

BONNEVILLE POWER ADMINISTRATION
ADMINISTRATOR'S RECORD OF DECISION
AND
RESPONSE TO COMMENTS
SOUTHERN IDAHO WILDLIFE MITIGATION
MEMORANDUM OF AGREEMENT
SEPTEMBER 2014

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I. INTRODUCTION

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

This Record of Decision (**ROD**) describes the backdrop that led to this Southern Idaho Wildlife Mitigation Memorandum of Agreement (**MOA**),¹ what the MOA contains, and how BPA provided for public review of the MOA and is responding to comments it received. This ROD also describes why BPA has decided to enter into the MOA and how entering into it complies with the Pacific Northwest Electric Power Planning and Conservation Act (**Northwest Power Act**). Finally, this ROD provides BPA's review and analysis of the MOA under the National Environmental Policy Act (**NEPA**).

The MOA is intended to permanently resolve half of the southern Idaho wildlife mitigation recommended by the Northwest Power and Conservation Council's (**Council**) and to do so in a manner consistent with the Council's Columbia River Basin Fish and Wildlife Program (**program**). The program specifically encourages such resolutions, as discussed below.

A. Background on BPA Wildlife Mitigation in Southern Idaho

BPA is obligated under the Northwest Power Act to protect, mitigate, and enhance fish and wildlife affected by the construction and operation of federal dams in the

¹ The terms "agreement" and "MOA" are interchangeable in this decision document.

Columbia River Basin from which BPA markets commercial power.² BPA's mitigation must be done in a manner consistent with the program. In southern Idaho there are four Federal Columbia River Power System (**FCRPS**) dams, constructed and operated by the Bureau of Reclamation (**Reclamation**) from which BPA markets commercial power: Minidoka, Palisades, Black Canyon, and Anderson Ranch (the **southern Idaho dams**). In addition, BPA pays the commercial power share of annual operational costs of Deadwood Dam, a Reclamation irrigation project that provides flow regulation for power production at Black Canyon Dam. The MOA would fully address all federal obligations to mitigate the effects on wildlife from the construction and operation of the four southern Idaho dams. In addition, the MOA would fully address all federal obligations to mitigate the operational effects of Deadwood Dam on wildlife and fish habitat.

Beginning in 1997, BPA entered into two programmatic mitigation agreements affecting southern Idaho, one with the Idaho Department of Fish and Game (**IDFG**) and the other with the Shoshone Bannock Tribes of the Fort Hall Indian Reservation. Those agreements outlined the process the entities would follow to protect habitat (typically through fee acquisition), manage and improve the habitat, and credit BPA's mitigation debt. In 2009 the Shoshone Paiute Tribes of the Duck Valley Indian Reservation entered a similar agreement with BPA. IDFG and the two tribes reached an agreement among themselves in 2010 and decided that IDFG would work with BPA to address half the construction and inundation wildlife mitigation owing in southern Idaho—which they call “the Idaho share” — and the two tribes would address the other half.³

Under the 1997 agreement IDFG used BPA funding to acquire and manage over 8,722 acres of habitat to mitigate for the southern Idaho dams. The new MOA will replace the 1997 agreement entirely by continuing to provide funding for existing mitigation site management as well as funding for additional new mitigation.

B. Overview of the MOA

The parties to the MOA are the State of Idaho and BPA. IDFG will lead MOA implementation for the state, but all state government offices and entities will be bound by the agreement's terms.⁴

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

³ MOA, Attachment 2.

⁴ MOA, III.C.1.

The MOA provides a comprehensive approach to mitigation by permanently resolving any rights, claims, or interests Idaho has in wildlife-related mitigation for the construction of the southern Idaho dams, the inundation resulting from them, and the effects of their operations on wildlife.⁵ In addition, the MOA covers the operational effects of Deadwood Dam on wildlife and fish habitat.⁶ Other legal responsibilities federal agencies have to mitigate for the southern Idaho dams under the Northwest Power Act and other statutes, such as the Fish and Wildlife Coordination Act, are also covered.⁷

Idaho will assume responsibility to mitigate half the effects of the southern Idaho dams, and half of the operational effects of Deadwood. The remaining mitigation remains available for the tribes or others to address.

To reach an agreement, the parties first identified the effects on wildlife from the southern Idaho dams using loss assessments done by the U.S. Fish and Wildlife Service and IDFG in the 1980s.⁸ The agencies reported acreage affected and also estimated habitat losses in terms of “habitat units.”⁹ The Council adopted the conclusions and incorporated the losses (and gains) into the program in 1989. While the Northwest Power Act calls on BPA to mitigate for wildlife and wildlife habitat, the program recommends mitigation for habitat only.¹⁰ Habitat is a proxy for wildlife, and appropriately so because population levels fluctuate due to natural and human-induced causes that BPA doesn’t control. Overtime, the technical and legal challenges presented by the continued use of the habitat unit (**HU**) metric led BPA to seek an agreement using acres.¹¹

The construction and inundation acreage figures used for the agreement are those identified in the loss assessments, minus the acres already funded by BPA as part of Idaho’s Southern Idaho Wildlife Mitigation Project (**project**). The parties agreed that construction of and inundation by the southern Idaho dams affected 33,290 acres, and

⁵ MOA, I.A.

⁶ MOA, I.A.

⁷ MOA, I.A.

⁸ U.S. Fish and Wildlife Service, *Wildlife Impact Assessment Palisades Project, Idaho* (1985); IDFG, *Wildlife Impact Assessment Anderson Ranch, Black Canyon, and Boise Diversion Projects, Idaho* (1986); IDFG, *Minidoka Dam Wildlife Impact Assessment* (1989).

⁹ See generally, P. Ashley, Columbia River Basin Fish and Wildlife Authority Habitat Evaluation Procedure Team Leader, February (2010) (overview of habitat units generally and the habitat evaluation procedure used to estimate them) available at <http://www.nwcouncil.org/fw/wac/wcf/>

¹⁰ Council, Columbia River Basin Fish and Wildlife Program at page 7 (2009).available at: <http://www.nwcouncil.org/fw/program/program-2009-amendments/>

¹¹ MOA, II.B.

that half of that was 16,645.¹² BPA has already funded Idaho to mitigate 8,722 acres, so there remain 7,923 acres to mitigate for construction and inundation. The acreage figure for operational losses—including those from Deadwood Dam—was estimated at 1,330 acres, with half being 665 acres.¹³ Thus “the Idaho share” of mitigation opportunity addressed in this MOA is 7,923 acres remaining for construction and inundation impacts plus 665 acres for operational impacts for a total of 8,588 acres of new mitigation that BPA will fund Idaho to secure and maintain.¹⁴ When fully implemented, counting pre-MOA and new acres to be mitigated, Idaho’s project will include at least 17,310 acres.

Idaho will follow well established principles, such as the IDFG Commission Land Acquisition Policy and the Idaho Comprehensive Wildlife Conservation Strategy, in selecting additional sites to mitigate under the project.¹⁵ The state will take an ecosystem approach in selecting, restoring, and managing both existing and new real property interests to enable significant benefits to fish, wildlife, and other resources of interest.¹⁶

C. BPA’s Funding Commitments

The parties structured the agreement to have three funds, each operating under distinct conditions and serving different purposes. Over ten years the funds will total just over \$40 million. BPA will provide \$22 million for Acquisition Funding, \$14 million for Stewardship Funding, and \$4 million for Administrative Funding. The funds are described below.

The Acquisition Funding

During the next 10 years BPA commits to providing Idaho \$22 million for Acquisition Funding to cover the costs Idaho incurs in mitigating and maintaining at least 8,588 acres of additional habitat in the project, either as fee or conservation easement acquisitions. BPA expects to provide all of this funding in the first six years of the agreement to accelerate and maximize the benefits, as illustrated in MOA **Attachment 3**.¹⁷

¹² MOA, II.C

¹³ MOA, II.C.2.

¹⁴ MOA, II.C.3.

¹⁵ MOA, II.D.1-2.

¹⁶ MOA, II.E.

¹⁷ MOA, II.F.1.

Idaho will achieve two tasks with the Acquisition Funding: protecting at least 8,588 additional acres as part of the project and providing permanent operation and maintenance funding for the additional acreage.¹⁸ As such the monies provided by BPA will procure current and future benefits to regional ratepayers well beyond the duration of this agreement. The intent is to fully recover the costs of these benefits in BPA's future rates.¹⁹

BPA will continue to follow U.S. Department of Justice real property acquisition policies in funding Idaho to protect additional habitat. Under the MOA, Idaho will develop for BPA most due diligence information needed for acquisitions of real property interests.²⁰ At closing, BPA will wire funds directly to escrow for the acquisitions. BPA will also wire Idaho an amount, agreed upon on a site-by-site basis, from the Acquisition Funding into the Stewardship Account, discussed below, to perpetually cover the operation and maintenance of the acreage being added to the project.²¹

Idaho, through IDFG, has a long history of securing and managing habitat for wildlife using federal dollars. To fulfill Idaho's commitment under the MOA, IDFG will continue to protect and manage habitat using its well-established habitat acquisition policy and rating process.²² Once Idaho secures a new property for the project, the MOA provides Administrative Funding, discussed below, for Idaho to draft a new management plan for the site or incorporate the site into an existing plan.

The MOA allows Idaho an additional five years, through FY 2029, as needed to expend the Acquisition Funding.²³ The funds will remain available until obligated. While the MOA allows for some flexibility in the funding stream for the Acquisition Funding,²⁴ the overall amount is assured and will not be reduced if Idaho protects 8,588 acres in fewer than 10 years or takes more than 10 years to spend the Acquisition Funding.²⁵

The Stewardship Funding

Unique among all the mitigation agreements BPA has entered in to, this MOA takes the stewardship concept, first developed in the Willamette Wildlife Agreement with

¹⁸ MOA, II.F.1.

¹⁹ MOA, II.F.1.c.

²⁰ MOA, II.D.2.

²¹ MOA, II.F.1.b.

²² MOA, II.D.

²³ MOA, II.F.9.

²⁴ MOA, II.F.7.

²⁵ MOA, II.G.

Oregon, and institutes stewardship for an entire project all at once. BPA will provide Idaho \$14,000,000 by December 31, 2014, to address stewardship of all project properties acquired under the 1997 IDFG MOA.²⁶ Funding for stewardship would be deposited directly into a Stewardship Account controlled by Idaho and used for the permanent protection of project properties.²⁷ The benefits of this funding accrues to current and future ratepayers beyond the current rate period, so BPA intends to fully recover the funds deposited for the Stewardship Funding in BPA's future rates.

Idaho will have its Endowment Fund Investment Board manage the Stewardship Funding, because the board already manages other large endowments, such as the school fund.²⁸ Idaho will track the Stewardship Account funds separately and report to BPA and the Council on the Stewardship Funding annually.²⁹ The IDFG Director will have sole discretion to determine the amount of the earnings to distribute from the fund.³⁰

Idaho's primary responsibility regarding the Stewardship Funding is to use it in a manner that preserves or enhances a project properties or group of properties' conservation values permanently.³¹ The MOA includes an extensive but non-exclusive list of typical stewardship activities Idaho will be undertaking with this fund.³² In addition to these activities, through FY 2024 Idaho may use the Stewardship Account for acquisitions of real property interests, but only after consulting with BPA and meeting all applicable environmental and federal due diligence requirements.³³ After 2024 Idaho may use the Stewardship Account to fund new acquisitions for the Southern Idaho Wildlife Mitigation Project without consulting BPA. Idaho may not use funds provided by BPA to pay taxes or payments in lieu of taxes.³⁴ And if Idaho makes any use of the funds provided by BPA for any purpose other than those specified in the MOA, BPA may cease making any further payments and demand custody and control of the Stewardship Account.³⁵

Upon complete delivery of the Stewardship Funding and funding for stewardship from Acquisition Funding to the Stewardship Account, BPA will have forever

²⁶ MOA, II.F.2.

²⁷ MOA, II.F.3.

²⁸ MOA, II.F.3.e.

²⁹ MOA, III.K.2.

³⁰ MOA, II.F.3.g.

³¹ MOA, II.F.3.i.

³² MOA, II.F.3.j.

³³ MOA, II.F.3.k.i.

³⁴ MOA, II.F.3.k.ii.

³⁵ MOA, II.F.3.k.iii.

satisfied any and all federal obligations to fund stewardship of the project properties.³⁶ Idaho agrees not to seek or support others seeking additional funding from BPA for stewardship or restoration for any project properties except as expressly allowed elsewhere in this MOA.³⁷

The Administrative Funding

From FY 2015 through FY 2024 BPA will provide \$400,000 annually to Idaho for the Administrative Funding to cover administrative expenses related to the project.³⁸ The annual inter-governmental contract administering the Administrative Funding will include only work elements for activities identified in **Attachment 6** to the MOA.³⁹ Those activities will include, among other things, finding and evaluating habitat protection opportunities; completing due diligence for new property acquisitions; accounting and reporting; drafting land management plans; and internal BPA expenses to support acquisitions.⁴⁰ Idaho may seek additional funding for administrative activities for up to 10 more years, through FY 2034, taking into account Idaho's future needs to administer the project.⁴¹ The parties would negotiate this continued funding by considering a base of \$400,000 annually plus inflation, minus costs and expenses that will no longer be incurred.

Additional Funding

The MOA includes three other exceptions to the prohibition on Idaho from seeking additional funds or BPA reducing the funding amounts.⁴²

- Federal law, the physical attributes, or the operating parameters of the southern Idaho dams or Deadwood Dam change substantially and significantly.
- *Force majeure* events.
- BPA agrees with the tribes to increase the amount of mitigation recognized for Deadwood Dam or the southern Idaho dams.⁴³

³⁶ MOA, II.F.3.n.

³⁷ MOA, II.F.3.n citing sections II.F.6 and III.C.3.

³⁸ MOA, II.F.4. *See also*, Attachment 1.

³⁹ MOA, II.F.4.

⁴⁰ MOA, II.F.5.

⁴¹ MOA, II.F.6.

⁴² MOA, III.C.3

⁴³ The parties' attorneys discussed this exception and agreed it could be triggered only if the amount of mitigation—that is, the number of acres, habitat units, etc.—was increased. Settling with a tribe with, for example, a different funding structure, term of agreement, or dollar per acre amount would not trigger this exception.

1. Budget, Fund, and Contract Management

Much like the Columbia River Accords and the Willamette Wildlife Agreement, the parties included budget and fund management provisions in the MOA. Annual budgets may fluctuate plus or minus 20 percent in relation to the budget commitments in the MOA to allow for shifting funds between years.⁴⁴ Beginning in FY 2019, BPA will increase the annual payment for Acquisition Funding and Administrative Funding by 2.5% each year for inflation.⁴⁵ To simplify contract management, BPA will consolidate the three annual contracts currently in place and issue a single new contract to IDFG for the Southern Idaho Wildlife Mitigation Project beginning October 1, 2014.⁴⁶

The parties intend to expend all funds provided under the MOA, except for the Stewardship Account, by the end of FY 2024. In the event funding remains the parties will extend the funding commitments through FY 2029, or provided Idaho has acquired at least 8,588 acres it may request BPA deposit the remaining funds into the Stewardship Account.⁴⁷ Idaho must deposit net proceeds earned from project properties into the Stewardship Account, but it may track them separately and use them on any project property for taxes and other costs incidental to ownership.⁴⁸

2. Additional Commitments

For its part, BPA will take reasonable steps to secure the funds promised and ensure it can fulfill its commitments as stated in the MOA.⁴⁹

Permanently Protecting Habitat

Idaho must permanently protect all habitat acquired through the MOA.⁵⁰ Property that Idaho acquires in fee will be protected by recording the MOA and a covenant running with the land in favor of the United States and enforceable by BPA.⁵¹ Where Idaho acquires an easement, it must include third party rights of enforcement for the United States, acting through BPA.

⁴⁴ MOA, II.F.7.

⁴⁵ MOA, II.F.8.

⁴⁶ MOA, III.H.

⁴⁷ MOA, II.F.9.

⁴⁸ MOA, II.F.10.

⁴⁹ MOA, III.A.

⁵⁰ MOA, III.B.

⁵¹ MOA, III.B.1; *see also* Attachment 4.

Idaho will hold properties acquired under the MOA in trust for the public and fish and wildlife.⁵² This does not preclude other uses of the acquired habitat, but such uses must be compatible with and not impair the wildlife mitigation purposes. Public recreational and educational use of habitat acquired under this MOA is an identified value, and is encouraged so long as it does not interfere with the purposes of wildlife mitigation.⁵³ Idaho will assume full responsibility for any real property interests it acquires and not seek any additional contributions from BPA for incidents of ownership that arise, such as taxes, assessments, hazardous waste or fire response, cultural or historic resource mitigation, or tort liability.⁵⁴

In the future, BPA may seek to construct, locate, operate maintain and access future transmission facilities within one or more project properties.⁵⁵ If it does so, the parties will negotiate the terms and conditions, but BPA will owe Idaho no additional consideration. BPA has a right to access all project properties.⁵⁶

The parties agreed to sunset the 1997 IDFG MOA and to replace it with this MOA. The existing project properties that Idaho owns in fee, shown in MOA **Attachment 1**, are covered by a recorded future interest called an executory interest. To ensure permanent protection for these properties, BPA will execute and record an extinguishment or amendment of its executory interests and Idaho will execute and record covenants to replace or amend the executory interests on these properties.⁵⁷

3. Term of the MOA

The MOA has no overarching term because Idaho has agreed to a perpetual obligation to protect and provide stewardship to wildlife habitat. In addition, the MOA anticipates that the parties may agree to continue annual Administrative Funding by BPA from FYs 2025-2034 to help Idaho ensure its effective administration of the project.⁵⁸

4. Reporting

The Council's program encourages BPA to enter long-term agreements that include mandatory reporting requirements. The MOA requires Idaho to report annually

⁵² MOA, III.B.2.

⁵³ MOA, III.B.3.

⁵⁴ MOA, III.F.

⁵⁵ MOA, III.G.

⁵⁶ MOA, III.B.4.

⁵⁷ MOA, III.D.

⁵⁸ MOA, II.F.6

though 2034 on its mitigation progress and use of the funds provided by BPA.⁵⁹ The parties selected a 20-year reporting period for several reasons.

1. Projects would generally be restored and stabilized such that stewardship costs would be reasonably predictable based on past experience.
2. After 20 years of experience with implementation and oversight by BPA and Council, challenges with implementation and reporting would likely be addressed.
3. Idaho retains the perpetual legal liability for maintaining the project, with or without a reporting duty.
4. BPA has an ongoing right to access the properties, so compliance can be monitored without reporting.
5. Idaho agreed to continue to participate in the Council's categorical and geographic reviews.⁶⁰
6. Idaho's open meeting laws allow the public to monitor the IDFG Commission's oversight of the project.⁶¹
7. Although not a stipulation of the agreement, the Idaho Endowment Fund Investment Board routinely prepares an annual report describing principal, withdrawals, and earnings/losses of each separate account in the Idaho Endowment Fund. This information is available on the board's website.⁶²

5. Dispute Resolution

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

D. Issues Affecting Tribes

This MOA is an outgrowth of discussions that began in the mid-2000s between BPA, IDFG, the Shoshone Bannock Tribe, and the Shoshone Paiute Tribe. Consequently, as soon as BPA reached an agreement in principle with Idaho in the first week of June 2014, BPA immediately began outreach with the two tribes and the Upper Snake River Tribes explaining the outline of the deal and offering to meet to discuss the deal and

⁵⁹ MOA, III.K.2.

⁶⁰ MOA, II.D.2.

⁶¹ Idaho Code §§ 67-2340 through 67-2347.

⁶² <http://efib.idaho.gov/reports.htm>

⁶³ MOA, IV.C.

any concerns raised by the tribes. BPA followed up by sending both tribes a summary of the agreement on June 13.

Prior to BPA's posting the draft MOA for public review on August 15, BPA shared a preliminary draft with the tribes. IDFG wildlife staff then discussed the agreement in Boise with tribal staff. On August 19, BPA and IDFG staff presented the draft agreement to the Council's Wildlife Advisory Committee in Spokane, Washington, where most of the wildlife department staff from state and tribal agencies throughout the region were represented.⁶⁴ BPA's Fish and Wildlife Division Director discussed the MOA with the tribes' representative at the Council meeting in Portland on September 9 and in Boise with tribal staff on September 12. This Record of Decision addresses the issues the tribes raised in those meetings and all the issues raised by the Shoshone Paiute Tribe in a comment letter dated September 15, 2014. The parties made every effort to inform the tribes of the proposed MOA in a timely manner and to appropriately reflect tribal interests in it.

The tribes' primary concern regards the precedent the MOA would have on their ability to continue working on southern Idaho wildlife mitigation with BPA.

The parties negotiated the new MOA so Idaho will address half of all the construction, inundation, and operational effects of the southern Idaho dams related to wildlife, and the operational effects of Deadwood Dam. This assumes the "split" of construction and inundation mitigation opportunity agreed to by Idaho and the tribes can be extended to include operational effects. The risk of that assumption, however, is BPA's. The MOA will not affect either tribe's ability to continue working with BPA to address the other half of construction and inundation effects, or to negotiate for work mitigating operational effects.⁶⁵ In particular, the MOA has no effect on BPA's pre-existing Columbia River Accord commitment to the Shoshone Bannock Tribes for up to \$16.55 million through 2018 for wildlife mitigation.

The MOA sets no legal precedent binding the Shoshone Bannock Tribe or the Shoshone Paiute Tribe. Questions of legal precedent ultimately need to be considered in the overall statutory context of BPA's mitigation responsibility. The Northwest Power Act creates a federal responsibility to fish and wildlife that BPA must fulfill.⁶⁶

⁶⁴ The PowerPoint presentation is available under the Wildlife Advisory Committee tab on the Council's website. http://www.nwcouncil.org/fw/wac/meetings/2014_0819/

⁶⁵ MOA, IV.G.

⁶⁶ 16 U.S.C. 839b(h)(10)(A).

The responsibility does not flow to any entity, state or tribe.⁶⁷ BPA's duty in this case is to mitigate the effects of the southern Idaho dams on fish and wildlife.

The Council's program guides this agreement as well as BPA's other mitigation efforts. Within that framework, BPA has the discretionary authority to decide how to implement the mitigation to address the wildlife losses from the federal dams in southern Idaho and whom to implement it with. BPA has chosen here to implement a half of the southern Idaho wildlife mitigation by working through an MOA with Idaho. The tribes' opportunities to continue working on wildlife mitigation are no different with or without the MOA.

Far from presenting obstacles for the tribes, BPA believes the MOA suggests creative approaches that the tribes can use to overcome the obstacles that thwarted their past attempts to reach a wildlife settlement with BPA.

- By using a principled crediting approach based on acres, BPA and Idaho have overcome the serious questions regarding use of the habitat evaluation procedure (HEP) that presented the largest obstacle to any long-term agreement.
- BPA pursued inclusion of operational effects, including those from Deadwood Dam, in part to create room for additional mitigation funding opportunities for the Shoshone Paiute Tribe. Otherwise, under the allocation agreed to between the state and tribes covering construction and inundation effects, the Shoshone Paiute Tribe could have little opportunity for additional habitat acquisitions.
- BPA and Idaho reaffirmed their belief and intent that the new MOA would have no legal precedent affecting the tribes.

E. Public Review and Response to Comments

BPA and Idaho took a number of voluntary steps to be open and transparent about the MOA. To that end, representatives of both entities met with the Council's Fish and Wildlife Committee, the full Council, the Council's Wildlife Advisory Committee, and the upper Snake River Indian tribes, and BPA met with its customers. In addition, BPA published the draft MOA and provided for a 30-day public comment period, from August 15 to September 15.

For two decades the Council has recommended that BPA fund the Southern Idaho Wildlife Mitigation Project.⁶⁸ Leading up to the agreement, the parties discussed the

⁶⁷ *Accord*, J. Shurts, Memorandum to Bill Booth and Tom Karier, Northwest Power and Conservation Council members (Aug. 29, 2014) (regarding nature of BPA's mitigation duty).

MOA with the Council on two occasions, once in August at the Fish and Wildlife Committee meeting and again in September at the meeting of the full Council.⁶⁹ As is its usual practice, the Council does not vote on or pre-approve BPA contracts, so no vote or approval was given for this MOA. BPA responded with Idaho to written questions from a Council member.⁷⁰ And Council member Bill Booth facilitated the negotiations.

BPA also received three written comments.⁷¹ The comments mostly covered issues raised already by the Council, the Wildlife Advisory Committee, or during one-on-one meetings with the tribes and customers. None of the comments covered issues that compelled either party to rethink its overall approach proposed in the draft MOA. Nevertheless, the parties made several changes to the final MOA based on comments received.

- Clarified Stewardship Funding management provisions.
- Clarified Idaho will hold new fee acquisitions in trust for the public and fish and wildlife.
- Noted Idaho's commitment to inform Reclamation of planned acquisitions.
- Added an exhibit of appropriate PISCES work elements to use in the annual contracts for the Administrative Funding.

The parties want to execute the agreement in FY 2014, which ends September 30, to take advantage of unspent capital funds BPA has available to implement the project. It is not certain that the amount of funding needed to establish the Stewardship Funding will remain uncommitted in FY 2015. Anticipating this quick turnaround after the comment period closed, the parties maintained regular contact and continued to meet with Council members, customers, wildlife managers, and of course, the tribes. In this way, the parties were able to analyze and respond to all of the issues raised during the comment period before signing the MOA.

The following sections identify and discuss the substantive issues raised during the comment period.

⁶⁸ See, e.g., Council, Recommendations (to BPA) for FY 2007-2009 Proposals available at: <http://www.nwcouncil.org/fw/reviews/2007/proposals/>.

⁶⁹ See the Council's agenda for its August 5 Fish and Wildlife Committee meeting at <http://www.nwcouncil.org/news/meetings/2014/08/>.

See the Council's agenda for its September 9, 2014, meeting at: <http://www.nwcouncil.org/news/meetings/2014/09/>.

⁷⁰ Responses are on file with BPA.

⁷¹ Comments from Charles Pace, the Shoshone Paiute Tribe, the Public Power Council, and the Idaho Conservation League are available to view at: <http://www.bpa.gov/applications/publiccomments/CommentList.aspx?ID=246>

Covenants Instead of Conservation Easements

BPA began working on wildlife mitigation in southern Idaho before the agency had much experience with conservation easements. Instead of easements, BPA and Idaho agreed in 1997 to use executory interests, a future interest in real property which relied on HUs as a triggering metric. If, for example, the HUs on a site dropped 20 percent, then BPA's future interest would vest. Experience has unfortunately shown HUs are not a dependable metric because they are subject to subjective assumptions regarding species and model selection, and habitat choice and delineation, thus leaving the HUs impossible to verify. HUs are therefore inappropriate for a benchmark to trigger a future interest or enforcement action on a mitigation property.⁷² Despite these flaws in the executory interests, Idaho had no obligation under the 1997 IDFG MOA to replace them at all, much less with a conservation easement.

With the new MOA, BPA could not persuade Idaho to switch to conservation easements. Instead, the parties agreed to use covenants to ensure new fee acquisitions were permanently protected for wildlife, and to include a third-party right of enforcement for the United States, on behalf of BPA, to enforce any conservation easements Idaho secures as part of the project. In addition, for existing properties in the project with executory interests, under the new MOA Idaho agreed to replace the executory interests with recorded covenants. BPA believed it was better to protect all fee-owned project properties—existing properties as well as new acquisitions—with a covenant than to leave the inadequate executory interests on the deeds of existing properties.

In addition, BPA found considerable value in that IDFG's mission as defined by statute commits it to managing project properties for wildlife. All proposed new acquisitions will be vetted publicly before the IDFG Commission. And IDFG's wildlife habitat protection programs are very popular, so they receive considerable public scrutiny. These factors support BPA's view that the conversion of the old executory interests to new covenants and the use of covenants and third-party enforcement rights going forward combine to provide secure, permanent protection of project properties.

⁷² See generally, P. Ashley (Regional HEP Team Lead), Habitat Unit Stacking White Paper (Feb. 19, 2008) on file with BPA and referenced in the 2009 Program at page 21, note 6.

Another comment was that the draft MOA does not have a template conservation easement for Idaho to use for easement acquisitions. When acquiring a conservation easement under the MOA, Idaho will continue to work through BPA and the federal real property acquisition processes and policies that BPA follows.⁷³ BPA's internal guidance covering real property acquisitions for the fish and wildlife program, the *Lands Handbook*, has a template easement.⁷⁴ While Idaho is not required to use a particular conservation easement template, in doing its due diligence BPA will review every easement submitted by Idaho to ensure adequate habitat protection and compliance with the terms of the MOA. In addition, the MOA requires Idaho to include in every easement a third party right for the United States to enforce it on behalf of BPA. BPA believes the terms of the MOA will allow it to ensure any easement funded will adequately protect wildlife habitat.

Operational Losses

In the Council's 2009 program a primary wildlife strategy is to "[c]omplete the current mitigation program for construction and inundation losses and include wildlife mitigation for all operational losses as an integrated part of habitat protection and restoration."⁷⁵ The program also recommends guidelines for negotiated wildlife mitigation agreements: "Whenever possible, wildlife mitigation should take place through long-term agreements that have clear objectives, a plan for action over time, a committed level of funding that provides a substantial likelihood of achieving and sustaining the stated wildlife mitigation objectives, and provisions for effective implementation with periodic monitoring and evaluation."⁷⁶ The Council noted that an acceptable "measureable objective" includes acres.⁷⁷

For the southern Idaho dams, the parties negotiated the operational loss portion of the agreement based on several things.

- Field observations of IDFG staff and their professional judgment of the significance of operational impacts of the projects on wildlife indicated very little adverse effects on habitat from dam operations.
- Understanding that the uncertainties associated with any attempt to study and quantify actual operational losses would involve numerous subjective

⁷³ MOA, I.I.D.2.

⁷⁴ The handbook provides internal guidance to BPA employees who work on Fish and Wildlife Program projects involving interests in real property. The handbook and template easement are available from BPA.

⁷⁵ Council, Program at page 20.

⁷⁶ Council, Program at page 21.

⁷⁷ Council, Program at page 21.

- assumptions and variables, such as a starting point for considering effects, metrics to monitor, and monitoring tools.
- The shared interest in expeditiously devoting people, time, and dollar resources to on-the-ground mitigation that could immediately benefit wildlife instead of the disputes and differences that are often associated with operational loss assessment processes.

BPA in particular found it important to address operational impacts to make the agreement comprehensive and fully address all outstanding federal wildlife mitigation responsibilities in southern Idaho. And because the Willamette Wildlife Agreement was the first and only other agreement to include operational losses, the parties also compared the ratio of inundated acres to operational losses use in Oregon and ultimately used a similar proportion for southern Idaho.

Irreconcilable Differences over the Habitat Evaluation Procedure

The Council's Wildlife Crediting Forum's final report highlighted the problems with trying to use HEP in southern Idaho.

HEP reports entered into PISCES show that many HEPs, even recent ones, do not use matrixes with habitats and species applicable to the mitigation sites being evaluated, or the HEPs use species models or model inputs that do not reflect on-the-ground conditions. There are some questions about HEP reports and analysis that may need to be reexamined. [There are] [d]ifference[s] of opinion on the applicability of the models used in this area.⁷⁸

The Forum also documented how southern Idaho wildlife mitigation efforts lagged behind most other areas of the Columbia River Basin.⁷⁹ The Forum's report identified the issues and concerns that prevented BPA and wildlife managers from reaching agreement and accomplishing more in southern Idaho.

- The Council's inclusion of Deadwood Dam construction and inundation impacts as an FCRPS mitigation responsibility.
- The Council's 2:1 crediting recommendation.
- Reliance on HEP and the resultant HU reporting when each manager used different species models, inputs, and matrixes.⁸⁰

⁷⁸ Wildlife Crediting Forum, *Report on Forum Deliberations*, Appendix G, at page 19 (Jan. 2010-May 2011). Available at <http://www.nwcouncil.org/fw/wac/wcf/>

⁷⁹ Forum, *Report*, Appendix G, at page 19.

⁸⁰ See, e.g., Regional HEP Team, *Krueger 2008 Follow-up HEP Report (IDFG)* at 4, 10 (Mar. 2014).

In addition, the 2009 program includes totals for species gains from inundation, but does not specify the role of these gains in mitigation crediting. For these reasons, BPA was uncomfortable attempting to reach agreement using HUs. Instead, the parties looked to the example of the Willamette Wildlife Agreement and used acres based on inundated acres documented in the loss assessments.

Deadwood Dam Disagreements

Not long after the southern Idaho dam wildlife loss assessments were submitted to the Council in the 1980s, BPA and the Council began discussing whether Deadwood Dam construction and inundation impacts were a FCRPS responsibility. By 1995 each entity established a firm and final position: The Council said mitigate Deadwood, BPA said no. To aid negotiations with the tribes and Idaho, BPA legal staff prepared a memorandum in 2009 reexamining the arguments.⁸¹ The MOA moves beyond that 20-year stalemate by actively addressing Deadwood's operational effects that BPA readily acknowledges as a ratepayer responsibility.

Crediting Ratio Concerns

A perennial question arises whenever BPA proposes a long-term wildlife agreement: How can the agreement be "consistent with the program" when the Council says to do mitigation at a 2:1 mitigation-to-loss ratio but the agreement uses a 1:1 ratio? The 1997 IDFG MOA, as well as the 1997 MOA with the Shoshone Bannock Tribe and the 2009 MOA with the Shoshone Paiute Tribe, all agree to use a 1:1 crediting ratio in southern Idaho.⁸² These agreements reflect BPA's long-standing final decision that the 2:1 ratio is inappropriate, documented in a letter to the Council in 2002.⁸³

Another concern raised during the public comment period is that Idaho should not plan on taking credit for 100 percent of a new mitigation project if it partners with another entity to purchase a property and only a small percent of the purchase price

⁸¹ BPA shared the memorandum with IDFG and the tribes in 2009, but received no new information or analysis in response.

⁸² Idaho confirmed its commitment to 1:1 crediting in 2005 by saying, "Idaho understands this means one credit for each habitat unit acquired or improved under the agreements...." Letter from S. Huffaker, IDFG Director, to T. Lamb, BPA Vice President Environment, Fish and Wildlife (Mar. 24, 2004). The Shoshone Bannock Tribes sent a nearly identical letter in 2007. Letter from A. Coby, Chair-Fort Hall Business Council, to G. Delwiche, BPA Vice President Environment, Fish and Wildlife (Apr. 10, 2007). The Shoshone Paiute Tribe's MOA recognizes "one credit for each HU acquired...." 2009 MOA, section V.A.2.

⁸³ Letter from Stephen Wright, BPA Administrator, to Larry Cassidy, Council Chairman (regarding wildlife crediting) (March 2002) available at: <http://efw.bpa.gov/IntegratedFWP/policyframework.aspx>

comes from BPA. If the state completes a number of mitigation actions using just 25 percent of the cost, that leaves more money for more projects and more acreage is protected for wildlife. BPA wants the state to be creative and succeed in fulfilling its commitments under the MOA. BPA is not worried that Idaho will somehow pad the acreage claimed from cost-shared projects, because the funding under the MOA is available only for mitigation of southern Idaho wildlife; all the funding will be spent on that purpose. Tracking the number of acres protected is a common, simply understood metric to measure work done; it's not meant to stifle the state's opportunities for partnerships that creatively address the mitigation goals of the MOA and the Council's program.

Another concern raised is that Idaho may be able to improperly inflate the amount of acreage mitigated under the project by taking credit for 100 percent of a cost-shared project in which it contributes only a fraction of the costs. The state could then claim to have mitigated 8,588 acres and request that BPA deposit the remaining Acquisition Funding balance into the Stewardship Funding where the state will ultimately have greater discretion in how and when to use the money. Depending on the cost-share partner, some will themselves seek credit and prevent double counting or counting in excess of Idaho's contribution. In addition, to ensure that Idaho is on track to meet its obligation to mitigate at least 8,588 additional acres and expend the Acquisition Funding on appropriate mitigation during the first six years of the agreement, as planned,⁸⁴ the parties will meet annually to discuss MOA implementation.⁸⁵ BPA can use this opportunity to address crediting concerns raised by the public or other resource managers.

Using an Acres Metric

The Council's Wildlife Crediting Forum, which met from 2010 through 2011, documented the ways in which HEP could not be relied upon to provide objective, repeatable documentation of either the quality or quantity of the habitat on a mitigation site.⁸⁶ The ISRP has repeatedly advised that the program limit the use of HEP to being an accounting tool for crediting.⁸⁷ HEP now stands as more of an obstacle than a tool to resolving long-running disagreements about BPA's Northwest Power Act mitigation responsibilities and crediting. Despite these concerns, the

⁸⁴ See MOA, Attachment 1.

⁸⁵ MOA, III.K.3.

⁸⁶ See, Wildlife Crediting Forum, [Final] Report on Forum Deliberations January 2010—May 2011. Available at: <http://www.nwcouncil.org/fw/wac/wcf/>

⁸⁷ See, ISRP, *Programmatic Wildlife Issues* at page 5 (Aug. 29, 2008).

parties initially considered how to reach agreement using HUs but couldn't. In order to proceed, another metric had to be used.

A concern has been raised that using acres could result in over-mitigating some habitats and under-mitigating others. HEP did not solve this problem either, because one of the adjustments regional wildlife managers made to HEP was to assume that "an HU is an HU" — that is, a lost muskrat HU can be mitigated with a mule deer HU. This came about because the wildlife managers had their own priorities for where and how they wanted to mitigate; they did not want to be tied to the species and habitats documented in the loss assessments for each dam.⁸⁸ BPA did not object, but it insisted all habitat funded by ratepayers must count against the mitigation debt.⁸⁹ Hence, an HU became an HU. The MOA allows Idaho to continue using its discretion to determine what habitats to mitigate, the only difference is that now "an acre is an acre."

Adequacy of Funding Levels

Sizing the Acquisition Funding

The parties considered a number of factors in sizing the Acquisition Funding. The parties settled on an average value of \$2,562 per acre for new acquisitions under the MOA after considering several factors. Historically acquisitions in southern Idaho cost \$1,658 per acre. During the last three years six parcels were acquired with prices ranging from \$1,901 to \$6,011 per acre. The portion needed for protecting the additional acreage is based on current real estate market prices; the idea that protection can be accomplished with conservation easements at a lower cost than acquiring fee title; and IDFG's increasing partnerships with local land trusts.⁹⁰

The portion of Acquisition Funding dollars needed to set aside in the Stewardship Funding to operate and maintain each new property was estimated considering efficiencies arising from IDFG controlling long-term operation and maintenance funding programmatically for southern Idaho; historic trust fund growth rates; past

⁸⁸ See, e.g., P. Ashley, *Columbia River Wildlife Mitigation Habitat Evaluation Procedure* (Feb. 2010) (explaining how under the Council's Program wildlife managers choose species and habitats to mitigate based on what they want (equal compensation mitigation model) not based on what was actually lost when a dam was built (in-kind model)). Available at: <http://www.nwcouncil.org/fw/wac/wcf/>

⁸⁹ See generally; BPA, *Wildlife Crediting Policy* (Mar. 5, 2002). Available at: <http://efw.bpa.gov/IntegratedFWP/policyframework.aspx> See also, BPA, *BPA's Pisces Wildlife Crediting Ledger* (Feb. 17, 2010). Available at: <http://www.nwcouncil.org/fw/wac/wcf/>

⁹⁰ BPA has investigated two conservation easement opportunities in southern Idaho that would have provided significant wildlife habitat benefits at much less than fee title costs.

experience with the Dworshak Trust Fund; and historic costs on Southern Idaho Wildlife Mitigation Project properties. Adding in the time span and flexibilities the MOA provides for Idaho to fulfill its obligations, the parties believe the agreement reasonably balances habitat protection needs, risks, and costs.

Sizing the Stewardship Funding

To establish a starting point for the Stewardship Funding the parties first examined current operation and maintenance costs for project properties—budgeted in recent years at \$42 per acre. Idaho believed that amount was low because some necessary work was either being postponed or funded through other sources. In addition, the parties considered per acre operation and maintenance funding elsewhere in the basin. Working with this information, and factoring in the risk Idaho was assuming by taking a one-time payment for stewardship/operation and maintenance, the parties agreed on roughly \$56 per acre to operate and maintain existing project properties.

The parties then considered the range of estimated returns on investment of the Idaho Endowment Fund Investment Board, where the monies will be invested and managed; inflation; fund management fees; and normal market fluctuations. The parties concluded that \$14 million provides a reasonable amount of funding to ensure Idaho can meet the operation and maintenance needs of the project indefinitely. Idaho bears the full risk of the adequacy of the funding levels throughout the agreement. Once the parties execute the MOA, as long as BPA fulfills its funding commitments it will have forever fulfilled half the mitigation for the southern Idaho dams.

Sizing the Administrative Funding

The parties sized the Administrative Funding by first considering the recent history of BPA funding to IDFG for administering, operating, and maintaining the Southern Idaho Wildlife Mitigation Project. Over the last few years, the start-of-year budget for the project averaged around \$460,000 per year. Examining IDFG's recent annual contracts, BPA found approximately 50% of the budget was going towards work that related to operation and maintenance of existing project properties. The MOA includes Stewardship Funding to cover the operation and maintenance of existing properties beginning in FY 2015, so those activities will no longer be covered by the annual contract. The parties then estimated the annual costs associated with the work that remains -- things like routine project administration, pre-acquisition activities, reporting, site stabilization and restoration of new acquisitions, planning, and related costs (see Attachment 6 of the MOA for a detailed list of the work that will be covered by the Administrative Funding). By providing \$400,000 annually for 10 years, with

provisions to potentially extend the funding an additional 10 years, BPA reasonably protected both ratepayers and southern Idaho wildlife.

BPA's Capacity to Fund other Agreements

BPA currently has the budget capacity and rate case coverage to meet all of its commitments in the MOA through FY 2015. No other project or sponsor budget will be reduced or eliminated for BPA to honor its commitments under the MOA. The funds committed to the Shoshone Bannock Tribes under its Accord for southern Idaho wildlife mitigation, for example, are unaffected by the MOA. BPA will continue to budget for these commitments and include them in its rates until they are fulfilled.

Members of the Council's Wildlife Advisory Committee asked how BPA expects to fund other settlement-like agreements if this MOA provides a model for reaching similar agreements. BPA will address each future agreement on its merits as the terms become apparent. Even with the 2010 Willamette Wildlife Agreement as a model, this MOA took over four years to negotiate. Experience suggests that BPA will not be flooded with opportunities to agree on outstanding wildlife mitigation matters, so there should be ample time to set rates and make room in budgets for future agreements. In addition, BPA is currently meeting many of the same mitigation duties on an annual basis as would be resolved in a future long-term agreement, so there will typically be some existing budgeting capacity to start working with.

Idaho Conservation League Comments

The Idaho Conservation League (ICL) provided comments that largely mirror and support the comments from the Shoshone Paiute Tribe. The conservation group raised several other issues as well, that are discussed below.

- *ICL expressed concern the MOA would enable "federal-to-state land transfer" for mitigation purposes. The MOA neither contemplates nor facilitates such transfers.⁹¹*
- *ICL suggested the MOA lacks provisions to address reservoir level fluctuations that affect wildlife habitat. The purpose of the MOA is to mitigate for construction, inundation, and operational impacts to wildlife from the southern Idaho dams and the operational impacts on fish and wildlife habitat from Deadwood Dam.*

⁹¹ Incidentally, the Council has prioritized wildlife mitigation on publicly-owned land over acquisition of private land. See, Council, Wildlife Mitigation Rule and Response to Comments at page 5 (Nov. 21, 1989).

- *ICL indicated the MOA should “live up to the standard” of the Willamette Wildlife Agreement.* Each agreement is unique, and the Willamette and southern Idaho differ significantly. Unlike Oregon, Idaho is not establishing a new mitigation program with numerous non-governmental and tribal partners; many of Idaho’s new projects will likely expand existing wildlife management areas; and a core purpose of the Willamette agreement was to address fish species listed for protection under the Endangered Species Act and aid BPA’s compliance with two biological opinions. The differences in the agreements are appropriate given the circumstances.
- *ICL raised the absence of mitigation for Federal Columbia River Transmission System development and operation in southern Idaho.* The Council dropped transmission impacts from the program in 1989. BPA addresses transmission system development and operational impacts on wildlife outside the program, so they are not appropriate for the MOA.⁹²

II. WHY BPA HAS DECIDED TO ENTER INTO THE MOA

A. Fulfilling BPA’s Mission

BPA’s mission includes providing mitigation of the FCRPS impacts on fish and wildlife, and providing an adequate, efficient, economical, and reliable power supply discussed below.⁹³ Although not mutually exclusive, achieving this mission requires BPA to balance the competing interests and requirements for emission-free and economically valuable hydropower produced by the FCRPS, and for the protection of the fish and wildlife affected by that hydropower production.

Providing for an adequate, efficient, economical and reliable power supply is one of the purposes of the Northwest Power Act.⁹⁴ BPA fulfills this purpose in many ways: it seeks to keep rates as low as possible given sound business principles, and manages the power aspects of the FCRPS to meet reliability standards and the other purposes of the system.

BPA’s decision to sign the MOA helps fulfill this statutory purpose because the MOA provides greater certainty of rate and borrowing needs by establishing long-term

⁹² See also, L. Bodi, BPA Vice President Environment, Fish and Wildlife, to Bill Bradbury, Council Chair, at page 19 (comments on recommendations for program amendments calling for transmission mitigation) (Nov. 20, 2013) <http://www.nwcouncil.org/fw/program/2013amend/comments>

⁹³ See “BPA Mission,” part of BPA’s Strategic Objectives 2010-2016 (July 7, 2009), available at http://www.bpa.gov/corporate/about_BPA/StratDocs/Strategic_Objectives_Paper_2010-2016.pdf.

⁹⁴ 16 U.S.C. § 839(2).

funding commitments that can be managed prospectively. Knowing the obligation and expectations will help provide cost and rate stability and certainty. The resolution achieved here ends many of the decades-old, time-consuming, and costly arguments over the federal wildlife mitigation responsibility for the southern Idaho dams and Deadwood Dam. It hedges against future uncertainty in long-term stewardship costs. And it incentivizes innovative, cost-effective approaches to protecting, mitigating, and enhancing wildlife and wildlife habitat affected by these dams. BPA believes it is sound business and in the interest of both customers and wildlife to take the convergence of opportunities presented here—a willing and reasonable partner in Idaho, a window of capital available immediately for major acquisitions, and a shared desire for resolution—to permanently settle half of the southern Idaho wildlife mitigation today.

B. Consistency with the Program

The Council has outlined the elements long-term agreements should achieve to demonstrate consistency the program.⁹⁵ The MOA is consistent with the program because it provides for half the mitigation for the southern Idaho dams and does so following the Council’s guidance for long-term agreements.

- *Measureable objectives, including acres of habitat types and number of habitat units by species to be acquired*
The MOA uses acres for a measureable objective in an effort to resolve specific technical issues associated with species-habitat stacking, proper crediting of past wildlife mitigation, crediting ratios, and other disagreements concerning the original loss assessments.
- *Consistency with the policies and objectives of the strategies in the 2009 Program, including Table C-4 (Estimated Losses and Gains)*
Implementing the MOA helps meet the objectives and strategies in the program by permanently completing half the mitigation called for in the program to address construction, inundation, and operation of the southern Idaho dams.
- *Adherence to open public process*
The parties adhered to an open public process by consulting or conferring with the Bureau of Reclamation, the Council, Wildlife Advisory Committee, BPA customers, and the tribes in addition to posting the draft MOA and taking public comment for 30 days. Idaho’s project selection process for use of MOA funds will be public working through the Idaho Fish and Game Commission.

⁹⁵ Council, Program at page 21.

- *Protection of riparian habitat benefitting both fish and wildlife*
The MOA embraces the habitat-based ecosystem approach to mitigation by reaffirming Idaho’s commitment to address wildlife habitat losses in southern Idaho in a manner that also protects and improves fish habitat.⁹⁶
- *Incentives to ensure effective implementation with periodic monitoring and evaluation or a periodic audit*
Idaho will report annually so the Council and BPA can review the effectiveness of MOA implementation. Specifically, Idaho will report on expenditures from the Stewardship Funding through 2034. In addition, for as long as it receives annual administrative funding from BPA, Idaho will prepare an annual report for BPA and the Council for mitigation funded through the MOA and track the project using PISCES.
- *Provisions for long-term maintenance*
Long-term operation and maintenance, called stewardship, is covered for both new projects and those already existing when the MOA is executed. For new projects, the parties will move an agreed upon amount of funds from the Acquisition Funding to the Stewardship Funding. For existing projects, BPA will provide \$14 million shortly after executing the agreement.
- *Sufficient funding to achieve the objectives*
BPA has committed to making funding available as provided in MOA Attachment 3. With the upfront Stewardship Funding for existing properties and the flexibility for protecting additional acreage, this substantial financial commitment over the life of agreement is sufficient to address the federal responsibility for wildlife affected by the southern Idaho dams.

C. Compliance with the Northwest Power Act

Under section 4(h)(10)(A) of the Northwest Power Act, BPA must use the Bonneville Fund and BPA’s other authorities to protect, mitigate, and enhance fish and wildlife to the extent affected by the development and operation of the federal dams in the Columbia River basin from which BPA markets commercial power.⁹⁷ The agreement ensures that wildlife in southern Idaho will be mitigated in a cost-effective, expeditious manner by a state and agency with considerable expertise and experience in managing wildlife habitat. Idaho will use the funding under the MOA to permanently protect and provide stewardship for at least 17,310 acres. In exchange for BPA fulfilling its commitments under the MOA, Idaho agrees BPA will have permanently satisfied and resolved any rights, claims, or interests Idaho has in

⁹⁶ MOA, II.D.1.

⁹⁷ 16 U.S.C. § 839b(h)(10)(A).

wildlife-related mitigation for the construction, inundation, and operation of southern Idaho dams, and wildlife-or fish-related mitigation related to the operational impacts of Deadwood Dam, no matter what metric is used to tally the debt and credit.⁹⁸ The MOA squarely addresses half the impacts of the southern Idaho dams on wildlife. Combined with BPA’s \$16 million commitment to the Shoshone Bannock Tribe through 2018 under the Columbia River Fish Accords, the MOA takes the part of the region most behind in wildlife mitigation and sets it on par with the rest of the basin.

D. Authority to Enter into the MOA

BPA’s authority and ability to enter into this MOA is provided by federal statutes. Since BPA’s inception, Congress has afforded the BPA Administrator broad discretion to enter into “such contracts, agreements, and arrangements . . . upon such terms and conditions and in such manner as he may deem necessary” to fulfill BPA’s statutory purposes.⁹⁹ This includes the express authority to make payments from the Bonneville Fund to implement BPA’s legal responsibilities under the Northwest Power Act.¹⁰⁰ BPA is imbued with considerable flexibility and discretion when entering into arrangements such as this MOA, provided that BPA uses that flexibility and discretion to fulfill one or more of its statutory responsibilities.

III. NATIONAL ENVIRONMENTAL POLICY ACT ANALYSIS

Under NEPA,¹⁰¹ BPA has assessed the potential for environmental effects related to entering into the MOA. BPA has reviewed its Fish and Wildlife Implementation Plan Environmental Impact Statement (**FWIP EIS**)¹⁰² and the Fish and Wildlife Implementation Plan Record of Decision (**FWIP ROD**)¹⁰³ to determine if BPA’s participation in the agreement falls within the scope of the FWIP EIS and ROD. As discussed below, BPA has determined that the decision to enter into the MOA is adequately covered within the scope of the FWIP EIS and the Preferred Alternative (**PA 2002**) Policy Direction that was adopted by BPA in the FWIP ROD. Entering into this MOA would not result in significantly different environmental effects from those examined in the FWIP EIS. BPA therefore has decided to tier its decision under NEPA for the MOA to the FWIP EIS and ROD.

⁹⁸ MOA, III.C.

⁹⁹ 16 U.S.C. § 832a(f).

¹⁰⁰ 16 U.S.C. §§ 838i(b), 838i(b)(12).

¹⁰¹ 42 U.S.C. § 4321, *et seq.*

¹⁰² FWIP EIS available at http://efw.bpa.gov/environmental_services/Document_Library/Implementation_Plan/.

¹⁰³ http://efw.bpa.gov/environmental_services/Document_Library/Implementation_Plan/RODforEIS0312.pdf

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

BPA developed the FWIP EIS and ROD to establish a comprehensive and consistent policy to guide the implementation and funding of BPA's fish and wildlife mitigation and recovery efforts. The FWIP EIS supports a number of decisions related to these efforts, including decisions related to funding fish and wildlife mitigation and recovery efforts; funding BPA's share of the Council's program; funding fish and wildlife research, monitoring, and evaluation; entering into regional funding agreements; and funding habitat acquisition and improvement activities.¹⁰⁴

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

The analysis in the FWIP EIS compares the potential environmental impacts for the possible range of implementing actions for fish and wildlife mitigation and recovery under each Policy Direction with the Status Quo. By considering the numerous potential fish and wildlife actions in the region, the FWIP EIS provides a cumulative assessment of potential environmental impacts from BPA's funding and implementation of these actions. The FWIP EIS also collects and sorts the many and varied proposed and on-going actions for fish and wildlife mitigation and recovery in the region.¹⁰⁵ These actions, referred to as Sample Implementation Actions, are organized in the FWIP EIS in tables for each Policy Direction alternative. These actions are representative of the types of actions that are consistent with the various alternatives.

The FWIP EIS also incorporates by reference BPA's Wildlife Mitigation Program EIS¹⁰⁶ and Watershed Management Program EIS.¹⁰⁷ BPA's Wildlife Mitigation Program EIS provided a comprehensive analysis of different program alternatives for addressing BPA's wildlife mitigation projects, including land acquisitions and management; habitat restoration and improvements; installation of watering devices and riparian

¹⁰⁴ FWIP EIS, Section 1.4.2; FWIP ROD, Section 7.

¹⁰⁵ FWIP EIS, Volume III.

¹⁰⁶ http://efw.bpa.gov/environmental_services/Document_Library/Wildlife_Mitigation/wildlifefeis.pdf

¹⁰⁷ http://efw.bpa.gov/environmental_services/Document_Library/Watershed_Management/waterfeis.pdf

fencing; and other conservation actions. In the Wildlife Mitigation Program ROD,¹⁰⁸ BPA decided to implement a program to support this wide range of potential wildlife mitigation actions. Similarly, the Watershed Management Program EIS provided a comprehensive analysis of different program alternatives for addressing BPA's watershed management projects, such as riparian restoration and other vegetation management techniques; in-channel modifications and fish habitat improvement structures; and various land management techniques. In the Watershed Management Program ROD, BPA decided to implement a program to support this wide range of potential actions intended to benefit fish, fish habitat, and aquatic ecosystems in the region.¹⁰⁹

Subsequent to completion of these programmatic EISs and their associated RODs, BPA prepared over 340 environmental analyses for site-specific actions under the Watershed Management Program and Wildlife Mitigation Program EISs. Each of these analyses confirmed that the environmental consequences for routine fish and wildlife mitigation activities are predictable, and that, although there can be short-term adverse effects from these activities, they continue to have net positive and increasingly beneficial impacts to fish and wildlife across the basin.

Through the FWIP ROD, BPA adopted PA 2002 as its policy direction for funding and implementing its fish and wildlife obligations. PA 2002 focuses on improving fish and wildlife habitat, modifying hydroelectric power operations and structures, and reforming hatcheries to both increase populations of listed fish stocks and provide long-term harvest opportunities.¹¹⁰ Actions that are consistent with PA 2002 include actions taken to replace wildlife habitat lost to hydro development, as well as to increase improvement of fish habitat (e.g., through protecting high-quality habitat, increasing tributary stream flow, removing passage barriers, and screening irrigation diversions) to improve fish productivity.¹¹¹ The FWIP ROD also adopts the strategy identified in the FWIP EIS for making subsequent fish and wildlife policy decisions based on the FWIP EIS and within the scope of PA 2002.¹¹²

B. Environmental Analysis for the Southern Idaho Wildlife Mitigation MOA

The MOA provides for BPA funding commitments to protect and improve wildlife habitat to meet the Federal mitigation obligations for wildlife- and resident fish

¹⁰⁸ http://efw.bpa.gov/environmental_services/Document_Library/Wildlife_Mitigation/wildliferod.pdf

¹⁰⁹ http://efw.bpa.gov/environmental_services/Document_Library/Watershed_Management/rod1.pdf

¹¹⁰ FWIP ROD, Section 3.

¹¹¹ FWIP ROD, Section 8.

¹¹² FWIP EIS, Section 1.4.1 and Figure 1-6; FWIP ROD, Figure 1, p. 15.

habitat-related impacts caused by FCRPS dams in southern Idaho. As discussed below, BPA has evaluated whether entering into the MOA is consistent, at a policy level, with the PA 2002 Policy Direction adopted by BPA in the FWIP ROD, as well as whether the types of projects and their associated environmental impacts that are expected to take place under the MOA are consistent with the types of projects analyzed and considered in the FWIP EIS and ROD.

Policy-Level Evaluation

The MOA focuses on providing funding for land protection, improvement, restoration, and management of both lands previously acquired with BPA funding in Idaho and future projects intended to benefit wildlife. The focus is consistent with the focus of PA 2002, on protecting and improving habitat through actions to offset habitat lost to hydro development and increase the value of that habitat to wildlife. By providing funding to Idaho for these projects (which may involve other local and regional interests as well), the MOA is consistent with PA 2002's goals of developing and implementing mechanisms for carrying out BPA's wildlife mitigation obligations with the government and people of the region. The MOA is precisely the type of regional funding agreement for habitat acquisition and improvement activities that the FWIP EIS and ROD are intended to support. Accordingly, the objectives of the MOA are consistent with the purposes and goals of PA 2002, and overall, the MOA is consistent, at a policy level, with PA 2002.

Project-Level Evaluation

The FWIP EIS describes potential impacts of actions that could occur as a result of each of the Policy Directions considered in the EIS.¹¹³ The land protection, improvement, stewardship, and management activities within the framework of the MOA are expected to result in short- and long-term benefits to fish and wildlife by increasing terrestrial and riparian habitat values. Overall benefits to wildlife would occur as a result of implementing the MOA through the process of protecting and managing lands for their existing habitat values and ensure habitat availability for fish and wildlife species in the future. Human populations would also benefit from lands acquired as part of future actions under the MOA, as opportunities for recreation are maintained and aesthetic values are preserved. Lands acquired under the MOA would be protected from future development, which would avoid impacts related to development such as increased surface runoff, soil erosion, and vegetation disturbance. Land acquisition and habitat improvement and restoration may in some

¹¹³ Section 5.3 of the FWIP EIS and, more specifically for PA 2002, in Section 3A.3 of the FWIP EIS.

instances provide additional protections for cultural resources, and vegetation management techniques would help to control invasive plant species and aid in the reestablishment of native plant species.

Potential negative environmental impacts of the projects under the MOA would be limited. On certain acquired lands, natural resources such as soils, vegetation, and water bodies on and near these lands could be affected by removal of structures, fences, and other human-introduced features, clearing of non-native vegetation, and other habitat restoration activities. These impacts, however, would be temporary and localized in nature and would be necessary to return the land to a more natural state. Negative impacts to human populations relating to removal of land from commodity production would affect only an extremely small portion of the lands available for those uses in Idaho.

In sum, the habitat protection and improvement projects contemplated in the MOA are the same type of projects that were considered in the FWIP EIS and that are included as part of PA 2002. In addition, while there could be some short-term localized impacts from the projects implemented under the MOA, the MOA will result in net benefits to fish and wildlife, water quality, and other natural resources. These impacts and benefits were recognized and considered in the FWIP EIS. The types of projects under the MOA and their expected impacts thus are consistent with the FWIP EIS and ROD, as well as PA 2002.

C. Further Project-Specific Environmental Review

All projects undertaken pursuant to the MOA must be in compliance with all applicable federal, state, and local laws and regulations, which may require additional environmental permitting or approvals before a particular habitat protection or enhancement project can be implemented. Actions undertaken with the Stewardship Funding are covered in this Record of Decision. The known near-term stewardship actions Idaho will implement using the fund are long-standing, routine operation and maintenance activities that have been found not to significantly affect the human environment.¹¹⁴ Idaho will, however, use the Stewardship Funding to provide long-

¹¹⁴ BPA issued a Finding of No Significant Impact based on the South Fork Snake River/Palisades Wildlife Mitigation Project Environmental Assessment (DOE/EA-0956, September 1995, available at http://energy.gov/sites/prod/files/EA-0956-FEA-1995_0.pdf). In this Environmental Assessment, BPA evaluated the environmental effects of its funding for a programmatic management plan that provides a combination of habitat protection and enhancement measures to permanently protect certain sections of riparian wildlife habitat along the South Fork Snake River. Additionally, BPA has found that routine operation and maintenance activities typically fit within classes of actions that the U.S. Department of Energy (DOE) has determined do not individually or cumulatively have a significant effect on the human environment and are therefore categorically excluded from further NEPA review pursuant to the DOE NEPA regulations that apply to BPA. *See* 10 CFR 1021, Subpart D.

term operation and maintenance, and may someday undertake actions not currently part of the routine work done on the Southern Idaho Wildlife Mitigation Project. Because such actions are presently unknown, remote in time and speculative in nature, BPA cannot evaluate the environmental effects any further. Consequently, the remainder of the NEPA analysis in this Record of Decision addresses actions Idaho may take when using the Acquisition Funding and Administrative Funding.

While this NEPA analysis addresses the policy decision to enter into the MOA, there may be a need for further NEPA review of individual habitat mitigation actions before they can be implemented using either the Administrative Funding or the Acquisition Funding. Fortunately, BPA has well-established processes for providing environmental review and compliance for the kinds of mitigation actions Idaho will implement with these two funds.

For routine habitat protection and improvement projects that have predictable environmental effects already analyzed in the FWIP EIS, Watershed Management EIS, or Wildlife Mitigation Program EIS, BPA may use a validation process to ensure all applicable tribal, federal, state, and local laws and regulations, in addition to NEPA, have been addressed prior to implementation (for example, the validation process includes addressing impacts, if any are identified, pursuant to the National Historic Preservation Act). Results of the validation process are tracked and can be accessed through PISCES, a web-enabled software application that assists BPA and its fish and wildlife program participants in managing projects throughout the Columbia River Basin.¹¹⁵ Alternatively, routine habitat protection and enhancement projects under the agreement may be evaluated under NEPA with a categorical exclusion applicable to real property transfers intended for habitat preservation and wildlife management.¹¹⁶ Under either approach to environmental compliance, BPA staff will work with Idaho to ensure that all applicable requirements have been met for these routine projects and are appropriately documented. The best management practices, restrictions, and mitigation measures imposed through regulatory processes will ensure that any project-specific adverse effects to water quality, habitat access, habitat elements, channel conditions and dynamics, flows, and watershed conditions will be brief, minor, and timed to minimize impacts.

¹¹⁵ Validation process results appear under the project work element tab for environmental compliance (WE ID 165) at <http://www.cbfish.org/Portfolio.mvc/WorkStatementElements/1>.

¹¹⁶ Routine land acquisition actions for habitat protection or enhancement typically fall under Categorical Exclusion B 1.25, found at 10 CFR 1021, Subpart D, Appendix B, which categorically excludes from further NEPA review “[r]eal property transfers for cultural resources protection, habitat preservation, and wildlife management.”

BPA may also determine that for some actions additional NEPA analysis will be completed. Decision factors may include controversy over effects on resources, special regulatory requirements (federal, state, or local), the participation of other federal agencies (where environmental review methodologies may differ), unprecedented actions (with accompanying uncertainty in impacts), or extraordinary environmental circumstances. For such projects, BPA will coordinate with the State of Idaho to ensure an appropriate strategy to comply with NEPA.

IV. CONCLUSION

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

Executing the MOA helps fulfill BPA's statutory purpose of providing for an adequate, efficient, economical, and reliable power supply. The obligations in the MOA provide greater certainty of costs and borrowing needs by establishing long-term funding commitments that can be managed prospectively, thus benefitting ratepayers and the region by helping to keep rates stable and as low as possible. Recognizing that the stewardship responsibilities will be implemented over the life of the agreement, the costs associated with the Acquisition Funding and the Stewardship Funding will be fully recovered in BPA's future rates. . BPA briefed customer groups about the nature of the agreement and how it would be funded and accounted for, and they supported the approach because it will permanently retire a long-term obligation while containing costs and providing rate certainty. The MOA also incentivizes Idaho to pursue innovative and cost-effective approaches to protecting, mitigating, and enhancing wildlife and wildlife habitat affected by these dams. For these reasons I believe it is sound business and in the interest of both customers and wildlife to sign the MOA and settle half the mitigation for the southern Idaho dams and Deadwood Dam operations.

Risks to BPA of signing the MOA are adequately covered by the collaborative commitments in the MOA and its consistency with the Council's Fish and Wildlife Program. Southern Idaho is the most under-mitigated area in the region with regard to construction and inundation effects on wildlife. Without this MOA BPA may well have had to pause its wildlife mitigation efforts in southern Idaho until the crediting and obligation issues had been resolved in another fashion. That concern outweighs the risks of proceeding in good faith with Idaho and seizing this opportunity to address half the wildlife losses without creating adverse legal precedent or prejudice to opportunities of the tribes or others to participate in BPA's southern Idaho mitigation work.

Based on a review of the FWIP EIS and ROD, I have determined that entering into the MOA falls within the scope of the PA 2002 alternative evaluated in the FWIP EIS and adopted in that ROD. This decision is a direct application of PA 2002, and is not expected to result in significantly different environmental impacts from those examined in the FWIP EIS. The agreement will assist BPA in accomplishing the goals related to PA 2002 that are identified in the FWIP ROD. Therefore, the decision to implement the MOA is tiered to the FWIP ROD.

Issued in Portland, Oregon, September, 23, 2014.

/s/ G. K. Delwiche
Gregory K. Delwiche
Acting Administrator and Chief Executive Officer