

cc: #41
John Cowger
Joe DeHerrera
Philip Kay

**OREGON DEPARTMENT OF FISH AND WILDLIFE
and
BONNEVILLE POWER ADMINISTRATION**

**OREGON COLUMBIA BASIN
(EXCLUDING THE WILLAMETTE BASIN)
WILDLIFE MITIGATION
MEMORANDUM OF AGREEMENT**

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This Agreement is made between the State of Oregon, by and through its Department of Fish and Wildlife (hereinafter ODFW), and the United States of America, acting through the Department of Energy and the Bonneville Power Administration (hereinafter BPA).

RECITALS

- A. ODFW's legislative mandate is to preserve, protect, and perpetuate wildlife and wildlife habitat for the citizens of Oregon. ORS 496.012 et seq.
- B. BPA is a power-marketing agency within the United States Department of Energy. BPA has certain wildlife mitigation duties pursuant to the Pacific Northwest Electric Power Planning and Conservation Act, P.L. 96-501; 16 USC 839 et. seq. (Act), which Act directs BPA to protect, mitigate, and enhance fish and wildlife 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 by the Pacific Northwest Electric Power and Conservation Planning Council (Council) under subsection 4(h) of the Act (16 USC 839b(h)), and other environmental laws.
- C. ODFW participates in the Columbia Basin Mitigation Program (Program) which outlines the way Oregon's wildlife managers propose to assist BPA in fulfilling its wildlife mitigation duties within the Columbia Basin of Oregon, excluding the Willamette Basin. BPA and the Council share a common interest in having ODFW participate in this Program and work toward fulfilling BPA's mitigation duties in the Oregon Columbia Basin. Oregon participates in the Program through the Oregon Wildlife Planning Coordination Project (Project No. 97-59-3). The Council has approved

and prioritized the Program budget of approximately \$ 9.1 million dollars for Fiscal Years 1997-2000. As one of Oregon's wildlife managers, ODFW will be the lead proponent of some of the projects to be funded by the Program. BPA funding of ODFW-sponsored projects (Projects) within the Program will be pursuant to this Agreement and future Intergovernmental Contracts.

D. BPA has completed the Wildlife Mitigation Program Final Environmental Impact Statement (March 1997) and Record of Decision (June 1997). This EIS provides the basis for National Environmental Policy Act ("NEPA") compliance for the Program.

E. The Program consists of Projects that are already underway, some that are planned but not underway, and some that are unplanned but anticipated for the future. The Projects that are already underway are identified in Attachment A. ODFW will identify planned and anticipated Projects for future funding and submit them to BPA through the Northwest Power Planning Council's prioritization process. See Attachment B, Area of Future Projects.

Projects in the Program will fit one of the following forms:

- i. ODFW improvement of habitat on land it currently owns.
- ii. ODFW improvement of habitat on other public lands.
- iii. ODFW acquisition, ownership and management of habitat.
- iv. ODFW facilitating another public or private entity's acquisition, improvement and management of habitat.

F. BPA funding of Projects under this Agreement will be provided in a manner consistent with section 4(h)(10)(D) of the Act (16 USC 839 b (h)(10)(D)) after BPA receives a recommendation from the Council that the Project be funded at a particular level, and BPA accepts that recommendation. This process is referred to as prioritization.

G. ODFW will dedicate the properties in the Program to wildlife habitat protection permanently and will manage the properties according to the terms of this Agreement and the site-specific management plan (Plans) that ODFW will prepare for each Project in the Program. While there may be exceptions, the goal for all Projects will be the creation,

protection, and maintenance of the Projects as naturally self-sustaining wildlife habitat to minimize future operation and maintenance costs.

H. The purpose of this Agreement is to provide a master agreement to cover future wildlife mitigation projects funded by BPA and implemented by ODFW, and to help BPA fulfill its wildlife mitigation duties under the Act. Future Intergovernmental Contracts and Site Specific Plans shall be subject to this master agreement.

I. It is contemplated that future projects under this Agreement will be implemented by Intergovernmental Contracts between the parties. The Intergovernmental Contracts may, amongst other things, call for:

- ODFW to find and propose wildlife mitigation projects to BPA.
- ODFW to conduct pre-project studies and analysis.
- ODFW to determine the projected number of habitat units (HUs) on mitigation projects for the purpose of completing Intergovernmental Contracts and the actual number of HUs on mitigation projects before and after implementation of Site Specific Management Plans, using Habitat Evaluation Procedures (HEP) modeling methods described in the HEP manuals developed by the United States Fish & Wildlife Service.
- ODFW to negotiate with landowners and acquire real property interests with the purpose of protecting, mitigating and enhancing wildlife and wildlife habitat.
- ODFW to prepare Site Specific Management Plans.
- ODFW to provide operational and maintenance activities and/or habitat improvements on project properties.
- ODFW to provide follow-up studies and analysis of the effectiveness of projects.
- BPA to fund ODFW project activities, implementation, operation and maintenance, and follow-up HEPs.

J. The parties consider this Agreement a business transaction between government entities in which BPA provides funding to ODFW for certain wildlife habitat acquisition and improvement activities, and ODFW provides BPA with habitat acquisition and management services and other valuable consideration such as recognition of BPA habitat unit credit.

AGREEMENT

1. BPA Obligations. (a) BPA shall pay for ODFW's costs in implementing wildlife mitigation projects pursuant to approved Intergovernmental Contracts. Each Intergovernmental Contract shall include a list of project activities and a project budget.

(b) It is the present intent of the parties that ODFW will advance certain project expenses and that BPA will reimburse ODFW after invoice. ODFW shall have no obligation to incur any expense or commit to perform any project activity unless and until the Council has recommended funding ODFW for the costs of performing such project activity pursuant to its prioritization process, and such payment has been approved by BPA.

(c) BPA shall pay ODFW's costs of complying with federal real property acquisition law, including the Uniform Relocation Assistance and Real Property Acquisition Policies Act, 42 U.S.C. §§ 4601-4655, in the implementation of the Program, as further discussed in Section 6 below.

(d) BPA shall also provide additional funds for operation and maintenance to help ODFW ensure the habitat's natural characteristics and mitigation qualities are developed and self-sustaining. All operations and maintenance funding will be subject to a yearly prioritization process administered by the Council, its assigns or successors. The parties shall make their best efforts to negotiate a long-term operation and maintenance (O&M) funding plan for payment on an annual basis, through establishment of a trust fund, or by any other means. In the event that a long-term agreement is not developed, O&M funding will continue to be subject to the annual prioritization process. An example of what may be reasonable O&M is the Columbia Basin Fish and Wildlife Authority's *Enhancement Restoration Operation & Maintenance of Columbia Basin Wildlife Mitigation Projects* (1998).

(e) BPA Approvals. Where this Agreement or any Intergovernmental Contract grants BPA approval authority, of Management Plans, for example, then unless provided otherwise BPA shall complete its review and announce its decision within a reasonable

time, typically within 30 days. For amended or redrafted submissions, review should typically be within 14 days. BPA shall not withhold its approval unreasonably.

2. Program Fund. (a) In the event BPA funds any project activities prior to ODFW incurring the project expense (e.g. long-term operation and maintenance expenses), such funds shall be placed in a separate designated cost-center account of ODFW. ODFW shall use funds from this account only for BPA-approved project activities. ODFW shall maintain accurate records of deposits and expenses and BPA shall have the right to inspect such records upon reasonable prior notice.

(b) ODFW will not charge nor invoice BPA for any project activities or expenses for which ODFW has received (or has the right to receive) payment under any other agreement, grant or program. If any material income is generated from property acquired with BPA funds (e.g. conservation reserve program payments) the parties shall arrange to have such funds, or a like-amount, applied to the operation and maintenance costs of such property.

3. ODFW Obligations. ODFW shall implement the Program according to the terms of the Intergovernmental Contracts and Site Specific Management Plans. In the event that there is any conflict between the obligations of ODFW contained in the Intergovernmental Contracts and this Agreement, the obligations described in the Intergovernmental Contracts shall prevail. Unless stated otherwise in the Intergovernmental Contracts or Site Specific Plans, the following shall apply:

(a) Habitat Units. ODFW shall determine the number of Habitat Unit credits BPA shall receive for each BPA-funded project, as described in Section 4 and 5 below.

(b) Wildlife Inventory and Management Plans. ODFW shall develop an inventory of the wildlife habitat on each Project. Based on the information obtained from the inventories the ODFW shall develop a site specific management plan (Plan). ODFW shall develop the Plan (i) within one year of completion of the baseline actual HEP described in Section 5 below, for acquisition of an interest in real property, or (ii) prior to initiating work on the habitat improvements for Projects where ODFW does not use BPA funds to purchase

an interest in real property. The completed plans shall be incorporated into and made a part of the Intergovernmental Contract for the project.

(c) NEPA Compliance. (i) ODFW shall assist BPA in complying with NEPA for each Project by applying the process outlined in the BPA Wildlife Mitigation Programmatic EIS and its Record of Decision (ROD) to each individual Project. This process includes assisting BPA in the completion of a Supplement Analysis which will consider (1) whether the Project is substantially consistent with the ROD relevant to environmental concerns, and (2) whether there are significant new circumstances or information relevant to environmental concerns. Unless otherwise agreed by the parties, the NEPA compliance for a Project will be done prior to the acquisition of any real property interest.

(d) ODFW will assist BPA in complying with its statutory responsibilities under the National Historic Preservation Act, 16 USC § 470 *et seq.* (e.g. such as conducting cultural resource surveys), and will address historic properties at the time of NEPA compliance when possible. ODFW and BPA will assess respective responsibilities for historic property protection on a site-by-site basis, as indicated in the relevant Intergovernmental Contract or Site Specific Plan.

(e) Operation of the Program and Projects. ODFW co-manages and co-operates the Program with the other Oregon wildlife managers. ODFW will have all management and operation control of ODFW-sponsored Projects, and will therefore be solely responsible for all incidents of ownership of real property interests acquired. Except as otherwise specifically provided in this Agreement, nothing herein shall be deemed to restrict the rights, privileges and powers of the State of Oregon to manage the use of, or exercise all of the rights incident to, land ownership associated with this Agreement.

(f) Permanent Protection of Habitat. All the habitat acquired, improved, or managed by ODFW with BPA funds shall be protected and managed for wildlife permanently on behalf of BPA as described in the Intergovernmental Contracts and Plans, and ODFW shall use its best efforts to prevent any and all uses of the properties that are inconsistent with this Agreement, the Northwest Power Planning Council's Columbia River Basin Fish and Wildlife Program, and the Plans required by Section 3(b).

(g) Unless otherwise agreed by the parties in writing, ODFW will take the steps to achieve permanent protection for wildlife habitat as described in Section 7.

4. BPA Credit.

(a) ODFW and BPA shall determine the number of HUs to be credited to BPA for each BPA-funded project, which shall be indicated in the relevant Intergovernmental Contract. The number of HU credits BPA shall receive shall be the greater of i) the number of HUs the parties estimate will be realized by BPA-funded activities of the project or ii) the actual number of HUs achieved. When BPA funds only a portion of a project, BPA shall receive full credit in proportion to the share of costs it provides.

(b) At the commencement of this MOA, the basis for determining HU credits shall be as follows: BPA shall receive full credit for all HUs achieved through protection or improvement activities. Full credit for protection Projects such as acquisition of an interest in real property means one credit for each HU acquired. Full credit for improvement activities means one credit for each HU achieved over the baseline actual HEP. Where BPA funds only a portion of a Project, BPA shall receive full credit in proportion to the share of costs it provides.

(c) BPA may credit HUs toward its mitigation duty for wildlife habitat losses at Federal Columbia River Power System (FCRPS) projects located in Oregon in the Columbia River Basin or any other FCRPS project (i) agreed to by BPA, ODFW and the Council, or (ii) adopted by BPA consistent with the Northwest Power Act and applicable law.

(d) If another crediting methodology is imposed by applicable law or by judicial decision, or agreed to among the Council, BPA and ODFW--and not overturned by any court of competent jurisdiction, that formula shall be used to recompute the credit provided in this part and the recomputed credit shall be used for all purposes, including the final determination of BPA's ultimate obligation to provide wildlife mitigation,

protection and enhancement; however, in no event will any such recalculation affect BPA's obligations under this Agreement.

(e) ODFW agrees that BPA's expenditure of money hereunder is consistent with Sections 4(h) and 10(e) of the Act. ODFW shall support BPA's obtaining full credit for its expenditures with respect to protecting and managing existing habitat on the properties, and for habitat improvements when implemented on the properties, so long as BPA complies with the terms of this Agreement, including but not limited to BPA's obligation to provide operation and maintenance funding as provided in Section 1(d).

5. Habitat Evaluation Procedures (a) A minimum of three HEP events is anticipated for most Projects. The first is an estimate of HUs; a full or complete HEP is not expected. These estimates will be used in the Intergovernmental Contracts conveying funds to ODFW for the securing of HUs. Next are the baseline HEP analyses of actual or existing HUs on the Project. This second HEP event will precede development of the Plans. Finally, ODFW will conduct additional HEP analyses to evaluate the results of implementing the Plans.

(b) ODFW will conduct HEPs, using the HEP guidelines developed by the U.S. Fish and Wildlife Service, for each Project. The parties will jointly identify the HEP species. Species and habitat selection will generally be based on upon the Wildlife Impact Assessments for Bonneville, The Dalles, John Day, and McNary Projects (Annual Report 1989 DE-AI79-87BP35261; Annual Report 1989 DE-AI79-88BP92430; Annual Report 1989 DE-AI79-88BP92430; Annual Report 1989 DE-AI79-88BP92430) and the underlying documents supporting the summaries. HEP models will be followed when available for target species; however, some modifications may be necessary as agreed upon by the parties. For example, when models are not available or applicable for a Project, the parties may agree to substitute other species. ODFW will notify BPA of the HEP in time for BPA to observe the HEPs. The results of the HEPs shall be used to evaluate the credit due.

(c) (i) Baseline HEPs. ODFW will conduct the baseline HEPs to determine the then existing HUs at a Project within one year following the acquisition of a real property interest under this Agreement and prior to undertaking habitat improvement activities-- unless otherwise agreed to by the parties.

ii) Subsequent HEPs. For Projects which involve minor habitat improvement activities, such as non-native vegetation removal, minimal revegetation or minimal mechanical manipulation, HEP sampling should occur within five to seven years following completion of the improvement activities. For Projects which involve major habitat improvement activities, such as revegetation, mechanical manipulation or other large scale land use modifications, HEP sampling should occur seven to ten years following completion of the improvement activities.

(d) For any Project the parties may conduct additional HEP studies as agreed upon. The party requesting the study shall fund it unless the parties agree otherwise.

6. Acquisition Process. (a) ODFW may utilize its own processes in preparing to acquire real property interests. Prior to acquisition of property in fee, BPA shall insure compliance with NEPA, including conducting cultural resource surveys.

(b) ODFW will comply with federal real property acquisition laws, such as the Uniform Relocation Assistance and Real Property Acquisition Policies Act, 42 U.S.C. §§ 4601-4655. For any acquisition involving potential relocation and other costs of 15,000 dollars or more, ODFW shall consult BPA's Manager, Real Property Services, before taking any action or making any commitments that may necessitate reimbursement by BPA under Section 1(b). ODFW shall obtain BPA's review and approval of all appraisals before each acquisition. BPA shall have ten calendar days to review the preliminary appraisal for compliance with Uniform Standards and Procedures of Appraisal Practices. BPA shall have five calendar days to approve the final appraisal after it has been revised and resubmitted, as necessary.

(c) Before acquisition of any real property interest a hazardous material and petroleum products survey shall be performed. At ODFW's option, the survey shall be done i) by

BPA staff in a timely and prompt manner or ii) by a qualified third party environmental consultant (with the costs reimbursed by BPA pursuant to Section 1). The survey results shall be submitted by ODFW to the Oregon Department of Administrative Services and to BPA for review and approval prior to the acquisition of any real property interest. Disapproval of the survey results by Department of Administrative Services or BPA will constitute grounds for either party to refuse to further pursue acquisition of the real property.

7. Permanent Protection of Wildlife Mitigation. ODFW shall take steps, as appropriate to a given Project, to permanently protect wildlife mitigation Projects acquired pursuant to this Agreement. The steps to be taken to permanently protect wildlife on a given project shall be set forth in the relevant Intergovernmental Contract. Unless otherwise provided in the Intergovernmental Contract, it is presumed that the protection shall be as follows:

(a) For property purchased in fee,

1. If BPA provides all or a significant portion of the acquisition costs, ODFW shall take title to any real property it purchases under this Agreement by a deed conveying fee simple subject to an executory interest in favor of BPA, in a form substantively equivalent to Attachment C, provided that the granting and/or exercise of such an executory interest will not violate any terms and conditions contained in any agreement ODFW may have with another third party funding source. ODFW shall record such deed in the appropriate county record. The parties believe this transaction for consideration between government entities does not trigger the Rule Against Perpetuities as codified at ORS 105.950 to 105.975. In the event the Rule applies, the parties agree that any future interest created herein shall terminate 90 years after its creation, thus meeting an exception to the Rule (ORS 105.950(1)(b)).

In addition, if BPA provides all or a significant portion of the acquisition costs, at the time ODFW takes title to or assumes control of real property, ODFW shall have the covenant contained in Attachment D recorded with all appropriate authorities. Prior to Closing on any property that will have a deed including the

covenant contained in Attachment D, ODFW will submit to the relevant County Recorder the proposed form of restrictive covenant and will request written confirmation that the County Recorder will record the covenant as submitted. ODFW will provide a copy of the County Recorder's response to BPA as soon as it is available. Provided ODFW complies with the process outlined in this subsection, then ODFW will not be in breach of this subsection if a County Recorder refuses to record such covenant, and in such circumstances ODFW shall take all possible steps to attempt to instead obtain and record appropriate conservation easements, at no additional cost to BPA, that meet the requirements of Section 7(b).

2. If BPA does not provide a significant portion of the acquisition costs and/or the granting of an executory interest may violate any term and condition contained in any agreement ODFW may have with another third party funding source, ODFW shall grant to BPA a conservation easement on the acquired property. The conservation easement shall (i) meet the criteria of ORS 271.715 to 271.795, (ii) be approved in writing by BPA, and (iii) guarantee BPA a third party right of enforcement.

(b) For any property acquired for a term of years, ODFW shall secure leases with the longest lease term possible given Project objectives. In addition, unless otherwise agreed in the Intergovernmental Contract, ODFW will obtain and record conservation easements that (i) meet the criteria of ORS 271.715 to 271.795, (ii) are approved in writing by BPA, and (iii) guarantee BPA a third party right of enforcement.

(c) For Projects where ODFW creates wildlife habitat improvements on property not owned in fee or leased for a term of years, ODFW shall insure permanence of the wildlife mitigation by obtaining and recording appropriate conservation easements, that meet the requirements in Section 7(b), on the property.

(d) Unless otherwise agreed in the Intergovernmental Contract, for BPA-funded improvements of habitat on real property ODFW currently owns, ODFW affirms that it has pre-existing statutory or contractual obligations to hold and use all such property for

permanent wildlife and wildlife habitat protection and mitigation, and, that it will either i) replace such properties with habitat of equal or greater habitat value if it is sold or converted to non-wildlife habitat uses or ii) return to BPA the BPA funds previously applied to projects or activities on such property.

(e) The parties will agree in writing, on a case-by-case basis, on how to ensure permanence for Projects involving habitat improvement on public lands other than those owned by ODFW.

(f) In the event ODFW sells or exchanges any of the lands acquired for mitigation, as authorized in Section 12 of this Agreement, ODFW may remove the Attachment D covenant from land to be sold and it shall record the same covenant with the deed to new land(s) acquired.

8. Recording by ODFW. The documents to be recorded pursuant to Section 7 above shall be recorded by ODFW at, or within 10 days of, Closing. Within 30 days of recording, ODFW shall submit to the BPA contracting officer a copy of the recorded documents showing the recording information. BPA may suspend its funding obligations under Section 1(d) for any Project for which it has not received the recording information.

9. Contents of Management Plans. Whenever practical, the Plans will focus on habitat management designed to achieve and maintain native habitat that is naturally self-sustaining. ODFW will develop the Plans in consultation with any federal, state, tribal or public entity that wishes to participate. All Plans should address management methods and, if necessary, mitigation, for all resources identified in the Supplement Analysis or other NEPA documents prepared for each Project. The Plans will incorporate the Project's Supplement Analysis and the Wildlife EIS by reference. ODFW will integrate management planning for historic and cultural resources, as defined by the National Historic Preservation Act, with the wildlife management practices as a means of avoiding impacts to cultural and historic resources. Cultural resource surveys shall be done prior to initiating non-exempt ground-disturbing activities. ODFW will also avoid sensitive

sites if at all possible in implementing habitat improvement actions. Only ground-disturbing activities approved in the Plans may be undertaken.

10. BPA Power of Termination. Except as provided in Section 11, if BPA determines that property acquired in fee with the Fund is not being managed for wildlife habitat--as evidenced by a twenty percent drop in the highest documented actual HEP values-- and unless BPA provides written consent to ODFW continuing to own and manage such property despite the twenty percent drop, then fee title shall vest in BPA as provided by the deed conveying fee simple subject to an executory interest in favor of BPA that ODFW will have had recorded as provided under Section 7(a) above--pending completion of a dispute resolution process which either party may invoke as described in Section 19.

11. Force Majeure. Neither party shall be liable to the other or deemed in fault under this Agreement if and to the extent that the party's performance of the Agreement is prevented by reason of force majeure. The term "force majeure" means an occurrence that is beyond the control of the party affected and could not have been avoided by exercising reasonable diligence. Force majeure includes, but is not limited to, acts of God, riots, strikes, fire, floods, epidemics, acts of government other than the State of Oregon or BPA, embargo, wrecks, or unavoidable delay in materials or manufacturing facilities from generally recognized sources in the applicable industry. The parties will make all reasonable efforts to resume performance promptly once the force majeure is eliminated. ODFW shall have no obligation to reproduce a Project's pre-existing wildlife habitat values any faster than natural regeneration reproduces them.

12. Acquisition, Exchange, Sale. If ODFW determines that a sale or exchange of real property interests would provide a net gain in HUs or aid in the fulfillment of the management objectives as stated in this Agreement and the Program, then ODFW may sell or exchange any real property interest acquired with the Fund after ensuring the following conditions are met: (a) the new real property interests are of equal or greater wildlife habitat value, as measured by a habitat evaluation procedure, to the habitats targeted in this Agreement, or aid in fulfillment of the Program or facilitate management of real property already acquired, (b) BPA's Fish and Wildlife Division Director concurs in the sale or exchange, and (c) ODFW complies with Sections 7 and 8 of this agreement

with regard to the new property acquired. BPA concurrence shall not be unreasonably withheld.

13. Conveyance to BPA. In the event of a conveyance of real property by ODFW to BPA pursuant to Section 10 or 21 of this agreement, ODFW will inform BPA (i) of any circumstance that exists which may impact BPA's ability to manage the property according to the site-specific management plan, and (ii) of any known hazardous material or petroleum contamination on the property.

14. Protection of Tribal Rights. Nothing in this Agreement is intended to nor shall abrogate or expand any federally protected or reserved Indian right.

15. BPA Monitoring. BPA shall have the right to enter upon the properties at reasonable times, having requested access at least one week in advance, to monitor ODFW's compliance with this Agreement and to enforce its terms

16. ODFW Reporting. Beginning June 30, 2001, and every June 30 thereafter, or as agreed upon in Intergovernmental Contracts, the ODFW shall provide BPA an annual written report generally describing the real property interests in the Project, HEP analyses undertaken or in progress, and management activities undertaken or in progress. ODFW shall also provide an accounting of the Fund at this time.

17. Public Access. ODFW shall provide reasonable public access to the properties owned by ODFW or purchased in fee under this Agreement. Public access is encouraged, but not required, for mitigation properties not managed by ODFW under this Agreement. ODFW will not provide public access or use that will result in adverse impacts to wildlife, the reduction of wildlife habitat values, or the destruction of other natural resource values for which the Properties are managed, or impede the increase in HEP value of improvement HUs. Nothing in this Agreement limits the authority or ability of ODFW to manage the properties for wildlife viewing, lawful hunting, fishing or trapping, public safety, wildlife habitat conservation, or to preserve and protect cultural, historic, and religious sites.

18. Limitation of Credit. The credit BPA obtains for the consideration paid to provide and maintain the Project as wildlife habitat as required and provided in this Agreement shall not be affected or diminished as a result of the failure of ODFW to carry out its obligations to maintain the properties as provided in this Agreement.

19. Dispute Resolution. BPA and ODFW agree to submit in good faith any disputes regarding the implementation of this Agreement or the management of the Program and Projects to non-binding mediation. This provision shall be triggered when one party makes a written request for the other party to join in mediation. Within 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 choose 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 60 days and there have been at least two mediation sessions, either 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.

20. Effective Date. This Agreement shall be effective when signed by the Director of ODFW or its assign; BPA's Group Vice-President of Environment, Fish and Wildlife; and BPA's Manager, Real Property Services.

21. Contract Approval. (a) If a court of competent jurisdiction finds that the parties or either of them were not authorized to perform any obligation under this contract, this Agreement shall terminate and the parties will have no further obligations to each other under this Agreement.

(b) Upon termination of the Agreement pursuant to Sections 21 or 30, ODFW shall deliver promptly to BPA (1) any and all personal property acquired with funding provided by BPA under this Agreement, (2) all uncommitted funds remaining in the Program Fund described in Section 2 (a) above, and (3) upon BPA's request and approval, and provided that BPA obtained an executory interest pursuant to Section 7 (a)

(1) above, either i) the title to real property acquired in fee pursuant to Section 6 and 7 (a) or ii) funds equivalent to the funds provided by BPA for acquisition. Notwithstanding the above, in no event shall BPA be entitled to the return of any personal property acquired with BPA funds if such property was attached to the property as a fixture (e.g. trees, plants, shrubs), nor reimbursement for the costs thereof . Unless otherwise agreed by the parties, the parties shall use their best efforts to enter into a new and binding agreement that accomplishes the intent of this Agreement. Either party may invoke the dispute resolution provisions of this Agreement to facilitate the negotiation of a new agreement.

22. Modification. The parties by mutual agreement may modify the terms of this Agreement. Any such modification shall be in writing signed by both parties.

23. Applicable Law. All activities undertaken pursuant to this Agreement and the Intergovernmental Contracts must be in compliance with all applicable state and federal laws and regulations. Federal law shall govern the implementation of this Agreement and any action, whether mediated or litigated, brought or enforced. The laws of the State of Oregon shall govern the rights and interests in real property.

24. Attorney Fees. In the event of litigation involving this Agreement each party shall bear its own costs and attorney fees, including those incurred on appeal.

25. 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 future performance or of a party's right to require strict performance in the future.

26. Assignment. Neither party may assign or transfer its rights or delegate its responsibilities under this Agreement without written approval from the other party, which approval shall not be unreasonably withheld. The parties agree that ODFW will retain ownership of properties acquired in fee with the Fund and, unless otherwise agreed by the parties, may only delegate its duties through long term leases, conservation easements and management agreements.

27. In Lieu Funding. ODFW may use the BPA funds only for acquisitions and improvements that are in addition to, not in lieu of, other expenditures it is required to make under other agreements or provisions of law. ODFW will pay, from a source other than BPA, payments in lieu of taxes, county weed assessments and minimum noxious weed control costs as required by state law for the Projects described in Recitals E(i) and (ii).

28. Transmission Access. If at any time BPA needs a transmission right-of-way over land purchased in fee using the Fund, then ODFW shall grant BPA perpetual easements, provided that, prior to ODFW granting such easements, BPA has provided proof of compliance with all applicable Federal laws, including but not limited to the National Environmental Policy Act, the Endangered Species Act, and the Clean Water Act. Upon BPA's request for an easement, the parties will negotiate an agreement for the easement that may include mitigation measures identified under such Federal laws. Transmission right-of-way easements shall be for the sole purpose of transmission of electrical power and ancillary transmission communications. The easement rights shall not be sold, assigned or subleased to third parties for other uses without the prior written consent of ODFW. If the easement requires ODFW to warrant and defend title to the rights granted under the easement, BPA shall pay all costs associated with obtaining sufficient title insurance to cover such warranty. Easements shall be generally in the form of attachment E. Provided, that BPA shall fund (1) an additional HEP to be conducted by ODFW after the transmission facility is complete, and (2) habitat replacements and improvements as agreed upon by the parties, such as fencing or replanting, to protect the remaining wildlife habitat. If necessary, BPA's credit at the site and ODFW's obligations under this agreement and any implementing Intergovernmental Contracts shall be adjusted based on the difference between the post-construction HEP and prior HEPs and consistent with the agreement of the parties regarding protection or replacement of habitat.

29. Notice. Any notice permitted or required by this Agreement shall be in writing, delivered personally to the persons listed below, or shall be deemed given five (5) days after deposit in the United States mail, certified and postage prepaid, return receipt requested and addressed as follows, or at such other address as any party may from time to time specify to the other party in writing. Notices may be delivered by facsimile or other electronic means, provided that they are also delivered personally or by certified mail.

Notices to BPA should be sent to:

Director: Environment, Fish & Wildlife
KEWN-4
Bonneville Power Administration
P.O. Box 3621
Portland, OR 97208

Director: Wildlife Division
Oregon Department of Fish and Wildlife
P.O. Box 59
Portland, Oregon 97207

30. Non-appropriation. ODFW payments of any amount under this contract attributable to actions taken after the last day of the current biennium is contingent on ODFW receiving from the Oregon Legislative Assembly appropriations, limitations, or other expenditure authority sufficient to allow ODFW, in the exercise of its reasonable administrative discretion, to continue to make payments or otherwise perform under this Agreement. In the event the Oregon Legislative Assembly fails to approve sufficient appropriations, limitations or other expenditure authority for ODFW to continue its duties under this Agreement, then ODFW may terminate this Agreement and BPA's remedies shall be limited to those in Section 21.

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

Bonneville Power Administration

By: Alexandra B. Smith
Alexandra B. Smith
Group Vice President
Environment, Fish and Wildlife

Date: 11/9/00

By: John R. Cowger
John R. Cowger
Manager Real Property Services

Date: 11/9/2000

Oregon Department of Fish and Wildlife

By: James W. Greer
Jim W. Greer
Director of Oregon Department of Fish and Wildlife

Date: 11/6/00

Reviewed for Sufficiency:

By: [Signature]
Oregon Department of Justice

Date: 10-31-00

ATTACHMENT A

PROJECTS ALREADY UNDERWAY

The Northwest Power Planning Council has recommended and approved the following projects for funding by BPA:

Securing Wildlife Mitigation Sites in Oregon (SWMSO)

SWMSO, Ladd Marsh Wildlife Area Additions *

SWMSO, Wenaha Wildlife Area Additions *

SWMSO, Irrigon Wildlife Area Additions *

SWMSO, Horn Butte *

SWMSO, South Fork Crooked River *

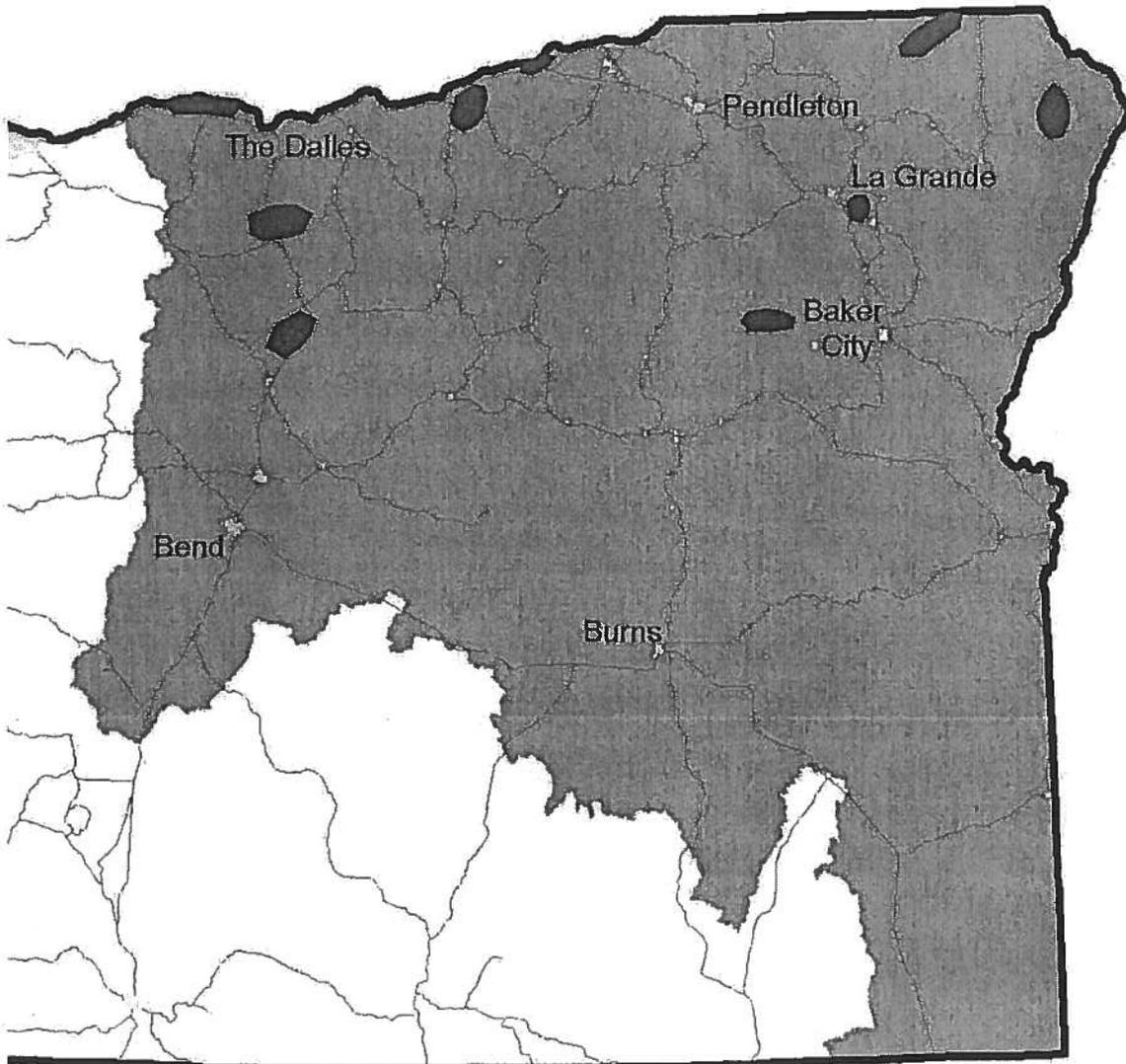
SWMSO, Trout Creek Canyon *

SWMSO, Mitchell Point *

* fund under *Securing Wildlife Mitigation Sites in Oregon (SWMSO)* project

ATTACHMENT B

AREA OF FUTURE PROJECTS



Focus of future mitigation will primarily occur near existing BPA mitigation sites, ODFW Wildlife Management Areas, other public lands, and sites with desired natural features. This map is not intended to represent all future project areas.

ATTACHMENT C

The Deed Conveying Fee Simple With an Executory Interest shall include the following provision or one substantively equivalent to it:

ODFW's acquisition of this real property has been enabled by the United States, Bonneville Power Administration (BPA), with the agreement that ODFW uses the property for wildlife habitat protection permanently and that title to this property shall vest in BPA, (1) upon the determination by BPA that this real property is not being managed for wildlife habitat protection, as described in the Oregon Columbia Basin Wildlife Mitigation Memorandum of Agreement dated *November 9*, 2000 on file with the BPA Manager, Real Property Services, and (2) pursuant to the terms of such Memorandum of Agreement. A copy of the Memorandum of Agreement can be obtained from:

Bonneville Power Administration
Manager, Real Property Services – TR-3
P.O Box 3621 or 905 NE 11th Avenue
Portland, OR 97232

If the Rule Against Perpetuities applies to BPA's future interest created here, then BPA's future interest shall terminate 90 years after its creation and vest in the State of Oregon.

ATTACHMENT D
COVENANT FOR RECORDING BY ODF&W

Covenant. This real property (interest) has been acquired by the State of Oregon, Department of Fish and Wildlife (ODFW) with the assistance of 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. ODFW made this acquisition backed by funds provided under a Memorandum of Agreement (MOA) between the ODFW and BPA dated November 9, 2000, a copy of which is on file with the BPA Manager, Real Property Services. To fulfill its promises to BPA under the MOA, ODFW is recording this covenant. A copy of the Memorandum of Agreement can be obtained from:

Bonneville Power Administration
Manager, Real Property Services – TR-3
P.O Box 3621 or 905 NE 11th Avenue
Portland, OR 97232

The MOA and this covenant commit ODFW, 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 to the extent the access does not interfere with the mitigation purposes of this acquisition, as provided in the MOA. This covenant is meant to run with the land, for the sole benefit of BPA, its assigns and successors. However, ODFW is granted the power to revoke the covenant to permit a sale or trade of a real property interest pursuant to Section 12 of the MOA, and any purchaser of this property may rely on a written and recorded revocation of this covenant by ODFW, in which case such purchaser shall be forever released from the restrictions contained herein.

By: _____

Jim W. Greer ODFW, Director

Date: _____

ATTACHMENT E

CONTRACT AND GRANT OF EASEMENT

Transmission Line and Danger Trees

WITNESSETH:

That the parties hereto covenant and agree as follows:

The Grantor, for and in consideration of the provisions contained in the Oregon Columbia Basin (excluding the Willamette Basin) Wildlife Mitigation Memorandum of Agreement, and the provisions contained in this agreement, hereby grants and conveys to the United States of America a perpetual easement and right-of-way for electric power transmission purposes in, upon, over, and under the following-described land, to wit:

The grant shall include the right to enter and to locate, construct, operate, maintain, repair, reconstruct, upgrade, remove and patrol one or more lines of poles or structures and appurtenances thereto, supporting conductors of one or more electric circuits of any voltage and any communication lines or equipment and appurtenances thereto, together with the present and future right to clear the right-of-way and to keep the same clear of all trees, whether natural or cultivated, and all structure supported crops, other structures, trees, brush, vegetation, fire and electrical hazards, except non-structure supported agricultural crops less than 10 feet in height. All such trees, brush, vegetation, structures, and fire hazards presently on the right-of-way shall become the property of the United States on the date of acceptance hereof and may be disposed of by the United States in any manner it deems suitable

The Grantor also hereby grants and conveys to the United States the present and future right to top, limb, or fell, and to remove, sell, burn, or otherwise dispose of "danger trees" located on Grantor's land adjacent to said right-of-way. A danger tree is any growing or dead tree, or snag, whether stable or unstable, which the United States at any time determines could within a five-year period fall, bend or swing against the transmission or communications lines or equipment or within electrical arcing distance of said lines, or which the United States determines could interfere with the construction or maintenance of said lines and equipment.

The Grantor covenants to and with the United States and its assigns that the title to all brush and timber cut or hereinafter growing within said parcel of land and also all danger trees identified or cut from Grantors land adjacent to said right-of-way is and shall be vested in the UNITED STATES OF AMERICA and its assigns and that the consideration paid for conveying said easement and rights herein described is accepted as full compensation for all damages incidental to the exercise of any said rights. At the United States' election title to danger trees may revert to the Grantor.

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

In addition to the consideration recited herein, the United States shall repair or make compensation for damage to agricultural crops, and to United States' permitted fences, irrigation and drainage systems within the easement area. The United States shall repair or make compensation only for damage caused by the United States and which results from and during construction, reconstruction, removal, or maintenance activities within the easement area. Payment for such damage shall be made on the basis of a damage estimate approved by the United States.

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

The United States shall pay all costs incidental to the preparation and recordation of this instrument and for the procurement of the title evidence.

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

The provisions hereof shall inure to the benefit of and be binding upon the heirs, executors, administrators, successors, and assigns of the Grantor and upon the assigns of the United States. Notwithstanding any other provision of this easement, the United States of America shall use this easement for the sole purpose of transmitting electrical power generated or authorized by the Bonneville Power Administration or other federal agency, and it may not sell or assign the rights granted hereunder to third parties for other uses without the prior written consent of Grantor.