

**MEMORANDUM OF AGREEMENT BETWEEN THE YAKAMA INDIAN NATION  
AND THE BONNEVILLE POWER ADMINISTRATION FOR DISBURSAL OF  
WILDLIFE MITIGATION FUNDS AND WILDLIFE MITIGATION CREDITING**

This Agreement is made by the Confederated Tribes and Bands of the Yakama Indian Nation (hereinafter YIN) and the United States of America, acting through the Department of Energy and the Bonneville Power Administration (hereinafter BPA).

**PURPOSE**

The purpose of this Agreement is to facilitate the disbursement of funds that BPA is obligated to provide the YIN pursuant to the Washington Wildlife Mitigation Agreement (hereinafter Interim Agreement) for YIN's acquisition and management of interests in lands identified in the approved "Lower Yakima Valley Wetlands and Riparian Restoration Project" (hereinafter Approved Project).

**RECITALS**

- A. The YIN is a federally recognized Indian Tribe, and has entered into a Treaty with the United States of America. The YIN is a sovereign government with authority to manage natural resources within its reservation.
- B. BPA is a power marketing agency within United States Department of Energy. The Pacific Northwest Electric Power Planning and Conservation Act, P.L. 96-501 (Act) directs BPA to protect, mitigate, and enhance fish and wildlife to the extent affected by the development and operation of federal hydroelectric projects of the Columbia River and its tributaries, in a manner

consistent with the purposes of the Act, the program adopted pursuant to section 4(h) of the Act, and other environmental laws. BPA has the authority pursuant to sections 2(e) and 2(f) of the Bonneville Project Act, 16 U.S.C. secs. 832a(e)-(f), to transfer real property to the YIN.

C. The BPA and other entities including the YIN have entered into the Washington Wildlife Mitigation Agreement (Interim Agreement) which obligates BPA to make available to the YIN a total of \$4,868,500 for the protection, mitigation, and enhancement of wildlife and wildlife habitat in accord with approved projects. This Agreement is for the transfer of the balance of the YIN's share of Interim Agreement funds, \$2,713,117 (hereinafter the Fund).

D. The terms and definitions of the Interim Agreement are incorporated herein by reference, and all of the rights and duties established in the Interim Agreement remain binding on the parties until the Interim Agreement expires, is lawfully terminated, or is modified in writing by the parties. Unless expressly stated otherwise, nothing in this Agreement is intended nor shall be construed to modify, affect, or alter any of the rights and duties of the parties detailed in the Interim Agreement.

E. The YIN has developed the "Lower Yakima Valley Wetlands and Riparian Restoration Project" (Project). The Project is an Approved Project under the Interim Agreement. Properties identified in the Project will be permanently dedicated to wildlife habitat protection and management. Site specific management plans (hereinafter Site Plan(s)) for these properties will be developed by the YIN and approved by BPA. Site plans will be developed pursuant to, and in conformity with section 5(c) of the Interim Agreement.

F. BPA has completed an Environmental Assessment (DOE No. 0941) under the National Environmental Policy Act, 42 U.S.C. §§ 4321-4370c, and reached a finding of no significant impact (Aug. 24, 1994) pursuant to 10 C.F.R. § 1021, regarding the funding of the Lower Yakima Valley Wetland and Riparian Restoration Project.

G. The underlying purpose of the Agreement is to protect, mitigate, and enhance wildlife and wildlife habitat permanently, so the parties have not included a term or termination provisions.

**NOW THEREFORE IT IS AGREED BETWEEN THE YIN AND BPA AS FOLLOWS:**

1. Basis for Disbursal of Fund: Pursuant to the Statement of Work, Intergovernmental Contract # 96BI39554, and as provided by the Interim Agreement, BPA shall transfer a total of \$2,713,117 to the YIN to be available for approved project use in FY 1996 and FY 1997. This amount includes obligated funding for FY 1996 and FY 1997 identified in C. above, and any carryover funds from FY 1993 through FY 1995. The YIN shall use the funds, and any interest earned from those funds to implement the Approved Project.

2. Land Preacquisition Activities and Costs: Implementation of the Approved Project includes acquiring interests in lands within the project boundaries. Once the fund is disbursed, the YIN may utilize its own processes in conducting any and all preacquisition activities, that include, by way of example, appraisals, drafting and presenting to sellers earnest money agreements, purchase and sale agreements, and conducting surveys; provided, the YIN will comply with federal real property acquisition laws. The costs of these Preacquisition activities shall be paid

out of the fund. The YIN and BPA recognize that this provision deviates from section 5(d) of the Interim Agreement.

3. Transfer of Land to Trust Status: When lands are acquired with the fund, application may be made by the YIN to the Secretary of Interior or his delegate for conveyance of fee land to the United States in trust status for the YIN. The Secretary has authority to approve such applications pursuant to 25 U.S.C § 465, and has promulgated regulations at 25 C.F.R. 151 et. seq. to implement this authority.

4. Leased Lands: YIN may use the funds provided by BPA for leases or conservation easements that protect, mitigate, and enhance wildlife and wildlife habitat. The YIN shall secure leases with the longest lease term possible under law given project objectives. If YIN is unable to renew a lease or easement, YIN shall secure another parcel(s), and guarantee an equal or greater amount of credit (HU's or otherwise) to BPA as was available under the preceding lease or easement agreement(s), including credit (HU's or otherwise) realized or projected from habitat maintenance and improvements made with BPA funds. BPA may participate in any Habitat Evaluation Procedures necessary to determine the habitat value of parcels leaving this project or becoming part of it. YIN shall pay the costs of these Habitat Evaluation Procedures from the consideration identified in part 1. above.

5. Funds for Operation and Maintenance: The Fund identified in recital C. above includes all amounts available for operation and maintenance through FY 1997. Funds for Operation and Maintenance in future years will be provided as detailed in the Interim Agreement.

6. Wildlife Manager Obligations: The YIN shall permanently protect, mitigate, and enhance properties as wildlife habitat which are purchased or leased with the fund in accord with the Site Plan approved for the property. The YIN shall prevent any and all uses of such properties that are inconsistent with the Site Plan or section 5(c) of the Interim Agreement. Until a property's Site Plan is approved, the YIN shall prevent all uses of such property that are inconsistent with the Interim Agreement and/or the Northwest Power Planning Council's Resident Fish and Wildlife Amendments to the Columbia River Basin Fish and Wildlife Program (1995) including,

- (a) grazing of domestic livestock and feral horses and cattle on the properties unless used as a method to manage the properties for wildlife as agreed by the parties;
- (b) any residential, commercial, or industrial use of the properties not consistent with the primary use of the property for wildlife and wildlife habitat benefits.

7. Dedication of Revenue From Property Management: Net revenue received from managing properties purchased or leased with Fund expenditures shall be used for wildlife management purposes under this project. Such revenues may be deducted from the amount of Operation and Maintenance funds that BPA may be obligated to provide unless otherwise agreed by the parties. The YIN shall provide BPA an annual accounting of net revenues received from managing the properties. Revenues received by the YIN for granting reservation-wide hunting privileges to the public shall not be included as net revenue received from managing properties for purposes of this Agreement.

8. Reporting: Beginning August 30, 1997 and every August 30 thereafter, YIN shall provide BPA an annual report generally describing the parcels in the project and the terms and duration of

any leases or easements acquired. YIN shall provide an accounting of the balance of the Fund, including interest earned, and income derived from the project. Upon reasonable written notice, BPA may audit YIN's project records.

9. Recording of Covenant: When the YIN acquires interests in real property as part of the Project with Fund expenditures, the YIN shall record this Agreement with a covenant (Attachment A) attached thereto with all appropriate authorities. The YIN shall provide BPA a copy of said documents within ten (10) days of recording. If the United States Department of Justice refuses to approve title with respect to an acquisition because of the covenant, the YIN may withdraw these recordings.

10. BPA Credit: For having used the Fund to acquire an interest in and/or improve Project property, the YIN shall support BPA's taking of protection, mitigation, and enhancement credit, (whether measured in acres, Habitat Units, or otherwise) as provided in section 5(c) of the Interim Agreement. The parties agree that BPA will receive a minimum of 2644 HUs under this Agreement. The YIN will support BPA's obtaining full credit so long as BPA complies with the terms of this Agreement and the Interim Agreement. The credit BPA obtains shall not be affected or diminished as a result of the YIN's failure to fulfill its obligations under this Agreement.

11. Public Access: The general public shall be provided reasonable access to properties acquired with fund expenditures. The YIN may regulate such access consistent with its laws, customs and agreements. Nothing in this Agreement limits the right or ability of the YIN to manage the properties for conservation, to preserve and protect cultural, historic, and religious

sites and to carry on and protect the federally guaranteed rights of the YIN. Nothing in this Agreement limits or diminishes any right or privilege of the YIN afforded under federal law.

12. Right to Enter: The BPA may enter upon properties on which Fund expenditures have been made at reasonable times to monitor compliance with the terms of this Agreement.

13. Incidents of Ownership: YIN or the United States Department of Interior, Bureau of Indian Affairs, will be responsible for all incidents of ownership of properties acquired with the fund. YIN shall hold BPA harmless and indemnify BPA from any liability arising from any incident of ownership that it may have in administration of the Plan.

14. Protection of Tribal Rights: Hunting, gathering and YIN cultural and religious activities is permitted according to YIN law or custom, provided such activities do not unreasonably diminish the purposes of the Project or its habitat value.

15. Dispute Resolution: BPA and YIN agree to submit in good faith any disputes regarding implementation or interpretation of this Agreement to non-binding mediation. This provision is triggered when one party makes a written request for the other party to join in mediation. Within thirty (30) days of this provision being triggered, the parties shall select a mediator, or if they are unable to select a mediator, each party shall select a mediator and the two selected will select a third mediator who shall be the sole mediator. The parties shall use their best efforts to resolve the dispute in mediation. After a dispute has been in mediation for at least sixty (60) days and there have been at least two mediation sessions, any party may initiate legal action to resolve the dispute. Except as provided in this part, pending completion of mediation no party shall initiate any legal proceeding except in aid of mediation.

16. Waiver of Immunity: BPA waives its sovereign immunity to the extent permitted by section 9(e)(5) of the NWPA, 16 U.S.C. section 839f(e)(5), for the purpose of any claim or action by the YIN arising out of this Agreement, whether for injunctive or declaratory relief, and consents to suit in any court of competent jurisdiction. The YIN waives its sovereign immunity for the purpose of any claim or action by BPA arising out of this Agreement, whether for injunctive or declaratory relief, and consents to suit in any court of competent jurisdiction. The parties agree that at the time this Agreement is signed, the only competent jurisdiction is federal court.

17. Choice of Law: Federal law shall govern the implementation and interpretation of this Agreement, and any action, whether mediated or litigated, brought or enforced.

18. Legal Fees and Costs: In the event of litigation involving this Agreement each party shall bear its own costs and attorneys fees, including any incurred on appeal.

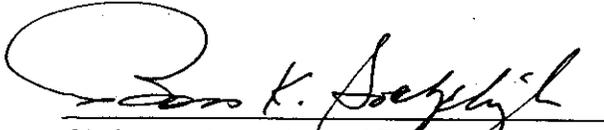
19. Waiver: The failure of any party to require strict performance of any term of this Agreement or a party's waiver of performance shall not be a waiver of any further performance or of a party's right to require strict performance in the future.

20. Surplus Funds: If the Fund is not exhausted after implementation of the Approved Project and the fulfillment of section 5(b)(xi) of the Interim Agreement, the YIN may expend the remainder of the Fund for additional wildlife mitigation projects pursuant to the Interim Agreement after BPA approval.

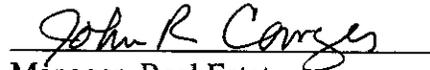
21. Contract Approval: If a third party brings an action and a court of competent jurisdiction finds that the portion(s) of this Agreement that relates to the use of the properties or the ability of BPA to exercise its rights with respect to the properties was unauthorized or not binding on the YIN under laws governing this Agreement at the time of signing, this Agreement may be terminated. Provided, that unless agreed to by the parties, the parties shall use their best efforts to enter into a new and binding agreement that carries out the intent of this Agreement. If the parties do not enter into a new agreement, the YIN shall repay a portion of the consideration set out in part 1, as agreed to by the parties. Such amount shall not exceed the consideration set out in part 1 divided by 99, multiplied by the number of years this Agreement endured, subtracted from the amount of consideration set out in part 1, multiplied by 7% (compounded annually). Any party may invoke the dispute resolution provisions of this Agreement to facilitate the negotiation of a new Agreement or repayment amount.

22. Binding Effect: This Agreement shall be effective when signed by the Chairman of the YIN as consistent with YIN Resolution T-24-91 (Attachment B); the Manager, Real Estate, of BPA; Group Vice President, Environment, Fish and Wildlife, of BPA; and the Secretary of Interior or his or her delegate.

IN WITNESS WHEREOF, the parties have signed this Agreement below.

  
Chairman, Confederated Tribes and Bands  
of the Yakama Indian Nation

Date: 5/2/96

  
Manager, Real Estate

Date: 4/25/96

  
Group Vice President, Environment,  
Fish and Wildlife

Date: 4/26/96

  
United States Bureau of Indian Affairs

Date: 5/2/96

ATTACHMENT A

COVENANT FOR RECORDING BY THE TRIBES

Covenant. The Yakama Indian Nation (YIN) has acquired this real property (interest) with the assistance of the Bonneville Power Administration (BPA) to help BPA in partially fulfilling its duty to protect, mitigate, and enhance wildlife habitat affected by the development of the Federal Columbia River Power System as required by section 4(h)(10)(A) of the Pacific Northwest Electric Power Planning and Conservation Act of 1980, 16 U.S.C. §§ 839 et seq. The YIN made this purchase backed by funds BPA provided under the Washington Wildlife Mitigation Agreement (April 1993), and a Memorandum of Agreement (MOA) between the YIN and BPA (May 1996) which are incorporated by reference herein. To fulfill its promises to BPA under those agreements, the YIN is recording this covenant.

The agreements cited and this covenant commit the YIN, its successors and assigns, to use this real property (interest) for the public purpose of permanent protection, mitigation, and enhancement of wildlife and wildlife habitat, to allow reasonable public access and to fully comply with the management rules set out in the attached Memorandum of Agreement and any future management site plans BPA and the YIN subsequently agree upon.

This covenant is meant to run with the land, providing permanent protection to the wildlife and wildlife habitat on behalf of BPA, its successors and assigns.

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Tribal Business Council Chair

Approved:

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BIA Agency Superintendent



FISH, WILDLIFE AND LAW &  
ORDER COMMITTEE

OFFICIAL ACTION

DATE: April 5, 1996

TOPIC: FY96 MOA for BPA Restoration funding

19 J.L. 96 ACTION REQUESTED: Review the information pertaining to the contract and MOA facilitating the transfer of funds from the Bonneville Power Administration to the Yakama Nation for implementation of the YIN Wetlands and Riparian Restoration Project.

FORMAL ACTION TAKEN: The information has been reviewed and the Committee requests that the contract and MOA be forwarded to the Executive Committee for signature.

DECISION: APPROVED DISAPPROVED TABLED

VOTE: TOTAL 3 FOR 2 AGAINST 0 ABSTAINED 0

MEMBERS		COMMITTEE ACTIVITY			
		ROLLCALL (P/A)	MOTION	SECOND	VOTE (F/A)
WILLIAM YALLUP, SR.	C	A			
LONNIE SELAM	S	<i>P</i>			
WENDALL HANNIGAN	M	<i>Present</i>	<i>WLN</i>		<i>FOR</i>
RAY JAMES	M	<i>P</i>		<i>B</i>	<i>F</i>
EX OFFICIO:					

P=PRESENT  
A=ABSENT

F=FOR  
A=AGAINST

OTHERS PRESENT: \_\_\_\_\_

CERTIFICATION: *Lonnie Selam* Chairman.

COMMITTEE ACTION NUMBER: 96-098 ROUTING: Original: Committee file  
Copies: Committee Members  
Division/Program  
Tribal Chairman

Attachment B

## R E S O L U T I O N

T-24-91

WHEREAS, the Yakima Indian Nation is a federally recognized tribe pursuant to the Treaty of 1855 (12 Stat. 951), and

WHEREAS, the Yakima Tribal Council is the governing body of the Confederated Tribes and Bands of the Yakima Indian Nation of the Yakima Reservation, Toppenish, Washington, by the authority delegated by Resolution T-38-56, and

WHEREAS, the Yakima Indian Nation is committed to the protection, conservation, and management of the wildlife resource such that cultural, religious and traditional values can be preserved, and

WHEREAS, the Treaty of 1855 guaranteed to the Yakima Indian Nation the right to manage the natural resources throughout the Ceded and usual and Accustomed areas of the Yakima Indian Nation, and

WHEREAS, the Pacific Northwest Electric Power Planning and Conservation Act (P.L. 96-501), and the Fish and Wildlife Program formed under the Act, recognizes impacts to wildlife and their habitat caused by the development of hydropower resources and authorizes planning and implementation of remedial measures to mitigate the damage done to wildlife at hydroelectric projects in the Columbia River Basin, and

WHEREAS, the Yakima Indian Nation has participated in the development of all wildlife loss assessment studies in the impacted area and has prepared a wildlife mitigation plan for public review prior to funding as required by the Northwest Power Planning Council.

NOW, THEREFORE BE IT RESOLVED, by the Yakima Tribal Council meeting in regular session at the Governmental Offices of the Confederated Tribes and Bands of the Yakima Indian Nation, Toppenish, Washington, a quorum being present that the Yakima Indian Nation's Offsite Mitigation Plan be approved and forwarded for public review, as per the process required by the Northwest Power Planning Council.

BE IT FURTHER RESOLVED, that the Yakima Indian Nation, being a recognized sovereign entity of government, shall participate in government to government dialogue with the Bonneville Power Administration to acquire funding for this mitigation project.

BE IT FURTHER RESOLVED, that the Yakima Indian Nation recognizes an appropriate time frame for the accomplishment of this planning stage to be 9 months and believes that the project should be fully implemented by September 1991.

RECEIVED

COPY

JAN 07 1991

RECORDS UNIT, FEDERAL ARCHIVES