

DRAFT AGREEMENT

Southern Idaho Wildlife Mitigation
Memorandum of Agreement
Between
The State of Idaho and Bonneville Power Administration
Regarding Wildlife and Wildlife Habitat Mitigation

August 13, 2014

DRAFT

This Agreement is made between the STATE OF IDAHO (“**IDAHO**”), by and through its DEPARTMENT OF FISH AND GAME (“**IDFG**”), and BONNEVILLE POWER ADMINISTRATION (“**BPA**”). Together Idaho and BPA are the Parties to this Memorandum of Agreement (“**Agreement**”).

I. Introduction

A. *Purpose of the Agreement*

The Parties enter this Agreement to address Federal habitat mitigation obligations for wildlife in southern Idaho, while also providing ecosystem benefits for resident fish. In particular, this Agreement permanently resolves any rights, claims, or interests Idaho has in wildlife-related mitigation under the Pacific Northwest Electric Power Planning and Conservation Act (“**Northwest Power Act**”) and other applicable laws related to the Federal Columbia River Power System (“**FCRPS**”) dams in southern Idaho. These dams include the Boise Diversion, Black Canyon, Anderson Ranch, Palisades, and Minidoka (“**southern Idaho dams**”).¹ In addition, this Agreement resolves any rights, claims, or interests Idaho has in resident fish- and wildlife-related mitigation related to the operational impacts of Deadwood Dam. The U.S. Army Corps of Engineers (“**Corps**”) and the Bureau of Reclamation (“**Reclamation**”) own and operate these dams for multiple public purposes, including irrigation, irrigation power, commercial power, recreation, and fish and wildlife.

B. *Idaho’s Interests*

This Agreement applies to all interested Idaho State agencies, boards, or commissions. IDFG will be the lead representative for Idaho. To the extent of the authority granted to it under Idaho law, IDFG represents Idaho, including all other interested Idaho state agencies, boards, or commissions, in this Agreement. Pursuant to Idaho Code § 36-103(a), Idaho’s wildlife policy is to preserve, protect, perpetuate, and manage all

¹ The effects of the Boise Diversion on fish and wildlife have been mitigated already, so it is not addressed further in this Agreement.

wildlife within Idaho. Idaho assists BPA in fulfilling BPA's wildlife mitigation responsibilities related to southern Idaho dams.

C. BPA's Interests

BPA is a power-marketing agency within the U. S. Department of Energy. BPA has wildlife mitigation responsibilities under the Northwest Power Act, 16 U.S.C. § 839b(h)(10)(A), and other environmental laws. This includes mitigation for wildlife impacts associated with southern Idaho dams.

Using its Northwest Power Act authorities, BPA has implemented various wildlife mitigation projects, including habitat acquisition and improvement, to address the effects of southern Idaho dams. Where possible, BPA prioritizes and funds mitigation projects that have both wildlife and fish benefits, reflecting an ecosystem approach to mitigation.

D. Southern Idaho Mitigation History

The Parties entered a programmatic wildlife mitigation agreement in May 1997 to address the effects of FCRPS dams on wildlife and wildlife habitat in southern Idaho. That agreement established the roles, responsibilities, and commitments of each Party to implement wildlife mitigation projects. The Parties executed a revised agreement in September 1997 ("**1997 MOA**") and began implementing wildlife mitigation for southern Idaho dams.

Attachment 1 to this Agreement shows the real property acquired by Idaho with BPA funding under the 1997 MOA. Upon execution of this Agreement, ongoing activities for all of the properties Idaho acquired under the 1997 MOA, and activities for future acquisitions under this Agreement, will be covered by a single BPA project called the "**Southern Idaho Wildlife Mitigation Project.**" "**Project Properties**" will include properties acquired by Idaho both under the 1997 MOA and under this Agreement.

Idaho agreed in 2010 with the Shoshone-Bannock Tribes of the Fort Hall Reservation, and the Shoshone-Paiute Tribes of the Duck Valley Indian Reservation, (collectively “**the Tribes**”) to allocate implementation for the wildlife mitigation opportunities related to Federal hydropower projects in the mid-Snake and upper Snake. Those entities agreed the Idaho share (“**Idaho share**”) is 50% (one half). See **Attachment 2**. This Agreement addresses the Idaho share only.

E. Deadwood Dam

The Northwest Power and Conservation Council (“**Council**”) has included mitigation for the construction and resulting inundation impacts from Deadwood Dam in its Columbia River Basin Fish and Wildlife Program (“**Council Program**”). BPA denies any legal obligation to address construction and inundation effects of Deadwood Dam, but accepts a duty for the commercial power share of operational impacts. The Parties have decided to resolve any rights, claims, or interests Idaho has in resident fish- and wildlife-related mitigation related to the operational impacts of Deadwood Dam by including funding and commitments in this Agreement to address those impacts.

This Agreement does not (1) resolve any rights, claims, or interests Idaho has in resident fish- and wildlife-related mitigation to address construction and inundation impacts of Deadwood Dam or (2) change BPA’s position that it has no obligation to mitigate those impacts.

F. Other Agencies

While not parties to this Agreement, other Federal and state agencies collaborate with the Parties and support the commitments in this Agreement and its underlying purposes. The following agencies have acknowledged their support for this Agreement.

- The Council has reviewed and recommended previous wildlife habitat projects implemented by BPA for southern Idaho dams.

- The Corps, as an owner and operator of FCRPS hydroelectric projects, supports this Agreement. **Attachment 3.A.**
- Reclamation owns and operates Black Canyon, Anderson Ranch, Palisades, and Minidoka dams in southern Idaho. Reclamation’s concurrence in this Agreement is included as **Attachment 3.B.**

G. Coordination with Tribes

The Parties have discussed this Agreement with the Tribes. BPA has a separate mitigation agreement with each of the Tribes and works with them on a government-to-government basis to mitigate fish and wildlife habitat. This Agreement does not establish any binding legal precedent affecting the Tribes.

H. Definitions

- **Construction and inundation impacts (“C & I”)** means the effects to wildlife and wildlife habitat from the construction of a dam and the subsequent inundation from its reservoir.
- **Mitigation** and **mitigate** are used to encompass the obligation to “protect, mitigate, and enhance” wildlife and related habitat affected by the development and operation of any hydroelectric project on the Columbia River and its tributaries. 16 U.S.C. §§ 839b (h)(1)(2), (5), and (10) (describing the Northwest Power Act objectives and agency obligations).
- **Operational impacts** are those adverse impacts to wildlife and wildlife habitat that may be associated with the operation of dams and reservoirs.
- **Restoration** means on-the-ground habitat improvement action that is typically done on a larger scale than stewardship and often including earthmoving activities or construction, and occurs only once or at most infrequently.

- **Stewardship** means land management, operation, maintenance and stewardship activities, along with project management and oversight, with representative stewardship activities enumerated in Section II.F.3.j.
- **Wildlife** means terrestrial and aquatic wildlife excluding fish.

II. Commitments for Wildlife Mitigation

A. Agreement

The commitments in this Agreement fully address any rights, claims, or interests Idaho has in wildlife-related mitigation or mitigation funding related to C & I and operational impacts from southern Idaho dams, and in resident fish- and wildlife-related mitigation related to operational impacts of Deadwood Dam, pursuant to the Northwest Power Act and Federal law.

B. Defining Federal Wildlife Mitigation Obligations

To avoid longstanding debates involving use of the Habitat Evaluation Procedure and Habitat Units, the Parties agree to use acreage to define Federal wildlife mitigation associated with southern Idaho dams.

C. Impacts and Amounts of Mitigation

1. C & I Impacts

The construction of southern Idaho dams and the inundation from their reservoirs affected approximately 33,290 acres. The Idaho share of wildlife mitigation from construction and inundation of southern Idaho dams is thus approximately 16,645 acres.

To date BPA has funded, and Idaho has mitigated, approximately 8,722 acres.

Attachment 1 lists these completed projects. This Agreement addresses mitigation for the remaining 8,588 acres.

2. Operational Impacts

For the purpose of wildlife mitigation for southern Idaho dams and for the purpose of resident fish and wildlife mitigation for Deadwood Dam, operational impacts equate to an additional 1,330 acres. To resolve the Idaho share of these operational impacts, BPA will fund, and Idaho will assume responsibility for, mitigation of 665 acres.

3. Remaining Federal Mitigation Responsibility

The Idaho share of the remaining Federal mitigation responsibility, as described in Sections II.C.1. and II.C.2., totals 8,588 acres—7,923 acres remaining for C& I impacts, plus 665 for operational impacts. Idaho assumes the responsibility to mitigate at least 8,588 acres using funding provided by BPA under this Agreement.

Table 1: Total acres lost, acquired, and remaining to mitigate

Total losses	33,290
Idaho Share of C&I— one half	16,645
Idaho acres acquired	8,722
Total C&I remaining	7,923
Plus half operational loss	665
Total remaining Idaho share	8,588

4. Crediting for Pre-Agreement and Remaining Mitigation

BPA may seek other credit for mitigation benefits achieved under this Agreement for any fish, aquatic, or other mitigation obligation under the Northwest Power Act or other laws, provided BPA does so in consultation with Idaho and seeks Idaho's concurrence. Should Idaho not concur, the Parties may proceed with either the Dispute Resolution provisions of this Agreement or mechanisms provided by the legal framework under which BPA is seeking other credit.

D. Principles Guiding Future Wildlife Mitigation Projects

The Parties will work collaboratively to mitigate the remaining Idaho share of 8,588 acres. Idaho and BPA will coordinate efforts under this Agreement with the Tribes to the extent practical to address Federal, state, and tribal interests appropriately.

1. Idaho already owns and manages tens of thousands of acres in Idaho for the benefit of fish, wildlife, and the public. IDFG has a policy establishing criteria for acquisition of property, including criteria for acquisition of property using Federal funds, such as funds provided under the Pittman-Robertson Act. IDFG develops plans for management of its wildlife management areas and other properties. Many of Idaho's acquisitions with BPA funding under the 1997 MOA have expanded or enhanced IDFG's already existing wildlife management areas.
2. Idaho will:
 - Actively seek to combine the BPA funding from this Agreement with funding from other sources to leverage wildlife mitigation under this Agreement.
 - Comply with IDFG and Commission Land Acquisition policy.²
 - Use the Idaho Comprehensive Wildlife Conservation Strategy,³ individual species management plans, and Council subbasin plans to assess wildlife values and priorities for project selection.
 - Follow BPA's In-Lieu and Capitalization policies.⁴
 - Cooperate with BPA due diligence necessary for acquiring and managing mitigation properties.

² Copies on file at IDFG and BPA.

³ <http://fishandgame.idaho.gov/public/wildlife/cwcs/>

⁴ See the Capitalization Policy at <http://efw.bpa.gov/IntegratedFWP/policyframework.aspx>; see In lieu-related policy documents generally at <http://efw.bpa.gov/IntegratedFWP/policyframework.aspx>

- Continue to participate in good faith in the Independent Scientific Review Panel’s categorical or periodic assessments of wildlife habitat projects under the Council Program.

E. Ecosystem Benefits

Idaho will take an ecosystem approach in selecting, restoring, and managing both existing and new real property interests under this Agreement. By protecting and restoring ecosystem structures and functional links between ecosystem elements, the Parties expect the Agreement to enable significant benefits to fish, wildlife, and other resources of interest.

F. BPA Funding of the Southern Idaho Wildlife Mitigation Project

1. Acquisition Funding

Beginning in FY⁵ 2015 and extending through FY 2024, BPA will make payments totaling \$22 million (“**Acquisition Funding**”) for approved new projects and their stewardship in the amounts identified below and summarized in **Attachment 4**. BPA will provide Acquisition Funding on a project-by-project basis, subject to the terms of this Agreement.

- a. BPA will review each project and its constituent elements (e.g., acquisition, planning, restoration, stewardship) to determine whether the project meets the conditions required for capitalization.
- b. The Parties will determine what portion of Acquisition Funding to dedicate to stewardship as new acres are protected through implementation of the Agreement. BPA will transfer such funding to the Stewardship Account established in Section II.F.3 as requested by Idaho.

⁵ References in this Agreement to “FY” are to the Federal fiscal year.

- c. Regardless of how BPA classifies a project's funding—*e.g.*, capital or expense—the annual total available budget remains the sum of the commitments stated in Section II.F and as adjusted in the manner allowed in Sections II.F.6-8. See **Attachment 4**.

2. *Stewardship Funding for 1997 MOA Properties*

BPA will provide Idaho funds to address stewardship of all Project Properties acquired under the 1997 MOA. By December 31, 2014, BPA will transfer a total of \$14,000,000 to Idaho's designated Stewardship Account as established in Section II.F.3.

3. *Stewardship Account*

- a. Idaho will deposit Stewardship Funding received under Section II.F.2, and funds allocated for stewardship of new acquisitions from Acquisition Funding under Section II.F.1, into a "**Stewardship Account.**" The Stewardship Account will become the property of Idaho and be managed and controlled by Idaho for the permanent protection of Project Properties. The Stewardship Account will be a public endowment fund not subject to Idaho Code § 67-1210.
- b. If funds in the Stewardship Account are inadequate to fulfill its purposes, BPA has no obligation to provide additional funding. If the Parties later agree that the amount in the Stewardship Account exceeds the amount needed to fulfill its purposes, then Idaho may spend such agreed-upon excess on expanding and improving the Southern Idaho Wildlife Mitigation Project.
- c. Idaho will invest the Stewardship Account and its earnings in a manner to provide stable and regular distribution of earnings to Idaho, while still preserving and increasing over time the value of the Stewardship Account at a rate equal to or in excess of the rate of inflation. Idaho will invest and manage the Stewardship Account in accordance with the Idaho Uniform Prudent Investor Act, Idaho Code Title 68 Chapter 5, and Idaho is

authorized to invest the assets of the Stewardship Account and its earnings in any investment authorized by the Act. IDFG's Director will have fiduciary responsibility for the Stewardship Account.

- d. Notwithstanding any other provision of this Agreement, the funds in the Stewardship Account may be used, without additional consultation with BPA, to pay reasonable expenses for governance, including fiduciary consulting, and investment management of the Stewardship Account on behalf of Idaho.
- e. The Stewardship Account will be accepted by the State of Idaho Endowment Fund Investment Board ("EFIB"), at EFIB's discretion and subject to the consent of the Idaho Board of Land Commissioners, as authorized by, and consistent with, Idaho Code § 57-720. If EFIB does not accept the Stewardship Account for investment, the Stewardship Account will be deposited in a combination of the Fish Game Expendable Trust Account and the Fish and Game Nonexpendable Trust Account, as established pursuant to Idaho Code §§36-108 and 36-109.
- f. Idaho shall account for this Account separately from other funds. Idaho, through EFIB or the Treasurer as appropriate, may deduct the expenses for investment of such funds from investment proceeds, and may combine or pool funds for investment purposes. EFIB will allocate earnings, formulate investment policies, and audit funds as set forth in Idaho Code § 57-720. The Treasurer will allocate earnings, formulate investment policies and audit funds in accordance with state law.
- g. IDFG's Director will have sole discretion to determine the amount of the earnings to distribute from the Stewardship Account to the Fish and Game Account for expenditure, the amount of earnings to retain as earnings for subsequent distribution, and the amount of earnings to be designated as a deposit to the Stewardship Account under Section II.F.3, which deposit will constitute an addition to principal and not earnings. Earnings for the

Stewardship Account will be annually calculated upon direction established by IDFG's Director to the EFIB or Treasurer, as appropriate.

- h. Idaho may create and manage separate accounts or funds within the Stewardship Account for individual or groups of Project Properties. Distributions from the Stewardship Account may be expended for stewardship activities on any Project Property at Idaho's discretion.
- i. BPA is funding Idaho to provide stewardship on the Project Properties—as described below—in a manner that preserves or enhances a property or group of properties' conservation value permanently. Idaho will use BPA funding for stewardship activities on Project Properties that help fulfill the terms of this Agreement, meet legal obligations associated with land ownership not otherwise prohibited by this Agreement, and follow any land management plan for a property or group of properties whose acquisition BPA approved.
- j. Representative stewardship activities include, but are not limited to, the following:
 - Maintain and defend boundaries and other legal property interests;
 - Monitor and address surrounding land uses or activities that could adversely affect conservation values;
 - Maintain IDFG's realty files, including photos, maps, tax and ownership information;
 - Update site management plans;
 - Maintain roads, bridges, trails, gates, fences, locks, and signage;
 - Control and prevent unauthorized public access or use;
 - Prevent encroachment and mitigate risk of catastrophic wildfire;
 - Inventory, map, and evaluate wildlife and habitat conditions;
 - Provide outreach to neighbors, stakeholders, local governments, and volunteers;
 - Detect, map, and treat invasive species;
 - Plan, conduct, and monitor effects from prescribed fire;
 - Manage vegetation through mowing and other activities;
 - Prepare Stewardship Account and Project Property monitoring reports.

- k. Limitations on the Use of the Stewardship Account.
- i. Through FY2024, Idaho may use funds in the Stewardship Account for restoration and acquisition activities only after consulting with BPA and meeting all environmental compliance conditions that BPA identifies. After FY2024, Idaho may use funds in the Stewardship Account for restoration and acquisition, in addition to stewardship activities, for southern Idaho wildlife mitigation without consulting with BPA.
 - ii. Idaho shall not pay property taxes or make payments in lieu of taxes with any funds provided by BPA. Idaho may make such payments from income generated from Project Properties as described in Section II.F.10.
 - iii. Idaho will not make any use or expenditure of these monies for any purpose other than those identified in Section II.F.3.i. To do so would violate this Agreement and provide justification and cause for BPA to cease making any further payments under this Agreement and demand custody and control of the Stewardship Account until Idaho reinstates all funds used in violation of this Agreement.
- l. Idaho's stewardship actions under this Agreement are not considered an ongoing Federal action. Idaho is not required to get any environmental compliance approvals from BPA for activities carried out with funds from the Stewardship Account, other than approvals that may be otherwise required under an easement or land management plan. Federal regulations shall not, by reason of BPA's funding, apply to contracts issued by Idaho for any work on the Project Properties.

- m. Based on the most recent review of Idaho's southern Idaho wildlife mitigation projects,⁶ the Parties agree the funding and commitments provided in this Agreement will enable Idaho to acquire and manage habitat in a manner consistent with the Council Program's objectives. The Parties also agree that the funding and commitments provided in this Agreement are adequate to provide stewardship in perpetuity for all Project Properties.
- n. Upon complete delivery of Stewardship Funding and funding for stewardship from Acquisition Funding to the Stewardship Account, BPA will have forever satisfied any and all Federal obligations to Idaho or any other entity under any law to fund the stewardship of Project Properties.

Except as provided otherwise in Sections II.F.6 and III.C.3, Idaho will not request or support the requests of others for any additional funding from BPA for stewardship or restoration activities for any Project Properties.

4. Administrative Funding

Beginning in FY 2015 and extending through FY 2024, BPA will provide \$400,000 annually to Idaho for administrative expenses ("**Administrative Funding**"). See **Attachment 4**. BPA will provide Administrative Funding using annual contracts typical to BPA's Fish and Wildlife Program issued and managed using BPA Purchasing Instructions.⁷ The annual contracts will incorporate the work elements in PISCES pertaining to land acquisition and administration,⁸ subject to the funding commitments and limitations of this Agreement. If Idaho reasonably objects to any provision in an annual contract and informal negotiations with BPA's Contracting Officer do not resolve the matter, Idaho may make its objection in writing to the Head Contracting Authority and BPA shall provide a timely written response.

- a. By the end of FY2024, BPA will pay to Idaho no less than the sum total of \$4,000,000 (four million dollars), along with inflation adjustments as

⁶ISRP, Review of IDFG's Revised Southern Idaho Wildlife Mitigation Projects (July 24, 2009)

<http://www.nwcouncil.org/fw/isrp/isrp2009-31/>

⁷<http://www.bpa.gov/Doing%20Business/purchase/Pages/default.aspx>

⁸ See the Work Elements Document linked at <http://efw.bpa.gov/contractors/statementsofwork.aspx>

provided in Section II.F.8. Should Idaho not expend all Administrative Funding monies during any one year, upon contract closeout, BPA will either reschedule the funds for use in a future year, or, at Idaho's request, deposit the funds into the Stewardship Account.

5. *Idaho's Use of Administrative Funding.*

The Parties understand that Idaho will use Administrative Funding to fund Project implementation, including but not limited to the following:

- a. personnel, services and supplies, equipment, professional services, contracts, and any other expense that Idaho determines is necessary to technically support and administer a robust wildlife habitat mitigation program;
- b. pre-acquisition and acquisition expenses, such as surveys, appraisals, baseline reports, relocation expenses, and title reports supporting the execution and recording of covenants for new acquisitions and acquisitions under the 1997 MOA pursuant to Section III.D;
- c. Intergovernmental coordination, including Federal, state, tribal, and local entities;
- d. initial site stabilization for new acquisitions as well as monitoring, evaluation, and restoration of wildlife habitat on Project Properties and, in Idaho's sole discretion, on properties that others acquire under this Agreement;
- e. management of the Stewardship Account and all projects and programs associated with that Account;
- f. preparation of reports and performance of other administrative responsibilities under this Agreement; and
- g. BPA's internal expenses for appraisal, survey, other realty services and environmental land audit work for Idaho's acquisitions under this Agreement, excluding expenses for BPA's Fish and Wildlife Division, legal, or environmental compliance.

6. *Additional Administrative Funding*

BPA will consider providing continued funds from FYs 2025-2034 to help Idaho ensure its effective administration of the Southern Idaho Wildlife Mitigation Project. The Parties will make reasonable efforts to negotiate this subsequent funding plan before the expiration of this Agreement, starting from a consideration of the base of \$400,000 annually (plus inflation as provided in Section II.F.8, minus pre-acquisition, initial site stabilization, restoration, and other expenses that will no longer be incurred), and taking into account Idaho's future administrative needs.

7. *Pre-scheduling and Rescheduling.*

Both Parties will make a good faith effort to fully allocate and expend the funds outlined in Section II.F of this Agreement. To do so, annual project budgets may fluctuate plus or minus 20 percent in relation to the budget commitments in this Agreement, to allow for shifts between years, *i.e.*, "**rescheduling**", or to an earlier time, *i.e.*, "**prescheduling**." Fluctuations within an overall project's scope of work, but outside of the 20 percent band, can also occur if mutually agreeable for reasons such as, but not limited to, floods, fires, or other emergency or *force majeure* events.

- a. BPA's financial commitments are described in fiscal year terms, but BPA Fish and Wildlife Program contracts are not necessarily aligned to the fiscal year. As a result, the expense budgets in Attachment 4 will be interpreted as project-year budgets. This means that a project (as implemented through a BPA-issued contract or contracts) can start anytime during the Federal fiscal year (October 1 through September 30) and use that project year budget for the full implementation period (usually one year).
- b. BPA will allow prescheduling future budgets and rescheduling unspent budgets if the adjustment complies with the amounts shown in Attachment 4.
- c. The budget cap in each fiscal year is 120% of the original inflation-adjusted budget as shown in Attachment 4. This cap governs Idaho's requests for prescheduling and rescheduling adjustments. The Parties may agree to

adjust the 120% cap to better fulfill the purposes of this Agreement. To exceed a 120% cap, Idaho will notify BPA at least six months in advance of the potential need for such an adjustment. BPA may decline to make the adjustment to avoid a “bow wave” of spending in any given year and on other reasonable grounds.

8. Inflation Adjustment

Beginning in FY 2019, BPA will increase the annual payments for Acquisition Funding and Administrative Funding by 2.5% each year. BPA will add the inflation adjustment, compounded, as shown in Attachment 4, but will not subsequently adjust project budgets as the schedule of that work changes.

9. Full Expenditure of Funds.

The Parties intend to expend all funds provided in this Agreement, except those held in trust in the Stewardship Account, by the end of FY 2024. If at the end of FY 2024 Acquisition Funding, except monies held in trust in the Stewardship Account, remains unexpended, the Parties will either extend the time for their expenditure through FY2029 or, provided Idaho has acquired at least 8,588 acres, place the unexpended balance in the Stewardship Account. The Parties will structure BPA’s payment of the balance of any unexpended funds to be completed expeditiously and in a manner that fits BPA’s available budgets while accommodating Idaho’s interests.

10. Net Proceeds from Project Properties

Idaho will deposit the net proceeds from any income generated from Project Properties through property-specific fees (*e.g.*, timber receipts, grazing lease fees, recreational or hunting fees, movie rights or royalties, sale of fixtures, etc.) into either the Fish and Game Account or the Stewardship Account. “**Net Proceeds**” refers to proceeds remaining after necessary expenses related to the income-generating activity. Idaho will account for Net Proceeds separately from other funding. Idaho may pay property taxes, payments in lieu of taxes, and other expenses and assessments using income generated from Project Properties. Idaho may use income generated from one Project

Property to address expenses arising on other Project Properties. Idaho will only spend Net Proceeds for the benefit of Project Properties for purposes allowed under this Agreement.

G. Relation to acres acquired

The Parties will pursue cost sharing and other efficiencies so that the funds provided under this Agreement could result in acquiring more than 8,588 acres during the term of this Agreement. As a result, BPA will provide funding for projects as described above through FY2024, even if the 8,588 acre land acquisition target is met earlier.

H. Additional Contributions to Stewardship Account

To the extent allowed by Idaho Law, Idaho may also deposit to the Stewardship Account, any funds donated, bequeathed, devised, or conditionally granted by individuals or entities other than BPA to Idaho for the purpose of stewardship of Project Properties for investment and management according to the terms of any such donations, bequeathals, devises, or grants. Idaho will separately account for any such funds. In calculating earnings of the Stewardship Account under Section II.F.3, Idaho will deduct any gifts, grants, transfers, deposits or devises to the Stewardship Account during the fiscal year for which the calculation is made.

III. Additional Commitments

A. Secure Funding

BPA will take reasonable steps to ensure that the commitments in this Agreement are not modified or reduced based on agency-wide streamlining or other cost-cutting efforts, and include the estimated cost of implementing this Agreement in the agency's revenue requirement to be recovered through base wholesale power rates.

B. Permanent Protection

1. Specific protection mechanisms. All habitat acquisitions in fee or by easement that BPA funds under this Agreement must include provisions for permanent protection and enforcement of those protections. For fee acquisitions, Idaho will execute and record a covenant running with the land using the template provided in **Attachment 5**. Where Idaho secures a conservation easement rather than fee, it will ensure that the United States, acting through BPA or its successor agency, obtains a third party right of enforcement using the template provided in **Attachment 6**.
2. Public use of protected lands. The Parties acknowledge the value of public recreational and educational use of lands protected under this Agreement and that enabling these activities is part of IDFG's statutory mission and an appropriate use for Project Properties.
3. Idaho agrees to BPA's access to all Project Properties with reasonable notice, and to BPA's perpetual enforcement rights for covenants and third party right documents executed for Project Properties under this Agreement.

C. Adequacy and Support of Agreement

Idaho agrees that the projects listed in **Attachment 1**, combined with the funding and commitments by BPA in this Agreement, permanently satisfy and resolve any rights, claims, or interests Idaho has in wildlife-related mitigation related to the construction, inundation, and operation of southern Idaho dams, and wildlife- or fish-related mitigation related to the operational impacts from Deadwood Dam, whether those effects are measured as habitat units, acres, or some other unit; and whether those effects are considered primary, secondary, cumulative, or otherwise.

1. This Agreement binds all interested Idaho State agencies, boards, or commissions.
2. During the term of this Agreement, if Idaho submits recommendations or comments, or supports those of another entity, related to wildlife habitat and

southern Idaho dams in relation to Council Program, then all such recommendations or comments will follow and be intended to effectuate this Agreement. Idaho will cooperate in good faith in assisting BPA to respond to any allegations that BPA has not fulfilled its Northwest Power Act wildlife-related mitigation responsibilities for the Idaho share of mitigation for southern Idaho dams, or for the Idaho share of mitigation for operational impacts of Deadwood Dam, whether in legal, administrative or general public forums, to the extent Idaho may do so without waiving Idaho's sovereign immunity or immunity under the Eleventh Amendment to the United States Constitution, and subject to constraints imposed under Idaho law.

3. Neither Party may seek to increase or reduce the funding specified in this Agreement, or support others in doing so, unless the Parties agree that one or more of the following exceptions apply:
 - a. There have been substantial and significant changes in applicable Federal law or in the physical attributes or operating parameters of southern Idaho dams or Deadwood Dam,
 - b. *force majeure* events, or
 - c. BPA agrees with the Tribes, whether through settlement or otherwise, to increase the amount of mitigation recognized for Deadwood Dam or southern Idaho dams.

If the Parties disagree over whether substantial and significant changes have occurred, neither Party may seek changes in this Agreement until completing dispute resolution as provided in Section IV.C. This section, however, does not restrict either Party from soliciting, receiving, or granting monies, or supporting others in doing so, in other programs not designed to directly address the Federal wildlife mitigation responsibility arising from the effects occurring, or that have occurred from, the construction, inundation, and operation, of southern Idaho dams.

D. 1997 MOA

This Agreement supersedes the 1997 MOA. For consistency in fulfilling Idaho's obligations under Section III.B to execute and record covenants for permanent protection of Project Properties, BPA will execute and record an extinguishment or amendment of its executory interests for Project Properties acquired under the 1997 MOA (Attachment 1) that Idaho holds in fee, and Idaho will execute and record covenants to replace or amend the executory interests on these properties. The Parties will make their best efforts to fully perform their duties under this section by September 30, 2016.

E. Consistency with the Council's Program

This Agreement is consistent with the Council Program⁹ in that the Agreement does the following:

- uses acres as a measureable objective to address unfinished mitigation for southern Idaho dams;
- protects properties and ensures their management for wildlife mitigation in perpetuity;
- provides funding for long-term maintenance of the habitat;
- provides sufficient funds to demonstrate a substantial likelihood of achieving the Agreement's wildlife mitigation objectives;
- builds on the Parties' mitigation commitments in the 1997 MOA to provide full mitigation;
- overcomes the impasse related to the Habitat Evaluation Procedure used to establish the initial wildlife habitat loss assessments incorporated into the Council Program; and

⁹ See generally, Northwest Power and Conservation Council, Columbia River Basin Fish and Wildlife Program at pages 20-21 (2009). <http://www.nwcouncil.org/fw/program/program-2009-amendments/>

- provides habitat benefits for southern Idaho fish.

F. Idaho Property Ownership and Management

The United States and BPA make no warranties or representations whatsoever regarding any real property interest in the Project Properties. Idaho assumes all management and operational control of the properties, and will therefore be responsible for all incidents of ownership. Idaho will take all lawful actions, assume full responsibility, and not seek any additional contributions from BPA for incidents of ownership that may arise from the acquisition and stewardship of any property covered by this Agreement. Such incidents of ownership include, but are not limited to, payments in lieu of taxes, taxes, levies, assessments, hazardous waste response, cultural or historic resource mitigation or preservation, endangered species protection, noxious weed or invasive species management, and tort liability.

G. Future Transmission Facilities

Idaho accepts that in the future BPA may seek to construct, locate, operate, maintain, and access future transmission facilities within one or more Project Properties. If BPA seeks to do so, there shall be no additional consideration owed by BPA to Idaho, beyond the funds provided in this Agreement, for securing the easement for these purposes. Should such a transmission easement be needed by BPA over a Project Property, the Parties will negotiate the terms and conditions of the easement, in accordance with applicable law (including appropriate mitigation measures, identified as part of the environmental analysis for the transmission right of way, to be funded by BPA), and taking into account the purpose of this Agreement. Transmission right-of-way easements shall be for the sole purpose of transmission of electrical power and ancillary transmission communications. Such transmission facilities are expressly not precluded by this Agreement.

H. Consolidating IDFG's BPA Mitigation Contracts

Upon execution of this agreement, BPA and IDFG will promptly execute a new statement of work for the Southern Idaho Wildlife Mitigation Project, 1995-057-00, to consolidate contracts numbered 65189, 62940, and 63060. The Parties will update and revise the statement of work annually as appropriate to reflect the terms of this Agreement.

I. Non-Appropriation of Idaho Funds

This Agreement shall in no way be construed so as to bind or obligate Idaho beyond the term of any particular appropriation of funds by the State's Legislature as may exist from time to time.

J. Public Records

Nothing in this Agreement prohibits access to information as required by state and Federal public information and open records laws.

K. Reporting

1. Beginning in FY2015 and through FY2024, and for as long as Idaho accepts annual funding to administer the Southern Idaho Wildlife Mitigation Project, Idaho shall prepare an annual report for BPA and the Council for wildlife mitigation funded through this Agreement, and use the BPA project tracking system, PISCES.
2. Beginning in FY 2015 and continuing through FY2034, Idaho will provide to BPA an annual accounting of the use of funds from the Stewardship Account, documenting all expenditures made using the Stewardship Account. BPA may inspect Idaho's records for the Stewardship Account at any time upon reasonable notice, which shall be no less than five business days.

3. Idaho will offer to meet with BPA at least once annually to assess progress and discuss future project opportunities.
4. Idaho will send all reports required under this Agreement to F&W Project Manager, KEWM-4, P.O. Box 3621, Portland, Oregon 97208-3621, unless otherwise directed by BPA.

IV. Administrative Provisions

A. Good Faith Implementation

This Agreement rests on bargained-for consideration. The Parties will work together to fulfill their commitments. Matters explicitly addressed within or related to this Agreement routinely arise in a variety of contexts and forums, often on short notice and in time-sensitive situations. The Parties will make reasonable efforts to implement and support this Agreement in good-faith.

Because questions or concerns may arise regarding a Party's compliance with this Agreement, the Parties will take the following steps.

- Designate a person to be initially and chiefly responsible for coordinating internal questions regarding compliance with the Agreement.
- Make reasonable efforts to consult together before making decisions implementing this Agreement, and support it at all of their respective organizational levels—*e.g.*, policy, legal, and technical.
- On a continuing basis, take steps to ensure that all levels of their organizations, and other interested or affected federal and Idaho agencies, boards, and commissions, are made aware of the existence of this Agreement and the specific commitments and obligations herein, and emphasize the importance of meeting them.

- Make best efforts to consult with the other Party before taking any action that could reasonably be interpreted as inconsistent with any part of this Agreement. Other issues relating to the natural resources of southern Idaho dams may arise in a broader context than this Agreement that may impact the Parties. The Parties agree to make best efforts to identify such other issues, and consult with the other Party before taking any action that could adversely affect the purposes and provisions of this Agreement. The Parties will make best efforts to resolve such other issues in a manner that preserves this Agreement and the spirit of collaboration fostered by it.

B. Periodic Review and Modification

The Parties agree to review this Agreement, including the attachments, and any issues concerning its implementation, in FY2019. At any time, either Party may propose an amendment of the Agreement. No amendment of the Agreement is effective unless and until it is in writing and signed by all Parties.

C. Dispute Resolution

The Parties will 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 or management of the Project and Project Properties under this Agreement through informal discussions, they will submit in good faith such dispute to non-binding mediation. Either Party may trigger this section by making a written request for the other party to join in mediation. Within 30 days of triggering this provision, the Parties will select a

mediator, or if they are unable to select a mediator, each Party will select a mediator and the two selected will choose a third mediator who will be the sole mediator. The Parties will 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, either party may initiate legal action to resolve the dispute. Except as provided in this part, pending completion of mediation, no party may initiate any legal proceeding except in aid of mediation. The Parties will each cover their own costs of dispute resolution and share equally the costs of mediation.

For disputes arising under annual contracts issued by BPA to fulfill its obligations for Administrative Funding, the Parties interpret this Dispute Resolution section as consistent with Section 21.3.14 of the BPA Purchasing Instructions, which allows the contractor and contracting officer to use alternative means of dispute resolution under the Contract Disputes Act. The Parties will only agree to binding arbitration, however, on a case-by-case basis.

D. Effective Date

This Agreement becomes effective from the date of the last signature.

E. Applicable Law

Federal law governs this Agreement and any action, whether mediated or litigated, brought or enforced, except where the Agreement specifically cites Idaho law.

F. Authority

Each Party represents and acknowledges that it has full legal authority to execute this Agreement.

G. Indian Trust and Treaty Rights

Nothing in this Agreement changes any tribe's legal rights, authorities, or jurisdiction related to wildlife, fish, or wildlife or fish habitat management.

H. Severability

If any court, regardless of appeal, invalidates any part of this Agreement as arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law, the Parties will consider that as constituting a material change and will negotiate as provided in Section IV.C, Dispute Resolution.

I. Entire agreement

This Agreement represents the entire agreement between the Parties concerning Federal wildlife-related mitigation related to the construction, inundation and operation of southern Idaho dams and concerning Federal resident fish- and wildlife-related mitigation for the operational impacts of Deadwood Dam. All previous communications between the Parties, either oral or written, with reference to the subject matter of this Agreement are superseded. Unless authorized in this Agreement, neither Party may impose on the other any additional requirements concerning reporting, documentation, planning, procedure, or any other subject related to mitigations activities under this Agreement.

J. Precedent

This Agreement, including but not limited to its reliance on acres instead of habitat units, shall not set a precedent for how either Party may approach wildlife mitigation and crediting elsewhere in Idaho.

SIGNATURES:

Administrator, Bonneville Power Administration

Governor, State of Idaho

Director, Idaho Department of Fish and Game

DRAFT

Attachment 1

IDFG's Southern Idaho Wildlife Mitigation Acreage to Date						
Dam	Property	Acquisition Sponsor	Current Landowner	Total Acres Protected	IDFG Acres Credited	Notes
Anderson Ranch						
	Smith (Boise River)	IDFG	IDFG	59	59	
	Rice Property	IDFG	IDFG	1,364	1,364	
	Faulkner/Bliss Point	IDFG	IDFG	1,802	1,802	
	Sandy Point	IDFG	IDFG	138	138	
	Hammer Flats	IDFG	IDFG	705	705	
Black Canyon						
	Payette River	IDFG	IDFG	91	91	
	Krueger	IDFG	IDFG	166	166	
Palisades						
	Horkley (Deer Parks)	IDFG	BLM	120	120	
	Menan/Kinghorn I (Deer Parks)	IDFG	BLM	142	142	
	Boyle Ranch (Deer Parks)	IDFG	BLM	2,592	1,295	Project shared between IDFG and SBT
	Allen	IDFG	BLM	81	81	
	Beaver/Kinghorn II	IDFG	BLM	310	155	Project shared between IDFG and SBT
	Palisades Noxious Weed	IDFG	N/A	N/A	N/A	
	Pine Creek/Kruse	IDFG	easement/TRLT*	800	400	Project shared between IDFG and SBT
	Winterfeld	IDFG	easement/IDFG	422	211	Project shared between IDFG and SBT
	Quarter Circle	IDFG	IDFG	2,135	712	Project shared between IDFG and SBT
	Soda Hills	SBT	BLM	2,563	1,281	Project shared between IDFG and SBT
Minidoka						
Totals				13,490	8,722	
*Easement held by Teton Regional Land Trust						

Attachment 2

August 13, 2010

Lorri Bodi
Bonneville Power Administration
P.O. Box 3621
Portland, OR 97208-3621

Dear Mrs. Bodi,

In coordination with the Bonneville Power Administration, the Southern Idaho Wildlife mitigation partners; the Idaho Dept of Fish and Game, the Shoshone-Bannock Tribe, and the Shoshone-Paiute Tribe, have cooperatively been working on a permanent settlement solution for the wildlife mitigation program. In an effort to facilitate each partners successful settlement agreement with Bonneville Power Administration, the partners have agreed to an allocation of habitat units (HU) that define the wildlife mitigation debt incurred by construction and inundation of the federal hydrosystem projects in the Mid and Upper Snake Provinces.

The partners agree that this wildlife mitigation debt be allocated as follows:

- **Shoshone-Bannock Tribe** – 50% of the total debt in the Upper Snake province and 10% of the total debt in the Mid Snake province, then reduced by the habitat units already mitigated for by the Shoshone-Bannock Tribes.
- **Shoshone-Paiute-Tribe** – 40% of the total debt in the Mid Snake province then reduced by habitat units already mitigated for by the Shoshone-PaiuteTribe.
- **Idaho Department of Fish and Game** – 50% of the total debt in the Upper Snake province and 50% of the total debt in the Mid Snake province then reduced by habitat units already mitigated for by the Idaho Department of Fish and Game.

We hope this information is helpful to you in your considerations of settlement for Southern Idaho.

We look forward to timely discussions on this important topic.

Respectfully,

Idaho Dept of
Fish and Game



Cal Groen
Deputy Director

Shoshone-Bannock
Tribes

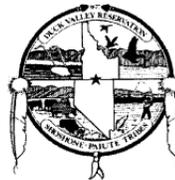


Nathan Small
Council Chairman

Shoshone-Paiute
Tribes



Robert Bear
Chairman, Business Council



cc: Governor Butch Otter, Bill Booth, NPCC

Attachment 3A

PLACEHOLDER: CORPS Statement of Support

Attachment 3B

PLACEHODLER: Reclamation Statement of Concurrence

DRAFT

Attachment 4

Proposed Funding Stream for Southern Idaho Wildlife Mitigation Agreement with IDFG

CAPITAL	FY14	FY15	FY16	FY17	FY18	FY19	FY20	FY21	FY22	FY23	FY24	TOTAL
New Acquisitions and Stewardship	0	\$5,000,000	\$5,000,000	\$5,000,000	\$2,500,000	\$2,500,000	\$2,000,000	\$0	\$0	\$0	\$0	\$22,000,000
Stewardship for Existing Acquisitions	\$14,000,000	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$14,000,000
Inflation	\$0	\$0	\$0	\$0	\$0	\$62,500	\$101,250	\$0	\$0	\$0	\$0	\$163,750
TOTAL Capital Inflation Adjusted Budgets	\$14,000,000	\$5,000,000	\$5,000,000	\$5,000,000	\$2,500,000	\$2,562,500	\$2,101,250	\$0	\$0	\$0	\$0	\$36,163,750
<i>120% Max</i>		\$6,000,000	\$6,000,000	\$6,000,000	\$3,000,000	\$3,075,000	\$2,521,500	\$0	\$0	\$0	\$0	
EXPENSE												
Administration and Pre-Acquisition Funding	\$0	\$400,000	\$400,000	\$400,000	\$400,000	\$400,000	\$400,000	\$400,000	\$400,000	\$400,000	\$400,000	\$4,000,000
Inflation	\$0	\$0	\$0	\$0	\$0	\$10,000	\$20,250	\$30,756	\$41,525	\$52,563	\$63,877	\$218,972
TOTAL Expense Inflation Adjusted Budgets	\$0	\$400,000	\$400,000	\$400,000	\$400,000	\$410,000	\$420,250	\$430,756	\$441,525	\$452,563	\$463,877	\$4,218,972
<i>120% Max</i>	\$0	\$480,000	\$480,000	\$480,000	\$480,000	\$492,000	\$504,300	\$516,908	\$529,830	\$543,076	\$556,653	
Grand Total (including inflation) \$40,382,722												

Attachment 5

After recording, return to:
Bonneville Power Administration
Real Property Services, TERR
Attn: BPA Tract No.
P.O. Box 3621
Portland, OR 97208-3621

COVENANT RUNNING WITH THE LAND

Covenant. The State of Idaho, through the Idaho Fish and Game Commission and the Idaho Department of Fish and Game (hereinafter Idaho or Grantor), for and in consideration of funding (insert actual dollar and legal amount BPA paid for purchase,) provided to acquire fee ownership of certain real property in the County of XXX, State of Idaho, hereby grants, bargains, conveys, and warrants to the United States of America, acting by and through the Department of Energy, Bonneville Power Administration, its successors and assigns (hereinafter BPA or Grantee), this covenant, created under the provisions of the Idaho Conservation Easement Act, Idaho Code §§ 55-2101 to 55-2109 and implemented under applicable state and federal law, which runs with the land legally described as follows:

A tract of land located in [Legal description—alternatively, attach the legal description as an exhibit.]

Under this covenant running with the land, Idaho will use this real property for the public purposes of mitigation, permanent protection and enhancement of wildlife and wildlife habitat, protection of historic properties, and to allow reasonable public access.

Idaho acquired this real property to help BPA in partially fulfilling its duty to protect, mitigate, and enhance wildlife habitat affected by the development of the Federal Columbia River Power System as required by section 4(h)(10)(A) of the Pacific Northwest Electric Power Planning and Conservation Act of 1980, 16 U.S.C. §§ 839 *et. seq.* The funds were provided under a Memorandum of Agreement (MOA) between Idaho and BPA, dated July 2014 and recorded in [identify where] under file No.XXXX. To fulfill its promises to BPA under the MOA, Idaho or its assign is recording this covenant running with the land. Provided, (1) should Idaho choose to exercise its rights to sell or exchange the property and BPA concurs, as evidenced by an affidavit executed by Idaho and BPA, or (2) a court finds the MOA is not binding on one of the parties, then this covenant will become void and be removed as an encumbrance upon this real property, or portion thereof.

ACKNOWLEDGED

Attachment 6

Template Language Third Party Rights to Enforce

Third Party Right Insertion. Where Idaho secures a conservation easement, it shall ensure the grantor grants third party rights of enforcement to the United States and third party right implementation provisions as part of the granting clause as follows:

For the same consideration cited above, Grantor hereby voluntarily conveys and warrants to the United States of America and its assigns third party rights of enforcement, entry, and inspection.

Definition of BPA's jurisdiction and control over third party rights should also be in the body of the conservation easement after the granting clause, where language specifically may be as follows:

Third Party Rights. Grantor has conveyed the rights of enforcement, entry, and inspection to the United States of America and its assigns in [cite section]. The Department of Energy, Bonneville Power Administration (BPA) is the acquiring federal agency having jurisdiction and control over the third party rights, which are more particularly described as follows:

Enforcement. BPA may, after providing Idaho with notice and a reasonable time to respond and engage in good faith consultation (where reasonable means no more than 14 calendar days, except in cases of emergency or unavailability of Idaho where BPA may reasonably act immediately to stop or mitigate a threat to conservation values), exercise all of the rights and remedies of Idaho and is entitled to all of the indemnifications provided to Idaho. If Idaho exercises the rights and remedies of the easement, then Idaho will be entitled to reimbursement from Grantor of its costs of enforcement. If BPA exercises the rights and remedies of the easement, then BPA will be entitled to reimbursement from Grantor of its costs of enforcement. If Idaho and BPA jointly exercise the rights and remedies of the easement, then Idaho and BPA will work cooperatively to apportion the costs of enforcement in accordance with the efforts of each.

Entry and Inspection. BPA may, in a reasonable manner and at reasonable times, enter and inspect the easement area to determine compliance with the terms of the conservation easement. Except in the case of an emergency, BPA will attempt to give Grantor and Idaho notice prior to such entry and inspection, which notice may be by telephone or electronic mail.

BPA shall sign an acceptance of the third party enforcement rights on the conservation easement document.