



Department of Energy

Bonneville Power Administration
P.O. Box 3621
Portland, Oregon 97208-3621

FREEDOM OF INFORMATION ACT/PRIVACY PROGRAM

February 24, 2014

In reply refer to: NN-1

Dirk Middents
K&L Gates
925 4th Avenue, Suite 2900
Seattle, WA 98104

FOIA #BPA-2014-00279-F

Dear Mr. Middents:

This is a final response to your request for records that you made to the Bonneville Power Administration (BPA), under the Freedom of Information Act (FOIA), 5 U.S.C. 552.

You requested the following:

“A copy of the Memorandum of Agreement (MOA) between Falling Springs, LLC, the Cowlitz Indian Tribe and BPA for acquisition of survival benefit units in the Lower Columbia River Estuary.”

Response:

BPA is releasing the document in its entirety.

Pursuant to Department of Energy FOIA regulations at 10 C.F.R. § 1004.8, you may administratively appeal this response in writing within 30 calendar days. If you choose to appeal, please include the following:

- (1) The nature of your appeal - denial of records, partial denial of records, lack of responsive records, or denial of fee waiver;
- (2) Any legal authorities relied upon to support the appeal; and
- (3) A copy of the determination letter.

Clearly mark both your letter and envelope with the words “FOIA Appeal,” and direct it to the following address:

Director, Office of Hearings and Appeals:
Department of Energy
1000 Independence Avenue SW
Washington DC 20585-1615

There are no fees associated with this request.

Please contact Kim Winn, FOIA Public Liaison, at 503-230-5273 with any questions about this letter.

Sincerely,

/s/Christina J. Munro

Christina J. Munro

Freedom of Information/Privacy Act Officer

Enclosure: Responsive document

**MEMORANDUM OF AGREEMENT BETWEEN
FALLING SPRINGS, LLC, THE COWLITZ INDIAN TRIBE,
AND THE BONNEVILLE POWER ADMINISTRATION FOR
THE ACQUISITION OF SURVIVAL BENEFIT UNITS IN
THE LOWER COLUMBIA RIVER ESTUARY**

This Memorandum of Agreement (**agreement**) is made between **FALLING SPRINGS, LLC**, a Virginia limited liability company, its successors and assigns (**Falling Springs** or **Astoria Wetlands**), **THE COWLITZ INDIAN TRIBE** (**Cowlitz**) and **THE UNITED STATES OF AMERICA**, acting by and through the Department of Energy, Bonneville Power Administration (**BPA**), each referred to as **Party** or jointly as the **Parties**.

I. RECITALS

A. Falling Springs is an environmental resources company that has managed and developed projects to restore, enhance and preserve aquatic resources and habitat throughout the United States. Astoria Wetlands, LLC is a subsidiary of Falling Springs.

B. BPA is a power-marketing agency within the United States Department of Energy. The Pacific Northwest Electric Power Planning and Conservation Act, 16 U.S.C. §§ 839-839h (**Northwest Power Act**) directs BPA to protect, mitigate, and enhance fish and wildlife affected by the development and operation of federal hydroelectric projects on the Columbia River and its tributaries (the **Federal Columbia River Power System** or **FCRPS**), in a manner consistent with the purposes of the Act, the fish and wildlife program adopted by the Pacific Northwest Electric Power Planning and Conservation Council under subsection 4(h) of the Act, and other environmental laws. In addition, BPA has obligations under the Endangered Species Act (**ESA**), 16 U.S.C. §§ 1531-1544, to aid in the conservation of listed species, including avoiding any actions that are likely to jeopardize the continued existence of listed species or to result in the destruction or adverse modification of their designated critical habitats.

C. The Cowlitz Indian Tribe is a federally-recognized Indian Tribe named on the Bureau of Indian Affairs list of Indian Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs, most recently published in the Federal Register on August 10th, 2012 (77 FR 47868). The historic area of interest asserted by the Cowlitz People encompasses much of Southwest Washington and Northwest Oregon. To the East it is bounded by the crest of the Cascade Mountains, to the south and west from the watersheds that drain into the Columbia River and its plume, and to the shared areas to the North into Puget Sound. The Preamble of the Constitution of the Cowlitz Indian Tribe specifically addresses natural resource concerns, directing that among the purposes of the Tribe shall be: "...securing our aboriginal land and any and all natural resources therein, preserving our culture and institutions..." Article I, § 2 of the Constitution continue to address natural resources issues from a jurisdictional perspective and established the purpose and need of the Natural Resources Department whose mission is:

To protect, conserve, restore and promote culturally-relevant species and landscapes integral to the unique identity of the Cowlitz People. To further educate the community and inspire future leaders and participants in this vision.

D. Under the National Oceanic and Atmospheric Administration Fisheries' 2008 and 2010 Biological Opinion (soon to be updated by the 2013 Biological Opinion) of Federal Columbia River Power System Operations (**2008 Biological Opinion**), BPA and the U.S. Army Corps of Engineers agreed to implement habitat improvements in the Columbia River estuary¹ to benefit salmon and steelhead listed for protection under the ESA. To measure the progress in making improvements to salmon and steelhead habitat in the estuary, NOAA Fisheries relies on a calculation of survival benefit units (**SBU**s). **SBU**s, are calculated with the assistance of "an expert regional technical group [**ERTG**] [which] will use the approach originally applied in the FCRPS Biological Assessment...and all subsequent information on the relationship between actions, habitat and salmon productivity models developed through the FCRPS RM&E to estimate the change in overall estuary habitat and resultant change in population survival..." (Reasonable and Prudent Alternative 37). The **ERTG** uses a scientifically based model based on the best available scientific information to estimate the biological value of estuary habitat improvements and translate them into anticipated improvements in juvenile salmonid survival. The biological value to juvenile salmon and steelhead stocks depends in part on how much they use the estuary, with restoration of tidal influence as a biological priority.

E. Astoria Wetlands owns approximately 221 acres of property in the City of Astoria, Clatsop County, Oregon, at the confluence of the Youngs and Wallooskee rivers (the **property**). Falling Springs proposes to implement an estuarine restoration project (the **Project**) on approximately 193.11 acres of the property (the **Project Area**) in order to restore, enhance and preserve in perpetuity aquatic and natural resources and habitat, including reconnecting tidal wetland habitat. The **Project** will include submerging portions of the property regularly, intermittently, or permanently with flood, tidal, and overflow waters. It may also include any or all of the following actions: riparian, floodplain, and channel features; vegetative plantings; modifications and improvements within and adjacent to the floodplain, channel, or shore for grade control, flowage, or bank stabilization purposes; fish and wildlife habitat or other ecosystem restoration improvements; placement of materials or structures in the bed, banks, or shorelines that influence stream velocity or channel form; removal or placement of gravels, cobbles, boulders, woody debris, culverts, pipelines and other structures or conveyances to recharge or maintain flow to existing wetlands or to create wetlands; and constructing, moving, removing, placing and restoring structures or obstructions including flood control and setback levees and dikes.

F. BPA proposes to purchase the Ocean and Stream **SBU**s for 2008 Biological Opinion listed salmon generated by the **Project**. The Cowlitz propose to assist Falling Springs in implementing the **Project** and will provide long-term project management to ensure permanent protection of the property. Astoria Wetlands proposes to donate a permanent conservation easement to the United States of America acting on behalf of BPA.

¹ The estuary extends from the mouth of the Columbia River upstream to Bonneville Dam.

THEREFORE, THE PARTIES AGREE AS FOLLOWS:

II. PROJECT PURPOSE AND CONSIDERATION

A. Purpose. The purpose of this Agreement is to establish the sequence of events by which the Parties will coordinate to implement the Project and the purchase of SBUs from Falling Springs by BPA, and the property on which the SBUs are created will be owned and managed by the Cowlitz Tribe. Another purpose of this Agreement is to define the transmission infrastructure work BPA has determined is necessary for the Project to be successful.

1. **Project Purpose.** The purpose of this Project is to allow BPA to purchase approximately 3.0 ocean and stream SBUs from Falling Springs to satisfy a portion of BPA's obligation under the 2008 Biological Opinion without BPA having to separately fund and implement each distinct phase of a habitat restoration project. The Parties designed this pilot Project as a turnkey project, where Falling Springs will take all necessary steps to timely create SBUs and BPA will purchase them at a price agreed upon in advance. The Project will occur on what is currently Astoria Wetlands' property at the confluence of the Young and Wallooskee rivers, legally described in **Attachment A** and depicted in an annotated aerial photograph of the surrounding area also in **Attachment A**.

2. **Structure of Agreement.** The Parties structured this overall agreement for acquiring SBUs using a staged approach, as follows. Astoria Wetlands purchased the property for restoration without any commitment from BPA or other expectation of federal funding. In addition, Falling Springs and the Cowlitz have initiated design of Property restoration and work on environmental compliance. To proceed further, Falling Springs seeks a progress payment from BPA. In exchange for that payment, Falling Springs will cause Astoria Wetlands to donate to BPA a permanent conservation easement over the Property (including provisions allowing breaching of dikes and levees and restoration of tidal influence), provide to BPA the 60% restoration plans and permits for the Property, and grant BPA the right to restore the Project Area itself to create the SBUs if Falling Springs fails to do so. The parties will rely on the ERTG to calculate the final SBU value created on the Project Area, and BPA will base its final payment on that SBU calculation. The Cowlitz agree to cooperate and assist and will receive fee title ownership to the Property, encumbered by the conservation easement, when Falling Springs delivers the SBUs to BPA and receives final payment. The Cowlitz has assured the parties that it has the authority and resources, with the commitment from Falling Springs to provide them stewardship funding, to manage the Property for fish and wildlife habitat.

3. **Consideration.** The Parties make this Agreement in consideration of the mutual benefits and obligations contained herein.

III. AGREEMENTS

A. Agreements. The Parties agree to execute or continue implementing additional agreements, as follows:

1. A fixed price contract for BPA to purchase SBUs from Falling Springs. This contract will be offered by BPA on, approximately, September 18, 2013 and will be accepted by Falling Springs no later than September 30, 2013. The draft fixed price contract is attached as **Attachment B**.
2. An intergovernmental contract between BPA and the Cowlitz for BPA to continue funding the Cowlitz to pursue any necessary permits and approvals remaining to implement the Project. This intergovernmental contract is contract number 59092 which will be updated each November 1, with the same contract number or as a continuation contract, as necessary to implement the terms of this Agreement. The intergovernment contract is attached as **Attachment C**.
3. A conservation easement from Astoria Wetlands to BPA for the permanent protection of the Property for fish and wildlife habitat and if necessary, to further accommodate transmission line, facilities and access needs, all as more particularly described in the conservation easement. The conservation easement, negotiated between the Parties, will be recorded before the Progress Payment is made, and is attached as **Attachment D**.
4. A stewardship agreement between BPA and the Cowlitz for how the Cowlitz will manage the stewardship funding for operating, maintaining, and protecting the Property in perpetuity. The stewardship agreement will be executed simultaneously with this Agreement. The final stewardship agreement, negotiated between the Parties, is attached as **Attachment E**.

B. Fixed Price Contract between BPA and Falling Springs. BPA will offer a firm fixed price contract with Falling Springs for a direct purchase of SBUs.

1. The contract will reflect the terms agreed to in this Agreement regarding deliverables for the progress payment, and final payment based on the cost-to-SBU ratio of \$2,350,000.00 per SBU for up to a total of 3.0 total stream and ocean SBUs, in any combination, at a total contract price not to exceed \$7,050,000.00, less agreed upon offsets and adjustments as discussed in section III.B.5 below.

2. The contract will extend at least four years, through September 30, 2017, to accommodate ongoing federal permitting and review processes, changes to BPA's transmission system infrastructure needed on the Property, and the habitat restoration work. Falling Springs will contract with Cascade Environmental Group, or other contractor agreed to by the Parties, to coordinate with BPA Transmission Services to ensure BPA infrastructure needs are accounted for during the design and construction of the Project.

3. SBUs shall be calculated by the ERTG using the method adopted in 2008 Biological Opinion.² After the first progress payment is made, the Property may not be encumbered in any way or otherwise used as collateral.

²BPA and U.S. Army Corps of Engineers, *Role of Science and Process for the Expert Regional Technical Group to Assign Survival Benefit Units for Estuary Habitat Restoration Project* (June 18, 2012).

4. Progress Payment. The contract shall include provisions for BPA to pay Falling Springs \$2,500,000.00 as a progress payment when Falling Springs completes the tasks listed below. BPA intends to make the progress payment within 10 days of receiving (i) an invoice for the amount of the progress payment and (ii) a certification from Falling Springs that all tasks have been completed in accordance with this agreement. So long as Falling Springs delivers the invoice and certification on or before September 20, 2013, the progress payment shall be made on or before September 30, 2013. In order to make a progress payment in federal fiscal year 2013, Falling Springs must submit its invoice and certification to BPA by September 20, 2013.

The tasks for the first progress payment are as follows (these tasks will also be listed in the fixed-price contract. Should there be a conflict between this Agreement and the fixed price contract, this Agreement controls):

- a. Provide cost estimate information: Cost estimate information will be organized into the following categories:
 - 1) Project Development / feasibility
 - 2) Design
 - 3) Acquisition
 - 4) COE 408 permit review – *Please note that while all BPA documents refer to this project as Wallooskee-Youngs, the USACE 408 permit review process refers to the project as Walluski-Youngs.*
 - 5) Restoration
 - 6) Stewardship
- b. Submit a 60% complete design of the plan for restoring the Project Area and creating the SBUs. The 60% design package is described in **Attachment F**.
- c. Deliver to ETRG a final SBU template
- d. Donate to the United States of America and its assigns, through BPA, a Conservation Easement executed by Astoria Wetlands over the Property in the form attached as **Attachment D**. Astoria Wetlands is donating the easement to the United States in exchange for mutual benefits provided under this Agreement, including but not limited to assuring BPA has the right to restore the Project Area and access for restoration, the ability to restate the terms of BPA's transmission right of way while retaining the original right of way priority on the deed to the Property, and protect the Property in perpetuity. Astoria Wetlands understands that while the easement is a donation, BPA will comply with the Department of Justice guidelines for federal real property

acquisitions³ including but not limited to complying with the Uniform Relocation and Assistance Act.⁴

- i. The conservation easement will encumber the entire Property. The form of conservation easement, **Attachment D**, depicts generally where the parties anticipate the final boundaries will be for “the Project Area” and the “upland area”. The Project Area will be approximately 193.11 acres restored to tidal influence and associated riparian buffers following the plans developed by Falling Springs and the Cowlitz; the upland area will be the remainder of the Property. If all Parties agree, the conservation easement may be amended upon project completion to confirm the final boundaries of the Project Area and upland area and to attach an updated baseline documentation report.
 - a. The conservation easement will ensure that Astoria Wetlands conveys to the United States and its assigns non-exclusive restoration and flowage rights to construct, operate, maintain, repair, alter, rehabilitate, remove, replace and monitor ecosystem and fish and wildlife habitat restoration.
- e. The Parties shall have executed a stewardship agreement, **Attachment E**.
- f. Falling Springs must deliver the following documents or substantiation to BPA at least five days prior to the agreed upon date for completing the progress payment.
 - i. A title insurance commitment free and clear of all liens and encumbrances which are not approved by BPA in writing. All costs and expenses incurred in connection with the title insurance commitment and any title insurance policy BPA may elect to purchase, shall be paid by BPA.
 - ii. Taxes, fees, and any tax penalties to be paid current. Any fees and tax penalties for a change in use or removal from the current tax classification will be the responsibility of Falling Springs.
 - iii. Recorded documentation of release of Mortgage.
 - iv. An appraisal waiver and statement of donation of conservation easement.

³ Uniform Appraisal Standards for Federal Land Acquisitions at <http://www.justice.gov/enrd/landack/Uniform-Appraisal-Standards.pdf>

⁴Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, P.L. 91-646, as amended, 42 U.S.C §4601, et seq.

- a. Water Survey Form
- b. Environmental Land Audit with all recommendations to be addressed to BPA's satisfaction.
- c. Baseline Documentation showing Property conditions at time of donation.

As of the date of this agreement, the following tasks identified above have been completed: (i), (ii), and (iv).

5. Final Payment. Upon completion of the Project, Falling Springs shall notify BPA in writing that the Project is complete. The Parties shall inspect the Project Area to confirm that Falling Springs completed its work in accordance with the designs and specifications provided to ERTG to calculate the number of SBUs generated from the Project. Within five business days of BPA's Contracting Officer's written acceptance, and written concurrence from the Cowlitz, that Falling Springs has completed the Project, the Parties shall submit the following:

- a. Project cost information: an update to the estimated project costs as outlined in III.B.4.
- b. An updated baseline document report to reflect completion of the Project to be completed by Cascade Environmental Group, or other contractor agreed to by the Parties, at the completion of the Project.
- c. BPA shall deposit into the account of Falling Springs the final payment stated in the contract, less
 - i. The \$2,500,000.00 paid by BPA to Falling Springs as a progress payment under section III.B.4.
 - ii. The amount BPA has actually funded the Cowlitz Tribe under contract number 59092, and under any continuation contract, to prepare and submit an application to the Corps of Engineers for a section 408 permit to breach the dikes and levees surrounding the property. Any amounts in excess of the contract amount listed in contract number 59092 on the date of this agreement shall only reduce the final payment if such excess amounts were agreed upon by Falling Springs in writing at the time such additional funding was approved by BPA. If such excess amounts were not agreed upon by Falling Springs, then they shall not be accounted for in order to reduce the final payment.
- d. Falling Springs shall provide BPA a bill of sale evidencing the sale of the SBUs to BPA and quit claim any interest Falling Springs has in the SBUs to BPA.
- e. Astoria Wetlands shall execute, deliver and record in Clatsop County a special warranty deed conveying the Property to the Cowlitz.

- f. A title insurance commitment subject to those liens and encumbrances accepted by BPA in connection with the progress payment and otherwise free and clear of all other liens and encumbrances not approved by BPA in writing. All costs and expenses incurred in connection with the title insurance commitment and any title insurance policy BPA or Cowlitz may elect to purchase, shall be paid by BPA or Cowlitz, as applicable.
- g. Taxes, fees, and any tax penalties to be paid current. Any fees and tax penalties for a change in use or removal from the current tax classification will be the responsibility of Falling Springs.

C. Falling Springs shall have deposited into the account named by the Cowlitz as provided for and on behalf of the Cowlitz \$150,000.00 for perpetual operation, maintenance, and stewardship of the Property. This payment shall be made within 5 days after the Final Payment is deposited into Falling Springs' account by BPA. **Stewardship Agreement between Falling Springs and the Cowlitz Tribe.** Falling Springs shall cause Astoria Wetlands to execute a special warranty deed transferring fee title to the Property to the Cowlitz. Any real estate taxes shall be prorated and any real estate excise taxes shall be paid by the party who bears primary responsibility for payment under the applicable statute or code. Neither Falling Springs nor Astoria Wetlands make any representations or warranties of any kind, express or implied, concerning the Property or any portion thereof, as to its condition, value, compliance with laws, status of permits or approvals, existence or absence of hazardous material on site, or any other matter of similar or dissimilar nature relating in any way to the Property, including warranties of fitness for a particular purpose, tenantability, habitability and use. Cowlitz acknowledges and agrees that it is taking the Property in its then "AS IS" condition. In addition, Falling Springs will provide \$150,000.00 to the Cowlitz for long-term operation, maintenance, and stewardship of the Property within 5 days of Final Payment from BPA.

- 1. Stewardship Account. Falling Springs shall deposit the stewardship funds in a long term trust account belonging to the Cowlitz Tribe to fund the operations, maintenance, and stewardship of the Property, as provided in the stewardship agreement between the Parties, **Attachment E.** Neither BPA nor Falling Springs has any obligation to provide additional funding for stewardship of the property going forward. If the Cowlitz and BPA agree that the amount in the trust account exceeds the amount needed to fulfill its purposes, then the Cowlitz may spend such excess on additional activities that further protect, mitigate, and enhance salmon and steelhead habitat below Bonneville Dam on the Columbia River.

D. **Intergovernmental Agreement between BPA and the Cowlitz Tribe.** BPA has an intergovernmental contract with the Cowlitz, attached to this agreement as **Attachment C**, to provide certain services in aid of the Project. The parties acknowledge that the contract may be amended, renewed and/or updated from time to time, and that upon such amendment, renewal and/or update, the amended, renewed and/or updated contract shall automatically and without further action replace the agreement attached hereto as **Attachment C** (except as otherwise set forth in Section 7(c)(ii)). Under the contract, the Cowlitz shall obtain the necessary approvals, permits, and consents—in particular a 408 permit from the U.S. Army Corps of Engineers—to enable on-the-ground restoration actions integral to the Project to proceed. BPA will continue to

renew the intergovernmental contract with the Cowlitz through fiscal year 2016, in amounts to be negotiated by Cowlitz and BPA and approved by Falling Springs, using the previous fiscal year's budget as a starting point, to further aid the planning, construction, and oversight of the project. In the event of a conflict between this section of this agreement and the intergovernmental contract regarding the Cowlitz's rights or responsibilities, the intergovernmental contract controls; and this agreement does not provide the Cowlitz any rights or remedies with regard to this section of this agreement beyond those provided under the intergovernmental contract.

In addition to the intergovernmental contract, the Cowlitz and BPA will enter into a Stewardship Agreement, attached as **Attachment E**, to guide the long term protection of the Property.

1. Permanently Protecting the Project Area. Cowlitz will protect the Project Area and its conservation values, including fish and wildlife habitat, in perpetuity, following the terms of this agreement and the conservation easement. With the stewardship funding provided by Falling Springs, the Cowlitz will operate and manage the Project Area perpetually to meet the following long term objectives which are more specifically described in the conservation easement:
 - a. at a minimum the Project shall maintain the restored habitats in the condition as shown in the baseline documentation report plus restoration attributes implemented to provide SBUs (including tidal influence).;
 - b. the project shall provide for natural regeneration where such regeneration is appropriate and consistent with the Project Area's conservation values; and
 - c. the Project shall control noxious weeds to maximize the Project Area's conservation values.
2. Ownership and Control, Incidents of Ownership. Upon taking title to the Project Area, Cowlitz will have all management and operational control of the Project Area and will be responsible for all incidents of ownership of the Project Area. Cowlitz agrees to hold harmless and indemnify BPA from any costs or liability from any incident of ownership that may arise from the ownership and management of the Project Area. Such incidents of ownership include, but are not limited to, hazardous waste or other environmental protection response, cultural or historic resource mitigation or preservation, taxes or other fees assessed by third parties, endangered species protection, and tort liability. Conversely, BPA shall be responsible for and shall indemnify and hold harmless Cowlitz, its agents, contractors, subcontractors, employees and officers harmless from all liability resulting from acts or omissions of BPA and its officers, employees and agents to the extent allowed by federal law.
3. Cowlitz to Provide Initial Management Plan. Cowlitz shall complete a land management plan (Management Plan) for the Property within one year after BPA delivers its final payment to Falling Springs as provided above in section III.B.5. Cowlitz should address the issues listed in **Attachment E**, the intergovernmental

government contract with BPA, and provide for management of the Project Area to achieve and maintain the desired future condition of the Property, including restoration attributes associated with the SBUs purchased. Cowlitz shall develop the management plan as part of an intergovernmental contract with BPA, the terms of which will be substantively equivalent to the draft management plan and guidance in **Attachment H**. The Cowlitz will develop the plan in accordance with BPA's applicable NEPA documents, particularly including BPA's Fish and Wildlife Implementation Plan, Final Environmental Impact Statement and Record of Decision,⁵ which includes specific planning steps. The Cowlitz shall also request participation from government, the public, and private landowners in the immediate area of the Property in developing the Initial Management Plan. The plan will address methods for managing the Project and, if necessary, mitigation for all resources as addressed in the Environmental Assessment prepared under NEPA for this Project. The Initial Management Plan should identify activities Cowlitz believes are necessary to operate and maintain the habitat and conservation values and SBUs of the Project Area.

4. BPA's Right to Approve All Management Plans and Amendments. BPA will review the Initial Management Plan, and subsequent amendments, to ensure the Management Plan conforms to the terms of this agreement, the intergovernmental contract, stewardship agreement, and the conservation easement, **Attachment D**. BPA will consult with Cowlitz regarding any concerns about the plan prior to making any decision to withhold approval of the plan. Any decision by BPA regarding the plan will be in writing and provided to the Cowlitz. Any decision to approve or disapprove the plan will base on whether the plan fulfills the purposes stated this agreement. BPA's approval does not indicate BPA's support for any particular action under the plan nor create any responsibility in any way on the part of BPA for any actions planned or otherwise related to the plan.
5. Amended Management Plan. No later than 10 years after Cowlitz implements the plan, BPA and the Cowlitz will confer and decide whether the plan needs amending. Subsequent amendments may follow as needed and use the processes outlined in this agreement. Within the interim period, if minor changes to the Management plan are needed to enhance or further protect conservation values, then these may be submitted to BPA for approval in writing and BPA may approve and update the Management Plan.

IV. ADDITIONAL RESPONSIBILITIES

In addition to the foregoing, the Parties agree:

A. Transmission Infrastructure. BPA has existing transmission infrastructure facilities and access rights on the Property. BPA has determined that changes to the transmission infrastructure are necessary for successful Project completion, specifically improved access to

⁵ http://www.efw.bpa.gov/environmental_services/Document_Library/Implementation_Plan/

the existing transmission lines in a manner consistent with the purposes of this Agreement (to be funded by BPA except for certain regulatory compliance activities funded by Falling Springs expressly described in Section IV.A.1, below). This Project is meant to be compatible and not substantially interfere with pre-existing utility rights of way or access. Going forward, the Parties intend that the conservation easement provided under this agreement and the transmission easement held by BPA will be considered together to effectuate both transmission and conservation purposes.

1. Fallings Springs shall pay for all permitting, studies or analysis associated with the Project, including the transmission permitting needs, as long as they are treated as part of the Project by the Corps of Engineers in the 408 or Nationwide Permit 27 permitting process. BPA shall pay for all other costs of permitting, studies or analysis.
2. Transmission Infrastructure Component
The Parties agree that as currently planned, BPA's transmission infrastructure changes, described further below, are necessary for successful project completion, and are contemplated as a component of permitting related to the larger restoration project. Consequently, the Parties agree to work closely together to facilitate completion of BPA's transmission infrastructure changes before breaching of the levees and dikes. Falling Springs and BPA, and their contractors and consultants, will coordinate closely to ensure work performed does not interfere with the work or activities of the other Party. The Parties will schedule regular coordination meetings, at least once every two months beginning with the month after this MOA is executed, unless otherwise agreed by the Parties, to provide Project and infrastructure updates.
3. Transmission Design Proposal.
BPA's Transmission Services will be responsible for design and construction of transmission system infrastructure changes, and all associated costs other than the permitting costs described in Section IV.A.1. Tower 41/5, 41/6 and Access Road in Mile 41 are located in the historic floodplain of the Wallooskee River and Youngs River. Restoration action will involve breaching of dikes and levees that will flood the Project Area, resulting in a stranded tower at some points of the year. BPA requires permanent access in order to access the site at least every 3 months to monitor an airway warning light on top of tower 41/6. In order to provide maximal benefit for juvenile salmon, BPA Transmission Services will relocate the 41/5 tower back on line 50 feet⁶. Access roads will be built to the new location to provide permanent access. This will allow the floodplain to be more undisturbed providing further benefit to the salmon.

Cost efficient design proposals are currently under consideration by the BPA Structures group and at this preliminary design stage of the project proposed changes include:

⁶ "Back on line" is a term of art meaning that the tower will be moved closer to the originating substation along the centerline of the transmission right of way.

- Either
 - Relocate existing (41/5) back on line to new footing foundation to be above flood level 11.71 ft. New concrete foundation footings and a new base structure will be required, or
 - Harden the existing tower footing (without relocation) of tower 41/5 with crushed rock embankment or poured in place concrete using custom formwork.
- Design and construct a new road to tower 41/6 (1200L x 14W) to improve access.
- Design and construct new road to new tower 41/5 (600ft.) (600L x 14W), if tower is relocated back on line.
- Design and construct a new base pad around tower 41/5 (60x60x6H) to be above flood level of 11.71 ft.
- Design and construct one construction pad (100'x100'x7' high) at tower 41/6 to be above 2yr flood plain 11.71 ft.
- Install new 4" PVC conduit for airway light cable (1200') installed in new roadway.

The preceding description of work represents the best description of the work to be performed by BPA during the Project available and known at this time. BPA shall not perform any work not detailed in this MOA within the Project Area without Falling Springs' approval, such approval not to be unreasonably withheld conditioned or delayed. It is reasonable for Falling Springs to withhold its approval if the proposed work adversely impacts the SBUs derived from the Project.

4. BPA acknowledges that Falling Springs desires to complete its breach of the levees and dikes during the 2015 calendar year and in order to complete such work, Falling Springs will need to commence the work in August or September of 2015. Given that BPA Transmission Services are heavily dependent on permit and outage coordination the projected timeline to completion of road and tower improvements is for September 30, 2015, and BPA shall use its best efforts to complete all such work on or before August 31, 2015.

If BPA has not completed its road and tower improvements on or before September 30, 2015, the Parties will determine if Falling Springs can proceed with implementation of the restoration work. If the Parties determine that work may not proceed and the levees and dikes cannot be breached by September 30, 2015, then the Parties will seek to either: a) identify a new date acceptable to all Parties for Falling Springs to proceed with work; or b) seek to renegotiate the contract. If the parties are unable to reach agreement on (a) or (b) in the preceding sentence on or before December 15, 2015, then BPA shall terminate this Agreement for convenience in accordance with the Falling Springs fixed price contract.

5. BPA's Transmission Services will also be responsible for coordinating transmission infrastructure activities with Cascade Environmental Group, or other contractor agreed to by the Parties.

B. Falling Springs assumes all responsibility for any taxes or penalties arising as a result of the Property being restored and any change in use classification(s).

C. Falling Springs shall document the nature and extent of use of the Property until restoration is complete and shall secure Land Use Agreements from BPA for activities other than those expressly allowed by the conservation easement.

D. By selling the SBUs on the Project to BPA, Falling Springs affirms that it has exhausted any and all environmental service benefits or credits that could accrue from the Project, and no other credit of any kind can be promised, given, sold, or traded to any other person or entity.

E. Falling Springs will coordinate with Clatsop County to ensure the diking easements encumbering the property are assigned to BPA at no cost or expense to BPA. The Parties will make best efforts to ensure the diking easements are assigned to BPA by December 31, 2013. BPA will hold the diking easements per the request of the USACE 408 permitting process. Once the 408 permitting process is complete and the property is deeded to Cowlitz, BPA may hold, transfer or dispose of the diking easements in its discretion.

F. Falling Springs delivered a letter from Northwest Natural Gas attached as **Attachment G**, acknowledging proposed actions on right-of-way owned by Northwest Natural Gas.

G. Contingencies. Because of the uniqueness of the Project and its unprecedented structure and complexity, the parties acknowledge that unanticipated problems could delay or prevent Project implementation.⁷ Consequently, this agreement, and the contracts related to it, allows Falling Springs up to three years from the date of executing this agreement to secure all necessary permits and approvals to commence on-the-ground restoration activities, and four years from the date of executing this agreement to complete the Project. Nothing herein shall excuse or delay performance by any Party, and time is of the essence with respect to all of the obligations set forth in this agreement. Nonetheless, BPA's obligation to make Final Payment is contingent on completion of the Project and final delivery of SBUs by Falling Springs.

VI. ADMINISTRATIVE

A. Default. BPA reserves the right to terminate any or all of any undelivered or unexecuted portion of this contract for cause if Falling Springs fails to make any delivery, fails to prosecute the work, or to perform as scheduled, or if any of the terms of this agreement are breached, and such default or breach is not cured within a commercially reasonable period of time after BPA has provided notice to Falling Springs. However, Falling Springs shall not be terminated for default if the failure to perform arises from unforeseeable causes beyond its control and without its fault or negligence; provided that Falling Springs give notice to the BPA that a force majeure event has occurred within a reasonable period of time after occurrence. Examples of those events are: (1) acts of God or of the public enemy, (2) acts of the Government

⁷ For example, there are dikes and levees located on the property, and in order to implement and realize the potential SBU benefits of the project the dikes and levees must be altered or removed.

in its sovereign or BPA in its contractual capacity, (3) fires, (4) floods, (5) epidemics, (6) quarantine restrictions, (7) strikes, (8) freight embargoes, and (9) unusually severe weather.

B. Information Disclosure. To fulfill its obligations under this agreement Falling Springs and the Cowlitz must provide BPA with information, including but not necessarily limited to information related to plans and permits for restoring the Property, the legal descriptions and conditions of the Property Falling Springs or the Cowlitz may also voluntarily provide other information useful to BPA's analysis and consideration of the Project but not required by BPA. Notwithstanding the foregoing, Falling Springs shall not be required to provide any confidential or proprietary information.

BPA will take reasonable steps to protect information received from Falling Springs or the Cowlitz against disclosure outside of BPA, including but not limited to information described in this MOA. The parties acknowledge that information concerning price, payments, conditions to payment, deliverables and description of work (including the process for completion of work) is treated as confidential and proprietary by Falling Springs and therefore is not intended to be disclosed outside of BPA. However, this requirement to protect information does not apply to information or documents in the public domain or that BPA must release to comply with Federal law, including the Freedom of Information Act, 5 U.S.C. § 552 (FOIA). If information from Falling Springs or the Cowlitz is requested by a FOIA request to BPA, BPA will give Falling Springs and the Cowlitz prompt notice of the request, and before disclosing such information will allow Falling Springs or Cowlitz sufficient time to take steps to protect such information as provided by federal law.

C. Dispute Resolution. The Parties shall attempt to resolve disputes arising out of or relating to this agreement by following the dispute resolution mechanism in this section and without resort to administrative, judicial, or other formal dispute resolution procedures. This section provides the Parties an opportunity to fully and candidly discuss and resolve disputes without the expense, risk, and delay of formal dispute resolution.

If the Parties cannot resolve a dispute regarding this agreement through informal discussions, they shall submit in good faith such dispute to non-binding mediation. Any Party may trigger this section by making a written request for the other Party or Parties to join in mediation. Within 30 days of triggering this provision, the affected Parties shall select a mediator, or if they are unable to select a mediator, each affected Party shall select a mediator and the two selected will choose a third mediator who shall be the sole mediator. The affected Parties shall use reasonable 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, an affected Party may initiate legal action to resolve the dispute. Except as provided in this part, pending completion of mediation no affected Party may initiate any legal proceeding except in aid of mediation. The affected Parties shall each cover their own costs of dispute resolution and share equally the costs of mediation.

The pendency of this dispute resolution mechanism shall not in and of itself relieve either Party hereto of its duty to perform under this agreement. For purposes of this section, "affected Parties" means those Parties that are in actual dispute and any other Party impacted by the dispute.

This dispute resolution provision does not apply to the fixed price contract between Falling Springs and BPA, **Attachment B**, the conservation easement, **Attachment D**, or intergovernmental contract between the Cowlitz and BPA, **Attachment C**.

E. Assignment. Falling Springs or Astoria Wetlands may assign its interest in this agreement to any entity controlling, controlled by, or under common control with Falling Springs so long as any assignment or other transfer of interest in the project includes such obligations, responsibilities and commitments as agreed to by Falling Springs pursuant to this agreement and its contract with BPA.

Before fee title to the Property is transferred from Astoria Wetlands to the Cowlitz, the Cowlitz may not assign or transfer its rights or delegate its responsibilities under this agreement without written approval from BPA and Falling Springs, which shall not be unreasonably withheld. Once fee title of the Property is transferred from Falling Springs to Cowlitz, only written approval from BPA is necessary for Cowlitz to assign or transfer its rights.

F. Amendment. The Parties by mutual agreement may modify the terms of this agreement. Any such modification shall be in writing signed by the Parties.

G. Binding Effect. This agreement shall be binding on the parties and their assigns and successors. Each Party shall have the right to enforce the terms of this agreement in any court of competent jurisdiction.

H. Acts of God/Force Majeure. Nothing contained in this agreement shall be construed to entitle the United States or BPA to bring any action against Falling Springs or Cowlitz for any injury to or change in a Property resulting from causes beyond Falling Springs' or Cowlitz's control, including, without limitation, naturally caused fire, flood, storm, and earth movement, or from any prudent action taken by Falling Springs or Cowlitz under emergency conditions to prevent, abate, or mitigate significant injury to the Property resulting from such causes. The Parties will make all reasonable efforts to resume performance promptly once the force majeure is eliminated.

I. 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.

J. Effective Date. This agreement shall be effective when signed by the Falling Springs; Cowlitz; BPA's Manager, Real Property Services; and BPA's Vice President for Environment, Fish and Wildlife. Each Party shall provide the others documentation showing the Party's authority to execute this agreement.

K. 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.

L. Severability. If a court determines that any provision in this agreement is invalid, illegal, or unenforceable under federal or Oregon law, the unaffected provisions nevertheless remain valid and enforceable.

M. Notice. Any notice permitted or required by this agreement, unless otherwise specified, shall be in writing, delivered personally to the persons listed below, or shall be deemed given on the date deposited 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. The addresses listed below can be modified at any time through written notification to the other Party.

Notices to BPA should be sent to:

Director, Fish & Wildlife Program
Bonneville Power Administration
P.O. Box 3621
Portland, OR 97208

For notices specific to BPA's Real Property Services:

Manager, Real Property Services
Bonneville Power Administration
P.O. Box 3621
Portland, OR 97208

Notices to Falling Springs should be sent to:

Falling Springs, LLC
Attn: Aaron Revere
1100 Boulders Parkway, Suite 100
Richmond, VA 23225

Notices to Cowlitz should be sent to:

Director, Natural Resources
Department
Cowlitz Indian Tribe
PO Box 2547
Longview, WA 98632

N. Attachments.

ATTACHMENT A—PROPERTY LEGAL DESCRIPTION

ATTACHMENT B—DRAFT FIXED PRICE CONTRACT FOR SBUs

ATTACHMENT C—COWLITZ TRIBE INTERGOVERNMENTAL CONTRACT

ATTACHMENT D—DRAFT CONSERVATION EASEMENT

ATTACHMENT E—STEWARDSHIP AGREEMENT

ATTACHMENT F—DRAFT 60% DESIGN CRITERIA

ATTACHMENT G—LETTER FROM NORTHWEST NATURAL GAS

ATTACHMENT H—LAND MANAGEMENT PLANNING GUIDANCE

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

BONNEVILLE POWER ADMINISTRATION

By: F. Lorraine Bodi Date: 9/16/13
Name: F. Lorraine Bodi
Title: Vice President, Environment, Fish + Wildlife

By: Shelley N. Fenton Date: 9/13/13
Name: Shelley N. Fenton
Title: Supervisory Reddy
Specialist

FALLING SPRINGS, LLC

By: 
J. Aaron Revere
Manager

Date: 9-12-13

COWLITZ INDIAN TRIBE

By: 
William Iyall
Chairman

Date: 