected Property that are damaged by any inconsistent activity; and
- d) Should the Grantor fail to do so, to retain and maintain the right to use any and all of the water rights associated with the Protected Property, and to protect those rights from threat of abandonment or forfeiture under relevant law; Grantee may, after providing 90 days advance written notice to the Grantor enter upon the Protected Property and take actions reasonably necessary to maintain the validity of the water rights.

**2. Transmission Facilities.** The Grantor conveys the following rights to the United States: to construct, locate, operate, maintain, repair, reconstruct, upgrade, keep clear, access and patrol future transmission facilities including ancillary transmission communications facilities within the Conservation Easement at no additional cost for securing the transmission easement for these purposes. Should such a perpetual transmission easement be needed, the Parties shall negotiate the final terms and conditions of the transmission easement in a form substantially similar to **Exhibit D**, Form Transmission Easement. Such transmission easement shall not be presumptively precluded by the terms of this Conservation Easement. The Parties shall seek to negotiate terms and conditions of the transmission easement that reflect the Purpose of this Conservation Easement, and may include mitigation measures in accordance with the MOA or as otherwise identified as part of an environmental analysis for the transmission easement under the National Environmental Policy Act, ESA, or any other applicable laws. Transmission easements shall be for the sole purpose of transmission of electrical power and ancillary communications.

**K. Prohibited Uses.** The Grantor shall manage the Protected Property to protect its fish and wildlife habitat on behalf of BPA, preventing any and all uses of the Protected Property that are inconsistent with the Purpose of this Conservation Easement. The Grantor may also manage the Protected Property to restore or enhance fish and wildlife habitat, provided BPA consents to the restoration or enhancement activities, either in a final Management Plan or by prior written agreement. Prohibited uses of the Protected Property include those specifically listed below. The Parties intend that any activity that may materially harm or materially interfere with one or more of the Conservation Values is prohibited, and therefore the list

identified below is not exhaustive.

1. *Residential, Commercial or Industrial Uses.* Any residential, commercial, or industrial uses of the Protected Property are prohibited, including timber harvesting, grazing of livestock, and agricultural production.
2. *Construction of Buildings, Facilities, Fences or Other Structures.* Construction of new buildings, facilities, fences or other structures is prohibited. Repair, maintenance, or replacement of existing buildings, facilities, fences or other structures identified in the Baseline Documentation Report are permitted at the same location and within the existing footprint of such structures.
3. *Utilities.* Except as provided for in Section J.2, the installation or relocation of new public or private utilities, including electric, telephone, or other communications services is prohibited. Existing utilities on, over, or under the Protected Property may be maintained, repaired, removed or replaced at their current location as that location is documented in the Baseline Documentation Report.
4. *Signs.* Except for no trespassing signs, for sale signs, signs identifying the owner of the Protected Property, and signs that may be erected by the Grantee identifying the Purpose of the Protected Property, all other signs, advertisements, and billboards of any nature are prohibited. The permitted signs may not exceed 15 square feet in size.
5. *Waste.* Dumping, collecting, recycling, accumulating, or storing of trash, refuse, waste, sewage, bio-solids, or other debris is prohibited.
6. *Mining.* The exploration, development, mining or extraction of soil, sand, loam, gravel, mineral, oil, gas, or other substance from the surface or subsurface of the Protected Property is prohibited.
7. *Topography.* Altering the existing topography of the Protected Property by digging, plowing, disking, or otherwise disturbing the surface or subsurface is prohibited.
8. *Watercourses/Wetlands.* Draining, dredging, channeling, filling, leveling, pumping, diking, impounding or any other alteration of any watercourses, ponds, seeps, bogs, springs, wetlands, or any seasonally wet area is prohibited, as is altering or tampering with existing water control structures or devices.

9. *Vegetation.* The cutting, trimming, shaping, killing, or removal of any vegetation from the Protected Property, except for noxious weeds, is prohibited.
10. *Exotic Species.* The introduction, cultivation, or use of exotic plant or animal species on the Protected Property is prohibited. Exotic plants include non-native invasive plant species.
11. *Roads and Impervious Surfaces.* Construction of new roads and paving of any existing road not paved or otherwise covered in an impervious material as of the Effective Date is prohibited. Existing roads identified in the Baseline Documentation Report may be maintained and repaired in their current condition and within their existing footprint as identified in the Report.
12. *Vehicle Use.* The use of motorized vehicles is prohibited, except as necessary to carry out activities agreed to by the Grantee, or for limited, de-minimus, non-commercial recreational uses such as hunting or bird watching if those activities are agreed-upon uses in the Management Plan.
13. *Subdivision.* The legal or “de facto” division, subdivision or partitioning of the Protected Property is prohibited.
14. *Grant of Rights.* The granting of any property interest or rights in the Protected Property, including easements, permits, licenses, and leases, liens, without the prior written consent of the Grantee is prohibited.

**L. Permitted Uses.** Uses or activities otherwise prohibited under Section K above may be allowed but only if: (1) the use or activity is, in Grantee’s sole discretion, consistent with the Purpose of this Conservation Easement; and (2) the use or activity and any necessary limits or prescriptions are agreed to by BPA in advance, either in a final Management Plan, or by written consent of BPA.

## **M. Enforcement**

1. *Notice of Violation, Corrective Action.* If Grantee determines that the Grantor or its representatives, contractors, successors, or assigns violates or threatens to violate this Conservation Easement, and if such determination or dispute is not resolved by negotiation as set forth in Section N, Grantee will give written notice to the Grantor and demand

- corrective action sufficient to cure the violation and, where the violation involves injury to the Protected Property resulting from any use or activity inconsistent with the Purpose, sufficient to restore the portion of the Protected Property so injured to its prior condition in accordance with a plan approved by Grantee.
2. *Grantor's Failure to Respond.* The Grantee may bring an action as provided in Section M.3 if the Grantor fails to cure the violation within thirty (30) calendar days after receipt of a notice of violation, or under circumstances where the violation cannot reasonably be cured within such thirty (30) day period, fails to begin curing the violation within the thirty (30) day period and fails to continue diligently to cure such violation until finally cured.
  3. *Grantee's Action.* Grantee may pursue an action in a court having jurisdiction to enforce the terms of this Conservation Easement: (1) to enjoin the violation, *ex parte* as necessary, by temporary or permanent injunction; (2) to require the restoration of the Protected Property to the condition that existed prior to any such injury; and (3) to recover any damages to which it may be entitled for violation of the terms of this Conservation Easement. The remedies described in this paragraph shall be cumulative and shall be in addition to all remedies now or hereafter existing.
  4. *Grantor's Action.* In the event that the Grantor seeks a determination as to the legal meaning or effect of this Conservation Easement, or as to any alleged violation hereof by Grantee, and if such determination or dispute is not resolved by negotiation set forth in Section N below, then the Grantor shall be entitled to bring judicial action in a court of competent jurisdiction.
  5. *Emergency Enforcement.* Notwithstanding the provisions of M.1 and M.2, if Grantee determines on the basis of substantial evidence that circumstances require immediate action to prevent or mitigate significant damage to one or more of the Conservation Values, Grantee may undertake reasonable actions to remove, eliminate or mitigate damages to the Protected Property. Grantee shall provide prior notice to the Grantor of such actions to the extent reasonably practicable and may seek Grantor participation in such actions, but may proceed with such actions without permission from the Grantor or without waiting for the Grantor to take any action.

- N. Dispute Resolution.** The Parties shall attempt in good faith to resolve any dispute arising out of or relating to this Conservation Easement by negotiation between executives or officials who have authority to settle the controversy.
- O. Acts of God/Force Majeure.** Nothing contained in this Conservation Easement entitles the Grantee to bring any action against the Grantor for any injury to or change in the Protected Property resulting from causes beyond the Grantor's control, including, without limitation, naturally caused fire, flood, storm, and earth movement, or from any prudent action taken by the Grantor under emergency conditions to prevent, abate, or mitigate significant injury to the Protected Property resulting from such causes. Such excuse from performance will be allowed only if such catastrophic event or other event beyond the Grantor's control has caused a substantial degradation of the Conservation Values. The Parties shall make all reasonable efforts to resume performance promptly once the force majeure is eliminated.
- P. Waiver.** The failure of any Party to require strict performance of any term of this Conservation Easement or a Party's waiver of performance shall not be a waiver of any future performance or of a Party's right to require strict performance in the future.
- Q. Conveyance and Assignment.** The Grantor may not convey the Protected Property nor assign or transfer its rights or delegate its responsibilities under this Conservation Easement without receiving prior written approval from BPA, which shall not be unreasonably withheld.

*[If Grantor is a tribe, insert the following:]*

Should the Grantor seek to have the United States acting through the Bureau of Indian Affairs take the Protected Property into trust for the benefit of the Grantor, BPA agrees to approve the conveyance in a timely manner, contingent on the following: (a) that Grantor notifies BPA of its intent to transfer the Protected Property into trust; (b) Grantor provides BPA with any notices from the Bureau of Indian Affairs regarding the proposal; (c) that the Grantor is abiding by the terms of this Conservation Easement; (d) the Bureau of Indian Affairs approves any transmission facility rights BPA has in the Protected Property and the permanent protection of the Conservation Values in accordance with this Conservation Easement as a condition of any fee to trust decision; and (e) the conveyance deed in which the BIA takes the property into trust contains a reference to and is taken subject to this Conservation Easement terms and provisions.

**R. Proceeds from Activities on the Protected Property.** The Grantor shall use any proceeds generated from activities on the Protected Property (e.g., leases) towards the operations, maintenance and restoration of the Protected Property. If proceeds exceed the operations, maintenance and restoration needs of the Protected Property, the Grantor may use the proceeds on other BPA-funded properties in the [*insert appropriate region – e.g., “Willamette River Basin” – covered by MOA*] owned by Grantor, or the Grantor may place the proceeds in its stewardship account for the property and roll the funds over to the next fiscal year until an operations or maintenance need arises.

## **S. Termination or Amendment**

- 1. Termination Standard.** This Conservation Easement may be voluntarily terminated by agreement of the Parties only if:
  - a) a subsequent, unexpected change in the conditions of the Protected Property or the surrounding area makes impossible the continued use of the Protected Property for the Purpose of this Conservation Easement (except that changed environmental conditions related to climate change, or other natural events, for example, wildfire, river channel migration, erosion or avulsion, shall not be grounds for termination); or
  - b) BPA agrees to exchange this Protected Property for another property proposed by the Grantor; factors that BPA will consider in determining whether to agree to an exchange include whether the new property is at the time of the proposed exchange determined by BPA to supply equal or better Conservation Values to meet BPA’s mitigation needs as compared with the Protected Property; whether the property will be permanently protected pursuant to a conservation easement granted to BPA on terms substantially similar to this Conservation Easement; and the costs to BPA of undertaking the acquisition of the new property, if any.
- 2. Termination Process.** If the Parties agree to voluntarily terminate this Conservation Easement and have met the above termination standard, the Parties shall terminate this Conservation Easement by executing and recording an instrument appropriate for the purpose. In the event of termination through an exchange for another property, the Parties must agree on the new property and its conservation easement before this Conservation Easement will be terminated.



**3. Proceeds after any Termination.** If this Conservation Easement is terminated either voluntarily by the Parties, or by involuntary extinguishment by a court of competent jurisdiction and the termination results in proceeds, BPA is entitled to either (1) a share of such proceeds in proportion to the amount BPA contributed to the fee title acquisition, which is [*Insert here the percentage BPA contributed to the purchase price, e.g., 100 percent of some lesser amount if there was cost share*] or (2) at BPA's election, to review and approve use of the proceeds by the Grantor to acquire new fish and wildlife habitat for BPA mitigation.

**4. Amendment.** This Conservation Easement may only be amended by agreement of the Parties, and any such amendment shall be properly documented, executed, and recorded. Amendments based on changed conditions may be made only when the effect of the amendment is to benefit the Conservation Values (for example, amending the Conservation Easement to place further restrictions on the use of or activities on the Protected Property). The Parties may not use amendments to impliedly terminate the Conservation Easement or remove any portion of the Protected Property from its terms, except to the extent consistent with the Purpose of the Conservation Easement.

**T. Control.** The Grantor has ownership and control of the Protected Property and is responsible for all incidents of ownership. Such incidents of ownership include, but are not limited to, maintenance and repair of existing structures, hazardous waste response, endangered species protection, noxious weed and invasive species response, tort liability, compliance with applicable laws, and payment of applicable taxes and assessments.

**U. Cultural Resources.** The Grantor is responsible for cultural or historic resource mitigation or preservation on the Protected Property in accordance with applicable cultural resource laws.

**V. Hazardous Substances.** To the best of the Grantor's knowledge, there are no hazardous substances present in, on, or under the Protected Property, including without limitation, in the soil, air, or groundwater, and there is no pending or threatened investigation or remedial action by any governmental agency regarding the release of hazardous substances or the violation of any environmental law on the Protected Property, and that there are no underground storage tanks located on the Protected Property. If, at any time, there occurs, or has occurred a release in, on, or about the Protected Property of any hazardous substances, the Grantor agrees to take all steps necessary to assure its containment and remediation without cost to Grantee, including

any cleanup that may be required, unless the release was caused by Grantee, in which case Grantee will be responsible for remediation in accordance with applicable law. Nothing in this Easement shall be construed as giving rise, in the absence of a judicial decree, to any right or ability in Grantee to exercise physical or managerial control over the day-to-day operations of the Protected Property, or any of the Grantor's activities on the Protected Property, or otherwise become an operator with respect to the Protected Property within the meaning of the Comprehensive Environmental Response Compensation and Liability Act of 1980, as amended ("CERCLA"). The Grantor specifically agrees to release and hold harmless Grantee from and against all liabilities for violations or alleged violations of, or other failure to comply with, any federal state or local environmental law or regulation relating to hazardous substances, including, without limitation, CERCLA, by the Grantor in any way affecting, involving, or relating to the Protected Property, except to the extent such violations or alleged violations are caused by the acts or omissions of Grantee.

**W. Notice.** Any notice permitted or required by this Conservation Easement, unless otherwise specified, must be in writing, delivered personally to the persons listed below, or will be deemed given on the date deposited in the United States mail, certified and postage prepaid, return receipt requested and addressed as follows, or at such other address as any Party may from time to time specify to the other Party in writing. Notices may be delivered by facsimile or other electronic means, provided that they are also delivered personally or by certified mail. The addresses listed below can be modified at any time through written notification to the other Party.

**Notices to BPA should be sent to:**

Director, Fish & Wildlife Program  
Bonneville Power Administration  
P.O. Box 3621  
Portland, OR 97208-3621

**Notices to the Grantor should be sent to:**

*[Insert sponsor info]*

**and to BPA's Real Property Services:**

Manager, Real Property Services  
RE: [INSERT BPA TRACT NO]  
Bonneville Power Administration  
P.O. Box 3621  
Portland, OR 97208-3621

- X. Effective Date.** This Conservation Easement vests when signed by the Grantor, and accepted by the Grantee.
- Y. Schedule of Exhibits.** All exhibits are incorporated and made part of this Conservation Easement.

Exhibit A – Legal Description

Exhibit B – Map

Exhibit C – Acknowledgement of Baseline Documentation Report

Exhibit D – Form Transmission Easement

Exhibit E – Acceptable Encumbrances

- Z. Signature in Counterpart.** This Conservation Easement may be executed in counterparts each of which shall be deemed to be an original but all of which taken together shall constitute one and the same agreement.

**AA. GRANT, COVENANTS AND WARRANTIES, SIGNATURE AND ACKNOWLEDGMENTS**

To have and to hold the Conservation Easement herein granted unto the United States and its assigns.

The Grantor warrants and covenants to and with the United States that the Grantor is lawfully seized and possessed of the Protected Property in fee simple, with a good and lawful right to grant the same, including a good and lawful right to grant this Conservation Easement; that the Protected Property is free and clear of all encumbrances and restrictions except the encumbrances and restrictions specifically set forth in **Exhibit E**, that the United States and its assigns shall have the use of and enjoy all the benefits derived from and arising out of this Conservation Easement; that the Grantor shall at the request of the United States execute or obtain any reasonable further assurances of the title to the Property; and that the Grantor will forever warrant the title to the Property and defend the United States against all persons who claim a lawful interest in the Property, except for persons who

claim interests under which this Conservation Easement has been taken  
subject to as described in Exhibit E.

IN WITNESS WHEREOF, the undersigned Grantor has executed this instrument  
this \_\_\_\_day of \_\_\_\_\_, 201\_\_.

**GRANTOR**

\_\_\_\_\_  
[INSERT NAME AND TITLE]

**ACCEPTANCE BY THE UNITED STATES**

\_\_\_\_\_  
[INSERT NAME AND TITLE]  
Bonneville Power Administration

\_\_\_\_\_  
Date

**ACKNOWLEDGMENT**

STATE OF )  
) ss.  
County of )

On this \_\_\_\_\_day of \_\_\_\_\_, 20\_\_\_\_\_, before me  
personally  
appeared \_\_\_\_\_  
\_\_\_\_\_, known to me or proved to me on the basis of satisfactory evidence to be the  
person who executed the within instrument as the \_\_\_\_\_

\_\_\_\_\_  
acknowledged to me that \_\_\_he executed the same freely and voluntarily in such  
capacity; and on oath stated that \_\_\_ he was authorized to execute said  
instrument in such official or representative capacity.

Notary Public in and for the

State of \_\_\_\_\_

(SEAL) Residing at \_\_\_\_\_

My commission expires\_\_\_\_\_.

ACKNOWLEDGMENT

STATE OF )  
 ) ss.  
County of )

On this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, before me personally appeared \_\_\_\_\_, known to me or proved to me on the basis of satisfactory evidence to be the person who executed the within instrument as the \_\_\_\_\_

\_\_\_\_\_ acknowledged to me that \_\_\_he executed the same freely and voluntarily in such capacity; and on oath stated that \_\_\_ he was authorized to execute said instrument in such official or representative capacity.

Notary Public in and for the

State of \_\_\_\_\_

(SEAL) Residing at \_\_\_\_\_

My commission expires\_\_\_\_\_.

**Template Conservation Easement  
EXHIBIT A**

**LEGAL DESCRIPTION**

**Template Conservation Easement  
EXHIBIT B**

**MAP**

**Template Conservation Easement  
EXHIBIT C**

**ACCEPTANCE AND ACKNOWLEDGEMENT  
OF  
BASELINE DOCUMENTATION**

The undersigned hereby acknowledge and agree that the Baseline Documentation for the [*Name of Protected Property*] in [*County, State*], prepared by \_\_\_\_\_ of \_\_\_\_\_ and dated \_\_\_\_\_, is an accurate representation of the biological, physical and historical conditions of the subject property as of the date of grant of the Conservation Easement. All of the undersigned parties have received copies of the Baseline Documentation and is on file with the Bonneville Power Administration.

**Grantor:**

\_\_\_\_\_  
[INSERT NAME AND TITLE]

\_\_\_\_\_  
Date

**Bonneville Power Administration:**

\_\_\_\_\_  
[INSERT NAME AND TITLE]

\_\_\_\_\_  
Date

Bonneville Power Administration



**Template Conservation Easement  
EXHIBIT D**

**FORM TRANSMISSION EASEMENT**

USE THE MOST CURRENT VERSION INCLUDED IN THIS DESKBOOK AS AN APPENDIX OR AS PROVIDED BY REAL PROPERTY SERVICES OR GENERAL COUNSEL

**Template Conservation Easement  
EXHIBIT E**

**ACCEPTABLE ENCUMBRANCES**

## Appendix VI

### Transmission Easement Template

AFTER RECORDING, RETURN TO  
Bonneville Power Administration  
TERP-3  
P.O. BOX 3621  
PORTLAND, OR 97208-3621

Legal description: A portion of the  
of Section , Township ,  
Range , .M., County,  
, as described in Exhibit(s)  
and shown on Exhibit(s) . (Affects  
Tax Account No. .)

BPA Tract  
No(s):

#### U.S. DEPARTMENT OF ENERGY-BONNEVILLE POWER ADMINISTRATION

#### EASEMENT Exclusive Transmission

THIS AGREEMENT, made between , the Grantor, whether one or more, and the United States of America and its assigns, the Grantee, pursuant to the Bonneville Project Act, of August 20, 1937, as amended, 16 U.S.C. §§ 832 et seq.; the Federal Columbia River Transmission System Act, of October 18, 1974, as amended, 16 U.S.C. §§ 838 et seq.; the Department of Energy Organization Act, of August 4, 1977, as amended, 42 U.S.C. § 7152; and the Pacific Northwest Electric Power Planning and Conservation Act, of December 5, 1980, as amended, 16 U.S.C. §§ 839 et seq.

The Grantor, for and in consideration of the sum of  
DOLLARS (\$) ) and the provisions  
contained in this agreement, hereby grants and conveys to the United States of  
America and its assigns, a perpetual exclusive easement and right-of-way for  
electric power transmission purposes in, upon, over and under the following  
described land ("Transmission Easement Area"), as described in Exhibit(s) ,  
attached hereto and by this reference made a part hereof. The acquiring federal  
agency is the Department of Energy, Bonneville Power Administration.

A. Transmission Easement Area

The grant shall include the right to enter and to locate, construct, operate,  
maintain, repair, reconstruct, upgrade, remove and patrol one or more lines of  
poles or structures and appurtenances thereto, supporting conductors of one or  
more electric circuits of any voltage and any communication lines or equipment  
and appurtenances thereto (collectively, "Facilities").

The grant further includes the right of ingress and egress over and across  
the Transmission Easement Area, including the right to grade and gravel routes  
of access if necessary, as determined by the Grantee.

The Grantor also hereby grants and conveys to the United States and its  
assigns the present and future right to clear the Transmission Easement Area and  
to keep it clear of all types of trees, shrubs, brush and other vegetation, except as  
reserved below.

The Grantor reserves the right to grow and maintain non-woody low growing  
plants, such as non-structure-supported agricultural crops or vegetative cover  
with a mature height not to exceed        feet. Any other trees, shrubs, brush or  
other vegetation within the Transmission Easement Area will not be allowed  
unless the Grantor contacts the Grantee and secures a written agreement  
allowing such use. In no event shall the Grantor plant any agricultural crops or  
vegetative cover, or trees, shrubs, brush or other vegetation covered by the  
written agreement within a 50-foot radius of all poles or structures. The Grantor  
also agrees not to obstruct access to these poles or structures within the  
Transmission Easement Area at any time. Any rights reserved by the Grantor  
shall not interfere with the rights of the Grantee.

The Grantor also hereby grants and conveys to the United States and its assigns the present and future right to clear the Transmission Easement Area and to keep it clear of any and all, structures, above and below ground improvements or infrastructure, fire and electrical hazards.

The Grantor agrees that prior to undertaking any activity (including, but not limited to, building a structure, placing any manmade item, planting, digging, earth-moving, burning, piling or storing materials) within the Transmission Easement Area, the Grantor agrees to contact the Grantee to seek a determination from the Grantee as to whether the proposed activity is safe and compatible with the Grantee's use, and does not interfere with the Grantee's current or future needs. The Grantor shall not proceed with any proposed activity within the Transmission Easement Area without written consent from the Grantee.

All unauthorized trees, shrubs, brush and other vegetation, structures, above and below ground improvements or infrastructure, fire and electrical hazards within the Transmission Easement Area shall become the property of the Grantee on the date of acceptance of this agreement and thereafter, and may be disposed of by the Grantee in any manner it deems suitable.

The Grantor also hereby grants and conveys to the United States and its assigns the present and future right to top, limb, or fell, and to remove, sell, burn, or otherwise dispose of "Danger Trees" located on the Grantor's land adjacent to said Transmission Easement Area. A Danger Tree is any growing or dead tree, or snag, whether stable or unstable, which the Grantee at any time determines (1) could within a five-year period fall, bend or swing (a) within 25 feet of the Facilities, or (b) within electrical arcing distance of said Facilities, or (2) could interfere with the construction, operation and maintenance of said Facilities.

The Grantor covenants to and with the Grantee that the title to all Danger Trees identified, now or in the future, or cut from the Grantor's land adjacent to said Transmission Easement Area is and shall be vested in the Grantee and its assigns; and that the consideration paid for conveying this easement and the rights granted herein is accepted as full compensation for all damages incidental to the exercise of any said rights. At the Grantee's election title to Danger Trees may revert to the Grantor.

B. General Provisions

In addition to the consideration paid hereunder, the Grantee shall repair or make compensation only for damage caused by the Grantee that is not incidental to the exercise of any of the above said rights and which results from and during construction, reconstruction, removal, or maintenance activities associated with the purposes of this agreement on and adjacent to the Transmission Easement Area. Payment for such damage shall be made on the basis of a damage estimate approved by the Grantee.

The rights granted herein are subject to easements of record and mineral rights of third parties.

The Grantor agrees to satisfy of record such encumbrances, including taxes and assessments, as may be required by the Grantee and to obtain such curative documents as may be requested by the Grantee.

The Grantee shall pay all costs incidental to the preparation and recordation of this instrument and for the procurement of any title report and title insurance that it may require.

The Grantor covenants to and with the Grantee and its assigns that the Grantor is lawfully seized and possessed of the land aforesaid, with a good and lawful right and power to sell and convey the same; that the land is free and clear of encumbrances, except as herein provided; and that the Grantor will forever warrant and defend the title to the rights granted herein and the quiet possession thereof against the lawful claims and demands of all persons whomsoever.

The provisions hereof shall inure to the benefit of and be binding upon the heirs, executors, administrators, successors, and assigns of the Grantor and upon the assigns of the United States.

<hr/> Grantor:  <hr/> Title (if applicable)	<hr/> Grantor:  <hr/> Title (if applicable)
---	---

_____ Date	_____ Date
---------------	---------------

_____ Grantor:	_____ Grantor:
_____ Title (if applicable)	_____ Title (if applicable)
_____ Date	_____ Date

Accepted for the UNITED STATES OF AMERICA
_____ Signature
_____ Title
_____ Date

## Appendix VII

### Template Language Where the Sponsor Receives an Easement and BPA Receives Third Party Rights to Enforce

*Where a sponsor secures a deed of conservation easement, it must ensure the grantor grants third party rights of enforcement to the United States, acting by and through BPA, and third party right implementation provisions by including the following four sections in the deed. Any changes to the language provided here must be approved in writing by Real Property Services and Office of General Counsel.*

**Grant of Third Party Rights.** For the same consideration cited above, Grantor hereby voluntarily conveys and warrants to the United States of America and its assigns third party rights of enforcement, entry, and inspection.

*Definition of BPA's jurisdiction and control over third party rights should also be in the body of the conservation easement after the granting clause, where language specifically may be as follows:*

**Third Party Rights.** Grantor has conveyed the rights of enforcement, entry, and inspection to the United States of America and its assigns in [cite section]. The Department of Energy, Bonneville Power Administration is the acquiring federal agency having jurisdiction and control over the third party rights, which are more particularly described as follows:

**Enforcement.** BPA may, after providing Sponsor with notice and a reasonable time to respond and engage in good faith consultation (where reasonable means no more than 14 calendar days, except in cases of emergency or unavailability of Sponsor where BPA may reasonably act immediately to stop or mitigate a threat to conservation values), exercise all of the rights and remedies of Sponsor and is entitled to all of the indemnifications provided to Sponsor. If Sponsor exercises the rights and remedies of the easement, then Sponsor will be entitled to reimbursement from Grantor of its costs of enforcement. If BPA exercises the rights and remedies of the easement, then BPA will be entitled to reimbursement from Grantor of its costs of enforcement. If Sponsor and BPA jointly exercise the rights and remedies of the easement, then Sponsor and BPA will work cooperatively to apportion the



costs of enforcement in accordance with the efforts of each.

**Entry and Inspection.** BPA may, in a reasonable manner and at reasonable times, enter and inspect the easement area to determine compliance with the terms of easement. Except in the case of an emergency, BPA will attempt to give Grantor and Sponsor notice prior to such entry and inspection, which notice may be by telephone or electronic mail.

## Appendix VIII

### Sample Covenant for Hatcheries

AFTER RECORDING, RETURN TO:  
Bonneville Power Administration  
Real Property Services, TERR-3  
P.O. Box 3621  
Portland, Oregon 97208-3621  
Tract ID:

#### DEED OF COVENANT RUNNING WITH THE LAND

THIS DEED OF COVENANT RUNNING WITH THE LAND (“**Covenant**”) is executed by [*Insert name of sponsor, description of sponsor, and address of sponsor*](“**Grantor**”), in favor of the United States of America (“**United States**” or “**Grantee**”). The acquiring federal agency is the Department of Energy, Bonneville Power Administration (“**BPA**”), headquartered in Portland, Oregon, at P.O. Box 3621, Portland, OR 97208-3621. The Grantor and Grantee together are referred to as the “Parties.”

#### I. RECITALS

The Grantor currently owns and operates the Grantor’s Hatchery (Hatchery), located along the River on the Grantor’ land, for the purpose of rearing resident trout to stock Grantor’s lakes and streams.

BPA is a federal power-marketing agency having obligations under the Pacific Northwest Electric Power Planning and Conservation Act, 16 U.S.C. §§ 839b *et seq.* (“**Northwest Power Act**”) to protect, mitigate, and enhance fish and wildlife and their habitat affected by the development and operation of Federal hydroelectric projects of the Columbia River and its tributaries, referred to as the “**FCRPS**,” in a manner consistent with the purposes of the Northwest Power Act, the Program adopted by the Pacific Northwest Electric Power and Conservation Planning Council under subsection 4(h) of the Northwest Power Act (“**Council Program**”), and other environmental laws.

[*Add recital language explaining the relationship of Grantor and BPA, the need for the*

*project, and the role of this acquisition.]*

To ensure that sufficient water exists to support future Hatchery operations, the Grantor acquired adjacent property in fee (“**Property**”) having certain appurtenant water rights, with funding from BPA. To ensure that the Property will be managed for fish and wildlife purposes, including Hatchery purposes, the Grantor intend to convey this Covenant to BPA.

## **II. CONVEYANCE AND CONSIDERATION**

The Grantor, for and in consideration of the funding (\$0,000.00) BPA provided to acquire fee title ownership of the Property in hand paid, and for other good and valuable consideration, hereby voluntarily conveys and warrants to the United States of America and its assigns this perpetual Covenant over the Property, situated in the County of Oz, State of Washington, legally described as follows:

THAT PORTION OF ..... [LEGAL DESCRIPTION]

Parties represent that this Covenant is a perpetual real property interest running with the land and consistent with Revised Code of Washington § 64.04.130 and Chapter 84.34 and other applicable state and federal law. BPA has the authority pursuant the Northwest Power Act, 16 U.S.C. §§ 839b(h) and 839f(a), the Federal Columbia River Transmission System Act, 16 U.S.C. §838i(b), or the Bonneville Project Act, 16 U.S.C. §§ 832a(c) through (f), to acquire real estate or to assist in the acquisition and transfer of real property interests.

## **III. PURPOSE OF USE**

This Covenant commits the Grantor, its successors and assigns, to use the Property only for fish and wildlife purposes agreed-upon by the Parties, currently to support operation of the adjacent Hatchery for the purpose of rearing resident trout to stock Reservation lakes and streams.

## **IV. LIMITATIONS ON USE**

The Grantor’ use of the Property, including use of water rights appurtenant to the Property, or any expansion of the Hatchery production or facilities onto the Property, shall be consistent with: any and all applicable laws and regulations; any Council Program; any and all plans and programs of federal, state, and tribal fish agencies for the Columbia Basin; any and all agreements or contracts between the Grantor and BPA,; and any and all plans submitted by the Grantor and approved by BPA, including but not limited to any Hatchery Annual

Operating Plans, Operation and Maintenance Manual, or future land management plans.

IN WITNESS WHEREOF, the undersigned Grantor have executed this Deed of Covenant Running with the Land this \_\_\_\_\_ day of \_\_\_\_\_, 2013.

**GRANTOR**

\_\_\_\_\_

NAME

TITLE

**ACCEPTED BY THE UNITED STATES OF AMERICA**

By: \_\_\_\_\_

Insert Name

Manager, Real Property Services

Bonneville Power Administration

Date: \_\_\_\_\_

**ACKNOWLEDGMENT**

STATE OF )

) ss.

County of )

On this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, before me personally appeared \_\_\_\_\_, known to me or proved to me on the basis of satisfactory evidence to be the person who executed the within instrument as the \_\_\_\_\_ acknowledged to me that \_\_\_he executed the same freely and voluntarily in such capacity; and on oath stated that \_\_\_ he was authorized to execute said instrument in such official or representative capacity.

\_\_\_\_\_  
Signature

\_\_\_\_\_

Print Name

Notary Public in and for the  
State of \_\_\_\_\_

(SEAL) Residing at \_\_\_\_\_

My commission expires \_\_\_\_\_

ACKNOWLEDGMENT

STATE OF \_\_\_\_\_ )

) ss.

County of \_\_\_\_\_ )

On this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, before me  
personally appeared \_\_\_\_\_, known to me  
or proved to me on the basis of satisfactory evidence to be the person who  
executed the within instrument as the \_\_\_\_\_

\_\_\_\_\_

acknowledged to me that \_\_\_ he executed the same freely and voluntarily in such  
capacity; and on oath stated that \_\_\_ he was authorized to execute said  
instrument in such official or representative capacity.

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Print Name

Notary Public in and for the  
State of \_\_\_\_\_

(SEAL) Residing at \_\_\_\_\_

My commission expires \_\_\_\_\_

# Appendix IX

## Water Survey Form

For BPA Funded Water Transactions (work element 5 and 92) and Selected Water Conservation Actions (work elements 82, 149, 150, 151)

**INSTRUCTIONS:** The project sponsor or BPA project manager must complete this form for land transaction work elements, including Land Acquisitions (5) and Lease Land (92). This form should be completed during the pre-acquisition phase for a land transaction, and attached to the particular Land Acquisition (5) or Lease Land (92) work element for the property involved.

Project sponsors shall also use the form for the water conservation work elements designed to conserve water, including Install Well (82), Install Pipeline (149), Install Sprinkler (150), or Line Diversion Ditch (151).

**BPA Project Manager:** \_\_\_\_\_  
**Project #:** \_\_\_\_\_ - \_\_\_\_ - \_\_\_\_  
**Name of Project Sponsor:** \_\_\_\_\_  
**Name of Property:** \_\_\_\_\_

1. **Are there surface water sources** (including springs), indications of water use (e.g., canals, irrigation equipment, irrigated lands), wells, or other groundwater sources on or immediately adjacent to the property boundary?
  - a. If not, please add your contact information, and attach this form in Pisces as a "Water Survey" attachment to your contract.
  - b. If so, please briefly describe the sources and the uses of water on the property. If water is being used for a beneficial purpose on the property, specifically state if water point of diversion is located within or outside of the property boundaries.
  
2. **Please list any and all water rights** associated with the answers to #1b, if any. Provide certificate or permit numbers, purpose of use, volume and instantaneous quantities of flow, date range of use, and priority date. Attach web link to information if available. If water rights have been adjudicated, please provide date of adjudication.

3. **For land transactions:** Please confirm the water rights, if any, that will be included in the transaction. If there are water rights appurtenant to the property and the water rights will not be included in the transaction, explain why.
  
4. **For water conservation actions:** Please confirm the water rights involved with the water conservation action that will be transferred instream. If it is not intended to include any of the water rights, explain why you would suggest doing this water conservation action for the benefit of fish and wildlife without transferring water instream.
  
5. **Who will be acting as the applicant** to complete the state administrative process to transfer water instream as part of this project?
  
6. **Please provide contact information** and date below.

**Your Name:** \_\_\_\_\_  
**Title:** \_\_\_\_\_  
**Address:** \_\_\_\_\_  
**Email:** \_\_\_\_\_  
**Phone:** \_\_\_\_\_  
**Fax:** \_\_\_\_\_  
**Date:** \_\_\_\_\_

7. **Attach this form in Pisces as a "Water Survey"** attachment to the contract containing the Land Acquisition or Water Conservation work element.

Thank You.

**Appendix X**  
**Environmental Land Audit**  
**Landowner Questionnaire**

Please answer the following questions to the best of your ability and initial at the bottom of each page.

Return via FAX to (541) 296-5121, Attention Fred Walasavage

Or mail to:

Bonneville Power Administration  
3920 Columbia View Drive  
The Dalles, Oregon, 97058  
Attn: Fred Walasavage

Or E-mail signed PDF copy to [fwalasavage@bpa.gov](mailto:fwalasavage@bpa.gov)

If you have any questions, please contact Fred Walasavage at (541) 980-2503.

Where appropriate, include copies of reports, citations, permits, etc. For questions for which a "Yes" response is given, or for those which otherwise need further explanation, please use the space provided on page 3 or additional pages as needed.

**Property Owner or Site Name:** \_\_\_\_\_

**Site address:** \_\_\_\_\_ (Street Address)  
\_\_\_\_\_ (Town, County)

**Phone Number:** \_\_\_\_\_

**Years of Property Ownership:** \_\_\_\_\_

**Prior Owner (if known):** \_\_\_\_\_



## Landowner Questionnaire

1. Is the property or any adjoining property currently used for an industrial or business use?

Subject Property:           No \_\_\_       Yes \_\_\_       Unknown \_\_\_  
Adjoining Property:       No \_\_\_       Yes \_\_\_       Unknown \_\_\_

2. To the best of your knowledge, has the property or any adjoining property been used for an industrial or business use in the past?

Subject Property:           No \_\_\_       Yes \_\_\_       Unknown \_\_\_  
Adjoining Property:       No \_\_\_       Yes \_\_\_       Unknown \_\_\_

3. Do activities on the property or any adjoining property currently involve dispensing fuel, motor vehicle or farm equipment repair or maintenance, storing abandoned vehicles, dumping of household or other items, outside storage of large amounts of equipment and supplies, the application of chemicals, pesticides or herbicides not associated with household use, or waste treatment, storage, or disposal?

Subject Property:           No \_\_\_       Yes \_\_\_       Unknown \_\_\_  
Adjoining Property:       No \_\_\_       Yes \_\_\_       Unknown \_\_\_

4. To the best of your knowledge, in the past, has any activity on the property or any adjoining property involved dispensing fuel, motor vehicle or farm equipment repair or maintenance, storing abandoned vehicles, dumping of household or other items, outside storage of large amounts of equipment and supplies, application of chemicals, pesticides or herbicides not associated with household use, or waste treatment, storage, or disposal?

Subject Property:           No \_\_\_       Yes \_\_\_       Unknown \_\_\_  
Adjoining Property:       No \_\_\_       Yes \_\_\_       Unknown \_\_\_

5. Are there currently, or to the best of your knowledge have there been previously any damaged or discarded automotive or industrial batteries, or pesticides, paints, or other chemicals stored on or used at the property?

No \_\_\_       Yes \_\_\_       Unknown \_\_\_

6. Are there currently, or to the best of your knowledge have there been previously, any industrial drums (typically 30 - 55 gallon) or sacks of chemicals located on the property or at the facility?

No \_\_\_       Yes \_\_\_       Unknown \_\_\_

7. Has fill dirt been brought onto the property that originated from a known contaminated site or that is of an unknown origin?

No \_\_\_\_ Yes \_\_\_\_ Unknown \_\_\_\_

8. Are there currently, or to the best of your knowledge have there been previously, any pits, ponds, or lagoons located on the property in connection with water treatment or waste treatment or disposal?

No \_\_\_\_ Yes \_\_\_\_

9. Are there currently, or to the best of your knowledge has there been previously, any stained soil or signs of stressed vegetation on the property (other than related to automotive oil drip or other similar source)?

No \_\_\_\_ Yes \_\_\_\_ Initial \_\_\_\_

10. Are there currently, or to the best of your knowledge have there been previously, any registered or unregistered storage tanks (above or underground) located on the property?

No \_\_\_\_ Yes \_\_\_\_

11. Are there currently, or to the best of your knowledge have there been previously, any vent pipes, fill pipes or access ways indicating a fill pipe protruding from the ground on the property or adjacent to any structure located on the property?

No \_\_\_\_ Yes \_\_\_\_

12. Are there currently, or to the best of your knowledge have there been previously, any flooring, drains, or walls located within the facility that are stained by substances other than water or are emitting foul odors?

No \_\_\_\_ Yes \_\_\_\_

13. Is the property served by an on-site septic system (i.e. septic tank or cesspool)?

No \_\_\_\_ Yes \_\_\_\_

14. To the best of your knowledge, have any hazardous substances or petroleum products, unidentified waste material, tires, automotive or industrial batteries or any other waste materials been dumped above grade, buried and/or burned on the property?

No \_\_\_\_ Yes \_\_\_\_

15. Is there any oil-filled electrical equipment such as transformers or capacitors?

No \_\_\_\_ Yes \_\_\_\_ Unknown \_\_\_\_

16. To the best of your knowledge, are you aware of the past or current existence of hazardous substances or petroleum products on the property?

No \_\_\_\_ Yes \_\_\_\_

17. Is the property is served by a private water well or non-public water system?

No \_\_\_\_ Yes \_\_\_\_

If yes, has water quality been tested? \_\_\_\_ Approx. Depth of Well: \_\_\_\_\_

If yes, please list sample date and results. \_\_\_\_\_

18. To the best of your knowledge, are you aware of any floor drains located in shops or outbuildings, or Dry Wells (a subsurface system used to disperse surface water or other fluids)

No \_\_\_\_ Yes \_\_\_\_ Unknown \_\_\_\_

19. Do you have any knowledge of environmental liens or activity and use limitations, such as deed restrictions or institutional controls on the property?

No \_\_\_\_ Yes \_\_\_\_

20. Do you have any knowledge of governmental notification relating to past or recurrent violations of environmental laws with respect to the property or any facility located on the property?

No \_\_\_\_ Yes \_\_\_\_ Initial \_\_\_\_\_

21. Do you have any knowledge of any past, threatened, or pending lawsuits or administrative proceedings concerning a release, threatened release, any hazardous substances or petroleum products involving the property?

No \_\_\_\_ Yes \_\_\_\_

22. Please indicate with a check if you can provide, or you are aware of any of the following documents pertaining to the subject property:

- Prior environmental site assessment reports, including asbestos survey or abatement reports
- Environmental compliance audit reports
- Environmental permits (i.e. solid waste disposal permits, hazardous waste disposal permits, wastewater permits, NPDES permits)
- Registration for above or underground storage tanks
- Registrations for underground injection systems
- Safety plans, preparedness and prevention plans, spill prevention plans, etc.
- Notices or other correspondence from government agencies relating to past or current violations of environmental laws or relating to environmental liens encumbering the property.
- Hazardous waste generator reports

**Comments related to #22 here:**

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**Please provide a description of the past and current use of the property to the best of your knowledge.**

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**For any question that were answered "Yes", or which otherwise require additional explanation, please provide details. Use additional Pages if needed.**

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The undersigned represents that to the best of his/her knowledge the responses, statements and facts given in this questionnaire are true and correct and no material facts have been suppressed or misstated.

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Name (Please Print)

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Company (if applicable)

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Signature

---

Date

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Affiliation with the Property

*NOTE: BPA provides this sample template as a courtesy to project sponsors. Sponsors must consult their own real property and legal advisors to determine if the template suffices for the acquisition contemplated. BPA assumes no liability for a sponsor's use of this template.*

## **Appendix XI**

### **REAL ESTATE PURCHASE AND SALE AGREEMENT [INSERT NAME OF PROPERTY]**

THIS REAL ESTATE PURCHASE AND SALE AGREEMENT (“**Agreement**”) is made this \_\_\_\_ day of \_\_\_\_\_, 20XX by and between: [IDENTIFY BUYER, including whether a non-profit corporation, Tribe, or State entity], (“**Buyer**”) and [IDENTIFY SELLER, WHICH SHOULD MATCH THE VESTING DEED OR WILL NEED TO CONSULT WITH TITLE COMPANY AND BPA], as record owner (“**Seller**”).

1. Seller is the owner of [INSERT ACREAGE] acres of real property, located at [INSERT ADDRESS, NEAREST TOWN, COUNTY AND STATE, TAX LOTS IN PARENTHESES], more particularly described in **Exhibit A** (legal description) and shown on **Exhibit B** (map, aerial photo, survey), together with any and all improvements thereon, and any and all rights, licenses, claims, privileges, reversions, and easements appurtenant thereto, including but not limited to access rights, timber rights, grazing rights, water rights, development rights, mineral resources rights, and oil and gas rights (collectively defined as “**Property**”).
2. The United States Department of Energy, Bonneville Power Administration (“**BPA**”), is providing funding to Buyer for the purchase of the Property pursuant to [INSERT FUNDING DETAILS FOR THE TRANSACTION, for example, “THE XX MOA, IN EXCHANGE FOR FISH AND WILDLIFE MITIGATION CREDITS”]. Buyer will convey [INSERT “A PERPETUAL CONSERVATION EASEMENT” OR “THIRD PARTY RIGHT OF INSPECTION, ENTRY, AND ENFORCEMENT”] on, over, under, and across the Property, where such instrument will be recorded at “**Closing**.” This transaction will thus be subject to BPA approval under federal law, regulations, and standards as set forth below.
3. Purchase and Sale. Seller shall sell, and Buyer shall buy, the Property in [COUNTY, STATE] located within [INSERT ABBREVIATED LEGAL DESCRIPTION, e.g., “Section 31, Township 10 North, Range 8 West, W.M.”], described in **Exhibit A** (legal description), and shown in **Exhibit B** (map, aerial photo, survey), subject to the terms and conditions set forth in the

remaining provisions of this Agreement, and together with any and all appurtenant rights, including but not limited to:

3.1 All of Seller's rights, licenses, privileges, reversions and easements appurtenant to the Property, including, without limitation, rights to all mineral resources (where "mineral resources" are broadly defined herein to include any and all non-metallic, metallic, and hydrocarbon resources) in, on and under the Property, as well as all development rights; air rights; water, ditch, and reservoir claims, permits, and rights; grazing rights; and associated tidelands and shorelands;

3.2 All improvements, if any, located on, over, under or across the Property;

3.3 All easements, rights-of-way, appurtenances and other rights used in connection with the Property, including but not limited to maintenance easements, rights to adjacent streets, roads, alleys and rights-of-way;

[FOR RIGHTS LISTED ABOVE THAT ARE PROVEN BY INDEPENDENT DOCUMENTATION, SUCH AS WATER RIGHTS, DEFINE AND CITE TO THEM AND CREATE AN EXHIBIT DOCUMENTING THEIR PERTINENT DETAILS. *So for example: "and together with: (1) any and all water rights, reservoir rights, or ditch rights, including but not limited to the appurtenant surface water rights described in Certificate XXXX, priority date XX, XX, XXXX (Exhibit C), and (2) access rights set forth in Document No. XXXX, recorded on DATE at the XX County recording office, STATE.]*

4. Purchase Price. The Seller voluntarily agrees to sell the Property for [SPELL OUT TOTAL, THEN FOLLOW WITH NUMBERS IN BRACKETS], which is the appraised value of (*i.e.*, just compensation for) the Property.

5. Conditions Precedent to Closing. Buyer's obligation to purchase the Property shall be subject to the following. If any condition set forth in this Section is not satisfied by the date specified (or as of the date of Closing if no date is specified), or such later date as Seller and Buyer agree upon in writing, this Agreement shall terminate and any earnest money, together with interest thereon, shall be refunded to Buyer, unless the condition is waived by the party benefitted.

5.1 Right to Enter and Inspect. Seller grants to Buyer, Buyer's representatives, and BPA, the right to enter upon the Property to

conduct such inspection, survey, tests, and appraisals as Buyer may desire, at Buyer's sole expense and liability.

5.2 Approval. [INSERT NECESSARY APPROVAL OF BOARD OF DIRECTORS, TRIBAL COUNCIL, ETC.]

5.3 No Change in Condition. Seller shall not have altered or damaged, or caused to have altered or damaged, the condition or character of the Property, including but not limited to altering topography, erecting structures, depositing soil, garbage, waste or other material, or removing standing or down timber, mineral resources (see definition in Section 3.1), and the like through activities such as logging, mining, clearing, grading, or excavating, during the period this Agreement is in effect. Present condition of habitat shall not be degraded in any manner.

5.4 Appraisal. Buyer's completion and acceptance of an appraisal report.

5.5 Legal Description of Land and Other Appurtenances. Buyer's review and acceptance of a proper legal description of the Property, and any access rights or other appurtenant rights, if applicable. A proper legal description of the Property and other appurtenant rights may necessarily include completion of other processes, such as a survey(s), to be reviewed and approved by Buyer.

5.6 Water Rights. Buyer's review and acceptance of water rights, claims, or permits (see also Section 3).

5.7 Satisfactory Evidence of Title and Title Insurance. Seller shall provide Buyer, at Seller's expense, with an ALTA policy (ALTA U.S. Policy – 9/28/91) of title insurance in the full amount of the purchase price insuring that title to the Property is vested in Buyer upon close of escrow and is free and clear of all exceptions, except those approved by the Buyer in writing (see also Section 6 regarding determination and approval of satisfactory evidence of title). Seller shall pay any and all fees and costs associated with providing satisfactory evidence of title (*e.g.*, Seller shall be responsible for removal of encumbrances to title deemed unacceptable after review).

5.8 Hazardous Waste. Buyer's satisfaction that no hazardous substances (see Section 9.3 for definition) exist on the Property which exceed acceptable regulatory cleanup standards or pose a threat to human health or the environment. Buyer shall be responsible for

initiating and ensuring the completion of a Phase I Environmental Site Assessment (“**Phase I**”). The Phase I shall meet the objectives and performance factors of 40 C.F.R. Part 312 Standards for All Appropriate Inquiries, final rule (40 C.F.R. § 312.11). Buyer and BPA must be satisfied with the finding, opinions, and conclusions contained within the Phase I report prior to Closing.

6. **BPA Funding.** Funding for the purchase of the Property by Buyer is contingent upon the BPA providing the funding on behalf of Buyer. BPA will only provide funding upon successful completion of its own due diligence. BPA’s review, which may include informal or formal approvals, includes but is not limited to the following:
- ✓ An appraisal of the Property, establishing the just compensation (*i.e.*, purchase price, see Section 4), prepared in conformity with the Uniform Appraisal Standards for Federal Land Acquisitions (*i.e.*, yellow book standards).
  - ✓ Approval of satisfactory evidence of title, in accordance with U.S. Department of Justice regulations and Standards for the Preparation of Title Evidence in Land Acquisitions by the United States (*i.e.*, Title Standards).
  - ✓ Approval of any and all surveys and legal descriptions of land and water or other appurtenances (see Sections 3 and 5), and any deeds, assignments, licenses, permits, access agreements or other documents necessary to the transaction.
  - ✓ Preparation or approval of identification, notification, and plan for relocation of displaced persons, or their actual relocation, under the Uniform Relocation Assistance and Real Property Acquisition Policies for Federal and Federally Assisted Programs Act (Uniform Act, 42 U.S.C. §§ 4601 *et seq.*);.
  - ✓ Preparation or approval of a Phase 1 report (see Section 5.8).
  - ✓ Preparation or approval of any necessary environmental permitting and compliance.
  - ✓ Approval and acceptance of all Buyer contingencies.
  - ✓ Commitment to transfer funds for acquiring the Property on behalf of Buyer at Closing.

**If funding by BPA cannot be obtained, this Agreement shall terminate. The Parties shall thereafter be deemed released from their rights, duties, and obligations under this Agreement, and the Escrow Deposits shall be paid to Seller.**



7. Escrow and Closing. Within [INSERT NUMBER] days of execution of this Agreement, the parties shall open an escrow account with [INSERT AGREED-UPON CLOSING AGENT] for the purpose of closing the purchase and sale of the Property. The parties shall sign and/or deliver necessary documents or funds when requested by Closing Agent to do so. Seller and Buyer shall each pay one-half the closing and escrow fees due to the Closing Agent.
8. Other Details of Closing. Provisions regarding deed, taxes, and fees at Closing follow:

8.1 General Warranty Deed. All right, title, and interest in and to the Property shall be properly executed, delivered, and recorded by General Warranty Deed (where the general warranty deed will adhere to statutory standards and Title Standards) at Closing, free from all liens and encumbrances, except the standard general title policy exceptions and special exceptions reviewed and approved as part of the satisfactory evidence of title (see Sections 5.7 and 6).

8.2 Proration of Taxes and Fees. Real property taxes, water assessments, rents, interest and reserves, liens, encumbrances or obligations assumed, and utilities on the Property, shall be prorated as of the date of Closing, with Seller responsible for the amounts due prior to Closing, and Buyer responsible for the amounts due after Closing. Closing Agent shall have no responsibility to obtain final billings or to pay for any utilities from the Closing funds.

8.3 Other Costs. Buyer shall be responsible for all taxes not included in Section 8.2 that may be due to applicable government authorities at Closing, including but not limited to excise taxes. Seller shall pay any real estate commission or finder's fees. Buyer shall pay the costs of recording of the deeds and other transfer documents. Buyer shall pay for its own due diligence costs, such as environmental assessments, appraisals and baseline reports. Each party shall pay its own attorney's fees.

9. Seller's Representation and Warranties. Seller represents and warrants to Buyer that each of the following are true and correct on the date of execution of this Agreement, and will be true and correct on the date of Closing.

9.1 Authority. Seller represents and warrants that it has marketable fee simple title to the Property and full power and authority to enter into

this Agreement and other related documents necessary to the land transaction, including but not limited to deeds conveying fee or less-than-fee interest(s). Further, Seller represents and warrants that any individuals signing such documents as Seller, or on the Seller's behalf, are duly authorized to legally bind the Seller. Seller agrees to provide evidence of authority to Buyer.

9.2 Absence of Litigation and Liens. Seller represents and warrants that they do not know, nor have reason to know, of any: (1) pending or threatened litigation, including court action, arbitration, administrative proceeding or other inquiry, against the Seller or Property that could affect the value of the Property or subject an owner of the Property to liability; (2) threatened or pending eminent domain proceedings; (3) intended public improvement that will result in the serving of any lien upon the Property or a portion of the Property; (4) uncured notice notifying Seller of any violation of law, ordinance, rule or regulation, which would adversely affect the Property or a portion of the Property; (5) actual or impending mechanic's or materialman's lien against the Property or a portion of the Property; and (6) lease, tenancy, occupancy agreement, or other possessory rights affecting the Property or portion of the Property.

9.3 Hazardous Substances. Seller represents and warrants to Buyer, in this Agreement and other related documents necessary to the land transaction, including the deed conveying fee or less-than-fee interest, that that they do not know, nor have reason to know, that there is any contamination of the Property by hazardous substances on, over, under or across the Property, including but not limited to contamination of the soil and or groundwater. For purposes of this Agreement, the term "**hazardous substances**" shall be interpreted broadly to include, but not be limited to: "hazardous substance" as defined in the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended (42 U.S.C. §§ 9601 *et seq.*); "hazardous waste" as defined by the Resource Conservation and Recovery Act of 1976, as amended (42 U.S.C. §§ 6901 *et seq.*); hazardous, toxic, or dangerous materials, substances or waste, asbestos-containing materials, polychlorinated biphenyls, radioactive materials, chemicals known to cause cancer or reproductive toxicity, petroleum products, distillates or fractions, or any other contaminant the presence of which is regulated by federal, state, or local statute, regulation, ordinance, or rule pertaining to environmental protection, contamination, or cleanup or requiring a permit or special handling in its use, collection, storage, treatment or

disposal, including but not limited to the Federal Water Pollution Control Act (33 U.S.C. §§ 1257 *et seq.*), and the Clean Air Act (42 U.S.C. §§ 2001 *et seq.*).

10. Risk of Loss and Possession. Until Closing, the Seller shall bear the risk of loss with respect to the Property, except such loss as may be directly caused by the actions or omissions of Buyer and Buyer's representatives. In the event of any damage to, or loss or destruction of the Property, except for actions or omissions of Buyer and Buyer's representatives, Buyer at its exclusive election may: (1) require the Seller to perform a specific and satisfactory remedy prior to Closing, (2) complete the purchase with compensatory proceeds from Seller at Closing, or (3) nullify the Agreement. Buyer shall have possession of and, except for a breach of warranty as provided in Sections 5 and 9, shall assume all risks for the Property on and after Closing.
  
11. Default. For purpose of this Section, a default is the failure of any party, without legal excuse, to complete the purchase or sale of the Property. Time is of the essence for this Agreement.
  - 11.1 By Seller. If Seller defaults prior to Closing, Buyer may terminate this Agreement and receive a refund of the earnest money. Alternatively, at Buyer's sole option, Buyer may elect to seek specific performance of this Agreement.
  
  - 11.2 By Buyer. If Buyer defaults prior to Closing, Seller's sole remedy shall be to retain the earnest money as liquidated damages. Forfeiture of earnest money shall be Seller's sole remedy. Such amount has been agreed to by both parties to be reasonable compensation and the exclusive remedy for Buyer's default, because the precise amount of such compensation would be difficult to determine.
  
12. Assignability. Buyer shall not assign this Agreement or any interest herein without the written consent of Seller. Consent to assignment shall not unreasonably be withheld, continued or delayed.
  
13. Construction – Binding Effect. This Agreement incorporates all prior negotiations and agreements of the parties relating to this land transaction, may not be amended except by a writing executed by Seller and Buyer, and is made under, and shall be construed and enforced in accordance with, appropriate state and federal law. This Agreement is binding upon, and is for the benefit of, the heirs, personal representatives, successors and assigns of Buyer and Seller.

14. Additional Documentation. Buyer and Seller agree to prepare and execute any additional documentation as may be reasonable and necessary to carry out the provisions of this Agreement and effect the transfer and conveyance of the Property to Buyer.

15. Notices. Any notice required to be given or which may be given hereunder shall be in writing and delivered personally or by certified mail to a party at the following addresses. A notice given personally shall be effective on the date of delivery and a notice given by certified mail shall be effective on the date of receipt, postage prepaid.

TO SELLER:           NAME  
                          STREET ADDRESS  
                          CITY, STATE, ZIP CODE  
                          E-MAIL  
                          PHONE, FAX

TO BUYER:           NAME  
                          STREET ADDRESS  
                          CITY, STATE, ZIP CODE  
                          E-MAIL  
                          PHONE, FAX

**Seller:**

By: \_\_\_\_\_ Date: \_\_\_\_\_  
[INSERT DULY AUTHORIZED REP MATCHING VESTING STATEMENT]

**Buyer:**

[INSERT BUYER NAME]

By: \_\_\_\_\_ Date: \_\_\_\_\_  
[DULY AUTHORIZED REP, TITLE]

**LIST OF EXHIBITS**

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**Exhibit A**  
Legal Description

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**Exhibit B**  
Map, aerial photo, survey

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**Exhibit C-X**  
[INSERT ADDITIONAL EXHIBITS FOR "TOGETHER WITH" ITEMS, SUCH AS  
WATER RIGHT CERTIFICATES OR ACCESS AGREEMENTS]

## Appendix XII

### Baseline Documentation Report Outline

Baseline documentation may rely on and incorporate by reference other information already in the project file, such as title opinions, appraisals, or water rights certificates and need not be duplicative. At a minimum the reports should include the following:

#### 1) General Contents<sup>2</sup>

- a) Describe the purpose and conservation values of the easement.
- b) Summarize the easement restrictions.
- c) State baseline report author identification and author's qualifications.
- d) Landowner contact information (name, address, phone numbers, email address)
- e) Physical address of property, including the county
- f) Directions to the property from the nearest town or major highway
- g) Date of site visit if different from date report prepared and signed
- h) Signature of owner and grantor acknowledging the report

#### 2) Property Description

- a) Invasive weed survey or list with kind, location, and extent of invasion.
- b) Flora and fauna survey or list.
- c) Habitat survey or list with types and locations.

#### 3) Current Management and Use

- a) Historical ownership and use describing the history of the easement area such as past agricultural, forestry, residential, commercial, or mitigation uses.
- b) Current property uses; e.g., extent farmed, for what crops, what techniques and management practices used.
- c) Potential threats to the conservation values posed by activities such as unauthorized use of the easement area or adjacent land use, as applicable.
- d) References to, or copies of, existing plans for forestry, burning, agriculture, or stewardship.
- e) Water use and rights.
  - i) Water right permit or certificates attached when appropriate.

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<sup>2</sup> Project sponsors should check Internal Revenue Service requirements for baseline documentation for all easements with a tax deductible component.

- ii) Document beneficial uses, time, place, and manner of use, point of diversion, water delivery infrastructure, and condition of equipment (e.g., fish screen in working order).
- iii) Document evidence of water rights being exercised in past five years.
- f) Evidence of unrecorded easements, leases, and permits, e.g., any evidence of active mining

#### **4) Maps and Photographs**

- a) Photographs showing the location size, use, and condition of all structures; e.g., houses, barns, pumps; utilities; fences, roads; trails; potential or future restoration sites; threats or impacts present (e.g., unauthorized trails, marijuana growing sites, dumps); priority ecological systems, plant communities, and other features identified as conservation values. Accompany all photographs with GPS coordinates and directional notations.
  - b) Verbal description covering the nature and condition of all utilities, both above and below ground.
  - c) Locations and conditions of all roads, paths, trails, and fences.
  - d) Photographs, with GPS coordinates of the photo points, of all property boundaries and corners.
  - e) Map depicting the location of photo points used in the baseline documentation report.
  - f) Map showing easement zones or other areas of special emphasis or restrictions, as applicable.
  - g) Acknowledgement
- 5) Easement grantor must sign an acknowledgement affirming that he or she read and agrees with the descriptions in the baseline document report. See the Baseline Documentation Report Acknowledgement below.**
- 6) Record a copy of the acknowledgement, but not the baseline report. BPA should retain a copy of the baseline report for its files.**

## Appendix XIII

### Baseline Document Report ACKNOWLEDGEMENT OF PROPERTY CONDITION

The undersigned accept and acknowledge that the Baseline Documentation Report titled [TITLE] prepared by [NAME] on [DATE] accurately represents the nature and condition of the [NAME] property at the time the conservation easement was transferred to the grantee. The grantee, sponsor [NAME], and the Bonneville Power Administration all have original copies of the report on file.

**Sponsor:**

\_\_\_\_\_ Date: \_\_\_\_\_

Title: \_\_\_\_\_

**Easement Grantee:**

By: \_\_\_\_\_ Date: \_\_\_\_\_

Title: \_\_\_\_\_

**Bonneville Project Manager:**

\_\_\_\_\_ Date: \_\_\_\_\_



## Appendix XIV

### Land Management Plan Suggested Table of Contents For Newly Acquired Properties

For properties in the Fish and Wildlife mitigation program requiring management plans, BPA must review and approve drafts of the plans. The following Table of Contents lists the topics BPA feels are essential for a plan and also lists general information most plans should cover. BPA does not require any particular format, so entities with established management plan formats and guidelines may use those as long as the essential elements described here are included. Some of the information listed here will already be in documentation developed in other stages of the project. The management plan should bring all the necessary information together in a single place and in a comprehensive manner to facilitate and document transparent property management decision making. Sponsors should be advised that as land management practices and the land itself changes over time, the management plans will also need to be changed and updated periodically.

**Note: Bolded items are required to facilitate BPA's review**

#### *A. Introduction and Background*

*Please describe and depict in sufficient detail. With the exception of the first two items, information should only be provided here if different from the baseline. If a baseline was developed during the acquisition process, it should be attached or linked electronically as an appendix.*

- 1) Project Site Name, date acquired, time period covered by the management plan, plan preparer name, key on-the-ground staff (Area Manager, technical staff).**
- 2) Property locations and size (include an updated map of all included lands).**
- 3) Purpose of the land acquisition; explain if the property fits into a bigger acquisition plan or larger conservation context. Explain relationship to other BPA mitigation properties or properties purchased by other entities.**
- 4) History of land use on property(ies)
- 5) Describe interim management activities between time of purchase and approval of Land Management Plan. Include the Land Use Agreement, if there is one in place

## *B. Current ecological setting*

*Describe and depict the current condition and/or use in sufficient detail. Be sure to describe any differences from the baseline report here.*

- **Habitat and Cover Types, including Special Status Habitats**
- **Focal Fish and Wildlife Species Information**
- **Invasive Species**
- **Current Water Rights and Usage**

*If relevant to property management, or the desired future condition of the property, describe and depict the following in sufficient detail. Again, describe any differences from the baseline report:*

- Documented species of concern
- Hydrology
- Historical and cultural resources and traditional use resources
- User groups and current recreational activities (include community involvement and educational activities)
- Climate Change
- Soils and Topography
- Fire History

## *C. Public Participation*

*Summarize how the public was engaged in your Land Management Plan development process. List other agencies or tribes that were involvement in the development of the plan.*

## *D. Goals and Actions*

*Describe your management goals and actions: goals should include measurable objectives.*

- 1) Describe the desired future condition for each conservation value, target species, and/or key habitat type. Explain how the desired future conditions were developed.**
- 2) Describe the restoration activities and operations and maintenance (O&M) activities that will be used to achieve each desired future condition. Include weed management practices, if any.**
- 3) Provide timeline of planned management actions, including O&M, restoration, and evaluation actions related to management goals.**
- 4) Identify all threats to any conservation values identified in the conservation easement and the plan for protecting the values from threat. Items to consider include: invasive species, use of adjacent land, recreational activities, etc.**

### *E. Management Restrictions and Prohibitions*

- 1) **Address each landowner reserved right in the conservation easement and MOA and describe how the landowner will exercise those rights in a manner that does not violate the conservation easement. Explain when, where, how much, and how each reserved right is managed. If necessary, include maps showing activity locations.**
- 2) **Address each prohibited use identified in the conservation easement and MOA and explain how the prohibition will be honored. If there are any exceptions, explain those here.**
- 3) **Describe any regulatory agency guidance active within the property e.g. required actions in NEPA mitigation action plans, incidental take permits, or biological opinions. Include other agency requirements, such as DEQ, as they impact management.**
- 4) **Describe hazardous waste remediation and management. If there are ongoing remediation and management actions or any follow-up from the pre-acquisition remediation, describe here. Attach a copy of the Environmental Land Assessment.**

### *F. Other Management Actions*

*Describe and depict in sufficient detail:*

- 1) **Water usage and water rights management. Describe any plans to transfer water rights instream or to document annual use of any water rights not placed into trust for instream use. Attach relative documents for these plans.**
- 2) **Infrastructure management (e.g., road, gate, and fence installation or maintenance)**
- 3) **Access management including trespass prevention. *Describe any actions that may impact any existing access rights/ easements.***
- 4) **Protection of known historic resources as they relate to the land management**
- 5) **Income-generating activities (if permitted by easement). For properties that re-invest the income produced back into the property, describe activities in detail and describe how the income will be managed.**

### *G. Adaptive Management Planning*

*\*\*Include anticipated issues, the process and steps taken to address them, and summary of progress to date, if applicable.*

## *H. Reporting*

- 1) List any reporting requirements that are required by the MOA, CE, other funding sources, or your own agency.
- 2) Describe how you will report on remedial actions taken to protect property from harm by third parties or to address past easement or management plan violations.
- 3) Summarize key issues or decisions that would cause managers to notify BPA. Include issues that trigger a formal BPA approval.  
Include:
  - i. Changes in ownership.
  - ii. Enforcement actions.
  - iii. Violations of regulatory, easement, or agreement conditions and planned remedial action, if any.

## *I. Appendices – include links if applicable*

- 1) Easement Restrictions and Management Actions Table
- 2) Baseline Report
- 3) Water right certificates
- 4) Mining permits
- 5) BPA-issued Land Use Agreements
- 6) Other documents that impact management of the property. Including, but not limited to:
  - Access easements
  - Responses to substantive public comments on the draft that were not incorporated into the final plan.
  - ELA
  - Consent Decree for Hazardous Waste

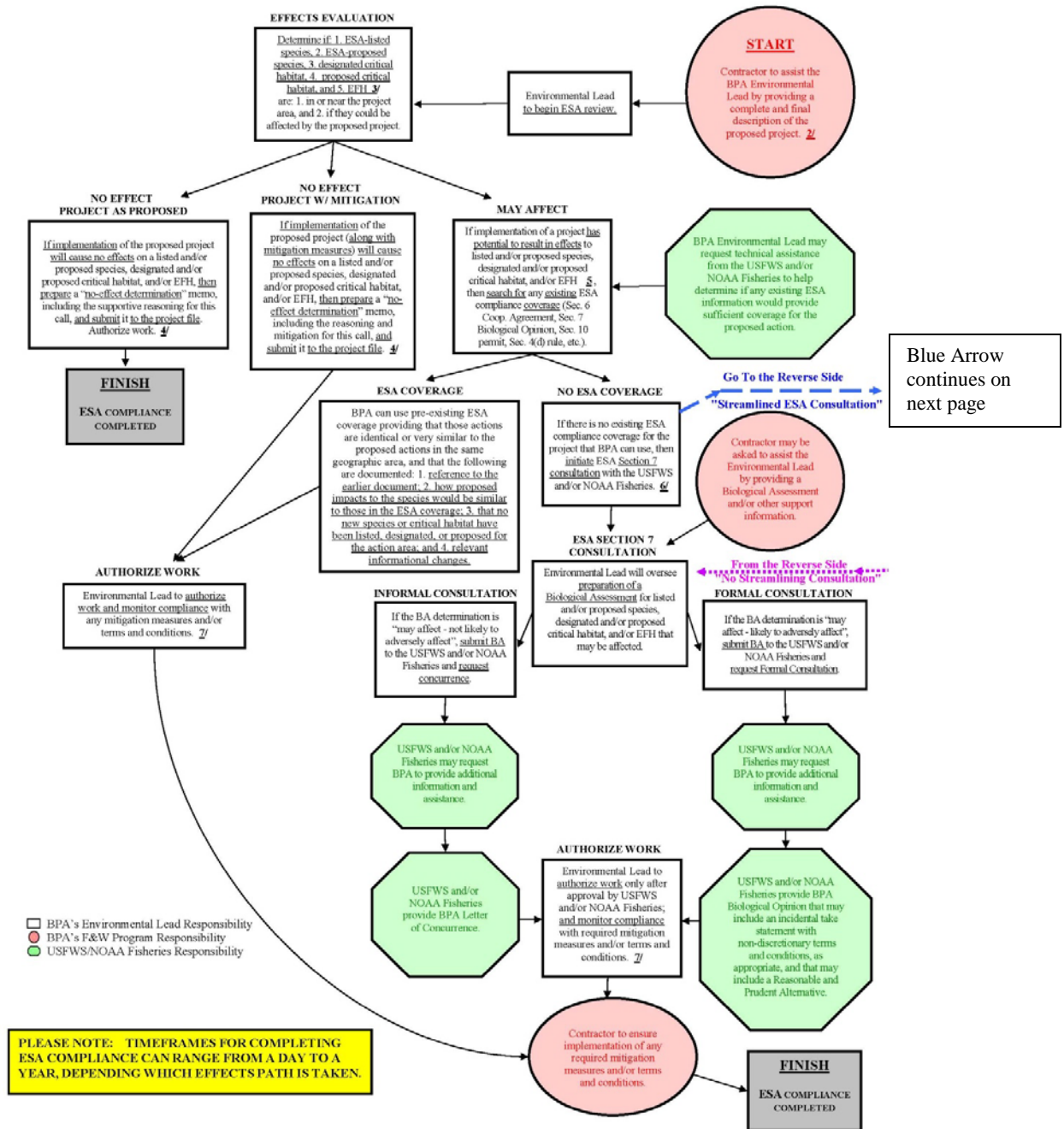
### **Appendix 1. Easement Restrictions and Management Actions Table**

Please include ALL easement restrictions and prohibitions in the table. The following is an example of the detail requested.

<i>Summary of Easement Restrictions</i>	<i>Management Action Compliance</i>
Preserve and protect the Conservation Values of the Property, including restoring and enhancing the site for fish	Goals and objectives in Management Plan provide for long-term protection/restoration of habitats, see

<p>and wildlife habitat as approved in the management plan or by BPA.</p>	<p>Section X. Public use will be managed to protect wildlife and habitats; see section X, Goals a-c. Objective X developed to monitor and evaluate effects of public use on site.</p> <p>Adaptive management (section X) includes monitoring and evaluating (section X) management actions, important for long-term success and protection of Conservation Values.</p>
<p>No residential, commercial, or industrial use of the Protected Property</p>	<p>At the time of purchase land was leased for agricultural use. This lease will continue as per Land Use Agreement with BPA while restoration activities are being planned.</p>
<p>No new construction, except fences as needed to facilitate habitat restoration or other activities included in the Management Plan or approved by BPA.</p>	<p>No fence construction anticipated or included in the Management Plan. Interior fences are planned for removal as part of restoration work.</p>
<p>No new utilities except as negotiated with BPA.</p>	<p>None contemplated as part of Management Plan.</p>
<p>No signs, except for no trespassing signs, no hunting signs, for sale signs, signs identifying the owner of the Protected Property, signs facilitating public use or education, and signs that may be erected by the Grantor or the Grantee identifying the Purpose of the Protected Property, all other signs, advertisements, and billboards of any nature are prohibited. The permitted signs may not exceed 15 square feet in size.</p>	<p>Boundary marker installation is included in Management Plan. Interpretive and instructional (use rules) signs may be installed as part of restoration.</p>

# Appendix XV Endangered Species Act Compliance Flow chart



<sup>1/</sup> In accordance with the Endangered Species Act of 1973 (ESA) as amended, Federal agencies shall "seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this Act". This compliance process requires integrated communication and participation among BPA, the Contractor, and the U.S. Fish and Wildlife Service and/or NOAA Fisheries.

<sup>2/</sup> ESA compliance review cannot proceed unless this is finalized.

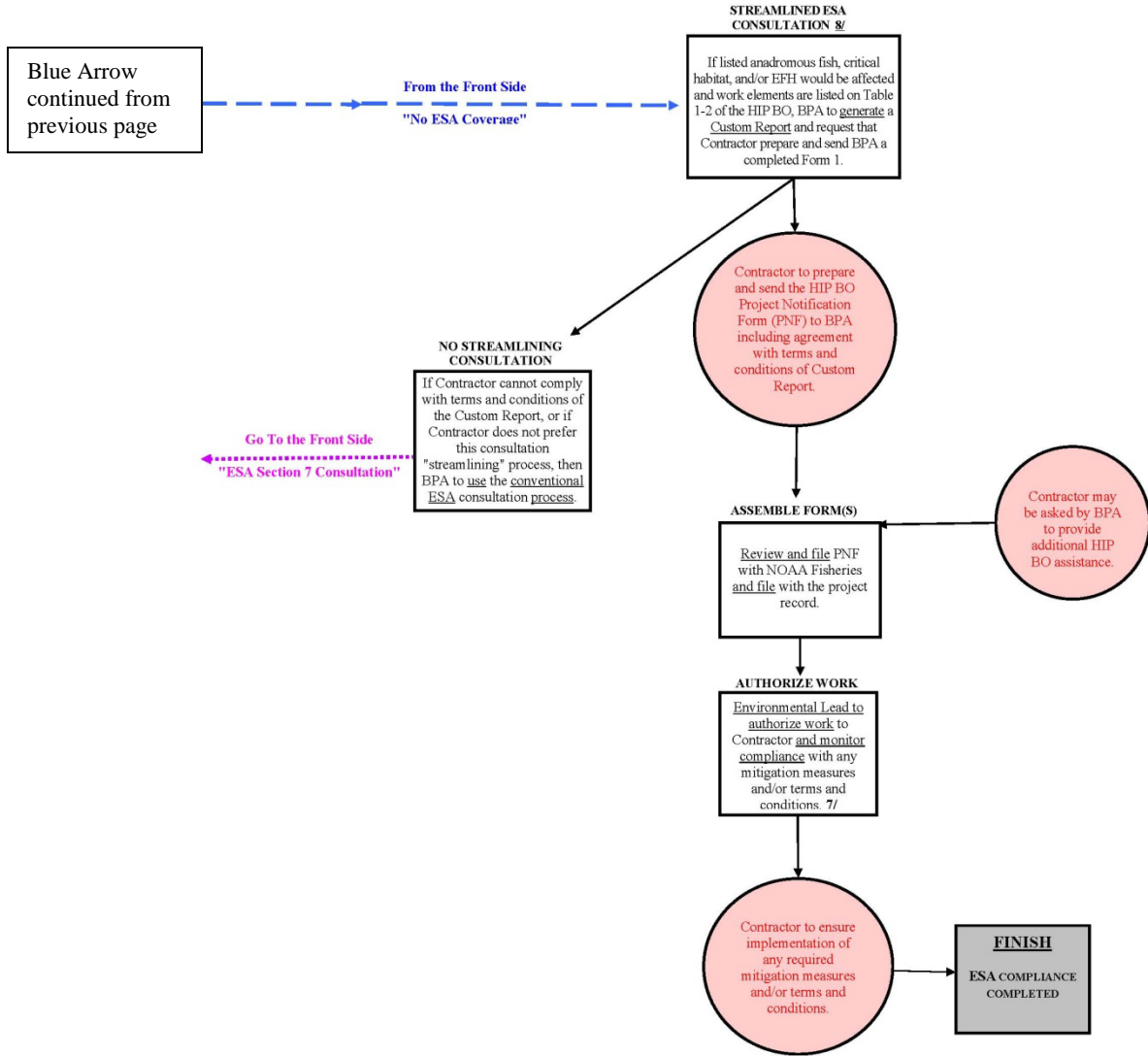
<sup>3/</sup> In accordance with the Magnuson-Stevens Fishery Conservation and Management Act, Federal agencies which carry out activities that may adversely impact Essential Fish Habitat (EFH) are required to consult regarding the potential effects of their actions on EFH. EFH means those waters and substrate necessary to fish for spawning, breeding, feeding or growing to maturity. The requirements of EFH reviews are hereby embedded into BPA's ESA compliance review. As needed, Environmental Planning biologists can suggest websites to assist in identifying species, critical habitat, and EFH.

<sup>4/</sup> Process complete for only those species that would not be affected.

<sup>5/</sup> Take is defined as to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect, or attempt to engage in any such conduct. "Harm" is further defined by FWS to include significant habitat modification or degradation that results in death or injury to listed species by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering. "Harass" is defined by FWS as intentional or negligent actions that create the likelihood of injury to listed species to such an extent as to significantly disrupt normal behavior patterns which include, but are not limited to, breeding, feeding, or sheltering.

<sup>6/</sup> Section 7 consultation with the USFWS includes wildlife, plants, bulltrout, and non anadromous-listed fish species; consultation with NOAA Fisheries includes anadromous and marine fish, marine mammals, marine turtles, marine invertebrates, and marine plants.

<sup>7/</sup> Environmental Lead to ensure that required mitigation measures, and terms and conditions are included in BPA's decision documents, such as ROD, FONSI, MAP, CX, etc.



8/ This streamlined process applies only to the species regulated by NOAA Fisheries and not to any species regulated by the USFWS. The Habitat Improvement Program (HIP) BO title is: "Endangered Species Act Section 7 Consultation Biological Opinion and Magnuson-Stevens Fishery Conservation and Management Act Essential Fish Habitat Consultation, Habitat Improvement Program, Oregon, Washington and Idaho, CY2007-2012 (HIP1)" of January 10, 2008. 2007/03996

## Appendix XVI

### Checklist of Requirements Conservation Easements Acquired with BPA Funding

BPA reviews all conservation easements being acquired with its funding. This checklist identifies some of the basic requirements for an easement. This is not a comprehensive list, and it does not replace the detailed review each easement receives by BPA's Real Property Services and Office of General Counsel.

**Conservation Values.** The easement needs the following features:

- Clearly defined Conservation Values, with the Values described in the body of the easement after the granting clause, not in the recitals.
- The Conservation Values at a minimum reference the species and habitats targeted for BPA mitigation, e.g., loss assessment species. Accord projects should specifically reference the targeted ESU and describe the benefits the species will derive from the easement.

**Exhibits:** The Conservation Easement should include the following exhibits.

- An exhibit with the legal description of the easement, *including the specific water rights being acquired* (if any).
- An exhibit showing the easement area on an aerial photograph or map, acceptable for recording purposes.
- An exhibit showing any reserved residential, restoration, hunting or agricultural zones or similar demarcations. Surveys, tax lots, or other forms of legal description are preferred, at a minimum use GPS points with BPA approval;
- An exhibit documenting the agreed-upon title encumbrances.
- An exhibit documenting agreement by grantor and grantee on baseline documentation.
- An exhibit with the sample BPA transmission line easement.

**BPA's Role.** Some reference to BPA role and authorities, substantially similar to the following:

**Federal Funding.** The Bonneville Power Administration (BPA) is a power-marketing agency within the United States Department of Energy. The Pacific Northwest Electric Power Planning and Conservation Act, 16 U.S.C. §§ 839-839h



(Northwest Power Act) directs BPA to protect, mitigate, and enhance fish and wildlife affected by the development and operation of federal hydroelectric projects on the Columbia River and its tributaries (the Federal Columbia River Power System, or FCRPS), in a manner consistent with the purposes of the Northwest Power Act, the fish and wildlife program (Program) adopted by the Pacific Northwest Electric Power Planning and Conservation Council (Council) under subsection 4(h) of the Northwest Power Act, and other environmental laws. Under the Endangered Species Act, BPA must avoid jeopardizing the continued existence, and aid in the recovery of, species listed for protection. 16 U.S.C. § 1536. The United States, acting through BPA, has the authority to fund conservation easements as provided by 16 U.S.C. §§ 832a(c), 839b(h)(10)(A), 839f(b). This Easement benefits BPA and the public interest by providing a mechanism for BPA to help permanently protect, mitigate and enhance fish and wildlife habitat to help address the construction, inundation, and operational impacts from the Federal Columbia River Power System.

**Granting clause.** Use the following template language when possible, *including the specific consideration paid by BPA*, and the grant to the United States rights of enforcement, entry, inspection, and transmission substantially similar to the following:

**The Grantor, for and in consideration of the funding in the amount of ([Insert the dollar amount provided by BPA for the purchase of the property]) in U.S. dollars which BPA provided to acquire fee title ownership of the Protected Property, hereby voluntarily conveys and warrants to the United States of America and its assigns a perpetual easement with access for conservation purposes (“Conservation Easement”) in, over, under, upon and across the Protected Property, legally described in Exhibit A (legal description)[*Note: the legal description must include a description of any water rights accompanying the property in the transaction*], attached and incorporated by reference, and shown in Exhibit B (map/aerial photo) attached and incorporated by reference, created and implemented under applicable state and federal law, and creating an interest in property intended to be a conservation easement under [Site the appropriate state statute].** For the same consideration cited above, Grantor also grants and conveys to the United States of America and its assigns, rights of enforcement, entry, inspection and rights relating to transmission facilities.

The Parties intend this Conservation Easement to be a perpetual and irrevocable easement in gross, and further intend its terms and conditions, set forth below, to create equitable servitudes and covenants running with the land, binding upon Grantor’s successors and assigns for the benefit of the [NAME] as Grantee and the

United States as holder of certain rights.

**BPA RIGHTS OF ENFORCEMENT, ENTRY, INSPECTION, & RELATING TO TRANSMISSION FACILITIES:**

Clauses (separate and apart from the granting, habendum or warranty provisions) referencing BPA as the U.S. agency for which the rights are being acquired, including transmission rights, and further describing those rights substantially similar to the following:

**RIGHTS CONVEYED TO THE UNITED STATES**

Regarding the rights of entry, inspection, enforcement, and rights for transmission facilities granted to the United States, BPA is the acquiring federal agency.

**A. Access.**

1. To enter the Property at a reasonable time and upon prior written notice to Grantor, for the purpose of making a general inspection of the Protected Property to monitor compliance with this Easement, including surveying the fish and wildlife habitat.

2. To enter the Property at such other times as are necessary if the BPA has a reason to believe that a violation of the Easement is occurring or has occurred, for the purpose of mitigating or terminating the violation and otherwise enforcing the provisions of this Easement. Such entry shall be upon prior reasonable notice to Grantor [and Grantee], and BPA shall not in any case unreasonably interfere with Grantor's use and quiet enjoyment of the Property by such access.

**B. Enforcement.** In the event that the Grantee fails to enforce any of the terms of this easement, as determined at the sole discretion of the BPA, then BPA may exercise all of the rights and remedies of the Grantee, and is entitled to all of the indemnifications provided to the Grantee.

A clause providing for BPA's transmission rights substantially similar to the following:

**Transmission Facilities.** If BPA needs a transmission line right-of-way including access over the Property, BPA may construct, locate, operate, maintain and access future transmission facilities within the Conservation Easement area, provided that such construction, location, operation, maintenance and access are consistent with the purposes of this Easement [INSERT THE FOLLOWING IF LANDOWNER SEEKING CHARITABLE DEDUCTION: “to preserve and protect the Property ‘predominantly in its existing condition as a relatively natural habitat of fish, wildlife, or plants, or similar ecosystem,’” (as that phrase is used in 26 U.S.C. § 170(h)(4)(A)(ii), as amended and in regulations promulgated under this law)]; and further provided that such construction, location, operation, maintenance and access does not have a materially adverse impact on the conservation values protected by this Easement. Should such a transmission right-of-way be needed by BPA over the Property, Grantee, Grantor, and BPA will negotiate the terms and conditions of the right-of-way in accordance with applicable law. Any transmission rights-of-way shall be for the sole purpose of transmission of electrical power and ancillary transmission communications.

**Notices to BPA.**

- A requirement that the landowner notify the Grantee and BPA regarding any *anticipated* change in land ownership;
  
- A requirement that the landowner notify the Grantee and BPA regarding any potential violations of the terms of the easement;
  
- Consider what other notices the landowner is required to give the Grantee that BPA would also be interested in, and include notification to BPA.
  
- Make sure the “Notices” provision of the Easement includes appropriate contacts for BPA (i.e., Real Property Services and Fish and Wildlife).

**BPA Approvals.**

Easement provides the following.

- BPA’s review and approval of: the Land Management or Stewardship Plan for the property and any amendments to the Plan; for example:

- CHOOSE ONE:

- A. Land Management Plan Approval.** The Grantor and Grantee shall provide the initial draft Land Management Plan to BPA and BPA

will have 30 business days to review it. The plan cannot be final without BPA's approval, which BPA may not unreasonably withhold or condition. When such approval is not granted or denied within thirty business days, approval of the Management Plan or any revisions thereto may be presumed. The Parties will provide subsequent Management Plans and plan revisions for BPA review, but they need BPA approval only when proposing substantive changes from the initial plan.

[Or]

**B. Land Management or Stewardship Plan Approval.** The Land Management Plan is attached as Exhibit [XX]. In the event of substantive changes to the Plan, the Parties shall provide a revised Plan to BPA and BPA will have 30 business days to review it. The revised Plan cannot be implemented without BPA's approval, which BPA may not unreasonably withhold or condition. When such approval is not granted or denied within thirty business days, approval of the revised Land Management Plan may be presumed.

Language requiring BPA's review and approval of any assignment of the easement.

Language requiring BPA's review and approval (through new acknowledged acceptance) of any amendment of the easement.

#### **BPA Participation in Grantee Reviews**

Language addressing how the Grantee and BPA will coordinate on review of activities by the landowner that the Grantee has oversight/review approvals for--when would BPA be involved, or not involved in prior approvals of activities by the landowner that the Grantee is reviewing and approving? This should be determined between the Parties on a case-by-case basis. For example, perhaps BPA wants to get the same notices of activities that the Grantee gets, and then Grantee and BPA can work out themselves (e.g. consistent with their MOA) how to address. Sample language from a recent conservation easement is below:

**Notices to BPA.** In addition to any other notices the Parties may provide to BPA, Grantee will promptly provide BPA with any notices provided by

Grantor to Grantee pursuant to Sections VIII and XIII.E. Grantee will also promptly provide BPA with any notices received or issued by Grantee pursuant to Sections IX, X, XIII, and XV.

**Post-Termination/Proceeds**

- Language providing for the appropriate allocation of the funds to BPA (or to other habitat projects coordinated and approved by BPA) if the easement is judicially terminated or extinguished, e.g., "This conservation easement was acquired using funds provided to the [Grantee] by BPA. In the event of judicial termination or extinguishment of the easement for circumstances as described under this Paragraph, the [Grantee] shall coordinate with BPA and shall apply any funds received in settlement for such termination or extinguishment to resident fish and wildlife habitat conservation as approved by BPA.

**REFERENCE TO the U.S. IN the HABENDUM CLAUSE; TITLE WARRANTIES:**

- That there is a habendum clause, sufficient title warranties and covenants for the Grantee and the United States, and an Exhibit that includes agreed-upon encumbrances, such as:

To have and to hold the Easement herein granted unto the Grantee and its successors and assigns.

Grantor hereby warrants and covenants to the Grantee and the United States that the Grantor is lawfully seized and possessed of the Protected Property in fee simple with a good and lawful right to grant the same, including a good and lawful right to grant this Conservation Easement; the Property is free and clear of any and all encumbrances and restrictions except those specifically set forth in Exhibit XX, attached and incorporated by reference; that the Grantee and its successors and assigns shall have the use of and enjoy all the benefits derived from and arising out of this Conservation Easement; that Grantor shall at the request of the Grantee execute or obtain any reasonable further assurances of the title to the Property; and that Grantor will forever warrant the title to the Property and defend the Conservancy against all persons who claim a lawful interest in the Property, except for persons who claim interests under the exceptions described in Exhibit XX.

## EXECUTION & ACCEPTANCE

That Grantor's execution of the easement, and the acceptance by Grantee and the United States, should read substantially as follows:

Witness my hand executing this Conservation Easement this [INSERT DAY] day of [INSERT MONTH], 2013.

GRANTOR:  
[Insert signature line, and underneath, name or names and how vesting statement reads on deed, followed by date + notarized acknowledgment]

ACCEPTED BY GRANTEE: [Insert signature line, and underneath, name or names and how vesting statement reads on deed, followed by date, +notarized acknowledgment]

ACCEPTED BY THE UNITED STATES  
[Insert signature line, and underneath:  
Name  
Title: Manager, Real Property Services, Bonneville Power Administration  
  
Date, followed by notarized acknowledgment]

## THINGS THE CONSERVATION EASEMENT SHOULD NOT HAVE:

- Any binding arbitration clause that includes BPA.
- A clause that requires BPA to submit any disputes to a particular judicial venue. (If the Grantor & Grantee want to agree on venue for their disputes, that's okay.)

## Appendix XVII

### Document List for "DOJ" Title Review

(For internal BPA use, provided here for information only)

- Completed BPA 945 form with resolution of all title items
- Purchase Agreement and amendments, signed by vested owner(s)
- Title report (BPA's showing proposed insured as the "United States of America and its assigns") and all exceptions with Surveyor certification stamp on legal description and all referenced legal description documents
- Phase 1 ELA with BPA review and approval and resolution of any recommendations
- Conservation Easement in final or near final form
- Draft warranty deed (if acquiring fee title) with water rights (if any)
- Baseline Documentation Report (if applicable)
- Authority to sign (Tribe, State agency, LLC, etc.) or completed affidavit (of heirship, interest of spouse for example), if necessary
- Water survey form fully completed
- Maps
- Appraisal or access to appraisal
- Answers or documentation related to outstanding questions
- Surveys and other documents as appropriate, e.g. for access and to ensure consistency with legal description

- Indication of project manager, and documentation from project manager, as appropriate, indicating that a particular cloud or encumbrance on title does not interfere with the conservation purposes of the acquisition
- Update acquisition spreadsheet with date sent for 945 reviews.



## Appendix XIII

### BPA COTR Annual Site Visit Land Monitoring Report Form

Description of Monitor Visit: Monitoring is conducted by auto, plane or on foot. Maps, routes and photopoints are all completed using GIS referencing with Trimble Nomad hardware and ESRI ArcPAD software. Photos are taken and stored digitally

<b>Site:</b> _____ _____	<b>Name of current owner:</b> _____ <b>Phone #:</b> _____
<b>Tract ID:</b> _____	<b>Address:</b> _____
<b>County/State:</b> _____	<i>New address?</i> Yes ____ No ____
<b>Project #:</b> _____	<b>Email:</b> _____
	<i>New email?</i> Yes ____ No ____
<b>Guiding Documents:</b> ( <i>Contracts, easements, management plans, land use agreements, etc.</i> )	
Easement dated: _____	Baseline dated: _____

Name of monitor: \_\_\_\_\_

Phone: \_\_\_\_\_

Date of monitoring visit: \_\_\_\_\_ Date of last monitoring visit:

\_\_\_\_\_

Owner contacted prior to visit? Yes\_\_ No\_\_ If not, why:

\_\_\_\_\_

Name(s) of person(s) accompanying monitor:

\_\_\_\_\_

**1. Ownership Status:** Has property changed hands since last monitoring visit?

Yes\_\_ No\_\_

If **yes**, to whom has the land been transferred (name/address/phone):

If **no**, does landowner has plans to transfer or sell land in near future?

Yes\_\_ No\_\_

Details:

2. **Present Land Use:** How is the protected land currently being used by the landowner(s)?

Residential use:

Agricultural use:

Forestry use:

Other uses or management activities:

3. **Condition of Protected Land:**

Has the property been altered by human/animal activity since last monitored (e.g. new buildings, roads, trails, fences, timber harvesting, excavation, grazing)?

Yes \_\_\_ NO \_\_\_

If **yes**, describe the activity and indicate its location on map. If possible, photograph and attach.

Has the property been altered by natural causes since last monitored (e.g. flood, fire, windstorm)?

Yes \_\_\_ No \_\_\_

If **yes**, describe the activity and indicate its location on map. If possible, photograph and attach.

Are there any adjacent property uses that could be affecting this property?

Yes \_\_\_ No \_\_\_

If **yes**, describe the activity and indicate its location on map. If possible, photograph and attach.

4. **Landowner Concerns:** Does the landowner have any questions or concerns?

Please list questions **below** and any responses by monitor. Note questions not answered for later follow up.

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Any landowner management activities requiring sponsor or BPA Prior Approval?  
\_\_YES \_\_NO

Any landowner management activities requiring prior notice to FWP?  
\_\_YES \_\_NO

Did landowner exercise any limited reserved rights?  
\_\_YES \_\_NO

5. **Easement Concerns:** Identify potential problems or specific areas of concern.  
Attach photos if possible.

◆ Building(s):

◆ Encroachment issues:

◆ Vegetation:

◆ Erosion issues:

◆ Water issues:

6. **Are Grantee rights and responsibilities (see below) being met?**  
\_\_YES \_\_NO

#### **LANDOWNER RIGHTS AND RESPONSIBILITIES**

*(Based on applicable agreements, easements, and law)*

- Buildings and structures:
- Grazing – Range Management:
- Cultivation, sod-busting, or other range management:
- Timber management:

- Water rights used:
- Water Developments – alterations to wetlands and riparian areas – changes to water rights:
- Maintenance or new construction of roads, fences, utilities or other improvements:
- Agrichemicals use – Pest management:
- Exploration and/or extraction of soil, gravel, sand, hydrocarbons or other minerals:
- Subdivisions, property sales, or property leases:
- Restoration and/or Habitat Enhancement:
- Unauthorized commercial uses:
- Dumping:
- Game farming or related:

**Status of Management Plan:** (If being developed or amended)

**Monitoring Concerns:** Is there anything you noted during this visit that future monitors should be aware of not already listed in monitoring plan or baseline?

Photo points taken: Yes \_\_\_\_ No \_\_\_\_

**Conclusion: Grantor was/was not in full compliance with all terms of the conservation easement during FY2\_\_\_\_.**

*At the end of monitoring visit, please check one of the following:*

\_\_\_\_ I noted nothing of concern                      \_\_\_\_ I think there might be a problem

Monitor signature: \_\_\_\_\_

Date: \_\_\_\_\_

## Appendix XIX

### Self-Assessment Form for BPA Easement Properties

Please answer the following questions about your conservation easement or property. This is a generalized questionnaire, so some of the questions may pertain to your individual property. Once completed, please return the form via e-mail to Dorie Welch, BPA F&W Biologist, at [dwwelch@bpa.gov](mailto:dwwelch@bpa.gov).

- 1. Property Information.** *(This information is filled in by BPA before sending the form to the landowner.) Please review information in this section for accuracy and make any corrections or updates if needed.*

Property Name:	
Property Address:	
Landowner Name:	
Landowner Address:	
Landowner Phone:	
Landowner Email:	
BPA staff assigned to land:	
Preparer's Name (if different from landowner):	

- 2. Ownership.** Please answer the following questions regarding the ownership of the property, and note any changes in the past year. Please include the names and dates of any transfers or claims made by others.

Does the landowner still own the entire parcel?	
Has there been any change in the land ownership in the past year?	
Has there been any division or partition of the	

property in the past year?	
Has an easement, lien, water right, or other right to use the property been granted in the past year?	
Has anyone asserted a claim (mineral right or other) to the property in the past year?	

**3. Management activities.**

Does this property have a management plan?	
What problems arose implementing the management plan? Should the management plan be changed or amended?	
Is the management plan effectively protecting the conservation values of the property? If not, please explain.	

**4. Natural Disturbances.**

Have there been ecological changes or natural disturbances in the past year? If yes, describe the specific changes and the location of the change.	
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**5. Adjacent Lands.**

<p>Are you aware of any planned or current activities on land adjacent to your property that may negatively impact the conservation values of the property?</p>	
<p>Are you aware of any new or planned or existing roads, trails, paths, or other features that pass close to your property? If so, please provide an explanation of what this feature is.</p>	
<p>Are there any disputes regarding the boundary of this property? Has anyone entered and used the property without your permission? Have there been any problems with neighbors or trespassers not indicated above? If yes, please provide details.</p>	

**6. Prohibited Uses.** The following uses are prohibited on the land covered by the conservation easement. If a section is marked “not applicable” by BPA, the prohibition is not applicable to your easement. Please note if there was any change in a prohibited use of the land in the past year.

Attribute	Easement Restriction	Change in the past year? If yes, please describe
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<b>Commercial activity</b>	Commercial or industrial activity is prohibited.	___Y	___N
<i>Observations:</i>			
<b>New residential activity</b>	New residential activity is prohibited.	___Y	___N
<i>Observations:</i>			
<b>Cutting vegetation</b>	No cutting of trees or vegetation, except as part of activities described in the Approved Management Plan or the manual removal of exotic species	___Y	___N
<i>Observations:</i>			
<b>Construction</b>	All construction, improvements and/or other man-made modifications such as buildings, structures, and parking lots are prohibited except those approved in writing by BPA.	___Y	___N
<i>Observations:</i>			
<b>Fences</b>	Fences are prohibited except for: 1. Temporary fences for the protection of trees or wildlife which provide for deer and elk movement 2. Fencing to control wildlife damage to sensitive vegetation is permitted provided that it is limited to small areas.	___Y	___N
<i>Observations:</i>			



<b>Roads</b>	Roads and parking lots are prohibited except for: 1. Maintenance of existing roads to allow restoration 2. Those approved by BPA	___Y	___N
<i>Observations:</i>			
<b>Topography</b>	Altering the general topography, including but not limited to flood control work is prohibited except as approved by BPA.	___Y	___N
<i>Observations:</i>			
<b>Water courses</b>	Natural water courses, lake shores, wetlands or other bodies may not be altered.	___Y	___N
<i>Observations:</i>			
<b>Off-road vehicles</b>	Except for vehicles used to facilitate the Approved Management Plan, motorized off-road vehicles may not be operated on the property. Bicycles may not be used either.	___Y	___N
<i>Observations:</i>			
<b>Land surface alteration</b>	Any mining, quarry, gravel extraction, grading, excavation, or alteration of the land surface is prohibited	___Y	___N
<i>Observations:</i>			
<b>Hazardous materials</b>	No release of hazardous substances such as oil, asbestos, fertilizers, herbicides, pesticides or nuclear material is allowed.	___Y	___N
<i>Observations:</i>			

<b>Public and river access</b>	Public access which damages the Property's Conservation Values or threatens such damage is prohibited. 1. Minimal public access, public access authorized in the Approved Management Plan, or public access approved by BPA by mail or email is permitted.	___Y	___N
<i>Observations:</i>			
<b>Dumping</b>	Waste, soil, trash, ashes, bio-solids and unsightly or offensive materials are not allowed and may not be accumulated.	___Y	___N
<i>Observations:</i>			
<b>Animals</b>	No domestic, exotic or farm animal of any type are allowed on the Property unless expressly permitted in writing by BPA and consisted with the restoration, preservation, or protection of the Conservation Values.	___Y	___N
<i>Observations:</i>			
<b>Billboards</b>	Billboards and signs are prohibited. Signs may be displayed to state: 2. The name and address of the Property 3. The owner's name 4. The area protected by this conservation easement 5. No trespassing signs and the like 6. Educational signs consistent with protection of the Conservation Values	___Y	___N
<i>Observations:</i>			

7. **Other**—Please use additional paper as needed.

Are there any easement conditions that you have questions about or that you would like to see readdressed?

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Are there any other things that BPA should know regarding this property?

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Is there any information or material that you need from BPA?

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If you have any questions about your easement or the information requested on this sheet, please contact Heidi Haserot, BPA Real Property Specialist, at 503-230-3115 or Dorie Welch at 503-230-5479.

Completed By: \_\_\_\_\_

Date: \_\_\_\_\_

**Thank you for your assistance.**

## Appendix XX

### Sample Land Use Agreement

In reply to:

BPA Case No.

Tract No.

Line Name:

AD NO# ; Structure #

Stationing:

#### LAND USE AGREEMENT

Bonneville Power Administration (BPA) hereby agrees to your use of BPA's conservation easement area for construction/installation, use, and maintenance of a \_\_\_\_\_.

The location of your use is partially within the \_\_\_\_\_ of Section \_\_\_\_\_, Township \_\_\_\_\_, Range \_\_\_\_\_, \_\_\_\_\_ Meridian, \_\_\_\_\_ County, State of \_\_\_\_\_, as shown on the attached segment of BPA Drawing No. \_\_\_\_\_, marked as Exhibit \_\_\_\_\_.

**You shall not make any changes or additions to your use of the easement without BPA's review and written approval. Any other uses on the easement must be applied for separately.**

Please note that BPA is not the owner of this property. If you are not the owner, you must obtain the owner(s) permission to use this property. There may also be other uses of the property that might be located within the same area as your project. This agreement is subject to those other rights.

This agreement is entered into with the express understanding that it is not assignable or transferable to other parties without the prior written consent of BPA. This agreement is revocable at will by BPA and does not modify, change, or otherwise alter the rights BPA acquired by Deed. BPA may terminate this agreement upon 30 days written notice.

The subject use of this easement area has been determined not to be a hazard to, or an interference with, BPA's present use of this easement for conservation and mitigation purposes. Accordingly, there is no present objection to such use. However, if BPA should determine at any time, that your use has become adversely affect the conservation values protected by the easement, you will be required to stop your use or remove such hazard or interference from the easement at no expense to BPA.

**BY ACCEPTING THIS LAND USE AGREEMENT YOU ARE AGREEING TO THE FOLLOWING CONDITIONS**

1. [Fill in conditions related to proposed use and conservation values on the easement. Samples follow.]
2. Any money's or rents collected as a result of grantees use of the easement will be deposited with \_\_\_\_\_, and applied towards the cost of funding the project O&M.
3. No additional structures of any kind shall be built within or on this BPA fee-owned site without BPA's written permission and an amendment to this LUA.
4. No commercial, industrial, manufacturing, or retail operation of any kind may take place at this BPA site.
5. No hunting of any kind will be allowed at this BPA site.
6. No accumulation of garbage, trash, junk, debris, machinery that does not run, brush or wood.
7. No livestock or pets allowed on the premises.
8. No discharge of any weapon on the premises, including but not limited to fire arms, air guns, or bows.
9. BPA premises (grounds, buildings and improvements) shall be maintained in good repair and in a safe, clean, and sanitary condition

**IN ADDITION, THE FOLLOWING IS BROUGHT TO YOUR ATTENTION**

You agree to assume risk of loss, damage, or injury which may result from your use of the easement area, except for such loss, damage, or injury for which BPA may be responsible under the provisions of the Federal Tort Claims Act, 62 Stat. 982, as amended. It is understood that any damage to BPA's property caused by or resulting from your use of the easement area may be repaired by BPA, and the actual cost of such repair shall be charged against and be paid by you.

Construction/installation, use, and maintenance of the \_\_\_\_\_ shall be at no cost to BPA.

BPA shall not be liable for damage to your property, facilities, or injury to persons that

might occur during maintenance, reconstruction, or future construction of BPA facilities as a result of your facilities being within the easement.

If you have any questions or concerns, please notify this BPA Realty Office. You may direct any communication to Bonneville Power Administration, [NAME], or telephone. **A copy of this agreement shall be physically located at the project during construction activities.**

**THIS LAND USE AGREEMENT BECOMES EFFECTIVE UPON THE SIGNATURE OF ALL PARTIES.**

**I HAVE READ, UNDERSTAND, AND CONCUR WITH THE TERMS OF THIS AGREEMENT:**

\_\_\_\_\_ Date

**I HAVE READ, UNDERSTAND, AND CONCUR WITH THE TERMS OF THIS AGREEMENT:**

\_\_\_\_\_ Date  
**Owners Name**

**THIS AGREEMENT IS HEREBY AUTHORIZED BY BONNEVILLE POWER ADMINISTRATION:**

\_\_\_\_\_ Date

## Appendix XXI

### U.S. DEPARTMENT OF ENERGY-BONNEVILLE POWER ADMINISTRATION PERMISSION TO ENTER PROPERTY

**Owner Name:**

Representatives of the Bonneville Power Administration (BPA) may enter my property identified below, for the purposes generally described.

Parcel ID	Section	Township	Range	Meridian	County	State
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I understand that:

BPA shall repair or pay for damage occurring by reason of this entry. Payment shall be made on the basis of an estimate approved by BPA and paid as soon as reasonably possible, but not later than six months from the date the damage occurred.

BPA representatives may enter the property, either by ground access or from the air, for the purposes listed below.

**RECONNAISSANCE:** During the preliminary project location process, personnel such as realty specialists, engineers, environmental specialists, and survey crews may enter the property to make site inspections, review access roads, establish and survey field control points, and/or place temporary aerial photography markers.

**RESOURCE ANALYSIS:** Environmental studies may identify locations where natural resources, such as plants and animals, are found and may also identify protective measures that BPA would take during the construction process if BPA decides to build a transmission line or substation. An archeologist or historian may inspect the proposed project area as part of the cultural resource analysis (see testing below). As a result of these studies, areas of significance may be selected for enhanced protection. Evaluation of historic structures may involve an inspection of these structures. You will be contacted before any structure inspections are made.

**SURVEY:** Surveyors will stake the proposed location, determine topography, and locate section/property corners and geographic features. Survey monuments may be set at project corners (substation only), proposed tower sites, and/or other necessary points. In cultivated areas, monuments will be buried to avoid interference with farming activity. Any cutting of brush or trees will be limited to the minimum width necessary to conduct the survey, and survey crews will attempt to restrict the width cleared to 5 feet. Trees up to 6 inches in diameter may be cut if necessary.

It may also be necessary to survey existing or proposed access roads to serve the project.

**TESTING:** For engineering purposes, it may be necessary to drill and excavate, at random intervals, to obtain earth samples from varying depths for soils analysis. There may also be testing for wetlands determination, or prehistoric archaeological evidence, both of which can involve auger holes (about 6 inches in diameter). All test holes and excavations will be refilled promptly after examination.

**APPRAISAL:** As part of the valuation analysis a Realty Specialist or licensed Appraiser may inspect the property. The information obtained from this inspection, together with an analysis of comparable properties recently sold in your community, will form the basis for the estimate of value. The Appraiser/Realty Specialist will appreciate being accompanied by you or your representative on this inspection, and every reasonable effort will be made to select a mutually convenient date.

**OTHER:** If applicable, please see attached explanation of additional purposes.

**CONTACT:** I would like BPA to contact me or my representative prior to entering my property Yes \_\_\_\_\_ No \_\_\_\_\_.

If Yes, please contact \_\_\_\_\_ at telephone number \_\_\_\_\_.

Special Instructions or Comments:

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Is there a Tenant: Yes \_\_\_\_\_ NO \_\_\_\_\_

If Yes, name \_\_\_\_\_

Phone number: \_\_\_\_\_

Are there now in the general area of the proposed project:

Structures or Improvements: Yes \_\_\_\_\_ No \_\_\_\_\_.

Personal Property: Yes \_\_\_\_\_ No \_\_\_\_\_

Describe: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**BPA Contact:**  
\_\_\_\_\_, BPA Realty Specialist

**Office No.:** \_\_\_\_\_  
**Toll Free:** \_\_\_\_\_

\_\_\_\_\_  
**Property Owner Signature**

\_\_\_\_\_  
**Date received by BPA**

\_\_\_\_\_  
Property Owner (Print Name)

\_\_\_\_\_  
Project Name

\_\_\_\_\_  
Address

\_\_\_\_\_  
BPA Tract No.

\_\_\_\_\_  
City State  
Zip  
Home Phone: \_\_\_\_\_

\_\_\_\_\_  
Cell Phone: \_\_\_\_\_  
E-Mail: \_\_\_\_\_

## Appendix XXII

### Sample Draft Bonneville Stewardship Funding Agreement

[Name of sponsor or property]

#### I. Purpose of the Agreement

The Bonneville Power Administration (“**BPA**”) has funded the acquisition by [SPONSOR] (“**Sponsor**”) of certain real property in \_\_\_\_\_ County, [State] (“**Property**”). BPA provided this funding to partially fulfill its fish and wildlife mitigation responsibilities under the Pacific Northwest Electric Power and Conservation Act, 16 U.S.C. § 839(b)(h)(10), and consistent with its obligations under the [Insert governing MOA and date]. In exchange, [Sponsor] granted the United States (acting by and through BPA) a conservation easement encumbering the Property (“**Conservation Easement**”). BPA and [Sponsor] are the Parties (“**Parties**”) to this agreement.

#### II. Property[/ies] Covered by this Agreement

1. [Property name] (BPA Tract ID .....

#### III. Consideration

1. BPA will make a one-time lump sum payment of \$\_\_\_\_\_ from which [Sponsor] will draw monies as needed to provide stewardship on the Property (the “**Stewardship Funding**”).
2. Upon delivery of the Stewardship Funding, BPA will have forever satisfied any and all obligations it may have to [Sponsor] or any other entity or under any law to fund the stewardship of the Property.
3. [Sponsor] will not request or support the requests of others for any additional funding from BPA for stewardship activities on the Property as those activities are described in section IV.2 below. This agreement does not, however, preclude [Sponsor] from seeking other funding from BPA or any other source to restore the Property, as provided in section IV.4 below, to improve the ecological conditions on them for native fish and wildlife. BPA has no obligation to provide additional funding for restoration.

#### **IV. Use of the Stewardship Funding**

1. BPA is providing the Stewardship Funding under this agreement for [Sponsor] to provide stewardship on the Property; that is, for land management and maintenance on the Property in a manner that preserves or enhances its conservation value. [Sponsor] must use the Stewardship Funding only in a manner that helps fulfill the terms of the Conservation Easement, legal obligations associated with land ownership not otherwise prohibited by this agreement, and any land management plan for the Property determined by BPA to be consistent with the purpose of the acquisition and the terms of the Conservation Easement.
2. [Sponsor] may expend the Stewardship Funding on land management and maintenance activities, including project management and oversight. BPA encourages [Sponsor] to use the funding for on-the-ground activities wherever possible to ensure protection, maintenance and enhancement of the Conservation Values identified in the Conservation Easement. Notwithstanding the foregoing, Stewardship Funding shall not be used for restoration activities as described in section IV.4, below. Any uncertainty may be referred to BPA for resolution.

Representative stewardship activities under this agreement include, but are not limited to:

- Maintain and defend Property boundaries and other legal property interests;
- Monitor and address surrounding land uses or activities that could adversely affect the conservation values on the Property;
- Maintain [Sponsor]'s realty files including current photos, maps, tax and ownership information;
- Update site management plans;
- Maintain roads, trails, gates, fences, locks and signage;
- Control and prevent unauthorized public access or use;
- Control and administer authorized access or use, such as for recreation;
- Prevent encroachment and mitigate risk of catastrophic wildfire;
- Inventory, map and evaluate habitat conditions;
- Outreach to neighbors, stakeholders, local governments and volunteers;
- Detect, map and treat non-native invasive species;
- Plan, conduct and monitor effects from prescribed fire;
  
- Vegetation management, such as planting, seeding, mowing and maintenance of past plantings; or
- Stewardship Fund reporting.

3. [Sponsor] is responsible for following applicable state and federal laws and obtaining any required permits when conducting stewardship activities. All activities completed with Stewardship Funding should be done using best management practices.
4. [Sponsor] shall not use Stewardship Funding for restoration activities. For purposes of this agreement, restoration differs from stewardship in that restoration is typically larger scale, often includes earthmoving activities or construction, and occurs only once or at most infrequently. Restoration activities include such things as removing dikes, creating islands, reshaping topography, and placing or removing riprap or pilings.
5. [Sponsor] shall not pay property taxes with Stewardship Funding.
6. [Sponsor]'s stewardship actions funded in whole or in part with Stewardship Funding is not considered an ongoing federal action. [Sponsor] shall not be required to get any pre-approval from BPA for activities which are carried out with the Stewardship Funding, other than approvals that may be otherwise required under the Conservation Easement or other agreement with BPA, and federal regulations shall not, by reason of the Stewardship Funding, apply to contracts issued by [Sponsor] for any work on the Property.

## **V. Stewardship Funding**

1. Upon execution of this agreement, BPA will wire the Stewardship Funding to [Sponsor]'s designated account.
2. *[This provision subject to change in order to reflect Sponsor's structure for accounting on individual properties]* Subject to the above, [Sponsor] may allocate the Stewardship Funding as it deems appropriate between: (1) a "spend-down" stewardship account for the Property, maintained centrally in the manner customary for such accounts for [Sponsor]; and (ii) an endowment account, from which the Property will receive a certain amount each year for application to the purposes of this agreement. [Sponsor] will maintain both kinds of accounts centrally at [Sponsor], with a separate subaccount for bookkeeping purposes for the Property, which will allow [Sponsor] to accurately track the Stewardship Funding and any other income from the Property.

3. In addition, [Sponsor] will deposit any net proceeds from any income generated from the Property through permitted activities (e.g., timber receipts, grazing lease fees, recreational or hunting fees, movie rights or royalties, sale of fixtures, etc.) in the stewardship account for the Property which is established in the manner described above. "Net proceeds" refers to proceeds remaining after necessary expenses related to the income-generating activity. Property taxes may be paid using income generated from the Property.
4. BPA and [Sponsor] may, by mutual written agreement, in addition to the property identified in in section II, above, agree to include under the terms of this agreement one or more additional properties where BPA has funded [Sponsor]'s purchase of the property(ies) to aid BPA in fulfilling its fish and wildlife protection, mitigation, and enhancement responsibilities under the Pacific Northwest Electric Power and Conservation Act, 16 U.S.C. § 839(b)(h)(10), or the Endangered Species Act, 16 U.S.C. § 1536. In that event, the terms of this Agreement shall apply to the funding BPA provides to [Sponsor] for the stewardship of the additional property(ies), and such additional property(ies) shall be included within the defined term "Property". The Parties intend that the Stewardship Funding shall be confined to the property for which it was originally awarded and that the term "Property" shall be construed to refer to such individual property, except as the context requires otherwise.

## **VI. Administrative Provisions**

1. [Sponsor] will provide to BPA an annual accounting of the use of the Stewardship Funding, beginning in calendar year 20\_\_ [*insert calendar year following acquisition*], documenting all expenditures made using the Stewardship Funding until the account is exhausted or the agreement expires as outlined in section VI.7, below. [Sponsor] will send the report to F&W Project Manager, KEWL/U/M-4, P.O. Box 3621, Portland, Oregon 97208-3621 unless otherwise directed by BPA. BPA may inspect [Sponsor]'s books for the stewardship account(s) at any time upon reasonable notice which shall be no less than five business days.
2. This agreement binds the Parties and their successors and assigns.
3. This agreement is meant to support [Sponsor]'s stewardship of the Property; however, this agreement does not amend or void any provision, or relieve [Sponsor] of any legal duties or restrictions, under the Conservation Easement or management plan. In the event of any conflict between the terms of this agreement and the terms of the Conservation Easement, the terms of the Conservation Easement shall control.

4. This agreement is a contract, and is separate and enforceable outside the terms of the Conservation Easement.
5. In the event there are disputes between the Parties relating to this agreement that are not resolved at the staff level, the staff of each Party will present the information and the nature of the dispute to its senior management staff for resolution. Should the Parties be unable to resolve the dispute at the senior staff level, the Parties agree to participate in mediation, using a mutually agreed upon mediator. The mediator will not render a decision, but will assist the disputing Parties in reaching a mutually satisfactory agreement.
6. In the event that [Sponsor] assigns or transfers the Property, [Sponsor] shall transfer the balance of the Stewardship Funding at the same time, including all principal, accrued interest, and other earnings, to the new owner of the property interest (or other entity approved by BPA), and [Sponsor] agrees to provide BPA a signed acknowledgement from the new owner that it understands the conditions for the use of the Stewardship Funding and will abide them. BPA will honor a reasonable, good faith calculation by [Sponsor] of the proper dollar amount to be transferred to the assignee of the Stewardship Funding.
7. The limitations and obligations that this Stewardship Funding Agreement imposes on [Sponsor] expire when either the Stewardship Funding has been fully expended or on September 30, 20\_\_*[30 years]*, whichever comes first.
8. Where this Agreement grants or requires BPA approval, unless provided otherwise, BPA shall complete its review and provide its decision within a reasonable time, typically within 30 business days after submission of a completed document from [Sponsor]. For amended or redrafted submissions, review should typically be within 15 business days. BPA shall not withhold its approval unreasonably.

**The United States Department of Energy, Bonneville Power Administration**

\_\_\_\_\_  
 F. Lorraine Bodi  
 Vice President, Environment, Fish and Wildlife

\_\_\_\_\_  
 Date

**SPONSOR**

\_\_\_\_\_

Name / Title

Date

## Appendix XXIII

### Survey Delivery Standards

The following standards are within the scope of typical survey work throughout the BPA service region, so following them will usually not increase project survey costs.

#### Survey Delivery Standards

- 1) Deliver the CAD drawing in any one of the following formats, in order of preference:
  - a. .dgn
  - b. .dwg
  - c. dxf
2. Use State Plane grid as the coordinate system of the CAD drawing.
  - a. Make sure the State Plane grid coordinates in the CAD drawing are referenced to the National Spatial Reference System (NSRS), currently NAD 83 (2011), or its successor, at a positional accuracy of one meter (1m).
3. Include a metadata statement in the CAD drawing with the following minimum information. An example of Washington SPCS, South Zone is as follows:
  - a. Units: USFT
  - b. Horizontal Datum: NAD 83(2011)
  - c. Vertical Datum: NAVD88 (Geoid12A)
  - d. State Plane Coordinate System: Washington SPCS, South Zone
  - e. Basis of Bearing: S89°46'22"W, 2635.32' between the southeast corner of Section 3 and the south quarter corner of Section 3, Township 9 North, Range 16 East.