

BONNEVILLE POWER ADMINISTRATION

**ADMINISTRATOR'S RECORD OF DECISION
FOR
EXTENSIONS OF THE COLUMBIA BASIN
FISH ACCORDS**

September 28, 2018

EXTENSIONS OF THE COLUMBIA BASIN FISH ACCORDS

1.0 INTRODUCTION

As part of its ongoing efforts to protect, mitigate, and enhance fish and wildlife in the Columbia River Basin, the Bonneville Power Administration (**Bonneville**), along with the U.S. Army Corps of Engineers (**Corps**) and the Bureau of Reclamation (**Reclamation**), has decided to update and extend its 2008 Columbia Basin Fish Accords (**Accords**) with five tribes and two states—collectively, “**the parties**.” The extension agreements (**Accord Extensions or Extensions**) address fish and wildlife affected by the development and operation of the Columbia River System and Upper Snake River Project dams, with a focus on salmon and steelhead protected under the Endangered Species Act (**ESA**). The Extensions continue the work begun under the Accords through certain on-going projects in the Columbia River Basin for up to four more years.

Through these Extensions, Bonneville commits to provide funding for another four years to the tribal and state Accord parties to implement projects for the benefit of fish and wildlife in the Basin, recognizing their role as co-managers of these resources. Specifically, the Accords being extended are:

(1) An agreement among Bonneville, the Corps, and Reclamation (together, the three federal agencies are known as the “**Action Agencies**”) and the:

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

These Tribes and CRITFC are collectively referred to as the “**Lower River Tribes**.” This Accord Extension is referred to as the “**Lower River Tribes Extension**.”

(2) An agreement between the Action Agencies and the Confederated Tribes of the Colville Reservation, referred to as the “**Colville Extension**.”

(3) An agreement between the Shoshone-Bannock Tribes of the Fort Hall Indian Reservation, referred to as the “**Shoshone-Bannock Extension**.”

(4) An agreement between the Action Agencies and the State of Idaho referred to as the “**Idaho Extension**.”

(5) An agreement between the Action Agencies and the State of Montana referred to as the “**Montana Extension**.”

This Record of Decision describes Bonneville’s decision to extend the Accords, including factors leading to that decision and the contents of the Extensions.¹ Bonneville has documented its consideration of the National Environmental Policy Act (NEPA) in entering into the extended agreements in a separate categorical exclusion also issued today.

2.0 CONTEXT OF EXTENSIONS

The Accords were developed in the mid-2000s in the context of decades of Columbia River System litigation over ESA compliance. The Accords reflected an effort by the parties to try a more collaborative approach to fish and wildlife mitigation in the Columbia River Basin. In 2008, the parties entered into 10-year Accord agreements, in effect through September 30, 2018.²

As the end of the Accords term drew near, the state and tribal parties expressed interest in extending the agreements. In the interest of continuing what proved to be an effective approach to addressing Bonneville’s fish and wildlife responsibilities and preserving the collaborative partnerships that developed among the parties during the initial Accords term, Bonneville agreed to explore Extensions of existing Accords. However, given the U.S. District Court for the District of Oregon’s remand of the 2014 Biological Opinion for effects of management of the Columbia River System, and subsequent spill injunction rulings, there has been tremendous uncertainty regarding system operations during this interim period before the Columbia River System Operations NEPA process is complete. To address such uncertainty, the parties recognized that certain modifications to the existing Accords would be necessary. The State of Washington, while still supportive of the Action Agencies’ efforts to address the effects of the Columbia River System on fish and wildlife, decided to continue collaborating in a spirit of partnership and to document expectations in a memorandum of understanding, rather than a contract, with the Action Agencies.

Each Accord Extension includes a section highlighting accomplishments from the prior 10 years, including achievements for fish and wildlife in the Columbia River Basin and specific successes under the Accords.³ In the Extensions, the Parties also acknowledge the results of the Action Agencies’ extensive efforts to overhaul the Columbia River System, and recognize fulfillment of the broad anadromous fish mandates of the Northwest Power Act—to improve survival at system

¹ The 2008 Accord agreements are available at www.salmonrecovery.gov.

² A detailed explanation of the origin and process leading to the 2008 Accords is in section 2 of Bonneville’s Record of Decision for the 2008 Accords. *See* BONNEVILLE POWER ADMIN., ADMINISTRATOR’S RECORD OF DECISION, 2008 COLUMBIA BASIN FISH ACCORDS (May 2, 2008), available at https://www.bpa.gov/news/pubs/PastRecordsofDecision/2008/MOA_ROD.pdf [hereinafter, 2008 Accords ROD]. The 2008 Accords ROD also helps explain Bonneville’s decision to extend the Accords. The 2018 Extensions retain the framework, relationships, projects, and much of the rationale of the original Accords. As such, this Record of Decision cites to and relies on specific portions of the 2008 Accords ROD, as appropriate.

³ *See, e.g.*, Lower River Tribes Extension, § II.

dams and provide flows of sufficient quality and quantity between dams to improve production, migration and survival of anadromous fish.⁴

With these achievements as a foundation, Bonneville has decided to proceed with the Extensions.

3.0 DESCRIPTION OF EXTENSIONS

While the terms of the Accord Extensions include certain modification and updates, they largely retain and reaffirm the commitments and provisions of the 2008 Accords. In particular, the parties are committing to continued implementation of projects for the benefit of fish and wildlife affected by the Columbia River System, with funding provided primarily by Bonneville. The focal point of the Accords was to provide actions to help ocean-going (anadromous) fish listed as threatened or endangered under the ESA. The Extension agreements retain that focus. However, like the Accords, these Extensions also provide actions to help other fish in the Basin, including non-ocean-going (resident) stocks in Montana such as the ESA-listed bull trout, as well as non-listed anadromous and resident species in the Basin, such as Pacific Lamprey. The agreements are intended to work in concert with the forthcoming Biological Opinions for the Columbia River System, developed by National Oceanic and Atmospheric Administration (NOAA) Fisheries and the U.S. Fish and Wildlife Service for operations beginning in 2019, as well as the existing Biological Opinion for the Upper Snake River Projects. The Extensions also contain several commitments for the benefit of wildlife impacted by the Columbia River System. In addition, projects benefiting fish often carry wildlife benefits.

Like the 2008 Accords, each Extension was negotiated independently, and so while each agreement reflects some common core commitments (in similar if not identical language), each also contains unique commitments that reflect the particular interests and priorities of the participating parties. The following section describes the Extensions and summarizes the key provisions, including provisions unique to each Extension.

3.1 Purpose

For Bonneville, the purpose of the Accord Extensions is to continue the ongoing efforts to address direct and indirect effects of the construction, inundation, operation and maintenance of fourteen dam and reservoir projects of the Columbia River System and Reclamation's Upper Snake River Projects on fish resources of the Columbia River Basin in a manner that balances Bonneville's fish and wildlife responsibilities with its other statutory responsibilities and its

⁴ See Northwest Power Act, 16 U.S.C. § 839b(h)(6)(E) (mandating measures regarding survival and flow for anadromous fish in the Northwest Power and Conservation Council's Columbia Basin Fish and Wildlife Program, with which Bonneville-funded mitigation is consistent); *id.* § 839(6) ("suitable environmental conditions" for anadromous fish are "substantially obtainable" from system operations and management).

strategic goals. In addition, the agreements reflect continued alignment among the parties regarding compliance with the Northwest Power Act,⁵ the ESA,⁶ the Clean Water Act,⁷ and NEPA.⁸ The agreements also address the parties' shared interest in certainty and stability in funding and implementation of projects. Finally, the Extensions continue to facilitate cooperative relationships with the Accord party states and tribes, which is critical to a regional mitigation effort spanning a four-state area and costing over \$500 million a year.

3.2 Provisions from the 2008 Accords that Remain in Effect

Each Accord Extension includes an **Attachment B** that lists the specific provisions from the corresponding 2008 Accord that will remain in effect during the Extension. Modifications from the 2008 Accords are described in further detail below.

3.3 High Priority Actions

During the Accord Extensions, the parties commit to working together and supporting the following time-sensitive and critical goals and milestones that Bonneville identified as crucial points for alignment and coordination:

- Issuance of NOAA Fisheries and U.S. Fish and Wildlife Service Biological Opinions on the effects of the coordinated water management of the Columbia River System, including operations and maintenance of the dam and reservoir projects, for 2019 and beyond.
- Agreeing on fish operations, including spring and summer spill for fish passage, for the 2019-2021 period.
- Collaborating to seek alignment of regional sovereigns in support of the Columbia River System Biological Opinions, including system operations, in appropriate forums.
- Coordinating and submitting complementary recommendations for amendments to the Columbia Basin Fish and Wildlife Program.⁹
- Finding efficiencies in project implementation that reduce administrative obligations related to project contracting, reporting, and, where appropriate, environmental compliance.¹⁰

⁵ Pacific Northwest Electric Power Planning and Conservation Act, 16 U.S.C. § 839 *et seq.*

⁶ Endangered Species Act, 16 U.S.C. § 1531 *et seq.*

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

⁸ National Environmental Policy Act, 42 U.S.C. § 4321, *et seq.*

⁹ See further discussion in section 3.9, below.

¹⁰ In addition, the Colville Extension includes additional high priority items regarding certain issues important to the Colville Tribes, such as potential actions to improve production at Chief Joseph Hatchery, implementation of actions by USFWS at Leavenworth National Fish Hatchery, and development of a captive fishery (discussed further in section 3.9.3, below).

The Parties to each Accord Extension agree to meet annually to consider the results of their efforts to meet the milestones described above, and to report on their respective efforts, including specific actions taken and future strategies, to achieve those ends.

3.4 Support for System Operations

In the Accord Extensions, the parties agree to collaborate on future fish operations, as described below.

3.4.1 Columbia River System Fish Operations

Included in each Accord Extension is **Attachment C, Columbia River System Fish Operations**, which summarizes key details with respect to planned fish operations for 2019 and beyond that the Action Agencies intend to submit to NOAA Fisheries for interagency consultation under Section 7(a)(2) of the ESA.¹¹ The parties have agreed to ongoing collaboration regarding these fish operations and associated ESA consultation during the term of the Extensions.¹²

In developing the fish operations described in Attachment C, the parties sought to build on and preserve the known benefits and lessons learned from implementation of earlier system operations for fish, in particular, the juvenile dam passage survival performance standards in the 2008 Federal Columbia River Power System Biological Opinion that were incorporated as commitments in the 2008 Accords.¹³ Working from this foundation, the Extensions commit the Parties to collaborative engagement on the development of Columbia River System operations and to seek regional alignment on fish operations. Attachment C describes the Parties' considerations for updating spill, transportation, avian predation, adult passage, and other key fish operations for the Columbia River System at this point in the consultation process with NOAA. Attachment C serves as a foundation to support ongoing efforts to incorporate new information and ideas for key components of fish operations beginning in 2019. The Parties' overarching commitments are those described in the Fish Operations, Affirmation of Adequacy, and Off-ramp sections of the Extensions. As drafted, the fish operations described in Attachment C include a block study design to test the latent mortality hypothesis. Attachment C also provides latitude for the parties to explore potential alternatives and includes a commitment to discuss and seek alignment on any modifications to the study design.¹⁴

¹¹ See att. C, note 1 (all Extensions). The Action Agencies' consultation package to NOAA Fisheries will provide additional detail.

¹² See, e.g., Lower River Tribes Extension, § III.B.

¹³ Under performance standard operations, the Action Agencies were able to achieve 96% survival at Columbia River System dams for juvenile spring migrants and 93% for juvenile summer migrants.

¹⁴ If a NOAA Fisheries or USFWS Biological Opinion prompts significantly different operations such that they would no longer be within the scope of Attachment C, an Accord Extension off-ramp might be triggered. Off-ramps are discussed in greater detail in section 3.10.7, below.

3.4.2 *Lamprey Actions*

Several Accord Extensions include actions for Pacific Lamprey.¹⁵ Together, the Action Agencies renew their commitment to collaborate with Accord parties on issues relating to Pacific Lamprey through continued participation in Pacific Lamprey Conservation Agreement interagency meetings and technical work groups.¹⁶ The Corps has also committed to specific lamprey actions; as long as those actions are implemented during the term of the Extensions, the parties agree not to support listing of Pacific Lamprey under the ESA.¹⁷

3.4.3 *Fish Passage Center*

As noted in certain Accord Extensions, several tribal Accord parties continue to rely heavily on the Fish Passage Center (**FPC**) for analysis and evaluation regarding the effects of Columbia River System operations, maintenance, and configuration on salmonid survival, productivity, and abundance.¹⁸ Bonneville has agreed to continue to provide funding through its existing contract with the Pacific States Marine Fisheries Commission, which subcontracts with the FPC, to ensure that tribes have continued access to such analysis and evaluation.¹⁹ To ensure transparency and uniform availability of information, the tribes have made a new commitment in these Extensions: to coordinate with the Action Agencies on any request from the tribes for FPC analysis, and to help ensure that draft and final FPC analysis, including underlying data and assumptions, is available to the Action Agencies upon request.²⁰

3.4.5 *Montana Operations*

The State of Montana, like the other parties to these Accord Extensions, has agreed to support the fish operations as described in Attachment C, as long as those operations do not lead to demands for augmented flows from Libby or Hungry Horse dam or adversely impact current reservoir operations at Libby and Hungry Horse (“**Montana Operations**”).²¹ Because Montana has a unique interest in preserving existing operations at Libby and Hungry Horse dams to benefit fish and wildlife affected by those two up-river projects, the Action Agencies have committed in the Montana Extension to continue supporting Montana Operations, including variable discharge and spring and summer operations developed as part of the **Council’s 2003 Mainstem Amendments**. In addition, the Action Agencies will support continued investigations into refining operations at Libby and Hungry Horse dams to further improve conditions for fish

¹⁵ See Lower River Tribes Extension, § III.B.2; Colville Extension, § III.B.2; Shoshone-Bannock Extension, § III.C.2; Idaho Extension, § III.C.2.

¹⁶ See Lower River Tribes Extension, § III.B.2.

¹⁷ *Id.*

¹⁸ *Id.* § III.B.3.

¹⁹ *Id.*

²⁰ *Id.*

²¹ Montana Extension, § IV.B.1.

and wildlife impacted by those projects while not adversely affecting fish in the lower river.²² Montana and the Action Agencies also agree to continue evaluating potential adjustments to winter and spring operations at Libby and Hungry Horse dams as part of the CRSO EIS process²³

3.5 Bonneville’s Financial Commitments

3.5.1 Accord Extension Budgets

For federal fiscal years (FYs) 2019 to 2022, Bonneville commits to provide funding for the state and tribal parties to implement specific projects, subject to environmental compliance, as described in Attachment A, budgets for the various Accord Extensions. Total funding commitments for the term of the Extensions, by Accord party, are listed below.

• Colville:	\$68,840,586
• CRITFC:	\$35,472,739
• Idaho:	\$63,760,116
• Montana:	\$24,526,239
• Shoshone-Bannock:	\$25,263,661
• Umatilla:	\$66,461,919
• Warm Springs:	\$34,668,762
• Yakama:	\$129,517,963
TOTAL:	\$448,511,985²⁴

3.5.2 Comparison to Base Budgets in the Original Accords

For expense funding commitments, the first year budgets under the Accord Extensions (FY 2019) provide approximately \$3.3 million in savings for Bonneville’s Fish and Wildlife Program compared to the total Accord budgets for the last year of the original Accords’ term. The total expense budget for all Accord parties in FY 2018—which represents the starting baseline for Accord Extension budgets²⁵—was approximately \$93.7 million. The total expense budget for all Accord Extensions in FY 2019 is approximately \$105.3. While the FY 2019 total Accord budget appears to be an increase from FY 2018, this is not the case.

²² *Id.* § IV.B.3.

²³ *Id.* § IV.B.3.c.

²⁴ This total includes \$424,465,062 in expense funding and \$24,046,923 in capital funding. The type of funding identified in the Extensions for a given project—expense or capital—is what Bonneville expects to be the correct funding type for the project when the funds are spent. However, the funding type will ultimately be determined based on Bonneville’s then-current capitalization policy and funding types for some commitments may change.

²⁵ Bonneville premised its willingness to negotiate extensions on the need to start FY 2019 budgets at the baseline level from the final year of the original Accords term, with no further adjustments for inflation, and also to achieve budget reductions from those baseline levels.

In 2008, Idaho and Montana chose not to include all of their projects in their Accords; the rest remained as separate contracts administered under Bonneville's broader Fish and Wildlife Program. The FY 2018 budgets for these non-Accord projects with the states totaled approximately \$14.9 million.

During Accord Extension negotiations, Idaho and Montana elected to bring these separate projects into their Accord Extensions. Therefore, to accurately compare the Accord budget for FY 2018 to the Accord Extension budget for FY 2019, the \$14.9 million-worth of Idaho and Montana projects should be factored into the FY 2018 Accord budget. This way, the values for the FYs 2018 and 2019 budgets include all of the same projects.

After accounting for the \$14.9 million from these Idaho and Montana projects, the FY 2018 total Accords budget is \$108.6 million. Comparing that total to the budget for the first year of Accord Extensions—\$105.3 million in FY 2019—shows \$3.3 million in overall savings to Bonneville's Fish and Wildlife Program, attributable to reduced Accord party budgets.²⁶

Conversely, certain project funding that was included as part of the 2008 Accord budgets has been moved out of the Accord Extension budgets and into a non-Accord contract under Bonneville's general Fish and Wildlife Program. Under the 2008 Accords the State of Idaho and the Umatilla Tribe had dedicated budgets to complete water transactions through the Columbia Basin Water Transactions Program (CBWTP). These parties will retain only enough funding under their Accord Extensions to continue identifying and developing suitable water transactions pursuant to the CBWTP. Funding from the Umatilla Tribe budgets associated with actual water transactions, however, has been moved out of their Accord Extension budgets and into the general CBWTP contract managed under Bonneville's general Fish and Wildlife Program.²⁷ This budget reduction from the Umatilla Tribe is not counted as part of the \$3.3 million overall savings, because the Umatilla Tribe's contribution to those overall savings came from other Umatilla projects. Funds previously budgeted for Idaho's actual water transactions were repurposed to other projects in the state's Accord Extension portfolio, after Idaho and Bonneville identified budget savings elsewhere. The repurposing of Idaho's water transaction funds is not being calculated as part of the \$3.3 million in savings.

Capital funding commitments under the Accord Extensions—almost entirely for land acquisition projects—are significantly less than under the 2008 Accords: \$24 million versus approximately \$220 million. The capital funding pace for acquisitions under the Extensions is roughly proportional to the capital acquisition pace established under the 2008 Accords. Of the \$220 million capital initially committed in the 2008 Accords, \$83 million is available as carry-forward

²⁶ The four-year average of Accord Extension expense budgets is \$106.1 million, which represents an annual average savings of \$2.5 million below the FY 2018 total Accord expense budget.

²⁷ The general CBWTP contract budget has been reduced by \$1 million dollars, starting in FY 2019, to account for the expected efficiencies stemming from a more consolidated approach to the overall water transactions project, which contributes to further savings in Bonneville's overall Fish and Wildlife Program budget.

through the Accord Extensions, largely associated with Bonneville’s prior hatchery construction commitments, as discussed further in section 3.6, below.

Unlike the 2008 Accords, the Accord Extensions do not provide for across-the-board inflation increases. (Projects under the 2008 Accords received 2.5% compounded increases, starting in FY 2010, to offset the effects of inflation.) Instead, in the Accord Extensions, the parties negotiated project budget increases, which Bonneville capped at 1.25%, in FYs 2020 and 2021. Because of the reduction to the overall Accord budget, discussed above, and the resulting reduced baseline budgets at the project level, Bonneville agreed to allow for modest project growth in FYs 2020 and 2021, not to exceed 1.25% in each of those years. Tribal and state Accord parties worked with Bonneville to allocate that growth among the projects in the Accord portfolios on a case-by-case basis and in accordance with the anticipated future needs and plans for those projects.

Related to project growth, recognizing the practical effects of reduced baseline budgets for Accord parties, Bonneville also agreed to make expense funds that remained unspent from the original term of the Accords available for Accord parties to use as “carry-forward” during the term of the Extensions.²⁸ The carry-forward is designed to allow more gradual “ramp down” to the reduced base budget levels of the Accord Extensions. Once they have spent down available carry-forward, modest project growth, capped at 1.25%, will then be allowed from the project baseline level.

At the individual project level, Bonneville and the Accord partners negotiated budget reductions while ensuring that projects continue to provide biological benefits that support fulfillment of Bonneville’s responsibilities. Specifically, Bonneville consistently focused budget discussions on promoting efficient use of funds (*e.g.*, cost-share), seeking to ensure that aspects of project work were not redundant, and limiting contract work elements related to travel and training. Overlaying these conversations was Bonneville’s ongoing effort to ensure that its mitigation funding has a strong nexus to work that addresses the effects of federal dams for which Bonneville has a mitigation responsibility.

3.5.3 *Specific Budget Rules and Provisions*

Consistent with the budget rules under the 2008 Accords, during the Accord Extensions, the total amount of funds that an Accord partner may spend in a single fiscal year—including any unspent carry forward funds from any prior fiscal years—shall not exceed 120% of the budgeted amount for that year set forth in Attachment A, unless Bonneville and an Accord party agree otherwise. This cap governs requests for changes in the timing of implementation and distribution of Accord dollars, through preschedules, reschedules, or budget transfers, as described in the Extensions.²⁹

²⁸ See Lower River Tribes Extension, § III.C.3.

²⁹ See, *e.g.*, Lower River Tribes Extension, § III.C.4.

The Accord Extensions allow for both Bonneville and the Accord parties to request voluntary budget adjustments that a party feels may be needed to address the year-to-year variability associated with Bonneville’s financial circumstances.³⁰ In the case of deteriorating financial conditions, Bonneville may call on Accord parties to voluntarily reduce expenditures in a given fiscal year, while selecting such reductions so as to not compromise compliance with ESA responsibilities or other legal obligations, and to preserve the Accord partner’s staff and capacity. Any funds saved through agreed-upon reductions to expenditures in a given year would be available for use in the following years of an Accord partner’s Extension, subject to applicable budget rules.

Conversely, if Bonneville’s financial condition improves, Accord parties may request that Bonneville increase its funding commitments or allowed annual expenditures, including relief from the 120% budget cap or other budget rules described above.³¹ Bonneville and the Accord parties understand that failure to reach agreement on a party’s requested increase or decrease in funding, as described above, may, under some circumstances, meet the conditions of one or more of the Accord Extensions’ off-ramps.³²

3.6 Hatchery Commitments

In the Accord Extensions, the Action Agencies do not commit to new or additional hatchery actions beyond those that appeared in the 2008 Accord agreements. However, Bonneville will continue to fund some operation and maintenance for existing hatchery facilities as shown in the Accord parties’ Attachment A budgets.³³

As noted in some of the Accord Extensions, certain hatchery actions that Bonneville committed to fund in the 2008 Accords, particularly for capital hatchery facility construction, have not yet been implemented or completed.³⁴ The 2008 Accords provided that Bonneville would continue to make its capital funding commitments available for such hatchery facility actions for an additional five years beyond the initial term of that agreement—that is, through FY 2023.³⁵ In recognition of the range of project steps associated with hatchery facility construction—*e.g.*, federal, state, and local permitting requirements, land use and property issues, water rights and water quality, environmental compliance, procurement and contracting, etc.—Bonneville has

³⁰ *See id.* § III.C.6.

³¹ *See id.*

³² *See, e.g.*, Shoshone-Bannock Extension, § III.D.7.

³³ Hatchery-related funding provided by Bonneville will be in addition to, and not replace, funding for hatcheries that are the legal responsibility of other entities, including but not limited to NOAA Fisheries’ hatchery-related responsibilities for facilities established under the Mitchell Act (16 U.S.C. §§ 755-757) or other appropriated programs, the mid-Columbia public utility districts’ Habitat Conservation Plans and other related agreements. *See, e.g.*, Lower River Tribes Extension, § III.E.2.

³⁴ *See id.* § III.E.3; Shoshone-Bannock Extension, § III.E.3.

³⁵ *See* Lower River Tribes 2008 Accord, § IV.B.2, *available at* <https://www.salmonrecovery.gov/Partners/FishAccords.aspx>.

agreed to continue to make capital funding—carried forward from the 2008 Accord commitments—available for five years past the expiration of these Extensions to give the parties more time to address issues causing delays in construction or implementation and to facilitate completion of the outstanding hatchery commitments.³⁶ However, the parties intend to complete these hatchery actions expeditiously and, if possible, within the timeframe originally established in the 2008 Agreement—that is, by 2023.

For hatchery projects funded under these Extensions, the parties will collaborate to identify and document the associated biological benefits, and will also coordinate in advance of sharing any draft or final ESA compliance documents with regulatory agencies for consultation on a proposed action, genetic management plan, or tribal management plan related to such hatcheries.³⁷ The Accord Extensions reaffirm and clarify the provisions of the original Accords requiring Accord parties to ensure that any proposed hatchery project will not impede, and where possible contribute to, recovery of ESA-listed species.³⁸ For Bonneville, this assurance is critical to avoid the unintended effect of new mitigation facilities creating the need for additional mitigation, increasing the costs and constraints on the system.

Finally, in these Extensions, Accord partners confirm their 2008 commitments to not seek further additional hatchery funding until 2038, subject to the exception provided in the 2008 agreements.³⁹

3.7 Habitat Commitments

The Accord Extensions provide for continued funding from Bonneville for existing habitat projects to improve spawning and rearing habitat for certain key tributaries that benefit ESA-listed salmon and steelhead, and other non-listed species, affected by Columbia River System operations. These habitat projects were identified during the initial term of the 2008 Accords, or even earlier, and have been vetted by the Independent Scientific Review Panel and Council review processes.⁴⁰ These projects are designed to:

- Preserve and build on past accomplishments and lessons learned;

³⁶ See Lower River Tribes Extension, § III.C.5.

³⁷ See *id.* § III.E.4.

³⁸ *Id.*

³⁹ *Id.* § III.E.2. In section IV.B.2 of the 2008 Accords, the Accord partners committed to not seek additional hatchery funding for 30 years after the effective date of those agreements; however, the provision also stated that “if after year 15 of the 30 year forbearance for hatcheries there is a change in the status of an ESU (e.g., a new listing), or if after year 15 there is new information or changed circumstances that indicate additional hatchery actions are needed to assist in mitigating impacts of the FCRPS consistent with current science and applicable law, the Tribes are not precluded from seeking additional funding from the Action Agencies for hatcheries.” While the original Colville Accord did not contain a hatchery forbearance provision, the Colville Extension has been updated to include such a provision, which is analogous to that aspect of other Accord agreements. See Colville Extension, § III.E.2.

⁴⁰ See Lower River Tribes Extension, § III.F.4.

- Help the Action Agencies carry out their responsibilities to protect, mitigate, and enhance fish and wildlife, including ESA-listed and non-listed salmon and steelhead, and protect and enhance treaty resources consistent with both treaty and tribal trust responsibilities;
- Help address water temperature issues in a manner that is expected to promote resiliency in the face of climate change;
- Comply with other applicable legal mandates, such as the prohibition against augmentation of appropriations, or the in lieu funding prohibition of the Northwest Power Act.⁴¹

3.8 Project Administration and Efficiencies

The projects in each state or tribal party's Attachment A will be administered under separate and discrete intergovernmental contracts—including specified work elements, milestones, site-specific environmental compliance, and deliverables—with the sponsoring Accord party.⁴² Once executed, the intergovernmental contract will govern all activities for the associated project, and all contracting actions will comply with the Bonneville Purchasing Instructions.⁴³

Additionally, to promote cost savings and maximize biological returns on investment, Bonneville and Accord parties will seek efficiencies in project administration. Such efficiencies will focus on actions to streamline contracting and reporting, and, where possible, environmental compliance, such as through the use of ESA Section 7 programmatic habitat improvement consultations.⁴⁴ The parties also anticipate savings and efficiency associated with the benefits of project bundling, multi-year contracting, and cost-sharing that Accord Extension terms help to facilitate.⁴⁵

3.9 Northwest Power and Conservation Council's Columbia Basin Fish and Wildlife Program

As in the 2008 Accords, the parties to the Extensions have discussed and agreed on particular matters concerning the relation of their joint and respective fish and wildlife mitigation efforts to the Council's Program and Program amendment process.

3.9.1 An Established Mitigation Framework

⁴¹ See *id.* § III.F.1.

⁴² See Lower River Tribes Extension, § III.G.

⁴³ See BONNEVILLE POWER ADMIN., BONNEVILLE PURCHASING INSTRUCTIONS (2018), available at <https://www.bpa.gov/Doing%20Business/purchase/Pages/default.aspx>.

⁴⁴ See, e.g., National Marine Fisheries Service. 2013. Endangered Species Act (ESA) Section 7 Formal Programmatic Biological and Conference Opinion, Letter of Concurrence, and Magnuson-Stevens Fishery Conservation and Management Act Essential Fish Habitat Consultation for Bonneville Power Administration's Habitat Improvement Program III (HIP III) KEC-4. NMFS# 2013/9724; U.S. Fish and Wildlife Service. 2013. Formal Section 7 programmatic consultation on BPA's Columbia River Basin Habitat Improvement Program. Oregon Fish and Wildlife Office, Portland, Oregon. TAILS no. 01EOFW00-2013-F-0199.

⁴⁵ See Lower River Tribes Extension, § III.D.3.

The parties to the Accord Extensions recognize that, at over 35 years old, the Council’s Program represents an established framework for mitigating the effects of the Columbia River System on wildlife.⁴⁶ Within that framework, Bonneville has relied on guidance in past Council Programs in making extensive, long-term investment in mitigation projects and equitable treatment for fish and wildlife.⁴⁷ With that foundation, the Accord Extension parties now intend to ensure that the benefits to fish and wildlife from such commitments continue to accrue, while also stabilizing the cost of those benefits.⁴⁸

3.9.2 Program Recommendations

Because the parties are extending these agreements at the beginning of the Council’s 2018/2019 Program amendment process, they have agreed to coordinate their actions relating to the amendment process for efficiency and to facilitate their continued alignment on substantive issues. The parties agree to recommend that the Council largely retain its 2014 Program, except as needed to incorporate these Extensions,⁴⁹ and to share with each other all draft recommendations and draft comments relating to the amendment process in a manner consistent with the coordination and no-surprises provisions of the Accord Extensions.⁵⁰ While, as a general matter, these Accord Extensions will be signed at the highest level of each state or tribal party’s sovereign government and will continue to apply to the each party’s staff, contractors, volunteers, representatives, and agents,⁵¹ the Idaho and Montana Extensions include an exception for their Council members, to the extent necessary, with respect to their responsibilities under the Northwest Power Act.⁵²

3.9.3 Passage and Reintroduction at Chief Joseph and Grand Coulee Dams

Certain Accord Extensions acknowledge that the Council’s Program includes a three-phase approach for investigating passage and reintroduction of anadromous fish above Chief Joseph

⁴⁶ See *e.g.*, *id.* § III.H.1; Montana Extension, § IV.E.1.

⁴⁷ See Lower River Tribes Extension, § III.H.1; Montana Extension, § IV.E.1.

⁴⁸ See Lower River Tribes Extension; § III.H.1.

⁴⁹ The Northwest Power Act requires that the Council, in developing its Fish and Wildlife Program to protect, mitigate and enhance fish and wildlife affected by the Columbia River System, “complement the existing and future activities of the Federal and the region’s State fish and wildlife agencies and appropriate Indian Tribes.” See 16 U.S.C. § 839b(h)(6)(A). These Accord Extensions between the federal Action Agencies and certain states and tribes are existing and future activities for protection, mitigation, and enhancement of fish and wildlife.

⁵⁰ See Lower River Tribes Extension, § III.H.3.

⁵¹ See, *e.g.*, *id.* att. B (indicating section V.F (Binding Effect) of the 2008 Accord—which specifies that all representatives of an Accord party are bound by the Accord terms—as a provision that remains in effect for the Accord Extension).

⁵² See Montana Extension, § IV.E.5 (“Montana’s Council representatives participated in the development of the 2008 Agreement and this Extension. Nothing in these agreements, however, is intended to affect, or shall be construed as affecting, consideration by such representatives of recommendations from parties other than Montana when discharging their duties under the Northwest Power Act.”); Idaho Extension, att. B (indicating that the analogous provision for Idaho Council members remains in effect for the Idaho Extension).

and Grand Coulee dams⁵³ However, because the Action Agencies have legal, economic, and policy concerns with the Council’s three-phase approach and any other specific proposals for passage and reintroduction, the parties agree that all matters relating to this issue require the greatest sensitivity and adherence to the no-surprises provision of the Extensions.⁵⁴

The Colville Tribes have expressed a particular interest in passage and reintroduction issues, given their geographic location in the upper Columbia River Basin where anadromous fish runs have been blocked by dams. The Action Agencies understand that the Colville Tribes intend to pursue cultural and educational fisheries activities involving anadromous fish above Chief Joseph and Grand Coulee dams using the Tribes’ own authorities and funding from sources unrelated to the Colville Accord Extension or Northwest Power Act mitigation.⁵⁵ However, the Colville Tribes agree not to use fish produced at or originating from Chief Joseph Hatchery for any purpose above Chief Joseph Dam, except that carcasses from such fish may be used for any biological purpose consistent with applicable regulatory requirements.

During the term of the Colville Extension, the Colville Tribe and the Action Agencies will explore possibilities for implementation of a captive fishery involving anadromous fish above Chief Joseph and Grand Coulee dams. Funding by Bonneville would have to be agreed to and reprogrammed from within the overall budget established in Attachment A to the Colville Extension.⁵⁶

3.10 No Surprises, Affirmations of Adequacy, Regional Support, Legal Provisions, and Withdrawal

3.10.1 Good Faith Implementation and No Surprises

In the Accord Extensions, the parties reaffirm their 2008 commitments to good-faith implementation and support, including an advance coordination commitment—colloquially known among the parties as “no-surprises”—that became a linchpin of their productive partnerships during the initial term of the 2008 Accords: “Each Party will make best efforts to consult with other parties prior to taking any action that could reasonably be interpreted as inconsistent with any part of this Extension.”⁵⁷

3.10.2 Affirmation of Adequacy

⁵³ See Lower River Tribes Extension, § III.H.4; Colville Extension, § III.H.4; Shoshone-Bannock Extension, § III.I.4; Idaho Extension, § III.I.4.

⁵⁴ See, e.g., Colville Extension, § III.H.4.

⁵⁵ See *id.* § III.H.4.b.

⁵⁶ See Colville Extension, § III.H.4.c.

⁵⁷ See Lower River Tribes Extension, §§ IV.A, IV.B.7; Shoshone-Bannock Extension, §§ IV.A, IV.B.5; Colville Extension, §§ IV.A, IV.B.7; Idaho Extension, §§ IV.A, IV.B.4; Montana Extension, § IV.D.

The Accord partners agree to affirmatively support, in legal, policy, and technical forums, the Action Agencies' commitments under these Accord Extensions and in ESA consultations, and find that these commitments constitute adequate Action Agency compliance for the ESA, the Northwest Power Act, and the Clean Water Act,⁵⁸ with respect to the Columbia River System. Going forward, the Accord Extensions include the additional affirmation and support regarding the Action Agencies approach to National Environmental Policy Act compliance during the term of the Extensions.⁵⁹

As was the case for the 2008 Accords, these continued affirmations of adequacy in the Accord Extensions are of vital importance to Bonneville, because they confirm that, as to the Accord parties, no additional Bonneville funding is needed to meet Bonneville's fish mitigation responsibilities during the term of the Extensions. However, although some Accord Extension projects provide wildlife benefits, wildlife-specific mitigation continues to be exempted from certain Extensions' affirmations of adequacy.⁶⁰

3.10.3 U.S. v. Oregon Support

As in the 2008 Accord, the Lower River Tribes' affirmation of adequacy in their Accord Extension continues to be predicated on a reciprocal commitment from the Action Agencies to support the 2018 – 2027 *U.S. v. Oregon* Management Plan, which includes the harvest plan developed by the tribes, states, and federal regulators that co-manage the Columbia River fisheries.

3.10.4 Regional Support for Columbia River System Operations

As noted in Section 3.4.1 above, Attachment C summarizes the current status of planned fish operations for the Columbia River System beginning in 2019 while providing for continued discussions to explore potential alternatives. To this end, all Accord parties have agreed to collaborate in seeking to attract other regional sovereigns' support for system operations that preserve and enhance Bonneville's ability to sustain its statutory obligations to continue providing competitive cost-based electric power and transmission services and fulfilling other valuable public service responsibilities for the region. These responsibilities include the protection, mitigation and enhancement of fish and wildlife affected by the development and

⁵⁸ For the Clean Water Act, this affirmation of adequacy does not apply to unpermitted releases of oil or toxic contaminants from Columbia River System projects or operations. In addition, certain Accord partners requested the opportunity to coordinate with the Action Agencies on efforts to address water quality issues such as hazardous waste/oil spill clean-up at Columbia River System dams, water temperature, total dissolved gas, and plant growth in Columbia River System reservoirs. The Action Agencies agreed to such coordination. *See* Lower River Tribes Extension, § IV.B.6; Colville Extension, § IV.B.6; Shoshone-Bannock Extension, § IV.B.4; Idaho Extension, § III.C.3; Montana Extension, § IV.B.4.

⁵⁹ *See* Lower River Tribes Extension, § IV.B.1; Shoshone-Bannock Extension, § IV.B.1; Colville Extension, § IV.B.1; Idaho Extension, § IV.B.1; Montana Extension, § V.A.

⁶⁰ *See* Lower River Tribes Extension, att. B; Colville Extension, att. B (operational impacts to wildlife not addressed).

operation of the Columbia River System, while helping assure the region an adequate, efficient, economical, and reliable power supply.⁶¹

The Fish Operations Implementation Actions section of the Extensions emphasizes the high priority the parties place on the ongoing collaboration to develop regionally agreed upon fish operations. The parties will seek alignment on Columbia River System operations, as well as a shared understanding of analyses regarding the biological effects of these operations, and to collaborate toward broader regional agreement on fish operations. The Lower River Tribes and CRITFC premised their commitment to these Extensions on the Action Agencies' continued collaboration with them as the agencies complete consultation on Columbia River System operations.⁶² The parties' shared objective is that the states and tribes fully understand and support these system operations.⁶³ In the event system operations resulting from the Action Agencies' ESA consultation processes fail to meet any party's expectations, the party may exercise its rights under one of the Extension off-ramps.⁶⁴ Together, these sections of the Extensions provide the flexibility and certainty the parties needed to extend the Accords in the absence of completed ESA consultations for post-2018 operations.

3.10.5 Columbia River System Operations Environmental Impact Statement

The Accord Extensions allow for full and open participation of the Accord parties in the Columbia River System Operations Environmental Impact Statement (**EIS**) process that the Action Agencies are currently undertaking. Consistent with the Accord partners' Cooperating Agency Memoranda of Understanding for developing the EIS, and to facilitate informed and open involvement in that process, the Action Agencies will provide Accord parties with advanced notice and copies of the draft and final EIS, including the identified preferred alternative.⁶⁵ Moreover, cooperating agencies retain the right to comment on all issues during the public draft and final EIS public review and comment process including dam breaching, and suggestions for different or additional alternatives for system operations.

3.10.6 Term

Unless a party withdraws under an applicable off-ramp (discussed below), each of these Accord Extensions will be in effect until the earlier of (1) when the Action Agencies issue their final decisions on the Columbia River System Operations EIS and any associated consultation under

⁶¹ See Lower River Tribes Extension, § IV.B.2; Colville Extension, § IV.B.3; Shoshone-Bannock Extension, § IV.B.2; Idaho Extension, § IV.B.2; Montana Extension, § V.B.2.

⁶² See Lower River Tribes Extension, § IV.B.2.

⁶³ See, e.g., Lower River Tribes Extension, § IV.B.2.

⁶⁴ See, e.g., *id.* § IV.D.1.a.

⁶⁵ See, e.g., *id.* § IV.B.5.

the ESA, or (2) September 30, 2022. The parties will meet to discuss potential modification or further Extension at least one year before these Extensions expire.⁶⁶

3.10.7 Off-ramps, Renegotiation, and Withdrawal

The 2008 Accords allowed for a party to withdraw under certain circumstances, principally: in the event of material non-compliance with the agreements not resolved by dispute resolution, in the event of material effects relating to Biological Opinion litigation, or in the event of a “force majeure” affecting a party’s performance.⁶⁷ In addition, the parties were able to consider negotiation or withdrawal for changed circumstances other than those enumerated in the agreements.

The withdrawal provisions of the Accord Extensions have been updated for clarity and to streamline the associated administrative process. In particular, the Extensions now specify certain “off-ramp” conditions that allow a party to withdraw and no longer be subject to its commitments or obligations under the Extension. One off-ramp focuses on financial circumstances.⁶⁸ For Bonneville, inclusion of financial off-ramps is crucial to accommodate the current uncertainties surrounding the agency’s general financial condition, including the potential added financial impacts of any new fish and wildlife costs, such as those that may be triggered in response to increased costs for fish and wildlife responsibilities associated with either the outcome of a NOAA Fisheries or USFWS consultation, or a judicial order concerning the implementation or sufficiency of the Action Agencies’ fish and wildlife actions. A financial off-ramp is also available for material changes to Bonneville’s financial condition due to energy market conditions, river flows, litigation, or other external factors that affect the agency’s financial health and associated ability to sustain fulfillment of its various statutory responsibilities.⁶⁹

To address the uncertainties that concern certain tribal Parties, some Accord Extensions also include an off-ramp for environmental conditions or events that negatively impact reasonable expectations regarding near-term biological conditions or performance of key fish populations.⁷⁰

Finally, off-ramps are available in the event of a party’s material non-compliance with the terms of the Accord Extension or initiation of litigation by one or more of the parties challenging the

⁶⁶ See, e.g., *id.* § IV.C.

⁶⁷ See, e.g., Lower River Tribes 2008 Accord, §§ IV.E.2, IV.E.4, V.I.2; Idaho 2008 Accord, §§ IV.E.2, IV.E.3, V.H.2.

⁶⁸ See Lower River Tribes Extension, § IV.D.1.a.

⁶⁹ See *id.* § IV.D.1.d.

⁷⁰ See *id.* § IV.D.1.e; Colville Extension, § IV.D.1.e.

sufficiency of the Extension commitments to meet federal obligations for the Columbia River System, including under the ESA, NEPA, Northwest Power Act, or CWA.⁷¹

In the event of an off-ramp condition, a party may seek to renegotiate or withdraw from the extension. The withdrawal provisions have also been streamlined, as compared to the analogous provisions from the 2008 Accords, to reduce the required procedures and administrative steps that could have conceivably taken a year or more. For instance, a potentially lengthy dispute resolution process was required prior to withdrawal from the 2008 Accords.⁷² Under the accelerated Accord Extension process, however, the parties will attempt to preserve the Accord Extension through a 90-day good faith effort to renegotiate its terms in a manner that obviates the concerned party's need to withdraw.⁷³ But if renegotiation is unsuccessful, a party may withdraw.⁷⁴

3.11 Columbia River Treaty

Both the Lower River Tribes Extension and the Colville Extension include an identical attachment concerning coordination with Bonneville and the Corps on matters relating to the Columbia River Treaty.⁷⁵ During the term of the Accord Extensions, Bonneville and the Corps will meet annually with the tribes to discuss Treaty and non-Treaty operations and Treaty operating plans. With respect to negotiations between the United States and Canada to modernize the Treaty regime post-2024, Bonneville and the Corps' consultation with the Tribes will be coordinated with the U.S. Department of State and will be conducted as appropriate and consistent with applicable policies, procedures, laws and regulations, and will be coordinated with the U.S. Department of State.

3.12 Changes to Final Accord Extensions

After the draft Extensions were released for public review, the parties made minor edits, primarily to ensure technical accuracy and for administrative and clerical matters, including

⁷¹ *See id.* § IV.D.1.c. After a decade's-worth of successful collaboration on fish mitigation efforts, the parties no longer felt the need to include a formal provision on forbearance from litigation in the Accord Extensions. Starting instead from a presumption of continued collaboration—rather than a strict prohibition—the parties have now stipulated that in the event that a disagreement relating to Columbia River System fish and wildlife issues reaches such a level that a party initiates litigation to resolve it, such initiation of litigation would be a permissible ground for the other parties to withdraw from the Extension.

⁷² Section IV.E.4 of the 2008 Accords first required the parties to use the dispute resolution process for disagreements as to the purported materiality of a withdrawal event or material non-compliance by a party. Then, the parties were required to renegotiate and try to reach a mutually agreeable modification to the agreement. The dispute resolution process itself provided for multiple levels of discussion, including elevation to the parties' executives.

⁷³ *See id.* § IV.D.2.

⁷⁴ *See id.* § IV.D.3. The terms of any separate intergovernmental contracts in effect between the parties at the time of withdrawal will remain in place unless and until altered as allowed in such contract. *See id.*

⁷⁵ *See* Lower River Tribes and Colville Extensions, att. D.

adding an “Effective Date” provision⁷⁶ and signatures blocks, and correcting typographical, formatting, and grammatical errors. Several additional changes are described below.

- For all Extensions, Attachment C, Columbia River System Fish Operations, has been edited for technical accuracy; to incorporate comments from NOAA Fisheries and the Nez Perce Tribe; and to reflect changes in the characterization of ongoing collaboration to find regional alignment on operations. In addition, a preface has been added to reaffirm role and intent of the attachment.
- In Idaho’s Attachment A, funding for wildlife mitigation was removed from the budget for project 1991-061-03 because Bonneville and Idaho recently entered into a separate agreement that settled funding for that purpose.⁷⁷
- In the Umatilla Tribe’s Attachment A, capital funding for water transactions was removed, as discussed in section 3.5.2, above.
- In the Yakama Tribe’s Attachment A, a project that was erroneously omitted from the total budget calculation in the public comment draft Extension has been added into the final calculation.
- Extension language regarding the nature of NOAA Fisheries’ determinations for hatcheries has been revised for clarity.

4.0 PUBLIC REVIEW AND RESPONSE TO COMMENTS

Bonneville elected to post the draft Accord Extensions for public review and respond to the comments it received as part of the agency’s ongoing commitment to public involvement and open decision making. While the comment period remained open until September 26, Bonneville began receiving comments and considering responses to them much earlier. At meetings with customers, tribes, Council staff, regulatory agencies, and public interest groups, Bonneville listened and gathered comments throughout the review period. In response to the comments both solicited and received, Bonneville has negotiated changes to the extensions, clarified language in them, and provided responses to the comments summarized below.

In addition to the comments noted and responded to in the preceding paragraphs, Bonneville received numerous comments on the Extensions that were identical to comments on the Accords. Because the responses to those comments in the Accords Record of Decision remain germane to

⁷⁶ With respect to the effective date, Bonneville intends to execute Accord Extensions after issuing this Record of Decision. However, some other Accord Extension parties may not be able to execute the Extensions as promptly. In such case, until fully executed by all parties to an extension, at which time it will become effective, Bonneville intends to issue the FY 2019 contracts scheduled for renewal using the budgets shown in the affected state’s or tribe’s Attachment A. In the unlikely event an Extension is not executed after the FY 2019 project contracts have been signed, Bonneville can proceed as described in the Bonneville Purchasing Instructions to modify and manage the project budget.

⁷⁷ See *infra* § 5.2.1.

the same comments received on the Extensions, those comments and responses are summarized here and incorporated by reference.⁷⁸

- Several commenters expressed disappointment that there was not more information regarding progress to mitigation goals and objectives from the work funded under the 2008 Accords.⁷⁹
 - In addition to the Accord accomplishments summarized in each Extension, the Action Agencies have previously described the Columbia River System overhaul;⁸⁰ CRITFC summarized 10 years of their tribal Accord accomplishments;⁸¹ and Bonneville tracks implementation progress and review on its Columbia Basin Fish website.⁸²
- Several commenters wanted the Action Agencies to use “measureable data” to evaluate the success of fish and wildlife mitigation actions to inform a project and budget prioritization process.⁸³
 - The data available for analysis of each of the projects Bonneville funds is available on the agency’s Columbia Basin Fish website. Bonneville has echoed these views in its own comments to the Council during past Columbia Basin Fish and Wildlife Program amendment processes.⁸⁴
- Several commenters said it was imperative to bend down the upward cost trajectory of fish and wildlife mitigation costs to deal with financial uncertainty.⁸⁵
 - For the past 20 years Bonneville’s annual budget for funding its direct fish and wildlife program has increased, often dramatically. With the Accord Extensions and Bonneville’s rigorous effort working with each mitigation contractor to review their contracts and budgets, the agency has negotiated level-to-decreasing budgets. With the need to ensure full legal compliance with applicable statutory

⁷⁸ 2008 Accords ROD, pages 28-38 (including internal citations).

⁷⁹ Comment letter from Public Power Council at page 2 (Sept. 26, 2018) (hereinafter “PPC Comment”); Comment letter from Northwest Requirements Utilities at page 1 (Sept. 26, 2018) (hereinafter “NRU Comment”). All comments are available on Bonneville’s public comment webpage available at:

<https://www.bpa.gov/applications/publiccomments/CommentList.aspx?ID=362>

⁸⁰ *See generally* Federal Columbia River Power System Improvements and Operations Under the Endangered Species Act – A Progress Report (Sep. 2013).

⁸¹ CRITFC, FISH ACCORDS 10-YEAR SUMMARY (2018) available at: <https://www.critfc.org/blog/2018/08/14/fish-accords-10-year-summary/>

⁸² <https://www.cbfish.org/>

⁸³ Comment letter from Snohomish County Public Utility District No. 1 at page 1 (Sept. 26, 2018) (hereinafter “Snohomish Comment”); Comment letter from PUD Cowlitz pages 1-2 (Sept. 26, 2018) (hereinafter “Cowlitz Comment”).

⁸⁴ *See, e.g.*, Bonneville, comments on the Council’s Draft 2014 Program (July 2014) available at <https://app.nwcouncil.org/fw/program/2014-03/comments/comment?alttemplate=ArticleClone&id=1097>

⁸⁵ NRU Comment at page 3.

mandates, and the desire to maintain the benefits that have accrued from four decades of fish and wildlife mitigation investment, Bonneville believes the Accord Extension budgets, and the agency’s overall fish and wildlife program budget, are at appropriate levels to accomplish needed work at this time and reflect sound business principles. Additionally, as explained in section 3.5.2, above, the overall Accord Extension budget has been reduced from fiscal year 2018 Accord budget, while securing an expanded affirmation of adequacy for Bonneville and the Action Agencies.

- Some comments questioned how the Extensions affect Bonneville’s flexibility to get more money to cover the costs of more spill.⁸⁶ And related, some commenters believed the “material changes” language in the off-ramp provisions needed greater definition to be effective.⁸⁷
 - In the event mitigation costs of operating the Columbia River System increase above those levels currently planned, the Extensions allow Bonneville to ask parties to reduce their budgets voluntarily. The Parties have an incentive to do so because reductions in one year will be carried forward and made available in future years. If the parties do not agree and Bonneville finds the additional operations costs are material, then Bonneville may terminate.⁸⁸
 - Bonneville negotiated a flexible off-ramp provision based on material changes to its financial condition, because what is material will depend on the legal, environmental, and financial conditions at that moment. Each party, including Bonneville, can determine for itself what is material, within the rules of good faith and reasonableness that are implied in all contracts.
- Similarly, some comments encouraged Bonneville to condition the Extensions so that any increase in spill costs will be offset by reductions within the agency’s fish and wildlife program budget.⁸⁹
 - Each Accord Extension describes how the parties will take a comprehensive approach to mitigation that includes Columbia River System operations, habitat protection and enhancement, hatchery management, and related research. The Extensions all acknowledge that Bonneville will manage these mitigation costs within a unified budget.⁹⁰ The extensions with Montana, Idaho, and the Shoshone Bannock Tribes elaborate further to clarify that managing the mitigation budget in a more unified manner will better enable Bonneville to fulfill its strategic goals

⁸⁶ Comment from PNGC Power at page 1 (September 26, 2018) (hereinafter “PNGC Comment”); Comment from Northwest RiverPartners at page 2 (Sept. 26, 2018) (hereinafter “RiverPartners Comment”).

⁸⁷ PNGC Comment at page 1; PPC Comment at page 2; RiverPartners Comment at page 2.

⁸⁸ See Lower River Tribes Extension, §§ III.C.6 and IV.D.1.d.

⁸⁹ NRU Comment at page 2.

⁹⁰ See, e.g., Lower River Tribes Extension, § III.

to “[h]old the sum of [its] program costs, by business line, at or below the rate of inflation through 2028,”⁹¹ and take “a more disciplined approach to managing the total cost of [its] Fish and Wildlife Program”⁹² by prioritizing its portfolio of mitigation investments “based on biological and cost-effectiveness and their connection to mitigation for the impacts of the Columbia River System.”⁹³ While the extensions do not require reductions from the state and tribal parties budgets, if spill or other operations costs increase materially Bonneville may use one or more off-ramps described in each extension.

- One commenter wanted to see a breakdown of Accord Extension costs showing what proportion goes to court ordered mitigation and required statutory mitigation.⁹⁴
 - Bonneville is not currently a party to litigation regarding Columbia River System fish operations. While the other Action Agencies are currently under court order to continue funding and implementing mitigation called for in NOAA Fisheries’ 2008 Biological Opinion and Reasonable and Prudent Alternative, as supplemented in 2010 and 2014, that document expires on December 31, 2018. The Action Agencies have a continuing substantive obligation to ensure their management of the Columbia River System complies with the Endangered Species Act and are currently in consultation with both NOAA Fisheries and U.S. Fish and Wildlife Service on the biological effects of system operations beginning in 2019. The Action Agencies have negotiated funding for projects in the Accord Extensions with consideration for the actions being proposed in these consultation processes and their anticipated commitments to ensure ESA compliance beginning January 1, 2019.

- Several commenters believe that because the Council has not approved the Extensions, that they are not consistent with the Council’s Columbia River Basin Fish and Wildlife Program.⁹⁵ Another commenter supported the Extensions, provided they did not conflict with the Action Agencies’ responsibilities under the Northwest Power Act with regard to consistency with the Council’s Columbia Basin Fish and Wildlife Program.⁹⁶
 - Virtually all of the projects in each state and tribal Party’s list of projects attached to the Extensions have been reviewed by the Independent Scientific Review Panel and recommended by the Council to Bonneville for funding. Those few projects

⁹¹ Bonneville Strategic Plan at 12.

⁹² *Id.* at 34.

⁹³ *Id.* at page 39.

⁹⁴ Comments from Advocates for the West at page 3 (September 18, 2018) (hereinafter “Advocates Comment”).

⁹⁵ Comment letter from Spokane Tribe of Indians pages 1-3 (Sept. 26, 2018) (hereinafter (“Spokane Comment”)); Comment letter from Coeur D’Alene Tribe at page 4 (Sept. 26, 2018) (hereinafter “Coeur D’Alene Comment”).

⁹⁶ Comment letter from Oregon Department of Fish and Wildlife at page 1 (Sept. 26, 2018) (hereinafter “ODFW Comment”).

that appear as “new” with 2019 tracking numbers are administrative consolidations from preexisting projects; changes in contractors who will perform the same work as before; or for kinds of work already reviewed and recommended by the Council but now with a new additional contractor. Funding these projects is therefore consistent with the program. Moreover, as a technical matter, the Northwest Power Act does not authorize the Council to approve Bonneville’s contracts.

- One comment noted that the Accords failed in a central purpose—ending litigation over Columbia River System Operations.⁹⁷
 - While it is true that one of the Accords’ litigation-related purposes was not fulfilled, there were in fact multiple purposes underlying the formation of the Accords.⁹⁸ The Sections I and II in each Accord Extension identify other purposes and reasons that support signing the agreements.
- One commenter does not think funding in some of the Extensions focuses on the species in the greatest need.⁹⁹
 - By focusing on ESA-listed species, and species emphasized in the Columbia River Basin Fish and Wildlife Program—such as Pacific Lamprey and sturgeon—Bonneville has followed the lead of resource regulators and managers in what species to prioritize.
- Several commenters thought the Accord Extensions with tribal parties included project administration principles related to tribal trust and treaty responsibilities in a manner that inappropriately treated those responsibilities as “consideration.”¹⁰⁰
 - These principles were included at the request of tribal Accord parties to reaffirm the importance of treaty rights, trust responsibility, and the tribes’ status as fisheries resource managers.
- One commenter disagreed with the discussions in the Accord Extensions describing the overhaul of the Columbia River System over the last several decades.¹⁰¹
 - Bonneville believes that the statistics and actions cited in Section II.A of the extensions speak for themselves as evidence of extensive changes and

⁹⁷ See, e.g., Comment letter from the Nez Perce Tribe pages 1-2 (Sept. 26, 2018) (hereinafter “Nez Perce Comment”).

⁹⁸ See, 2008 Accords ROD pages 1-5.

⁹⁹ See, e.g., Nez Perce Comments at page 2.

¹⁰⁰ See, e.g., Nez Perce Comment pages 2-3. For example, the commenter was concerned about administration of projects in a manner consistent with legal rights of tribes and their status as resource managers, and recognizing federal trust responsibility. See also, Comment Spokane Tribe pages 15-16.

¹⁰¹ Nez Perce Comment pages 3-4.

improvements to the configuration and operation of the Columbia River System. These actions were taken by the Action Agencies to advance their purpose of overhauling the Columbia River System, to protect, mitigate, and enhance fish and wildlife, and to help to ensure System management is not likely to jeopardize ESA-listed species or destroy or adversely modify designated critical habitat.

- One commenter expressed concern that the status of Pacific Lamprey warrants greater lamprey-focused actions than those provided for through the Accord Extensions.¹⁰²
 - Nothing in the Accord Extensions precludes additional action for Pacific Lamprey.

- One commenter thought the provisions regarding the Fish Passage Center in the Lower River Tribes and the Colville Extensions improperly infringe on the role of the fisheries managers.¹⁰³ Another thought alternatives for the services the Fish Passage Center provide should be sourced to another research center or university.¹⁰⁴
 - The Fish Passage Center provision in the 2008 Accord was a subject of comments and addressed in Bonneville’s earlier ROD and that discussion remains relevant.¹⁰⁵ Bonneville disagrees that the Accord Extension language impinges in fisheries managers’ responsibilities. The language was developed in coordination with the Lower River Tribes, CRITFC, and the Colville Tribes—all fisheries co-managers—and reviewed by Federal fisheries regulators. For its part, Bonneville wanted assurances that research it funds with ratepayer dollars would be available upon request. And Bonneville notes that while it is committed to funding through Pacific States Marine Fisheries Commission to ensure the Fish Passage Center’s services are available to the tribal parties, that does not preclude engaging other sources of evaluation services as needed.

- One commenter said that because Bonneville allows the state and tribal Accord Parties to carry forward unspent funds from the original 2008 Accord budgets, the extensions do not reduce costs.¹⁰⁶
 - See the discussion of cost and budget cuts in section 3.5.2 above.

- One commenter believed that the hatchery implementation commitments should include funding necessary for infrastructure and emergency repairs.¹⁰⁷

¹⁰² *Id.* page 4.

¹⁰³ *Id.*

¹⁰⁴ Snohomish Comment page 2.

¹⁰⁵ *See* 2008 Accords ROD pages 6 and 31.

¹⁰⁶ Nez Perce Comment page 5.

¹⁰⁷ *Id.*

- The state and tribal parties agreed that the Action Agencies’ commitment to provide ongoing stability for hatchery operations and maintenance would adequately address the federal mitigation obligations related to the hatchery programs.
- One commenter believed that Bonneville’s budget reductions for the Lower Snake Compensation Program and other artificial production programs potentially affect the functioning of those facilities.¹⁰⁸
 - Those budgets were negotiated with the USFWS and others to ensure adequate operations and maintenance continued to support LSRCP production levels.
- One commenter questioned why the parties are agreeing to seek to identify a method to document the biological benefits associated with hatchery projects.¹⁰⁹
 - Bonneville wants to collaboratively establish methods to better identify the conservation value of its hatchery project investments to weak and ESA-protected fish stocks.
- One commenter said Attachment C should be removed or substantially rewritten.¹¹⁰
 - Attachment C has been substantially revised to reflect ongoing collaboration and consultation, and comments from the Nez Perce Tribe, CRITFC, and NOAA Fisheries. In addition, Bonneville added a preamble to Attachment C in the Lower River Tribes extension to further address concerns raised by the Nez Perce Tribe. See the discussion above in section 3.10.4.
- One commenter thought Section IV.D in the Lower River Tribes’ Extensions set up non-Accord projects for future budget cuts, regardless of their benefit to ESA-listed species, before there would be cuts to Accord projects.¹¹¹
 - Bonneville disagrees. The commitment in Section IV.D.2 of the Lower River Tribes extension is to “first seek to preserve this Extension” if a Party exercises an off-ramp. This has nothing to do with non-Accord projects or contractors. This provision reflects the parties’ commitment to their partnership. Reading this section in context shows that before withdrawing, “the Parties shall *first* make a 90-day good faith effort” to renegotiate their agreement. (Emphasis added.)

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* page 6.

¹¹⁰ *Id.* pages 6-7.

¹¹¹ *Id.*

- Two commenters believed the provision regarding translocation of anadromous fish is inconsistent with the Council’s Columbia Basin Fish and Wildlife Program and contradicted Bonneville’s position in past litigation regarding that program.¹¹²
 - Bonneville has noted some of its concerns with the Council’s 2014 Program provisions regarding passage and reintroduction of anadromous fish above Chief Joseph and Grand Coulee dams in past letters to the Council during the 2014 Program amendment process. In litigation, Bonneville supported the Council’s 2014 Program amendment process and the biological objectives it included, such as “flow and dam passage measures” related to juvenile anadromous fish.¹¹³ Bonneville did not brief its views on translocation of anadromous fish. The Council did, though. It noted that Bonneville “opposed or had serious qualms about” new provisions in the program such as “investigating the reintroduction of anadromous fish above Grand Coulee Dam...”¹¹⁴ Bonneville’s positions before the Council and the court are consistent.

- Two commenters believe that fish produced at Chief Joseph Hatchery be should be available for use above Chief Joseph Dam.¹¹⁵
 - Part of Bonneville’s legal and policy concerns with the use of Chief Joseph Hatchery production above Chief Joseph Dam is that with the Consolidated Appropriations Act of 2008 Congress authorized “Expenditures from the Bonneville Power Administration Fund for “hatchery production facilities to supplement Chinook salmon below Chief Joseph Dam in Washington . . .” only.¹¹⁶

- One commenter requested that footnote 11 from the Colville Extension be deleted because it conflicted with the Indian law canon of statutory construction requiring ambiguous statutes to be construed liberally in favor of the Indians.¹¹⁷
 - This footnote explains some of Bonneville’s thinking on why the translocation provisions in the Council’s 2014 Program are not a “measure” as defined by the Northwest Power Act. The note is not interpretation of an ambiguous statutory provision. Therefore, the cited canon of statutory construction is not applicable. Moreover, where Bonneville does interpret the Northwest Power Act, it deserves

¹¹² Coeur D’Alene Comment page 3; Spokane Comment pages 9-13.

¹¹³ *Northwest Resource Information Center v. Northwest Power and Conservation Council*, (9th Cir. No. 15-71482) (2017) Brief of Respondent-Intervenor Bonneville Power Administration at page 9.

¹¹⁴ Spokane Comment page 10.

¹¹⁵ Coeur D’Alene Comment pages 3-4; Spokane Comment pages 11-14.

¹¹⁶ Pub .L. No. 110-161 (Dec. 26, 2007), 121 Stat. 1964.

¹¹⁷ Spokane Comment pages 13-14.

“substantial deference” given “the complex subject matter and Bonneville’s factual and legal expertise.”¹¹⁸

- Two commenters believed signing the extensions would diminish the Council’s ability to provide guidance to Bonneville in the forthcoming 2019 Program amendments.¹¹⁹
 - Bonneville explained the interrelation of the 2008 Accords and the Council’s Program in its brief filed in *Northwest Resource Information Center v. Northwest Power and Conservation Council*.¹²⁰ The relationship of the extensions to the Council’s Program remains the same.
- Some comments suggested Bonneville used money to buy cooperation from the tribal Accord parties.¹²¹
 - Bonneville rejects this *ad hominem* attack on the tribes. The commenter should take this view up with the tribes directly. Moreover, the facts do not support this criticism. Oregon has been the only state in the basin without an Accord or similar agreement, and it receives more mitigation funding from Bonneville than any other state.¹²² Of the 13 tribes receiving mitigation funding, the Nez Perce Tribe ranks third in funding behind the Yakama and Colville tribes. Oregon and the Nez Perce Tribe are plaintiffs in opposition to the Federal position in Columbia River System litigation. Cooperation comes from shared interests and values, not funding.

Comments Related to the National Environmental Policy Act

Several comments on the draft Accord Extensions related to the NEPA. Those comments and responses follow. The comments are available on Bonneville’s website at <https://www.bpa.gov/applications/publiccomments/CommentList.aspx?ID=362>

- One commenter expressed concern that the presence of four lower Snake River dams interferes with the Nez Perce treaty tribal fishing rights and the survival of salmon and orcas.¹²³
 - The U.S. Army Corps of Engineers, the Bureau of Reclamation and Bonneville are preparing the Columbia River System Operations Environmental Impact

¹¹⁸ *Confederated Tribes of the Umatilla Indian Reservation v. Bonneville Power Admin.*, 342 F.3d 924, 928 (9th Cir. 2003) (citing *Aluminum Co. of Am. v. Central Lincoln People’s Util. Dist.*, 467 U.S. 380, 389 (1984)).

¹¹⁹ Coeur D’Alene Comment page 4; Spokane Comment page 3.

¹²⁰ See *supra* note 113.

¹²¹ Comment letter from Charles Pace pages 1-2 (Sept. 26, 2018).

¹²² See, e.g., Northwest Power and Conservation Council, 2017 COLUMBIA RIVER BASIN FISH AND WILDLIFE PROGRAM COST REPORT, Table 10 (2018) available at <https://www.nwcouncil.org/sites/default/files/2018-4.pdf>. See also, 2008 ROD at page 31.

¹²³ Comment from Mstthews (sic) (Sept. 26, 2018).

Statement, which is looking at alternative ways to operate, maintain and configure the Columbia River System, including an alternative that analyzes the impacts of breaching the four Lower Snake River dams. That analysis will take a broad look at the impacts to many resources, including anadromous and resident fish, orcas and cultural resources.

- One commenter supported the Accord Extensions as an interim action until the CRSO EIS is completed.¹²⁴
 - Thank you for your comments and we look forward to your continued engagement in the Columbia River System Operations Environmental Impact Statement process.

- Several commenters asked how the affirmation of adequacy provision in the Extensions does not undermine the court ordered CRSO EIS development, or generally expressed concern that the extensions may prejudice the CRSO EIS outcome.¹²⁵
 - Regarding the affirmation of adequacy language, each Accord party supported the Federal Defendants’ proposed schedule for completion of the Columbia River System Operations Environmental Impact Statement (CRSO EIS),¹²⁶ and nothing in the Accord Extensions affects how the Accord parties should participate in the EIS process. The Accord parties are also cooperating agencies under the CRSO EIS. To become a cooperating agency, these parties negotiated with the Action Agencies to develop cooperating agency Memoranda of Understanding to govern their participation during the preparation of the EIS.
 - The Cooperating Agency Memoranda of Understanding outline the parties’ rights and responsibilities related to the CRSO EIS process. Said another way, nothing in the Accords Extensions affects how the Accord parties should participate in the CRSO EIS process. Specifically, the Action Agencies and cooperating agencies wanted to ensure an informed and open public involvement process, so the Cooperating Agency Memoranda of Understanding provide Accord parties with advanced notice and copies of the draft and final EIS, including the identified preferred alternative.¹²⁷ Moreover, cooperating agencies retain the right to comment on all issues during the public draft and final EIS public review and comment process, including dam breaching, and suggestions for different or additional alternatives for system operations.

¹²⁴ Comment from Trout Unlimited (Sept. 26, 2018).

¹²⁵ Spokane Comment page 2, comment 4; Coeur D’Alene Comment page ; ODFW Comment; PPC Comment.

¹²⁶ Joint Reply of Amici Warm Springs and Umatilla Tribes and Yakama Nation to Plaintiffs’ and Defendants’ Briefs re Remand Schedule, *Nat’l Wildlife Fed. v. Nat’l Marine Fisheries Serv.*, No. 3:01-cv-00640-SI (D. Or. July 1, 2016); Three States’ Motion for Leave to File Brief re Proposed NEPA Process Timetable, *Nat’l Wildlife Fed. v. Nat’l Marine Fisheries Serv.*, No. 3:01-cv-00640-SI (D. Or. June 30, 2016).

¹²⁷ See, e.g., Lower River Tribes Extension, § IV.B.5.

- Finally, these Extensions are time-limited and will not prohibit legal challenges to the Records of Decision on the CRSO EIS.¹²⁸ Specifically, the Extensions are in force until after the *earlier* of either when the Action Agencies issue their final decisions on the CRSO EIS and any associated consultation under the ESA for the Columbia River System, or September 30, 2022. This ensures that any Accord party may file suit once the Action Agencies make a final decision; thus, the Action Agencies are not requiring any Accord party to support their ultimate approach in the CRSO EIS.
- One commenter expressed concern that the Accord Extensions are unsupported by a proper NEPA analysis, including public notice and opportunity to comment. This commenter provided comments in advance of the Accords Extension public comment period, and Bonneville asked that it submit them as part of our formal comment period on the Accords Extensions. Comments received during the comment period were considered in the Administrator’s decision as documented in the Record of Decision and in consideration of the potential environmental impacts consistent with the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321, *et seq.*¹²⁹
 - Based on the nature of the action (extending and updating the existing 2008 Accords) and consideration of public comments, Bonneville determined that a categorical exclusion applies.

5.0 WHY BONNEVILLE HAS DECIDED TO EXTEND THE ACCORDS

5.1 The Accord Extension Agreements Are Consistent with Bonneville’s Strategic Plan

As explained in its 2018-2023 Strategic Plan (**Strategic Plan**), Bonneville intends to hold program costs, by business line and including Fish and Wildlife, at or below the rate of inflation through 2028.¹³⁰ For Fish and Wildlife, this applies to new commitments as well.¹³¹

Commitments such as the Accord Extensions are a subset of Bonneville’s larger Fish and Wildlife Program as a whole, and the associated Extension budgets are likewise a subset that is fully contained within the Fish and Wildlife Program’s overall budget. Therefore, under the Strategic Plan, the cost of the Accord Extensions—including use of any carry-forward funds as allowed under the budget rules described in section 3.5.3 above—will be absorbed within the broader established Fish and Wildlife budget, which in turn will be held at or below the rate of inflation.

¹²⁸ The Cooperating Agency Memoranda of Understanding are also time-limited and expire when the Action Agencies sign Records of Decision on the CRSO EIS.

¹²⁹ Advocates Comment pages 1, 4.

¹³⁰ See BONNEVILLE POWER ADMIN., BPA 2018-2023 STRATEGIC PLAN, 12, 39, *available at* <https://www.bpa.gov/StrategicPlan/StrategicPlan/2018-Strategic-Plan.pdf> [hereinafter, *Strategic Plan*].

¹³¹ *Id.* at 39.

Furthermore, each of the Accord Extensions takes into account the dynamic energy market in the West, the uncertainties of mitigation costs such as spill for fish passage, and other factors affecting Bonneville’s overall financial condition, which spurred development of the Strategic Plan in the first place. The factors underlying this financial condition are not described in detail in the Extensions, but they are widely available in the public domain and underscore Bonneville’s need to bring greater cost discipline to all aspects of its business and operations.¹³² To that end, Bonneville’s Strategic Plan identifies strengthening financial health as its first strategic goal, and establishes specific objectives to achieve this goal.¹³³ These topics have been discussed extensively by all of the Accord Extension parties.

With this backdrop, Bonneville negotiated the Extensions to increase focus, certainty, and stability in its fish and wildlife costs. Complementing the broader, agency-wide efforts to strengthen its financial health and manage costs—including by stabilizing its fish and wildlife costs—while continuing to deliver fully on Bonneville’s mission,¹³⁴ the Extensions all include numerous provisions and mechanisms aimed at savings. Further, an underlying principle in the Extensions is Bonneville’s intent to manage the cost of Columbia River System fish operations; habitat protection and enhancement; hatchery management; and research, monitoring and evaluation as “separate components under a unified fish and wildlife mitigation budget,” meaning that a cost increase in one area would be offset by decreases in another.¹³⁵ One recent example is the 2018 Spill Surcharge, where Bonneville decided to offset the majority of additional costs associated with court-ordered spill for fish passage by reducing Fish and Wildlife Program expenditures.¹³⁶ To manage these costs in a more sound business way, and meet Strategic Plan objectives, including for Bonneville’s overall Fish and Wildlife program, the Extensions include new administrative provisions:

¹³² See, e.g., BONNEVILLE POWER ADMIN., ADMINISTRATOR’S DECISION, IMPLEMENTATION OF THE FY 2018 SPILL SURCHARGE, at 1-5 (June 2018), available at https://www.bpa.gov/Finance/RateCases/surcharge18/surcharge18documents/Spill_Surcharge_Implementation_FY2018_06-21-2018.pdf (discussing energy market conditions, cost of court-ordered spill, and other factors as contributing to Bonneville’s precarious financial condition and its corresponding need to implement cost-management actions across the agency) [hereinafter Spill Surcharge Rod].

¹³³ See generally Strategic Plan (identifying objectives such as improving cost-management discipline, building financial resiliency, prioritizing fish and wildlife investments based on biological effectiveness and mitigation for impacts of the Federal Columbia River Power System, and managing fish and wildlife program costs at or below the rate of inflation).

¹³⁴ See Strategic Plan at 3 (Bonneville vision is to be “an engine of the Pacific Northwest’s economic prosperity and environmental sustainability,” providing high reliability, low rates, responsible environmental stewardship and regional accountability.”).

¹³⁵ See Lower River Tribes Extension, § III. See also Shoshone-Bannock Extension, § III.A (describing Bonneville’s management of “fish and wildlife mitigation projects and Columbia River System operations as a single effort”; this “biological investment portfolio model [serves] as a sound business approach to managing the costs [of balancing the multiple purposes for which the Action Agencies operate the Columbia River System]”).

¹³⁶ See Spill Surcharge Rod at 5.

- Reducing redundant or unnecessary research, monitoring, and evaluation.¹³⁷ This includes focusing limited resources on work that has a direct nexus to Columbia River System operations or mitigation actions and work that is used to inform management decisions with respect to system operations or related mitigation actions.
- Budget reductions in each state and tribe’s Attachment A projects.¹³⁸
- Agreement that Bonneville may call for additional voluntary expenditure reductions.¹³⁹
- A provision to discuss and attempt to agree on the allocation of unspent funds at the end of the Extensions, but making no commitment to carry-those funds forward into future fiscal years after the Extensions expire.¹⁴⁰
- Commitments to seek efficiencies and streamline project management and implementation.¹⁴¹
- Formalized tracking of cost-sharing opportunities.¹⁴²
- Coordination on hatchery project ESA compliance to ensure projects do not impede recovery (and by implication increase Bonneville’s environmental compliance costs for the operation, maintenance, and configuration of the Columbia River System).¹⁴³
- Bonneville has reinforced its concerns regarding the economic, legal, and policy implications of translocation of anadromous fish above Chief Joseph and Grand Coulee dams.¹⁴⁴
- A new off-ramp allowing withdrawal in the event of material negative change in Bonneville’s financial conditions.¹⁴⁵
- The ability to terminate 90-days after triggering an off-ramp.¹⁴⁶ As discussed above, under the 2008 Accords, termination could have taken a year or more after the required notices, negotiation, and dispute resolution processes.

5.2 The Accord Extensions Are Consistent with and Support Bonneville’s Legal Responsibilities

Bonneville’s authority and ability to enter into Accord Extensions is provided by Federal statutes.¹⁴⁷ Since Bonneville’s inception, Congress has afforded the Bonneville Administrator

¹³⁷ See, e.g., Lower River Tribes Extension, § III.C.1.

¹³⁸ See *supra* § 3.5.2.

¹³⁹ See Lower River Tribes Extension, § III.C.6; Shoshone-Bannock Extension, § III.D.6; Colville Extension, § III.C.5; Idaho Extension, § III.D.5; Montana Extension, § III.B.3.

¹⁴⁰ See Lower River Tribes Extension, § III.C.6.

¹⁴¹ See, e.g., Lower River Tribes Extension, § III.D.3; Idaho Extension, § III.E.2.

¹⁴² See, e.g., Lower River Tribes Extension, § III.D.3.

¹⁴³ See Lower River Tribes Extension, § III.E.4.a; Idaho Extension, § III.F.4.a; Shoshone-Bannock Extension, § III.F.4.a; Colville Extension, § III.E.4.a.

¹⁴⁴ See Colville Extension, § III.H.4.a; Lower River Tribes Extension, § III.H.4.

¹⁴⁵ See Lower River Tribes Extension, § IV.D.1.d; Shoshone-Bannock Extension, § IV.D.1.d; Colville Extension, § IV.D.1.d; Idaho Extension, § IV.D.1.d; Montana Extension, § V.E.1.d.

¹⁴⁶ See, e.g., Lower River Tribes Extension, § IV.D.2.

¹⁴⁷ See 16 U.S.C. § 839(b)(h)(10)(A).

broad discretion to enter into “such contracts, agreements, and arrangements, *including the amendment, modification, adjustment, or cancellation thereof*, . . . upon such terms and conditions and in such manner as he may deem necessary” to fulfill Bonneville’s statutory purposes.¹⁴⁸ This includes the express authority to make payments from the Bonneville Fund to implement Bonneville’s legal responsibilities, including its legal responsibilities under the Northwest Power Act and the Endangered Species Act.¹⁴⁹ Bonneville’s Administrator is imbued with considerable flexibility and discretion when entering into agreements such as Accords, provided that Bonneville uses that flexibility and discretion to fulfill one or more of its statutory duties. As described in this section, the Accords are both consistent with and help Bonneville fulfill its Federal responsibilities.

5.2.1 Northwest Power Act

The Extensions highlight and document the overhaul of the Columbia River System undertaken by the Action Agencies since the mid-1990s. These system improvements in both project configuration and operations address the broadly stated anadromous fish mandates in the Northwest Power Act by improving survival at the dams and ensuring flows of sufficient quality and quantity to improve fish production, migration, and survival, thus meeting the sound biological objectives for juvenile and adult survival.¹⁵⁰ Through this overhaul, and the operations that accompany it, the Action Agencies have provided and continue to provide fish and wildlife equitable treatment with the other purposes of the system.¹⁵¹

Columbia River System operations are not, however, governed by the Extensions. Instead, the Extensions commit the agencies to collaborate with the states and tribes in developing proposed operations.¹⁵² Operations beginning in 2019 will be guided in particular by ESA section 7 consultations currently underway with NOAA Fisheries and the USFWS, as well as myriad other laws and regulations governing the Action Agencies’ management of the Columbia River System.

The Extensions all include robust commitments in their respective Attachment A’s for continuing to fund and implement extensive on-the-ground protection, mitigation, and enhancement work that directly benefits fish and wildlife and their habitats affected by the development and operation of the Columbia River System. All of the ongoing projects have in the past been vetted by the Independent Scientific Review Panel and recommended for funding by the Council. Because the Extension commitments maintain ongoing projects, Bonneville

¹⁴⁸ 16 U.S.C. § 832a(f) (emphasis added).

¹⁴⁹ 16 U.S.C. § 838i(b); § 838i(b)(12).

¹⁵⁰ See, e.g., Lower River Tribes Extension, § II.A.

¹⁵¹ The discussion and analysis of how the Accords provide equitable treatment in the 2008 Accords ROD also remain applicable today. See 2008 Accords ROD § 5.2.3.3.

¹⁵² See, e.g., Lower River Tribes Extension, § III.B, att. C.

believes they remain consistent with the Fish and Wildlife Program and the purposes of the Northwest Power Act.

While the Extensions with the tribes and Idaho all focus on anadromous fish, other fish such as bull trout, sturgeon, and Pacific lamprey, as well as wildlife, are also considered. For example, the “Montana operations,” based on the Council’s 2003 Mainstem Amendments to its Columbia River Basin Fish and Wildlife Program, are a key feature in the Montana Extension. In addition, all the Extensions retain the Action Agencies’ commitment to take reasonable actions to aid non-listed fish during emergencies when significant detrimental biological effects are demonstrated.¹⁵³

Wildlife mitigation, a Bonneville responsibility under the Northwest Power Act and a component of the Council’s Program, is central to the Colville and Shoshone Bannock Extensions.¹⁵⁴ Wildlife funding has been excluded from Idaho’s Extension, though, because in 2014 Bonneville and Idaho reached a settlement agreement on southern Idaho wildlife mitigation, and last month Bonneville signed a similar long-term agreement addressing wildlife mitigation in northern Idaho.¹⁵⁵ All of Bonneville’s wildlife mitigation commitments through the State of Idaho are now governed by those two settlements. Montana’s habitat work, while premised on mitigating resident fish, also protects and enhances water, riparian habitat, and associated uplands. Similarly, the Lower River Tribes’ habitat work for anadromous fish also benefits wildlife. By extending these commitments to protect and enhance fish habitat, Bonneville is also fulfilling its obligation to mitigate wildlife affected by Columbia River System operations.¹⁵⁶

In order to help ensure compliance with the in lieu prohibition in the Northwest Power Act, as discussed in Section 5.2.3.2 of the 2008 Accords ROD, Bonneville worked with Accord parties to ensure there is project-specific cost sharing that provides parallel or complementary funding on projects where other entities are authorized or required to provide mitigation. Cost-share funding source summaries, where applicable, can be generated on Bonneville’s project tracking website, Columbia Basin Fish.¹⁵⁷

Bonneville helps provide for an adequate, efficient, economical and reliable power supply in the Pacific Northwest, one of the purposes of the Northwest Power Act,¹⁵⁸ in multiple ways. Bonneville seeks to keep rates as low as possible consistent with sound business principles, and to manage Columbia River System operations to support power system reliability needs and

¹⁵³ See, e.g., *id.* att. B.

¹⁵⁴ See, e.g., Colville Extension, att. A (including project #1992-048-00, Hellsgate Big Game Winter Range, for wildlife mitigation); Shoshone-Bannock Extension, att. A (including project #1995-057-02 for wildlife mitigation in southern Idaho).

¹⁵⁵ See Council 2014 Program, at 72 (recommending settlement agreements as a wildlife mitigation tool).

¹⁵⁶ 16 U.S.C. § 839b(h)(10)(A).

¹⁵⁷ See cbfish.org.

¹⁵⁸ 16 U.S.C. § 839(2).

comply with applicable reliability standards. Signing the Extensions is consistent with these purposes. Consistent with agency-wide cost management efforts underway, Bonneville has taken significant steps, in coordination with Accord parties, to decrease funding commitments from the 2008 Accords level, while continuing to bring Bonneville and its customers a level of certainty about fish and wildlife costs and offer expanded administrative provisions for managing all of the various mitigation costs as part of a single unified budget.

5.2.2 *Endangered Species Act*

The actions and commitments in the Accord Extensions, including Bonneville-funded projects in the Attachment A's, are intended to benefit ESA-listed and non-listed fish. For ESA-listed fish, Accord Extension actions help to support fulfillment of Bonneville's commitments and responsibilities under the ESA. For example, during the initial Accords term, Bonneville worked with the Umatilla Tribe to refocus Accords funding to target high priority habitat work on Catherine Creek, to benefit ESA-listed fish species and facilitate biological results related to ESA responsibilities.

Similarly, to the extent that Bonneville's ESA responsibilities evolve during the term of these Extensions—*e.g.*, as a result of section 7 consultations with NOAA Fisheries and USFWS for operation of the Columbia River System beginning in 2019—Bonneville would plan to work with Accord parties to re-prioritize or re-focus Accord commitments and funding to address new or changed ESA responsibilities. If Bonneville and the Accord parties are unable to agree on a redirected focus, the added cost of ESA compliance on top of the existing Accord Extension commitments could lead Bonneville to explore use of an off-ramp in order to redirect agency funds to support actions that address evolving ESA responsibilities.

5.2.3 *Treaty and Trust Responsibilities*

As discussed more fully in the 2008 Accords Record of Decision,¹⁵⁹ Bonneville acknowledges that many tribes in the Columbia River Basin have reserved treaty rights pertaining to fish and other natural resources, and that such treaties are federal laws that Bonneville must observe and uphold. With respect to treaty rights and the federal government's trust responsibilities to all Indian tribes, Bonneville fulfills these responsibilities first by meeting the statutory obligations prescribed in general statutes applicable to all federal agencies, such as the National Environmental Policy Act, and in statutes tailored specifically to Bonneville's activities, such as section 4(h)(10)(A) of the Northwest Power Act. Further, Bonneville seeks to give special consideration to tribal views and concerns, especially when making decisions that may affect tribal resources, through government-to-government consultation with tribes pursuant to Bonneville's Tribal Policy. For the same reasons described in the 2008 Accords Record of

¹⁵⁹ See 2008 Accords ROD § 5.2.1.

Decision,¹⁶⁰ the Accords continue to be consistent with the tribal treaty or reserved rights and the United States’ trust obligation.

6.0 NATIONAL ENVIRONMENTAL POLICY ACT

Consistent with the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321, *et seq.*, Bonneville has assessed the potential environmental effects that could result from extending and updating the existing 2008 Accords. This extension of the 2008 Accords for up to four years is administrative in nature and does not require Bonneville to take any action that would have a potential effect on the environment. The projects identified for funding through these extensions would build upon and largely continue the work that has taken place through the existing 2008 Accords. Consistent with the 2008 Accords, funding for individual projects would be provided through separate intergovernmental contracts. These projects would continue to undergo site-specific environmental review, including NEPA analysis. If there are projects that change the status quo or directly impact the physical environment, then Bonneville would conduct a commensurate NEPA process. The Accord Extensions also include support for Columbia River System operations, maintenance, and configuration, but do not provide funding to the states or tribes for these actions or, in any manner, adopt changes to current system operations.

Accordingly, Bonneville has determined that the extension of the 2008 Agreements is purely administrative in nature. It also falls within a class of actions excluded from further NEPA review. More specifically, this proposal falls within Categorical Exclusion A2 Clarifying or Administrative Contract Actions, found at 10 C.F.R. § 1021, Subpart D, Appendix A, which provides for the categorical exclusion from further NEPA review of “Contract interpretations, amendments, and modifications that are clarifying or administrative in nature.” Bonneville has prepared a categorical exclusion determination memorandum that documents this categorical exclusion from further NEPA review, which is available at Bonneville’s website:

<https://www.bpa.gov/efw/Analysis/CategoricalExclusions/Pages/2018.aspx>.

7.0 CONCLUSION

Bonneville has partnered with the Accord parties over the last decade to develop, improve, and refine a shared approach to fish and wildlife mitigation in the Columbia River Basin. The Accords allowed, indeed required, the parties to focus on a common purpose—to protect, mitigate, and enhance fish and wildlife affected by the Columbia River System, consistent with trust and treaty responsibilities. The Accords’ bedrock principles of collaboration and open communication on Columbia Basin fish and wildlife matters ultimately proved to be among the most valuable, if not the most valuable, aspects of the agreements. Crucially for Bonneville, between those principles underpinning the Accord relationships and the adaptability that the substantive terms allowed, the Accords offered a more cost-effective way to fulfill Bonneville’s

¹⁶⁰ *Id.*

responsibilities, and in a manner that produced valuable results for fish and wildlife. While one goal of the 2008 Accords—to end litigation over Columbia River System fish operations—was unsuccessful, these other benefits accrued.

Now, to preserve and perpetuate those benefits, Bonneville has decided to extend the Accords. The Accord Extension parties understand the uncertain nature and complexity of Columbia Basin fish and wildlife matters as they extend these Accords, but the parties are satisfied that the modified and updated terms provide them each with the flexibility they need to protect their interests. Moreover, in spite of these uncertainties, the parties have chosen to hold onto what certainty they can—that is, an ongoing commitment to productive collaboration and alignment in their efforts to protect, mitigate, and enhance fish and wildlife in the Columbia Basin, while promoting greater cost discipline and stability in those efforts.

For these reasons, and the others explained above, Bonneville has decided to extend the 2008 Columbia Basin Fish Accords.

Issued in Portland, Oregon, September 28, 2018.

/s/ Elliot E. Mainzer

Elliot E. Mainzer

Administrator and Chief Executive Officer