

Non-Treaty Storage Fish and Wildlife Agreement



by
Bonneville Power Administration
and
Members,
Columbia Basin Fish and Wildlife Authority

NON-TREATY STORAGE FISH AND WILDLIFE
AGREEMENT

by

BONNEVILLE POWER ADMINISTRATION

and

MEMBERS

COLUMBIA BASIN FISH AND WILDLIFE AUTHORITY

I. RECITALS

-A. The Bonneville Power Administration ("BPA") is negotiating and proposes to enter into two Agreements - (1) the "Non-Treaty Storage Agreement" ("NTSA") with the British Columbia Hydro and Power Authority ("B.C. Hydro") and, (2) an NTSA with the Mid-Columbia participants. These Agreements are designed to provide operational flexibility and to enhance the opportunity for hydroelectric power production on both the U.S. and B.C. Hydro systems.^{1/}

-B. BPA has issued a preliminary environmental assessment with respect to NTSA (March 1990), and will take a final NEPA action prior to or concurrent with signing NTSA contracts.

-C. The issues presented in NTSA have been the subject of discussion in the region for more than a year. During the past two months, extensive discussions between BPA, tribal leaders and fish and wildlife agencies have occurred with respect to NTSA and the environmental assessment. The issues are highly complex, and despite the best intentions of the parties, somewhat contentious.

-D. BPA believes NTSA will be implemented in a manner which avoids adverse effects on fish and wildlife resources. The agencies and Tribes concerned with those resources see risk associated with the operation of NTSA if fish and wildlife resources are not adequately addressed.

^{1/} The terms Mid-Columbia utilities and Mid-Columbia participants are used interchangeably in this Agreement. The Mid-Columbia participants include the owners, operators, and purchasers of power from the Mid-Columbia Projects (Wells, Rocky Reach, Rock Island, Wanapum, and Priest Rapids). The Mid-Columbia utilities which own and operate the Mid-Columbia Projects, include Grant, Chelan, and Douglas Public Utility Districts. BPA intends to sign NTS Agreements with all Mid-Columbia participants.

-E. The parties acknowledge that this Agreement will provide opportunities for benefits to the power system and to fish and wildlife interests.

-F. The tribes and fish and wildlife agencies have developed fish flow proposals for consideration by the operators of dams and regional policymakers. These tribes and agencies are concerned with any program, including NTSA, which might adversely effect fish and wildlife resources or the ability to obtain consideration and implementation of improved flows, or other fish and wildlife measures. BPA prefers to focus on a variety of techniques to rebuild the fishery resource.

-G. The parties all agree that improved communications and issue resolution among the parties must occur if the Columbia River system is to operate in a cooperative policy environment and assure adequate consideration of the interests of the parties. The efforts with respect to NTSA are a start, but only a start. Because long-term system planning will occur over the next few years and because diverse and complicated issues (like NTSA) will arise which require action while such planning occurs, the parties agree that process improvements are necessary and will help improve the quality of decision making.

-H. This Agreement is entered into by the parties under the provisions of and in furtherance of the Pacific Northwest Electric Power Planning and Conservation Act and is intended to carry out, in part, the obligations of BPA under that Act. BPA does not enter this Agreement as mitigation for execution of NTSA contracts.

-I. BPA recognizes and agrees to exercise its authorities regarding operation of the Columbia River system, which is comprised primarily of the Columbia and Snake Rivers and their attendant tributaries and drainage basins, to implement BPA responsibilities to protect, mitigate and enhance fish and wildlife in that river system together with its other responsibilities under law.

-J. The parties acknowledge that this Agreement is a condition precedent and that agreement on initial guidelines is a condition subsequent to the tribes and fish and wildlife agencies providing BPA the letter attached hereto as Exhibit B.

-K. BPA recognizes that in the event that BPA does not adopt initial guidelines which are agreeable to the parties, this Agreement shall be void and CBFWA or its members may challenge the NTSA. In the event of such a challenge, all issues and remedies may be pursued by the CBFWA or its members and BPA shall not object to the use of the letters previously filed in the NTSA NEPA process.

II. GOALS AND OBJECTIVES

BPA and the Tribes and fish and wildlife agencies agree to the following goals and objectives:

- A. Consistent with III.A.1., BPA shall develop operating guidelines for NTS use which are designed to avoid adverse impacts to fish and wildlife habitat and to avoid risk of mortality or injury to fish and wildlife. It is the intent of this goal that such operating guidelines shall seek to assure that adverse impacts to fish and wildlife resources, if any, shall be no greater than would have occurred in the absence of Non-Treaty Storage (NTS). This standard does not provide a basis for advocating for fish and wildlife resource interests not related to the operation of NTS. However, flow and reservoir storage issues related to NTS may be relevant in establishing operating guidelines.^{2/} Provided, BPA and CBFWA will carefully monitor NTS use in order to assure compliance with this goal and to determine whether means exist to provide additional benefits, not provided by this agreement, to fish and wildlife interests and the power supply system. Issues pertaining to the goals of this agreement shall be subject to the dispute resolution processes described in III.B.3.d. Issues pertaining to the question of providing additional benefits shall be resolved through agreement by the parties, and shall not be the subject of dispute resolution.
- B. Operation of the U.S. portion of NTS will be governed by operating guidelines developed pursuant to this Agreement, will be monitored carefully, and impacts to fish and wildlife resources, consistent with section II.A, will be reviewed at least annually by the parties to this Agreement, using the best scientific information available. Guidelines for operation of the U.S. portion of NTS can be adjusted annually or as needed, or other techniques may be employed, based on the monitoring program.
- C. This Agreement and BPA's implementation of the NTSA will not preclude the ability or efforts of the fish and wildlife agencies and Tribes to seek and achieve implementation of improved flows or reservoir operations within the Columbia River System, or other fish and wildlife measures. This Agreement does not constitute on the part of BPA a commitment to increase flows or seek to alter reservoir operations as proposed by the agencies and Tribes, nor does it preclude BPA from opposing increased flows or changes to reservoir operations.

^{2/} This standard recognizes that fisheries science is both qualitative and quantitative and that the parties diverge widely on whether and to what extent the NTS may affect fish and wildlife and what scientific techniques may prove or disprove such impacts. The mediator should listen to all reasonable arguments, exclude no credible evidence offered to show impacts, and use his/her best judgment to balance the different views on best available scientific information with respect to meeting this goal.

- D. This Agreement seeks to establish improved communications with respect to the operation of NTS, interim issues, and long-term issues which are to be dealt with in the Systems Operations Review ("SOR").
- E. A variety of tools are available to the parties to improve communications and resolve disputes. This Agreement identifies specific dispute resolution mechanisms under Section III.B.3.d., but is not to preclude utilization of others.
- F. Policy issues with respect to NTSA will be resolved by policymakers, through regular policy discussions, with assistance and input from the technical, operating and legal staffs of the parties, as appropriate.
- G. Processes for improved communications and resolution of disputes are to be considered as part of the benefits accruing to power, fish and wildlife and tribal interests through this Agreement.

III. ELEMENTS OF THIS AGREEMENT

A. Operating Measures

- 1. BPA will develop annual operating guidelines in consultation with the parties to this Agreement for the U.S. parties' use of NTS that assure: (1) current flow requirements specified by the Water Budget; (2) flows specified in the Vernita Bar Agreement; and, (3) avoiding adverse effects on fish and wildlife resources, if any, resulting from NTS consistent with section II.A. above. Operation of the entire portion of NTS will be monitored and impacts to fish and wildlife resources reviewed, as needed, but at least annually to assure that the goals and objectives set forth in II.A. are met. Based on the monitoring and other information, guidelines for operation of the U.S. portion of NTS will be adjusted as needed consistent with the goals in Section II. BPA will make every reasonable effort to assure that the entire NTS will be operated consistently with the goals and objectives of this Agreement.
- 2. Accounting mechanisms will be developed by BPA, and agreed to by the parties, so that NTSA operations can be monitored for consistency with the operating guidelines established pursuant to this Agreement.
- 3. BPA will make every reasonable effort to achieve a four-year Agreement with Idaho Power Company (IPC) to guarantee the use of at least 180 kaf annually from Brownlee Reservoir for use in the Water Budget. After expiration of such Agreement, BPA will make reasonable efforts to obtain similar or improved arrangements for anadromous fish flow improvement.

4. On receipt of an acceptable statement of work from a study oversight team consisting of the Shoshone-Bannocks, Nez Perce, BPA, and IDF&G, BPA will promptly fund IDF&G to conduct a feasibility/coordination study--the Idaho Water Rental Pilot Project, not to exceed \$80,000. This study will examine the feasibility and effects of renting water from Idaho water banks for the purpose of Snake River anadromous fish flow improvement. The study, overseen by the above study team, will include thorough coordination with appropriate in-state water management entities and address their views. The study will include addressing factors related to the contingencies listed below and avoid duplicating other ongoing studies of the potential use of Idaho water for anadromous fish flow improvement. BPA will promptly increase its FY 1991 Fish and Wildlife Program budget by \$1 million (this and subsequent references in this section reflect 1990 dollars and will be adjusted for inflation) to establish a pilot project to rent Idaho water for the purpose of fish flow improvement on the Snake River, contingent on the following:
 - a. Study team determination that water rented must be at a reasonable price and is in addition to and not in lieu of other instream flow actions that benefit fish.
 - b. The study team determines that necessary Agreements can be obtained from IPC to make any rented water effective for anadromous fish flow improvement. Costs for any IPC services are included in the \$1 million budget.
 - c. The study team agrees that necessary State and Federal laws and regulations, and Water District rules recognize and protect inriver use of rented water for anadromous fish flow improvement.
 - d. Upon Agreement by the study team on a statement of work, an appropriate in-state entity will arrange and administer necessary water rental contracts.
 - e. The study team will document the effectiveness of the water use in improving the migration of juvenile salmon and steelhead and/or improving the migration of adult salmon or steelhead through the lower Snake River. Such fishery research studies, not funded by this \$1 million, will be coordinated through BPA's Implementation Planning Process.
 - f. The study team will identify existing programs and conditions needed for resident fish and wildlife resources in the mid- and upper Snake River, and provide management consideration to protect those resources with actions achieving anadromous fish improvement.

5. The parties recognize that BPA may be able to recoup some or all of the \$1 million made available under this section in additional power revenues. BPA will budget at least \$1 million in FY 1992 and FY 1993, above its planned program budget, for renting Idaho water if the pilot project results in net increased flows at Lewiston each year for anadromous fish, a three-year study is initiated in FY 1991 to evaluate the pilot project's success in improving fish migration, and the above contingencies are met. In the event BPA determines it recoups all or a portion of the \$1 million, the parties will discuss increases in the amount of funds allocated. Following the three-year pilot project and a positive evaluation of the project to improve fish migration, continuation of the project will be integrated into BPA's Fish and Wildlife Program.
6. In the event that one or more of the contingencies identified in III.A. 4-6 cannot be satisfied in the feasibility/coordination study, as determined by the study team, BPA will continue to make available feasibility/coordination study funds to IDF&G, not to exceed \$50,000 annually for the term of this Agreement. These funds will be used to investigate issues to make water renting for anadromous fish flow improvement feasible. When feasible, as determined by the study team, BPA will annually budget at least \$1 million for three years for the pilot project, assuming the above contingencies are met. After the three years, the project will be integrated into BPA's Fish and Wildlife Program as indicated above. As long as renting of Idaho water for anadromous fish flow improvement is not deemed feasible, BPA will, in consultation with and based on recommendations made by the Shoshone-Bannocks, Nez Perce, and IDF&G as a priority, seek other means to increase passage survival of Snake River fish stocks through its Fish and Wildlife Program in conjunction with other ongoing fish passage measures.
7. All Agreements and determinations by the study team with respect to III.A. 4-6 above shall require a unanimous vote of the study team participants.
8. Nothing in this Agreement shall preclude any person, governmental entity, or tribe from directly marketing any water they may have to BPA.

B. Process Measures

1. To improve communications and understanding of the power supply system, BPA agrees to finance a person employed by CBFWA to be housed within the Division of Power Supply.

This person shall be provided with regular access to top level decision makers and decision processes within BPA's Division of Fish and Wildlife and Division of Power Supply.

BPA and CBFWA will jointly participate in and agree upon the hiring of the individual selected to fill this position.

BPA and CBFWA shall enter into a contract governing the working relationship of the person chosen to fill this position. Such contract will be consistent with the charter of CBFWA and Federal rules and regulations applicable to BPA. The contract shall preclude the person selected from providing sworn testimony in any forum for or against BPA, other owners or operators of Columbia River projects, or the fish and wildlife agencies or tribes during the term of employment with CBFWA and for two years after said employment with respect to NTS.

2. The parties to this Agreement agree that regular meetings at the policy level, coupled with technical work sessions at the technical level in preparation for such meetings, are necessary to improve communications and build trust. Given the number of discussions and issues anticipated by this proposal, it is reasonable to assume that policymakers from the parties should plan to meet at least bimonthly. BPA and the fishery agencies and Tribes shall revise as necessary the existing consultation procedures to avoid duplication of meetings which are made redundant by this Agreement.
3. With respect to NTS, the parties agree as follows:

Initial Guidelines

a. i) BPA shall prepare and adopt initial guidelines for the period September 15, 1990 to January 20, 1992 within 80 days of the execution of the Finding of No Significant Impact on the NTSA with BC Hydro (FONSI) or within 80 days of the execution of the NTSA with BC Hydro, which contract execution shall be characterized in BPA's written record of decision as a final action under Section 9(e)(5) of the Northwest Power Act, 16 USC 839(e)(f). For the purposes of Section III.B.3.a.iii. any party may elect the earlier of these dates by notifying all parties in writing. In the absence of written notification to all parties, the later of these dates shall apply for purposes of III.B.3.a.iii.

ii) Time is of the essence in the adoption of these guidelines and the parties shall, concurrent with the execution of this Agreement, designate parties with whom BPA is to work in guideline preparation.

iii) If the parties to this Agreement are unable to agree on initial guidelines by 5pm on the 81st day after execution of the

FONSI or the BPA-BCH NTSA, as elected pursuant to III.B.3.a.i., this Agreement shall be void. Any party may then pursue all remedies described in Section I.K. of this Agreement. Written notice of a party's disagreement shall be provided to all of the other parties. Initial guidelines shall not be subject to mediation.

iv) Initial guidelines shall utilize the consultation processes described in this Agreement provided that the Mid-Columbia utilities shall be accorded the participation opportunities described in III. C. 7. of this Agreement. BC Hydro shall be accorded observer status at its request.

Later Guidelines

- a.
 - i) BPA shall prepare in draft final form annual operating guidelines by December 15, 1991 to cover the period from January 20, 1992 to January 19, 1993. Subsequent annual guidelines shall be prepared for each year in accordance with Attachment A. Consistent with sections II.A and III.A.1 and other provisions of this Agreement, the guidelines will be developed based on an assessment of projected conditions, previous experience with NTSA, input on fisheries concerns and power supply needs, and other relevant factors.
 - ii) The process for guideline preparation shall include meetings between BPA and tribal and agency technical staffs to be followed by at least one policymaker meeting prior to the guidelines final adoption on January 20. These meetings will adhere to the time frames established in Attachment A.
 - iii) Prior to adopting final guidelines BPA shall in good faith consider any proposed changes recommended by the agencies and tribes which will further the goals of this Agreement.
 - iv) In the event the parties cannot agree on annual operating guidelines by January 20, but only after the technical and policy discussions referenced above, the parties may refer the draft guidelines to dispute resolution as provided in Section III B.3.d of this Agreement.
- b. BPA and fishery agencies and Tribes shall host a meeting of policymakers and technical staff at the end of the spring season to report on spring storage and releases and plans for the fall, and at the end of the fall season to report on fall releases and plans for the spring. All parties shall present issues and concerns, report on beneficial and adverse fish and wildlife effects of the NTSA and requests

for changes in the NTSA operating guidelines or other appropriate techniques to compensate for effects to fish and wildlife resources consistent with section II.A. and other provisions of this agreement as appropriate, and identify proposed changes in operating guidelines or other actions for future years.

- c. Regular communication will occur through the technical staffs, facilitated at least in part by the person in the position described in III.B.1. above, to promote full communication and resolution of concerns as they arise. Special meetings or discussions at the policy level may be called as necessary.
- d. The parties will make every attempt to resolve disputes regarding the NTSA through the technical and policy efforts described elsewhere in this Agreement.^{3/}
 - i) Informal dispute resolution processes shall be available for disputes regarding the adoption or implementation of annual operating guidelines consistent with the Agreement's goals and objectives, or other terms to be enforced under this Agreement. Parties shall first exhaust all informal dispute resolution processes described herein prior to initiation of other remedies.
 - ii) Any party may submit the above matters to non-binding mediation pursuant to the dispute resolution provisions under this section. CBFWA members shall first use the CBFWA consensus process, and then best efforts, to resolve issues among themselves.
 - iii) The disputing party shall notify all other parties in writing of the dispute. The writing shall identify with specificity the subject of the dispute and propose a good faith resolution consistent with this Agreement.
 - iv) In the event the dispute is not resolved after the presentation of a proposed solution, the matter shall be referred to a mediator chosen prior to December 1 each year by BPA and the agencies and tribes. The mediator should possess a high level of professional expertise regarding the interaction of the Columbia River hydroelectric system, and the Columbia River fisheries, and shall be independent of the parties to

^{3/} The term parties is used to denote BPA and CBFWA Members.

this Agreement: he/she shall not be employed or under current or previous contract to BPA, a BPA customer or group of customers, or CBFWA or CBFWA members. If the parties cannot agree on a mediator, they shall identify their respective nominees, and the nominees shall select a third party as mediator.

- v) The mediator shall establish informal procedures for soliciting information and hearing the positions and proposed solutions of the parties in order to resolve the dispute. These procedures will likely vary depending on the nature of the dispute. The parties agree to the timely submission of disputes with respect to annual operating guidelines so that such disputes may be resolved by the mediator or the parties prior to BPA's publication of final guidelines and no later than February 1. The mediator will work with the parties to provide for a schedule which contributes to fair and timely decision making. Other disputes which are subject to the dispute resolution process herein shall be resolved by the mediator or the parties no later than three (3) working days after submission unless the parties otherwise agree or the mediator determines such a schedule would result in undue hardship to any party.
- vi) The mediator shall solicit and consider the views of all parties, as well as take into account the goals and objectives and other provisions of this Agreement. His/her decisions shall briefly explain the reasoning underlying the decisions, unless otherwise agreed by the parties.
- vii) The parties agree as follows:
 - (a) Any CBFWA Member intending to seek judicial review of actions under this Agreement shall first notify all other signators of such an intent. Notice shall be given to Policy leaders at the Director, Tribal Chairman, and Senior Assistant Administrator level, and their primary legal counsel. CBFWA Members shall first use the CBFWA consensus process, then confer with BPA, on an emergency basis to attempt to resolve any impasse.
 - (b) If no informal resolution of the impasse is possible, BPA shall suspend requests for releases or storage pursuant to NTS operation for a period not to exceed 15 days in order to afford petitioners an opportunity to seek such legal

remedies as they believe they may be entitled to on an emergency basis.

- (c) BPA and CBFWA agree to limit any questions for judicial review under this Agreement to the adoption or implementation of annual operating guidelines consistent with the Agreement's goals and objectives, or other terms to be enforced under this Agreement, provided that BPA's previously adopted guidelines shall remain in effect during all dispute resolution processes.

CBFWA and BPA may raise any substantive or procedural legal arguments, provided that such arguments challenge only the guidelines and their implementation and not the NTSA itself. This Agreement may be terminated by BPA or CBFWA if either is adversely affected by the raising of arguments inconsistent with this provision, or by BPA if BPA is enjoined or otherwise precluded from operating under BPA's previously adopted guidelines during the pendency of judicial review.

- (d) The mediator's report shall be part of the record in any judicial proceeding brought pursuant to this subsection, and shall be included by BPA in its record of decision.
- (e) The Administrator's resolution of disputes concerning adoption or implementation of annual operating guidelines consistent with the Agreement's goals and objectives, or other terms to be enforced under this Agreement as described in III.B.3.d.vii (c) above shall be characterized by BPA in its record of decision as final action or implementation of final actions under section 9(e)(5) of the Northwest Power Act, 16 USC 839(e)(f), provided they have not been so designated prior to that time, and provided further that only in the latter circumstance may the fish agencies and tribes take appropriate steps to seek judicial review of such final action without further resort to informal dispute resolution mechanisms described in this Agreement.
- (f) BPA shall explain in writing why it chose not to adopt the mediator's recommendations.

4. Interim Issues

The parties acknowledge that a number of issues will arise that require technical and policy discussion that will not be

resolved, and should not be resolved through the SOR process. It may be difficult at this time to identify or agree on issues which are to be treated as "interim," and which issues are "long-term" and should be incorporated into the SOR process. For example, consideration of the full flow proposal recently offered by the agencies and Tribes is viewed by many as a long-term issue. However, consideration of certain elements of the proposal, or refinements in the existing water budget until completion of the SOR may be considered "interim." During the regular meetings of the policymakers triggered by this Agreement, discussions whether an issue presented by BPA or the Tribes and fish and wildlife agencies should be treated as "interim," and how the parties are to proceed in responding to such issues will occur.

5. Systems Operation Review Process

All parties agree that the development of a systems plan for the Columbia Basin, which focuses on all competing interests within that system, makes a great deal of sense. The interaction between BPA, the Corps, the Bureau, the Tribes and fish and wildlife agencies is complex, and has not been discussed in detail among the parties. BPA and the fish and wildlife agencies and Tribes agree to use their best efforts to establish ground rules for an effective working relationship between all such parties by no later than September 30, 1990. This process will include a description of the roles of the parties at both policy and technical levels.

C. Additional Commitments of the Parties

1. The parties agree that the terms of this Agreement with respect to NTSA are for the term of the proposed NTSA between BPA and B.C. Hydro. However, it is further recognized that NTSA will be discussed in the context of SOR, and that revisions to this Agreement may be necessary and appropriate to implement plans approved pursuant to SOR.
2.
 - a. In consideration for BPA's execution of this Agreement, neither CBFWA nor any member of CBFWA will bring or join in any judicial or administrative challenge against the NTSA BPA may execute with B.C. Hydro provided that this provision shall be inoperative if such NTSA is inconsistent with this Agreement, and provided further that any such challenge initiated under authority of this subsection shall be treated as a III.C.3 action rendering this Agreement void.
 - b. This Agreement does not preclude the right of any party described in Section III.C.2. to sue to enforce its terms and provisions.

3. a. This Agreement shall be effective upon execution. Execution shall occur prior to or upon execution of a BPA-BC Hydro NTSA. This Agreement has a condition subsequent: it shall be void in the event a CBFWA member disagrees with the initial guidelines adopted by BPA. Prior to BPA's adoption of initial guidelines the only operative provisions of this Agreement shall be those governing guideline preparation.

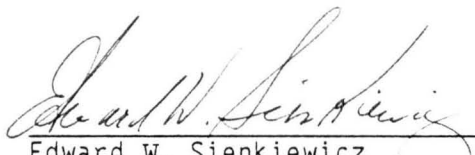
b. This Agreement shall remain in effect for the term of the NTSA, provided however that if any judicial or administrative challenges other than those enumerated in III.B.3.d.vii (c) are brought against NTSA execution or implementation by CBFWA or a member of CBFWA this Agreement shall be void, and provided further that if judicial or administrative challenges are brought against NTSA execution or implementation by any third party, which in BPA's judgment cause NTSA operations to be suspended, terminated, or rendered impracticable, BPA may suspend or terminate this Agreement. BPA's decision to suspend or terminate this Agreement shall not be subject to the dispute resolution provisions of Section III.


c. Except for III.B.3.d.vii (c) challenges, any challenge against the Mid-Columbia participants or BC Hydro execution and implementation of NTS agreements shall be treated as challenges against BPA pursuant to III.C.3.
4. Nothing in this Agreement or the NTS agreements will prejudice, limit, or preclude any member of CBFWA from advancing, or otherwise seeking to have implemented flow regimes or other fish and wildlife measures for fish and wildlife before any judicial, legislative, or administrative forum.
5. Nothing in this Agreement or the NTS Agreements will prejudice, limit or preclude BPA from advancing or otherwise seeking to have implemented a variety of techniques to meet the goal of a Section II.A.
6. Nothing in this Agreement modifies the rights reserved by Treaty or Executive Order relating uniquely to Indian Tribes and applicable to any tribal signator nor precludes any Tribe from bringing an action for enforcement of such rights if implementation of this Agreement violates those rights, but not for judicial review pursuant to other law.
7. Any NTS contract BPA negotiates with the Mid-Columbia participants shall (1) provide opportunity for those participants to participate in the policy and technical processes leading to the establishing of guidelines as specified in this Agreement and (2) be consistent with this Agreement.
8. If this Agreement is terminated for any reason, the parties to this Agreement are free to pursue any remedies they may have with respect to the issues addressed by this Agreement.

9. Nothing in this Agreement shall establish any precedent of law, fact or policy regarding any matter not expressly addressed in this Agreement.
10. All parties shall act consistent with this Agreement and support this Agreement and take no positions inconsistent with this Agreement.
11. The parties agree that BPA's execution of the NTSA is a final action taken pursuant to the Northwest Power Planning and Conservation Act. 16 USC 839-839h. No party shall dispute this characterization.
12. Federal law shall govern the construction and interpretation of this Agreement. Suits to challenge final actions of the Administrator under the Northwest Power Act, or the implementation of such final actions, shall be filed in the United States Court of Appeals for the region. Suits claiming breach of contract and monetary damages in excess of \$10,000 shall be filed in the United States Court of Claims, or in such other court as may be prescribed by statute.


James Jura
Administrator
Bonneville Power Administration


John Smith
Chairman
Columbia Basin Fish and Wildlife
Authority


Edward W. Sienkiewicz
Senior Assistant Administrator
Bonneville Power Administration


Marv Plenert
Vice-Chairman
Columbia Basin Fish and Wildlife
Authority

Attachment A

Annual Operating Guidelines Schedule

December 1 - - - CBFWA technical staff (1) provide BPA with their best scientific analysis of the application of last operating year's NTSA guidelines with respect to fish and wildlife resources and (2) propose changes to new guidelines to assure that the guidelines are consistent with II.A. and III.A.1. of this Agreement.

December 1 - December 10 - - - BPA power supply and fish and wildlife staff review CBFWA submittal, past year's operating experience, and begin to draft proposed guidelines for next operating year.

December 15 - - - Final draft guidelines completed by BPA technical staff and provided to CBFWA, subject to adjustment for January 15 volume forecasts.

January 16 - January 20 - - - Policy leaders discuss guidelines and adjust as necessary.

January 20 - - - Final guidelines issued by BPA.

January 20 - February 1 - - - Dispute resolution process, if needed.

February 2 - March 30 - - - Administrative or judicial remedies, if needed.



June 29, 1990

Mr. James J. Jura
Administrator
Bonneville Power Administration
P. O. Box 3621
Portland, OR 97208-3621

Dear Mr. Jura:

The Columbia Basin Fish and Wildlife Authority (CBFWA) is a consortium of Pacific Northwest state and federal fish and wildlife agencies and Indian tribes. Our Members are dedicated to the sound management of our region's fish and wildlife resources. We have been active in administrative and judicial proceedings to protect these fish and wildlife resources.

Our state and federal agency members include the Burns-Paiute Indian Colony, Coeur D'Alene Tribe of Idaho, Confederated Salish and Kootenai Tribes of the Flathead Reservation, Confederated Tribes and Bands of the Yakima Indian Nation, Confederated Tribes of the Colville Reservation, Confederated Tribes of the Umatilla Indian Reservation, Confederated Tribes of the Warm Springs Reservation of Oregon, Idaho Department of Fish and Game, Kalispel Indian Community, Kootenai Tribe of Idaho, Montana Department of Fish, Wildlife and Parks, National Marine Fisheries Service, Nez Perce Tribe of Idaho, Oregon Department of Fish and Wildlife, Shoshone-Bannock Tribes of Fort Hall, Shoshone-Paiute Tribes of the Duck Valley Reservation, Spokane Tribe of Indians, United States Fish and Wildlife Service, Washington Department of Fisheries, and Washington Department of Wildlife. Collectively, CBFWA with its member agencies and tribes is the single largest body of fish and wildlife expertise in the Pacific Northwest.

CBFWA Members have followed with interest the proposal of the Bonneville Power Administration (BPA), to sign one or more Non-Treaty Storage Agreements (NTSA) with the British Columbia Hydro Power Authority and the mid-Columbia utilities.

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At various times during the NTSA environmental and public comment review processes, our Members have offered comments. The comments expressed concern that the NTSA might adversely affect fish and wildlife in the Columbia River Basin through, among other things, reduction of spring and summer flows and increased fall flows in the Columbia River. The comments are contained in a series of letters sent to BPA during the NEPA comment period and other comments made for the record at public meetings, the proceedings of which were transcribed.

Since submitting those comments, BPA and CBFWA Members have worked cooperatively to find a way to alleviate CBFWA concerns and make the implementation of NTSA work for both fish and wildlife and power communities. This letter signals our belief that we have reached an agreement that addresses our concerns. A copy of this letter, noted as Exhibit B, will be attached to the negotiated Fish and Wildlife Agreement.

The Agreement provides, in part, for a process to insure that BPA develops operating guidelines (the key to successful implementation of an NTSA) for NTS use that avoids adverse impacts to fish and wildlife habitat and that avoids risk of mortality or injury to fish or wildlife. Such operating guidelines shall seek to assure that adverse impacts to the fish and wildlife resources shall be no greater than could be experienced in the absence of the NTSA. Importantly, the Agreement provides for a 80 day period within which the parties shall work to develop mutually agreeable initial operating guidelines. If BPA fails to develop initial operating guidelines agreeable to all CBFWA Members, the agreement shall be void. Any CBFWA Member will then have the right to initiate any proceeding and raise any defense or issue challenging the NTSA and its implementation or any other matters related to NTS, including the adequacy of BPA's environmental reviews. CBFWA Members may rely on any comments filed with BPA with respect to the NTSA in such challenge.

To the extent initial operating guidelines are developed that are satisfactory to CBFWA Members with respect to our concerns regarding BPA's entry into NTSA's, we will not challenge the NTSA, or the initial guidelines, and will not take any position against the NTSA, itself. If acceptable guidelines are adopted by BPA, we will not support the use by third parties of our prior comments in the event that third-parties file suit prior to the adoption of the guidelines.

We are confident based on the several months that we have taken to develop the fish and wildlife agreement that we will work cooperatively and successfully to adopt mutually agreeable


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guidelines. We also expect that the Agreement will be a springboard for future discussions addressing other important fish and wildlife concerns in the Columbia River Basin. With this Agreement, mutually acceptable operating guidelines, and assuming good faith implementation by BPA and CBFWA, effects on fish and wildlife, if any, should pose no significant adverse impact to the environment.

This can be a win-win situation for the environment. BPA and electric consumers can obtain additional hydro system flexibility, while fish and wildlife are protected and receive benefits from the operational flexibility that NTSA makes possible.

In my role as the current Chairman of the CBFWA, I am signing this letter of transmittal which represents the consensus action (approved without dissent) of the CBFWA Members. Individual agencies and tribes will provide separate signed statements in support of this Agreement.

Sincerely,


for John Smith
Chairman