Willamette River Basin Memorandum of Agreement Regarding Wildlife Habitat Protection and Enhancement between the State of Oregon and the Bonneville Power Administration

October 22, 2010

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This Agreement is made between the STATE OF OREGON, with its DEPARTMENT OF FISH AND WILDLIFE ("**ODFW**") as lead representative, and BONNEVILLE POWER ADMINISTRATION ("**BPA**"). Together the State of Oregon and BPA are the Parties to this Memorandum of Agreement ("**Agreement**").

I. Introduction

A. Purpose of the Agreement

The Parties enter this Agreement to foster a cooperative relationship as partners to address federal habitat protection and enhancement commitments for wildlife in the Willamette Basin and to provide fish habitat protection and restoration for anadromous and resident fish species listed under the Endangered Species Act ("**ESA**"). In particular, this Agreement permanently resolves longstanding wildlife mitigation and crediting issues under the Pacific Northwest Electric Power Planning and Conservation Act ("**Northwest Power Act**") and other applicable laws related to the federal Willamette River Basin Flood Control Project dams including those from which BPA markets commercial power ("**Willamette dams**").[1] The U.S. Army Corps of Engineers ("**Corps**") owns and operates these dams for multiple public purposes, including flood control primarily, as well as recreation, fish and wildlife, and power generation.

The National Marine Fisheries Service ("**NMFS**") and the U.S. Fish and Wildlife Service ("**USFWS**") have issued biological opinions for the Willamette dams covering ESA-listed Upper Willamette River spring Chinook and winter steelhead, Oregon chub, and bull trout (collectively, "**Willamette biological opinions**").[2] The wildlife mitigation provided under this Agreement will include habitat protection and restoration that benefits both wildlife and ESA-listed fish species addressed in the Willamette biological

[1] The Willamette dams for which BPA shares a mitigation responsibility include Big Cliff, Foster, Green Peter, Dexter, Detroit, Hills Creek, Lookout Point, and Cougar.

[2] NMFS' Reasonable and Prudent Alternative in its biological opinion states that the Action Agencies will, among other things, protect and restore habitat in the Willamette basin beginning in 2010 and continuing through 2023. The USFWS concluded that operating the flood control project would not jeopardize Oregon chub or bull trout, provided the Action Agencies implemented the habitat measures called for by NMFS.

opinions. Additionally other fish species of interest and resources of interest to Tribes and regional stakeholders will also benefit from this wildlife mitigation program.

NMFS supports this Agreement, to the extent that it addresses anadromous fish. See **Attachment 1** to this Agreement. NMFS recognizes that this Agreement requires restoration and protection actions that will provide some dual benefits, that is, benefits both fish and wildlife species.

B. Oregon's Interests

This Agreement applies to all interested Oregon State agencies, boards, or commissions. ODFW will be the lead representative for the State of Oregon and, to the extent of the authority granted to it under Oregon law, ODFW represents the State of Oregon, including all other interested Oregon state agencies, boards, or commissions, in this Agreement. ODFW's legislative mandate is to preserve, protect, and perpetuate wildlife and wildlife habitat for the citizens of Oregon. ORS § 496.012. ODFW implements this mandate through the Oregon Conservation Strategy and the Habitat Mitigation Policy. ODFW assists BPA in fulfilling its wildlife mitigation responsibilities related to the Willamette dams that produce hydroelectricity which BPA markets for commercial purposes through the Willamette Basin Wildlife Mitigation (Project. No. 1992-068-00). As a wildlife manager, ODFW proposes and supports the proposals of others' wildlife habitat protection and enhancement projects for BPA to fund. To support these endeavors, the Parties entered into the Willamette Basin Wildlife Mitigation Memorandum of Agreement in 2000 ("**2000 MOA**").

C. BPA's Interests

BPA is a power-marketing agency within the United States 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 the power generation impacts of certain Willamette Basin dams.

Using its Northwest Power Act authorities, BPA has implemented various protection, mitigation, and enhancement projects, including wildlife acquisition and habitat improvement projects in the Willamette that provide substantial benefits to fish and fish habitat. Where possible, BPA prioritizes and funds mitigation projects that have both wildlife and fish benefits, reflecting an ecosystem approach to mitigation.

D. 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 Northwest Power and Conservation Council ("**Council**") has reviewed and recommended previous wildlife habitat projects implemented by BPA in the Willamette Basin under the Northwest Power Act. The Council supports the Parties' Willamette Basin wildlife crediting resolution as consistent with the Columbia River Basin Fish and Wildlife Program ("**program**").
- The Corps owns and operates the Willamette dams under federal law. For purposes of this Agreement, the Corps and BPA are the "**Action Agencies.**" The Corps has reviewed and concurred with this Agreement. See **Attachment 2.**

E. Coordination with Tribes

The Parties have developed this Agreement while coordinating with the Tribes identified below. By providing certainty for tribal participation and mitigation funding, this Agreement will benefit tribal interests in Willamette Basin wildlife. Each of the following sovereign Tribes has unique rights and interests with respect to wildlife and wildlife management. Notwithstanding those differing rights and interests, each Tribe may propose, and where appropriate, implement specific projects, or components of projects, under this Agreement. The Parties intend to work with each Tribe on a government-to-government basis to understand each one's interests while implementing this Agreement.

- Confederated Tribes of the Grand Ronde Community of Oregon
- Confederated Tribes of the Warm Springs Reservation of Oregon

- Confederated Tribes of the Siletz Indians of Oregon

The Parties Therefore Agree as Follows:

II. Commitments for Wildlife Mitigation

A. Agreement

The Parties agree that the commitments described below resolve longstanding wildlife mitigation issues associated with the Willamette dams, build on and are consistent with the Northwest Power Act and the Council's program, and fulfill requirements under federal law. These commitments fully address the impacts to wildlife from the construction, inundation, operation, and maintenance of the Willamette dams.[3] In addition, as provided below, this Agreement also provides habitat benefits for Willamette basin fish. For purposes of this Agreement, "**wildlife**" means terrestrial and aquatic wildlife and their habitats and specifically does not include fish.

B. Defining Federal Wildlife Mitigation Obligations

To resolve wildlife mitigation and crediting issues related to the Willamette dams, all federal mitigation requirements for wildlife impacts associated with the Willamette dams will be based on acres as defined below. The Parties decided not to define wildlife mitigation based on habitat units to avoid the associated questions such as an appropriate crediting ratio and the need for a matrix to define and cross-reference species-habitat stacking issues. The Parties define the federal wildlife mitigation obligation in the Willamette Basin under the following terms.

- **Mitigation for the impacts of inundation, dam construction and all other non-operational aspects of the Willamette River hydropower system including above pool losses:** The mitigation obligation for the acreage affected

[3] The Parties do not anticipate maintenance activities to have further adverse affects on wildlife habitat, but if they do the Parties shall use the processes established in this Agreement and work with the Corps to address those impacts.

by the construction and inundation of the Willamette dams, including above pool losses, is 25,537 acres.

- **Mitigation for operational losses:** "**Operational losses**" are those that may be associated with the operation and maintenance of the dams. To address the issue of operational losses, the federal wildlife mitigation responsibility includes an additional 1,000 acres.
- **Total federal wildlife mitigation responsibility:** The federal wildlife mitigation responsibility totals 26,537 acres.

C. Crediting for Previous and Ongoing Wildlife Mitigation

BPA has already implemented mitigation projects that have partially met the total federal wildlife mitigation responsibility. BPA has implemented **6,699** acres of wildlife mitigation in the Willamette Basin. **Attachment 3** lists these completed projects.

For FY 2010 and FY 2011, the Parties shall make all reasonable efforts to complete the following wildlife mitigation acquisitions totaling at least 2,958 acres, which **Attachment 4** depicts.

- ODFW proposes that BPA acquire a conservation easement from the Trappist Monks of Guadalupe, Inc. ("**Trappist Abbey**") in the Red Hills country near Lafayette under its Willamette Basin Wildlife Mitigation (Project 1992-068-00).
- The Nature Conservancy proposes acquiring fee title to the "**Wildish**" property at the confluence of the Coast and Middle Fork Willamette under its Willamette Wildlife Acquisitions (Project 2009-017-00)[4].
- ODFW also proposes working with the McKenzie River Trust to acquire the "**Green Island Addition**" property located at the confluence of the McKenzie River and the mainstem Willamette under its Willamette Basin Wildlife Mitigation (Project 1992-068-00).

[4] BPA shall ensure that the grantee gives the State of Oregon the right to approve grantee's successor or transferee should the grantee decide to dispose of the Wildish property.

- The Nature Conservancy acquired the "**Yamhill Oaks Addition**" property located in Muddy Valley under its Willamette Wildlife Acquisitions (Project 2009-017-00).

Time is of the Essence Contingency: ODFW considers the acquisition of the Wildish and Trappist Abbey properties a central condition of this Agreement; BPA considers this Agreement a central condition of funding for acquisition of the Wildish and Trappist Abbey properties. The owners of Wildish have indicated in writing that their offer to sell is contingent on closing occurring no later than October 30, 2010. As a result, time is of the essence in finalizing this Agreement and closing on Wildish and the Trappist Abbey. The Parties shall make every reasonable effort to complete their due diligence and required processes to allow them to enter into this Agreement and ensure these two acquisitions can close on or before October 28, 2010. If the Parties fail to enter into this Agreement and close on the Wildish and Trappist Abbey acquisitions by October 28, 2010, neither Party has a continuing obligation to pursue this Agreement or the Wildish or Trappist Abbey acquisitions.

Completing these acquisitions will result in a remaining wildlife mitigation obligation for the Willamette dams of 16,880 acres. Table 1 shows these calculations.

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

Total losses	**26,537**
Acres acquired	6,699
2010 acres acquired	2,958
Total acquisitions	**9,657**
Total remaining	**16,880**

D. Principles Guiding Future Wildlife Mitigation Projects

In order to advance mitigation for the remaining 16,880 acres, the Parties shall adhere to the following key principles, and shall work collaboratively in their implementation.

1. The Parties shall operate within the Council's review and recommendation process under the Northwest Power Act. All new wildlife mitigation projects in the Willamette will be covered by an ODFW umbrella project called "**Willamette Wildlife Mitigation**." Independent science review will be provided at the programmatic level on the project selection criteria, as discussed below, but not for individual acquisition or restoration projects.

2. ODFW shall work with Tribes and regional stakeholders (including other federal and Oregon state agencies, local governments, and non-governmental organizations) in developing project selection criteria, setting priorities, and implementing future Willamette wildlife mitigation projects. Project selection criteria will address targeted wildlife species and may address other species and resources of interest to Tribes and regional stakeholders that would benefit from the wildlife projects, (e.g., fish species, whether anadromous or resident, including lamprey, as well as other resources of interest, such as amphibians, insects, or culturally important plants, etc). ODFW will work with affected Tribes on a government-to-government basis to ensure a collaborative approach that reflects each Tribe's unique interests in Willamette wildlife mitigation.

3. ODFW shall openly develop a new process or adapt an existing one for evaluating and prioritizing all Willamette wildlife mitigation projects. Any entity, including Tribes and regional stakeholders, may submit proposed projects. This process will include regional coordination, consideration of cost effectiveness, and public transparency.

4. The project selection criteria must expressly consider funding from sources other than those provided by BPA under this Agreement. ODFW shall ensure that project proposals that include substantial contributions from other entities (and maximize the

acreage concurred in by ODFW) have those contributions reflected positively in the final project rankings. In addition, the Parties support using ecosystem services markets as specified in ORS 468.581-468.587 (including the potential sale of credits in those markets to reduce the costs attributable to this Agreement) so long as the conservation goals of this Agreement remain paramount.

5. The project selection criteria developed and the wildlife projects funded under this Agreement must be consistent with the Council's program (including the Willamette Subbasin Plan), BPA's In-Lieu Policy, and the State of Oregon's Conservation Strategy. The project selection criteria developed for dual benefits projects must also integrate the project selection criteria developed by the Habitat Technical Team, established by the Willamette Action Team for Ecosystem Restoration to coordinate habitat restoration activities under the biological opinions.

6. The Parties shall have the project selection criteria complete and ready to apply by October 1, 2012. Before then, ODFW shall work with the Tribes and regional stakeholders to identify appropriate projects already in development that can be submitted for funding under this Agreement during the interim period before the project selection criteria are complete and ready to apply.

7. The Parties will use an ecosystem approach, which means that wildlife projects under the Agreement are expected in many cases to provide dual benefits for both wildlife and fish (whether anadromous or resident fish, including lamprey), and may also address other species and resources of interest to Tribes and regional stakeholders that would benefit from the wildlife projects, (e.g., amphibians, insects, or culturally important plants).

8. The Parties understand that, where Tribes acquire lands under this Agreement for the purpose of wildlife habitat mitigation, the Tribes and tribal members may desire to also use those lands for traditional and cultural purposes. The Parties respect and will support Tribal traditional and cultural uses and intend that any such uses on lands

acquired under this Agreement comply with any constraints set by the management plans and conservation easements to which those lands are subject. As more specifically addressed in section IV.G, this Agreement advances wildlife habitat mitigation and does not alter any entity's position concerning Tribal rights or interests.

9. Accountability under this Agreement will be provided through BPA project tracking, an annual report prepared by ODFW for BPA and Council review, and an annual meeting with Willamette wildlife implementation partners to assess progress and discuss future project opportunities.

E. Selecting, Reviewing, and Prioritizing Future Wildlife Mitigation Projects

1. To select, review, and prioritize future wildlife mitigation projects under this Agreement, ODFW shall establish and utilize a new collaborative process, or adopt an existing one, involving affected Tribes and regional stakeholders. This group, the collaboration group, ("**collaboration group**") will operate and conduct business using an open and transparent process. Participation by Tribes will be expressly solicited.

2. ODFW shall work with the collaboration group to develop criteria for selecting and prioritizing projects under this Agreement ("**criteria**"). These criteria will include cost-effectiveness for value obtained. ODFW shall submit any new project selection and prioritization criteria to the Council's Independent Scientific Review Panel and respond to any comments from the reviewers before adopting and relying on the criteria.

3. Project solicitation and review will occur as follows. As discussed above, ODFW shall work with the Tribes and regional stakeholders to identify appropriate projects already in development that can be submitted for funding under this Agreement during the interim period before the project selection criteria are complete and ready

to apply. The Parties shall coordinate with the Council to solicit project proposals as needed. ODFW, working with the collaboration group, shall review, select, and prioritize project proposals using the criteria.

4. At the conclusion of this review period, ODFW shall provide BPA with a list of projects prioritized using the criteria. ODFW shall advise BPA in writing on whether it concurs in each project for funding and acreage credit under this Agreement. ODFW shall address each project as a whole; that is, it shall review and prioritize each proposal in its entirety, not constituent parts. If ODFW does not concur in a project, it shall explain its decision in writing to BPA and address each of the criteria and any other relevant decision factors. The sponsor may then reformulate the project in any way (including, but not limited to, by separating out project elements or combining the project with other projects) and resubmit it for collaboration group and ODFW review.

5. If ODFW does not concur in the priority for funding or amount of acreage credit for a tribal project, the Tribe in question may request dispute resolution at the sovereign level. Oregon and BPA will engage the tribal entity in a government-to-government discussion and strive for resolution.

6. Only projects in which ODFW concurs will be counted toward satisfying the federal wildlife mitigation obligation under this Agreement. During the term of this Agreement, ODFW shall concur on at least 16,880 acres of projects.

7. BPA shall fund the projects, up to the fiscal year allocation, in the prioritized order in which ODFW concurred. BPA shall fund the projects prioritized for a given fiscal year so long as funding remains available. Once funded by BPA, a project counts toward satisfaction of the federal wildlife mitigation obligation under this Agreement. If BPA disagrees with ODFW's prioritization of projects, BPA and ODFW shall engage in dispute resolution as provided in section IV.C. BPA retains the right, but has no obligation, to fund projects in which ODFW does not concur; however, unless

otherwise agreed by the Parties, such projects will not count toward satisfying the federal wildlife mitigation obligation under this Agreement and will not reduce BPA's financial obligation.

F. Dual Fish and Wildlife Benefit For Willamette Biological Opinion Crediting

The wildlife mitigation commitments under this Agreement will also include significant habitat acquisitions and assure enhancements for listed salmon and steelhead, bull trout, and Oregon chub. As required in the reasonable and prudent alternative ("**RPA**") in the Willamette biological opinions, program planning processes, and ESA regulations and policies, the Parties will proceed under this Agreement using an ecosystem-based approach to provide benefits to listed and non-listed fish and wildlife.

1. The Action Agencies will implement RPA 7.1.3 as described in **Attachment 5**, and in return receive credit under the two Willamette biological opinions for wildlife habitat projects funded under this Agreement that benefit ESA-listed fish as described in Attachment 1. The Parties shall consider these projects in concert with other projects being funded or to be funded by the Action Agencies in order to fulfill their habitat restoration obligations under the biological opinions, so that the different efforts will work together to provide more benefit than if they were done completely independently. No separate or additional BPA funding from Willamette biological opinion projects is required by this Agreement in order for the Action Agencies to claim, and ODFW acknowledge, biological opinion credit from wildlife projects funded under this Agreement. The Parties and the collaboration group will coordinate dual benefits projects with the Habitat Technical Team established under the NMFS biological opinion to review such projects. To count as benefiting fish, a dual benefits project must be certified as such by both Parties and be adjacent to a river, stream, lake, pond, or spring and significantly benefit at least one federally-listed anadromous fish species under the Willamette biological opinion. Provided that the Parties are on track to attain the dual benefits as described below in section II.F.4, if coordination with the Habitat Technical Team is not possible before closing

on a wildlife habitat project to be funded under this Agreement, the wildlife habitat project may proceed and the Parties shall account for the fish benefits after closing.

2. Conversely, ODFW shall receive credit against its acreage commitment in this Agreement for any fish habitat project implemented using separate or additional funding under the Willamette biological opinions that has significant wildlife benefits. No funding from this Agreement needs to be used on a fish habitat project for ODFW to take wildlife acreage credit for it. The amount of acres determined credited as wildlife habitat mitigation in such projects shall be mutually agreed upon by the Parties.

3. If a project involves other entities that provide actual cash cost-sharing for acquisition or restoration, then ODFW may count the full acreage toward its obligations under this Agreement—unless the cost-sharing entity seeks credit; e.g., ecosystem services credit, then ODFW's acreage credit shall be in proportion to the funding that BPA provided.

4. The Parties shall ensure that at least 10 percent of the BPA project funding dollars under section II.G.1 below provide habitat protection or restoration with significant fish benefits, i.e., dual benefits, for both wildlife and ESA-listed anadromous fish species under the NMFS Willamette biological opinion. ODFW shall coordinate its dual benefits project recommendations with NMFS and USFWS. Beginning in 2014 and every third year afterward, ODFW shall convene the collaboration group to assess on a cumulative, not annual, basis whether dual benefits are accruing at a rate of 10 percent or more.

5. If during the course of this Agreement, additional fish species adversely affected by the Willamette dams become listed under the ESA, ODFW will work with the collaboration group to amend the project selection and prioritization criteria to reasonably accommodate the new listing.

6. BPA's funding commitments under this Agreement are in addition to those it has made, and will be making, under other agreements for fish habitat work in the Columbia River estuary, which will likely provide substantial additional wildlife benefits. BPA is not claiming wildlife mitigation credit under this Agreement for estuary projects even if they evidence substantial wildlife habitat values. In the event a legal challenge is made concerning the adequacy, extent, or location of Willamette wildlife mitigation, BPA may in its discretion, and with ODFW's support, count habitat projects on the Oregon side of the estuary as mitigation that also benefits wildlife affected by the Willamette dams, unless the Parties have agreed to credit estuary projects against Bonneville Dam wildlife impacts.

G. BPA Funding of Wildlife Mitigation Projects

1. Willamette Wildlife Fund

Beginning in FY 2011 and extending through FY 2025, BPA shall make available funding for approved new projects in the amounts identified below. BPA will provide the funding on a project-by-project basis, subject to the commitments and limitations of this Agreement. All new projects, whether sponsored by ODFW or another entity, will be funded through the Willamette Wildlife Fund.

a. BPA will review each project and its constituent elements together—i.e., acquisition, planning, restoration, operation and maintenance, etc. Regardless of how BPA classifies its funding, the annual total available budget remains the sum of the commitments stated in section II.G.1 and II.G.2 and as adjusted in the manner allowed in section II.G.3. See **Attachment 6.**

b. FY 2011-2013: $2.5 million per year.

c. FY 2014-2025: $8 million per year.

d. The Parties shall determine what portion of this funding for new projects to dedicate to stewardship during the project selection process, and ODFW shall deposit funds BPA provides for stewardship in a long term operations, maintenance, and protection account ("**Stewardship Account**") that will become the property of ODFW and be managed and controlled by ODFW

solely for the long term protection of the properties protected under this Agreement.

i. ODFW shall hold the Stewardship Account in trust for wildlife and use the Stewardship Account, including the principal and all interest, investment, and other proceeds derived from investment of the principal, solely for long term operation, maintenance, and protection, activities that preserve or advance the conservation values of the properties purchased under this Agreement. ODFW shall develop a grant program using the Stewardship Account for this purpose, so that project proponents may implement this operation and maintenance.

ii. ODFW shall not make any use or expenditure of these monies for any purpose other than those identified in section II.G.1.d.i above. 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 return of all monies then in the Stewardship Account until ODFW reinstates all funds used in violation of this Agreement.

iii. The Parties shall allow the Tribes noted in section I.E to opt out of the grant program developed to distribute monies from the Stewardship Account. If a Tribe opts out, the Parties will establish alternative up front stewardship funding from the Willamette Wildlife Fund for that Tribe's projects. The amount of funding for the Tribe will take into account the number of acres it has under this Agreement and the per acre basis monies in the Stewardship Account for other entities' similarly-situated projects.

iv. ODFW shall provide an annual report to BPA on the Stewardship Account and, upon reasonable notice, ODFW shall provide BPA access to the records and documents necessary for BPA to determine whether the account was used for any purpose other than those identified in section II.G.1.d.i.

v. If funds in the Stewardship Account are inadequate to fulfill its purposes, BPA does not have an obligation to provide additional

funding. If the Parties agree that the amount in the Stewardship Account exceeds the amount needed to fulfill its purposes, then ODFW may spend such excess on additional activities that further protect, mitigate, and enhance fish and wildlife habitat in the Willamette Basin within the scope of this Agreement.

2. ODFW operation and maintenance Fund

Beginning in FY 2011 and extending through FY 2025, BPA shall make available operations and maintenance funding to ODFW to develop a more robust wildlife habitat mitigation management program, to implement the program outlined in this Agreement, as well as to operate and maintain wildlife habitat mitigation project lands currently operated by ODFW, to conduct restoration actions for properties under ODFW management, and to assist with the management of other properties acquired by others under ODFW's Willamette Basin Wildlife Mitigation contract (where ODFW agrees to do so) as funding allows, as follows:

a. FY 2011 and 2012: $837,000 per year.
b. FY 2013: $1.1 million.
c. FY 2014-25: $1.7 million per year.

This funding will be provided using BPA's cost reimbursable contracts typical to the fish and wildlife program, subject to the funding commitments and limitations of this Agreement.

3. Pre-scheduling and Rescheduling

Both Parties shall make a good faith effort to fully allocate and expend the funds outlined in sections II.G.1 and II. G.2 of this Agreement. In order 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., a "**rescheduling**", or can potentially be moved 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 budgets in Attachment 6 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 shall allow prescheduling future budgets and rescheduling unspent budgets if the adjustment complies with the amounts shown in Attachment 6.
c. The budget cap in each fiscal year is 120% of the original inflation-adjusted budget as shown in Attachment 6. This cap governs ODFW requests for prescheduling and rescheduling adjustments. The Parties may agree to adjust the 120% caps on the budget to better fulfill the purposes of this Agreement. In order to exceed a 120% cap, ODFW shall 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.

4. Operation and Maintenance Funding after FY 2025

BPA shall also provide continued funds for ODFW operation and maintenance from FYs 2026-2043 to help ODFW ensure the mitigation projects funded under this Agreement and managed by ODFW develop and maintain natural, native habitat characteristics and trend toward becoming self-sustaining. As provided in section II. G. 6, this will not include additional funds for operation and maintenance of habitat mitigation projects funded under this Agreement that were covered by BPA contributions to the Stewardship Account. ODFW will also use this funding to oversee the grants program under the Stewardship Account, as outlined in section II.G.1., and to provide the monitoring and protection activities that the Parties deem necessary to protect the real property interests funded under this Agreement. The Parties shall make reasonable efforts to negotiate this ODFW operation and maintenance funding plan before the expiration of this Agreement, starting from a base of $1.7 million annually (plus inflation as provided below), and

taking into account ODFW's future administration, maintenance, and enforcement needs. In the event that a long-term agreement is not developed, operation and maintenance funding will continue to be subject to the annual prioritization process under the Council's program.

5. ODFW's Use of Operation and Maintenance Fund

The Parties understand that ODFW may use the operation and maintenance fund from BPA under this Agreement for the following:

a. to pay for personnel, services and supplies, equipment, professional services, contracts and any other expense that ODFW determines is necessary to develop and implement a more robust wildlife habitat mitigation program, including pre-acquisitions costs;
b. to operate, maintain, monitor, evaluate, and restore wildlife habitat mitigation projects it and, provided that ODFW has agreed, in its sole discretion, to fund operation and maintenance on projects that others acquire under this Agreement;
c. to establish and facilitate the collaboration group; and
d. to operate and manage the Stewardship Account and all projects and programs associated with that fund.

6. Operation and Maintenance Funding for Projects Implemented by Other than ODFW

In general, any necessary operation and maintenance funding (including pre-acquisition costs, as well as post-acquisition restoration) for wildlife habitat mitigation projects funded under this Agreement and implemented by entities other than ODFW shall be included within the initial project funding application and counted in the Willamette Wildlife Fund provision (section G.1) above. The Parties encourage project funding proposals to include elements involving purchase of land (or interests in land), as well as expected restoration and operation and maintenance needs. However, while ongoing operations, maintenance, and restoration activities for such projects may continue after 2025 when this Agreement expires, the Parties structured the Stewardship Account in

section II.G.1.d.i to address those needs without further financial obligation from BPA (unless BPA, in its discretion, determines that the conservation values of its investments require additional protection above the level provided by the Stewardship Account).

7. Inflation

Beginning in FY 2015, each of the figures for acquisition and operation and maintenance funding in sections II.G.1 and II.G.2 above shall increase by 2.5% each year. BPA will add the inflation adjustment, compounded, as shown in Attachment 6, but will not subsequently adjust project budgets as the schedule of that work changes.

8. Relation to Acres Acquired

The Parties shall pursue cost sharing and other efficiencies so that the funds provided under this Agreement could result in acquiring more than 16,880 acres during the term of this Agreement. As a result, BPA will provide funding for projects as described above through 2025, even if the 16,880 land acquisition target is met earlier.

9. Other Funding Sources

The Parties shall actively encourage all project proponents to seek additional sources of funding from federal and state agencies, Tribes, private groups and others. Any such non-BPA funding that contributes to implementation of a project funded by BPA under this Agreement is in addition to (and not a substitute for) the funding from BPA by this Agreement.

10. Unexpended funds

The parties intend to expend all the funds provided in this agreement, except those held in trust in the Stewardship Account, by the end of FY 2025. If at the end of this Agreement funds remain unexpended, the Parties shall either extend the term of the Agreement up to five years or place the unexpended balance in the Stewardship Account.

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. General provisions. The Parties recognize that BPA funding of habitat mitigation projects under this Agreement will result in the project sponsor or other entities owning land, an interest in land, or restored land. Such project sponsors may include ODFW, other state or local governmental entities, tribal entities, non-governmental organizations and others. For projects where the sponsoring entity is the landowner, that entity shall ensure permanent protection of those lands for wildlife habitat mitigation in perpetuity as specified below. With that assurance in place, management of the acquired land, or interest in land—including restored areas is left to the land owner, subject to any conservation easement or management plans.

2. Specific protection mechanisms. All habitat acquisitions in fee or by easement that BPA funds to comply with this Agreement must include provisions for permanent protection and enforcement of those protections. For fee acquisitions where title is held by ODFW, or by an entity acquiring a real property interest with funds under this Agreement, the holder shall grant the United States of America, on behalf of BPA, a conservation easement based on the template provided in **Attachment 7**. For conservation easement acquisitions or restoration projects, the holder of the easement shall ensure that BPA obtains a third Party right of enforcement that includes the language provided in **Attachment 8, section II.B.3**.

3. ODFW will acquire all real properties without any warranties or representations from BPA. Where ODFW holds habitat acquisitions in fee, it shall be solely responsible for management of habitat, fish, wildlife and all other resources on that land, and ODFW has sole decision authority regarding use and management of those lands, subject to this Agreement; moreover, ODFW shall be responsible for all incidents of ownership of the property. Such incidents of ownership include, but are not limited to, hazardous waste response, cultural or historic resource mitigation or preservation, endangered species protection, noxious weed and invasive species response, and tort liability.

4. BPA may, in consultation with ODFW, substitute a land management entity for itself as the holder of a conservation easement on fee owned acquisitions or the entity holding a third Party right of enforcement on easement acquisitions.

5. Public use of protected lands. The Parties acknowledge the value of public recreational and educational use of lands protected under this Agreement. Once a project sponsor acquires land under this Agreement, ODFW may enter into agreements with the fee title holder or primary management authority for the purpose of addressing public uses of that land, without BPA review or approval. However, any such agreements must comply with Oregon law and not conflict with any conservation easements imposed or the conditions in this Agreement.

C. Adequacy and Support of Agreement

Oregon agrees that after BPA fulfills its total wildlife mitigation obligations under this Agreement, BPA will have permanently satisfied the federal wildlife mitigation duties for the Willamette dams under applicable law. As noted above, this commitment applies to all interested Oregon State agencies, boards, or commissions.

1. During the term of this Agreement, if Oregon submits recommendations or comments, or supports those of another entity, related to wildlife habitat in the Willamette in relation to Council Program amendments, then all such recommendations or comments shall follow and be intended to effectuate this

Agreement. Oregon shall cooperate in good faith in assisting BPA to address any allegations that BPA has not fulfilled its Northwest Power Act wildlife and wildlife habitat mitigation responsibilities for the Willamette dams whether those allegations arise before the Council, the Columbia Basin Fish and Wildlife Authority, any agency within the State of Oregon, the state and Federal courts, or in the press to the extent Oregon may do so without waiving Oregon's sovereign immunity or immunity under the Eleventh Amendment to the United States Constitution, and subject to constraints imposed under Oregon law.

2. Unless both Parties agree that there have been substantial and significant changes in applicable federal law or in the physical attributes of the Willamette River Flood Control Project, this Agreement completely fulfills the federal wildlife mitigation responsibility arising from the effects to wildlife or wildlife habitat from the construction, inundation, operation, and maintenance of the Willamette dams. 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 such substantial and significant changes have occurred. 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, operation, and maintenance of the Willamette dams.

D. 2000 ODFW MOA

This Agreement supersedes the 2000 ODFW MOA.

E. Land Acquisition and Management

Attachment 8 provides the details for how the Parties shall contract for, acquire, manage, and protect real property interests under this Agreement.

F. Non-Appropriation of ODFW Funds

ODFW's authority and obligation to make any payment or to incur any expense required to be made or undertaken by ODFW under this Agreement are contingent on ODFW receiving funding, appropriations, grant funds, expenditure limitations, allotments, or other expenditure authority sufficient to allow ODFW, in the exercise of its reasonable administrative discretion, to meet its obligations under this Agreement. Nothing in this Agreement may be construed as permitting any violation of Article XI, section 7, of the Oregon Constitution or any other law regulating liabilities or monetary obligations of the State of Oregon. ODFW represents that it has sufficient appropriations and expenditure limitations for the current biennium to make all payments and to cover all expenses contemplated by this Agreement that are to be paid or incurred in ODFW's current biennial budget period. ODFW shall employ its best, good-faith efforts to request and seek funding, appropriations, grant funds, expenditure limitations, allotments, or other expenditure authority sufficient to allow ODFW to perform its obligations throughout the term of this Agreement. ODFW shall take no action that would constitute a purposeful means of impairing or terminating ODFW's funding or expenditure authority so as to jeopardize ODFW's ability to perform its payment obligations throughout the term of this Agreement.

G. Public Records

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

IV. Administrative Provisions

A. Good Faith Implementation

This Agreement rests on bargained-for consideration. The Parties shall work together in partnership 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 shall 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 organization, and other interested or affected State of Oregon 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 the Willamette Valley 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 as partners fostered by the Agreement.

B. Periodic Review

The Parties agree to review this Agreement including the attachments, and any issues concerning implementation of the Agreement, every five years. At any time, either Party may propose an amendment of the Agreement.

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 or management of the program and projects under this Agreement through informal discussions, they shall 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 shall select a mediator, or if they are unable to select a mediator, each Party shall select a mediator and the two selected will choose a third mediator who shall be the sole mediator. The Parties shall use 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 shall each cover their own costs of dispute resolution and share equally the costs of mediation.

D. Term of Agreement

This Agreement provides funding through September 30, 2025, as provided in sections II.G.1 and II.G.2. Except as specifically noted in sections II.G.4.(Limited ODFW operation and maintenance after 2025), III.C.(Mutually Agreed Substantial and Significant Changes in the Project or Law), and IV.H (Severability), this Agreement

permanently satisfies the federal wildlife mitigation duties for the Willamette dams under applicable law.

E. Applicable Law

Federal law governs this Agreement and any action, whether mediated or litigated, brought or enforced.

F. Authority

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

G. Indian Trust and Treaty Rights

This Agreement provides for the voluntary participation of Indian Tribes and the general public in proposing particular properties to be managed for fish and wildlife protection, mitigation, and enhancement. Nothing in this Agreement:

- supersedes or otherwise affects any federal, state, or tribal statute, law, ordinance, administrative rule, or regulation;
- creates, implies, alters, diminishes, modifies, expands, or extends the legal rights, authority, or jurisdiction of any Indian Tribe; or
- alters in any way Tribal legal rights, authorities, or jurisdiction related to wildlife or wildlife 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 shall consider that as constituting a material change and shall negotiate as provided in section IV.C, Dispute Resolution. If such negotiations do not result in satisfactory modifications, then either Party may withdraw from this Agreement.

I. Entire Agreement

This Agreement represents the entire Agreement between the Parties concerning federal habitat protection, mitigation, and enhancement commitments for wildlife in the Willamette Basin, as described in section I. A. 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. This Agreement may be amended only by mutual written amendment signed by each Party.

SIGNATURES:
Signed in Portland, Oregon, on this 22nd day of October, 2010

FOR THE BONNEVILLE POWER ADMINISTRATION;

Stephen J. Wright
Administrator and Chief Executive Officer

FOR THE STATE OF OREGON;

Theodore R. Kulongoski
Governor, State of Oregon

LEAD REPRESENTATIVE FOR THE STATE OF OREGON;

Roy E. Elicker II
Director, Oregon Department of Fish and Wildlife

Attachment 1: National Marine Fisheries Service Concurrence Letter

UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
Northwest Region
7600 Sand Point Way N.E., Bldg. 1
Seattle, WA 98115

October 15, 2010

F. Lorraine Bodi
Acting Vice President
Environment, Fish and Wildlife
Bonneville Power Administration
P.O. Box 3621
Portland, Oregon 97208-3621

G. Witt Anderson
Director, Programs Directorate
U.S. Army Corps of Engineers, Northwestern Division
P.O. Box 2870
Portland, Oregon 97208-2870

Dear Ms. Bodi and Mr. Anderson:

NOAA's National Marine Fisheries Service (NMFS) has reviewed the subject Memorandum of Agreement (Wildlife MOA) between the State of Oregon and Bonneville Power Administration (BPA). Based on our legal jurisdiction, NMFS focused on the anadromous fish mitigation components of the Wildlife MOA. NMFS supports the elements of the Wildlife MOA that provide for anadromous fish habitat protection and restoration.

As context for this MOA, in July, 2008, NMFS issued a Biological Opinion (Opinion) on the Willamette River Basin Flood Control Project, operated and managed by the U.S. Army Corps of Engineers (the Corps), BPA, and U.S. Bureau of Reclamation, collectively known as the Action Agencies. The two anadromous fish species listed under the Endangered Species Act (ESA) that were most affected by the proposed action were Upper Willamette River (UWR) Chinook salmon and UWR steelhead. One of the required measures in the Reasonable and Prudent Alternative (RPA), identified as RPA 7.1, requires the Action Agencies to establish and carry out a comprehensive habitat protection and restoration program in the Willamette basin, and to fund projects under this program. RPA 7.1.3 requires completion of at least two projects by 2010, and additional projects each year from 2011 through the term of the Opinion (2023). This RPA measure allows for large projects that might require several years to complete to be funded over a multi-year period.

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The Wildlife MOA describes the federal mitigation credit that Oregon acknowledges, including the credit for acquisition of the Wildish property at the confluence of the Coast and Middle Fork Willamette rivers. BPA has indicated that this acquisition will be funded contingent on finalizing the Wildlife MOA and receiving NMFS concurrence on RPA7.1.3 credit for the acquisition and restoration.

Wildish is a 1271 acre acquisition proposed to close in late October. This property on the Middle Fork Willamette supports one of the UWR Chinook salmon core populations. The property lies within an anchor habitat identified by the Willamette Biological Opinion Habitat Technical Team as a highest priority area. Four of 11 high priority restoration actions identified in the Corps' recent Floodplain Restoration Study are located on the property. NMFS recognizes that acquiring and restoring this property has both fish and wildlife habitat benefits. The Nature Conservancy (TNC) will own the property, and the United States will hold a perpetual conservation easement over it to ensure the property endures as fish and wildlife habitat. In addition, TNC, local governmental entities and the Corps are conducting a feasibility study on restoration actions in the Willamette River Basin including actions on the Wildish property. With authorization and appropriations, the Corps could participate with a cost-shared sponsor such as TNC in restoration actions on the property. BPA will provide some of the restoration funding under its existing contract with TNC.

We agree with the Action Agencies that the protected riparian, floodplain, and instream habitat value of the property that is currently degraded and needs to be restored, should be given four years' credit under the Willamette Opinion. In order to fully maximize the potential benefits as fish habitat, restoration of the property needs to be completed. NMFS included restoration as part of its consideration of four years' credit for Wildish. To address this need for restoration, NMFS understands that a number of parties may be funding the work. However, no additional credit under the Willamette Opinion will be given to BPA for restoration projects completed on the Wildish property.

In addition to the Wildish property acquisition, BPA has purchased, or is nearing completion of purchase, other properties in 2010 (known as Berggren Watershed Conservation Area (previously Hunsaker) and Melevin). Further, BPA has completed habitat restoration work on Green Island to meet the RPA 7.1.3 obligation of "at least 2 projects" by 2010. NMFS will consider these three projects collectively as fulfilling the RPA 7.1.3 obligation for habitat restoration projects for two years.

NMFS acknowledges and supports Section F of the Wildlife MOA, "Dual Fish and Wildlife Benefits." To satisfy RPA 7.1.3 commitments for 2011 through 2023, we understand that BPA will fund these "dual benefit" projects in addition to providing dedicated funding under the Opinion. Section F of the Wildlife MOA notes that many of the protection and restoration projects funded under the Wildlife MOA will benefit both wildlife and fish species. It requires BPA and the State of Oregon to ensure that at least 10% of the funding provided under the MOA benefits both wildlife and ESA-listed anadromous fish species. NMFS recognizes the value of these provisions and supports efforts to achieve fish benefits from protection and restoration funded by the Wildlife

MOA. NMFS is in the process of exchanging letters with BPA and the Corps regarding future funding and implementation commitments under RPA 7.1.3.

As all parties in the Willamette Basin move forward to protect and restore habitat for ESA-listed fish and other species, NMFS supports efficient use of funds to achieve objectives of the NMFS' Opinion and RPA. We encourage all parties to take an ecosystem approach to habitat restoration and to use cost-sharing and efficiencies where possible to realize the maximum benefit to habitat and listed fish.

We look forward to working with BPA, the Corps, the State of Oregon, the Tribes, and other interested groups as we move forward with habitat protection and restoration in the basin.

Sincerely,

William W. Stelle, Jr.
Regional Administrator

cc: Bruce Suzumoto

Attachment 2: Army Corps of Engineers Concurrence Letter

DEPARTMENT OF THE ARMY
CORPS OF ENGINEERS, NORTHWESTERN DIVISION
PO BOX 2870
PORTLAND OR 97208-2870

OCT 18 2010

Programs Directorate

Ms. F. Lorraine Bodi
Bonneville Power Administration
Post Office Box 3621
Portland, Oregon 97208-3621

Dear Ms. Bodi:

The U.S. Army Corps of Engineers (Corps) appreciates the opportunity to review the Willamette River Basin Memorandum of Agreement Regarding Wildlife Habitat Protection and Enhancement between the State of Oregon and the Bonneville Power Administration (Agreement). The Corps supports the ecosystem approach adopted in this Agreement and the Willamette Basin habitat benefits that will accrue as a result.

As the Agreement acknowledges, the Corps was authorized by Congress to construct, operate and maintain the Willamette River Basin Flood Control Project dams for multiple uses including flood control, recreation, fish and wildlife, navigation and power generation. The Corps, with Bonneville Power Administration, and the Bureau of Reclamation (collectively the Action Agencies) completed Endangered Species Act (ESA) consultation on the effects of operating these projects on listed species under the jurisdiction of the National Marine Fisheries Service (NMFS) and the U.S. Fish and Wildlife Service (USFWS).

The Agreement includes provisions that will effectively address Action Agency responsibilities called for in the NMFS Biological Opinion. While the Corps is not a Party to the Agreement, the Corps is committed to meeting its ESA responsibilities and views the Agreement as step toward accomplishment of this objective.

The point of contact for the Corps is Mr. David Ponganis at (503) 808-3828.

Sincerely,

W. F. Anderson

Witt Anderson
Director, Programs

Attachment 3: List of Completed Wildlife Projects

Property	Hydropower Project	Acres
John Palensky WMA	Hills Creek	417
Willow Creek	Hills Creek	329
Buford Park Addition	Dexter	42
Big Island	Cougar	108
Tualatin River NWR	Detroit	227
Canby Landing	Big Cliff	23
Muddy Creek/Mary's River	Foster	222
Green Island	Lookout Point	856
Willow Creek Additions I	Lookout Point	165
Coburg Ridge	Lookout Point	1,244
Zena Complex	Detroit	1,797
Lonestar Ranch	Detroit	199
Yamhill Oaks	Detroit	272
Little Willamette	Detroit	198
Buena Vista	Detroit	118
Baskett Butte	Detroit	150
Willow Creek Additions II	Lookout Point or Hills Creek	10
Berggren Watershed Conservation Area	Cougar	92
Tualatin NWR Additions	Detroit	230
Total		6,699

Attachment 4: Pending FY 2010 Mitigation

Property	Hydropower Project	Acres
Wildish	Hills Creek	1,271
Trappist Abbey	Green Peter-Foster	1,310
Yamhill Oaks Addition	Detroit	319
Green Island Addition	Lookout Point-Cougar	58
Total		2,958

Attachment 5: Action Agency RPA 7.1.3 Implementation Letter

Department of Energy

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

ENVIRONMENT, FISH AND WILDLIFE

October 15, 2010

In reply refer to: KE-4

Mr. Will Stelle Jr., Regional Administrator
Northwest Region
National Oceanic and Atmospheric Administration
7600 Sand Point Way NE
Seattle, WA 98115-0070

Dear Mr. Stelle:

This letter describes for the National Oceanic and Atmospheric Administration's National Marine Fisheries Service (NMFS) how the Action Agencies[1], specifically the Bonneville Power Administration (BPA) and the U.S. Army Corps of Engineers (Corps), will implement the habitat Reasonable and Prudent Alternative (RPA) 7.1.3 in the Endangered Species Act Biological Opinion on the Willamette River Basin Flood Control Project (the Willamette Biological Opinion). The plan described in this letter addresses how the Action Agencies will implement RPA 7.1.3, and does not cover other RPA measures in the Opinion. BPA has sent this letter on behalf of the Action Agencies, all of whom concur in it.

RPA 7.1.3 is part of a comprehensive habitat restoration program described in RPA 7.1 to "protect and restore aquatic habitat to address limiting habitat factors for ESA-listed fish."[2] The Action Agencies will carry out this habitat restoration during the term of the Willamette Biological Opinion in collaboration with NMFS and the U.S. Fish and Wildlife Service (FWS).[3]

RPA 7.1.3 states:

> By 2010, the Action Agencies will complete at least two of the highest priority projects that should result in significant habitat improvement for listed fish species. The Action Agencies will complete additional habitat projects each year from 2011 through the term of this Opinion. Alternatively, larger projects that might require several years to complete could be funded over a multi-year period instead of funding individual, smaller projects each year. NMFS will inform the Action Agencies whether they agree with the decision to fund and carry out these projects.[4]

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[1] The Action Agencies for the Willamette Biological Opinion include BPA, the Corps, and the Bureau of Reclamation. The Bureau of Reclamation is not directly involved in RPA Action 7.1.
[2] Willamette Flood Control Project Biological Opinion, RPA 7.1 at 9-76 (July 11, 2008).
[3] *Id.* RPA 7.1.2 at 9-77.
[4] *Id.* RPA 7.1.3 at 9-78.

The FWS also issued a biological opinion on the operation of the Willamette flood control project. The FWS concluded that operating the project would not jeopardize Oregon chub or bull trout, provided the Action Agencies implemented the habitat measures called for in RPA 7.1.[5]

RPA 7.1.3 Compliance in 2010

Under the Willamette Biological Opinion the Corps started the Willamette Action Team for Ecosystem Restoration (WATER), a forum to coordinate project recommendations from federal, state, and tribal governments to implement the Willamette Biological Opinion. A technical subgroup under WATER, the Habitat Technical Team, reviews potential habitat protection and restoration projects for funding under RPA 7.1.3.

During 2009 and 2010, the Habitat Technical Team was getting organized and developing program information and project selection criteria. It was not ready to review projects for 2010 funding. After discussing these circumstances with NMFS, BPA solicited and received informal technical review from the Habitat Technical Team on four projects.

In 2010, BPA implemented three habitat protection and restoration projects with a fourth planned. The four projects are:

- Berggren Watershed Conservation Area, also known as Hunsaker, a 92-acre acquisition on the McKenzie River with significant restoration potential. The property sits across the river from Big Island, a large conservation property. It is also adjacent to protected habitat that is owned and managed by Lane County Parks. Oregon chub and Upper Willamette River (UWR) Chinook salmon make extensive use of the off-channel habitat on Big Island, and the McKenzie River Trust, the organization that owns and will manage restoration of the project, plans to create a larger, contiguous riparian area that reaches across both banks of the river and that protects and enhances side-channel and mid-channel island habitats.
- Melevin, a 58-acre acquisition proposed to close in October 2010. It lies near the confluence of the McKenzie and Willamette rivers with significant restoration potential. With restoration, the property will generate off-channel habitat for UWR Chinook salmon and Oregon chub and create better floodplain connectivity with both the mainstem Willamette and the historic McKenzie River channel.
- Green Island, a restoration project on an island, acquired with BPA funding and managed by the McKenzie River Trust, in the McKenzie River near the confluence with the Willamette River. The project involved removal of a levee and replanting with native vegetation to allow annual flooding and restore historic ecosystem

[5] Biological Opinion on the Continued Operation and Maintenance of the Willamette River Basin Project and Effects to Oregon Chub, Bull Trout, and Bull rout Critical Habitat Designated under the Endangered Species Act pp. 168, 170 (July 11, 2008) http://www.nwp.usace.army.mil/pm/programs/biop/docs/USFWS_WillametteBO-Final_071108.pdf

functions. UWR Chinook salmon and Oregon chub are present in the waters surrounding the property.

- Wildish, a 127± acre acquisition proposed to close in October. This property on the Middle Fork Willamette supports an UWR Chinook salmon core population. The property lies within an anchor habitat identified by the Habitat Technical Team as a highest priority area. Four of 11 high priority restoration actions identified in the Corps' recent Floodplain Restoration Study are located on the property, which also supports Oregon chub.

With these four significant projects, the Action Agencies have carried out RPA 7.1.3 regarding completion of at least two of the highest priority projects by 2010. After discussing with NMFS the acreage, riverine habitat, riparian areas, and flood plain habitat involved in these projects, and considering their restoration potential, the Action Agencies propose to apply crediting for RPA 7.1.3 as follows: Two years' of credit for Berggren, Melevin, and Green Island; four years' credit for Wildish acquisition and restoration as provided in NMFS' October 15, 2010, letter regarding the Willamette River Basin Memorandum of Agreement regarding Wildlife Habitat Protection and Enhancement between the State of Oregon and BPA (Willamette Wildlife MOA).

RPA 7.1.3 Implementation in 2011-2023

For the remainder of the term of the Willamette biological opinion, the Action Agencies will implement RPA 7.1.3 as follows.

BPA is negotiating the MOA with the State of Oregon to address federal wildlife habitat protection and enhancement in the Willamette Basin and to help address fish habitat restoration called for in RPA 7.1.3. The parties to the agreement commit to using an ecosystem approach to mitigation, which means that wildlife projects under the agreement are expected in many cases to provide benefits for fish as well. The draft agreement provides that at least 10% of the BPA project funding must provide significant habitat protection or restoration benefitting ESA-listed anadromous fish species under the NMFS Willamette Biological Opinion. BPA believes, however, that BPA funding for dual benefits projects that benefit both fish and wildlife will likely exceed 15% through 2025, the term of the agreement.

The draft MOA also provides that beginning in 2014 and every third year afterward a Willamette Wildlife MOA collaboration group will assess the cumulative rate of dual benefits. NMFS and the Action Agencies will then meet with Oregon Department of Fish and Wildlife to determine:

- If, and to what extent the dual benefits exceed 15%; and
- The appropriate adjustment, if any, of out-year planning budgets described below to reflect the efficiencies and savings gained by the value of dual benefits above 15%.

In addition to the funding proposed for the agreement with Oregon, BPA will provide $500,000 annually for FYs 2011, 2012, 2013 and $800,000 annually through FY 2023 for habitat restoration and protection projects recommended by the Habitat Technical Team using the

process approved by the Independent Scientific Review Panel,[6] under RPA 7.1.3. These funds will support habitat restoration and protection projects reviewed by the Habitat Technical Team as high priorities to address limiting factors for ESA-listed fish species that were the subject of the Willamette Biological Opinions (NMFS and FWS). The Corps will also provide funding through appropriate programs as authorities and appropriations are made available. Funds from other sources may also be available for cost-sharing these projects.

In the event BPA and Oregon do not sign the Willamette habitat agreement, the Action Agencies will reengage NMFS to discuss appropriate actions regarding the Wildish acquisition and habitat protection and restoration obligations under 7.1.3 for the remainder of the term of the Biological Opinion. Crediting for the three completed habitat protection and restoration projects will not be impacted; in other words, the Action Agencies will have met the RPA 7.1.3 obligation of "complete at least two of the highest priority projects" by 2010.

The Action Agencies request a letter from NMFS confirming it agrees that the Action Agencies will comply with RPA 7.1.3 by executing this plan to "fund and carry out these projects" as described above for 2010 and for specific funding for multi-year and future habitat projects. [7]

Sincerely,

Lorri Bodi

F. Lorraine Bodi
Acting Vice President, Environment, Fish and Wildlife

cc:
Mr. Witt Anderson, U.S. Army Corps of Engineers
Mr. Tim Personius, Bureau of Reclamation
Mr. Richard Hannan, U.S. Fish & Wildlife Service
Mr. Barry Thom, NOAA Fisheries
Mr. Bruce Suzumoto, NOAA Fisheries
Mr. Roy Elicker, Oregon Department of Fish and Wildlife

6 Final Review of Willamette Bi-Op Habitat Restoration (#2009-012-00) (Aug. 25, 2010) http://www.nwcouncil.org/library/isrp/isrp2010-29.pdf
[7] *Id.* RPA 7.1.3 at 9-78.

UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
Northwest Region
7600 Sand Point Way N.E., Bldg. 1
Seattle, WA 98115

October 15, 2010

F. Lorraine Bodi
Acting Vice President
Environment, Fish and Wildlife
Bonneville Power Administration
P.O. Box 3621
Portland, Oregon 97208-3621

G. Witt Anderson
Director, Programs Directorate
U.S. Army Corps of Engineers, Northwestern Division
P.O. Box 2870
Portland, Oregon 97208-2870

Dear Ms. Bodi and Mr. Anderson:

NOAA's National Marine Fisheries Service has reviewed the subject plan contained in the letter from the Action Agencies dated October 15, 2010 (enclosed), and concurs that the Action Agencies will comply with RPA 7.1.3 by executing the plan as specified in the Action Agency letter.

Sincerely,

for William W. Stelle, Jr.
Regional Administrator

Enclosure

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Attachment 6: Inflation Adjusted Budgets

Attachment 6
Inflation Adjusted Budgets

	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021	2022	2023	2024	2025	total
ODFW Operation & Maintenance (O&M) fund BPA Project # 2011-XXX-XX	$837,000	$837,000	$1,100,000	$1,700,000	$1,700,000	$1,700,000	$1,700,000	$1,700,000	$1,700,000	$1,700,000	$1,700,000	$1,700,000	$1,700,000	$1,700,000	$1,700,000	$23,174,000
1.025	$0	$0	$0	$0	$42,500	$86,062	$130,714	$176,482	$223,394	$271,479	$320,766	$371,285	$423,067	$476,144	$530,547	$3,052,440
inflation adjusted totals	$837,000	$837,000	$1,100,000	$1,700,000	$1,742,500	$1,786,063	$1,830,714	$1,876,482	$1,923,394	$1,971,479	$2,020,766	$2,071,285	$2,123,067	$2,176,144	$2,230,547	$26,226,440
120% max	*$1,004,400*	*$1,004,400*	*$1,320,000*	*$2,040,000*	*$2,091,000*	*$2,143,275*	*$2,196,857*	*$2,251,778*	*$2,308,073*	*$2,365,775*	*$2,424,919*	*$2,485,542*	*$2,547,680*	*$2,611,372*	*$2,676,657*	
Willamette Wildlife Fund BPA Project # 2011-ZZZ-ZZ	$2,500,000	$2,500,000	$2,500,000	$8,000,000	$8,000,000	$8,000,000	$8,000,000	$8,000,000	$8,000,000	$8,000,000	$8,000,000	$8,000,000	$8,000,000	$8,000,000	$8,000,000	$103,500,000
1.025	$0	$0	$0	$0	$200,000	$405,000	$615,125	$830,503	$1,051,265	$1,277,547	$1,509,486	$1,747,223	$1,990,904	$2,240,676	$2,496,693	$14,364,424
inflation adjusted totals	$2,500,000	$2,500,000	$2,500,000	$8,000,000	$8,200,000	$8,405,000	$8,615,125	$8,830,503	$9,051,265	$9,277,547	$9,509,486	$9,747,223	$9,990,904	$10,240,676	$10,496,693	$117,864,424
120% max	*$3,000,000*	*$3,000,000*	*$3,000,000*	*$9,600,000*	*$9,840,000*	*$10,086,000*	*$10,338,150*	*$10,596,604*	*$10,861,519*	*$11,133,057*	*$11,411,383*	*$11,696,668*	*$11,988,085*	*$12,288,812*	*$12,596,032*	

Grand Total (ODFW O&M and Willamette Wildlife Fundincluding inflation) $144,090,864

Attachment 7: Conservation Easement Template

AFTER RECORDING, RETURN TO:
Bonneville Power Administration
Real Property Services, TERR
Re: [Insert BPA Tract No.]
P.O. Box 3621
Portland, OR 97208-3621

Abbreviated legal description (full legal description in Exhibit A):
[INSERT HERE]

Approx. Acres: [INSERT ACRES]

Summary of important features: [INSERT HERE QUICK LIST OF IMPORTANT FEATURES THAT WERE PRIMARY REASONS FOR PURCHASE, EG, "Riparian habitat and uplands along X creek designated as critical habitat for ESA-listed species Y"]

DEED OF CONSERVATION EASEMENT

THIS DEED OF CONSERVATION EASEMENT is executed this ____ day of _____, 20__, by and between the State of Oregon, acting by and through its Department of Fish and Wildlife, ("**Grantor**"), in favor of the United States of America, acting by and through the United States Department of Energy, Bonneville Power Administration, based in Portland, Oregon (""**BPA**"). Grantor and BPA may be referred to individually as "**Party**" and collectively as "**Parties**."

RECITALS

A. Grantor's legislative mandate is to preserve, protect, and perpetuate wildlife and wildlife habitat for the citizens of Oregon. ORS § 496.012. Grantor implements this mandate through the Oregon Conservation Strategy and the Habitat Mitigation Policy.

B. BPA is a federal agency within the U.S. Department of Energy having obligations under the Pacific Northwest Electric Power Planning and Conservation Act ("**Northwest Power Act**"), 16 U.S.C. §§ 839-839h, to protect, mitigate, and enhance fish and wildlife and their habitat 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 Northwest Power Act and the Fish and Wildlife Program ("**Program**") adopted by the Pacific Northwest Electric Power Planning and Conservation Council ("**Council**") under subsection 4(h) (16 U.S.C. § 839b(h)) of the Northwest Power Act (collectively referred to as "**Northwest Power Act obligations**").

C. In the Willamette River basin of Oregon, BPA performs its Northwest Power Act obligations to compensate for the construction and inundation impacts of the FCRPS Willamette Basin projects through a Council-recommended "**Willamette Basin Mitigation Program**," in part by partially or wholly funding the acquisition of real property interests, primarily fee title or perpetual conservation easements, to secure permanent protection and restoration of important fish and wildlife habitat.

D. BPA has the authority under the Northwest Power Act, 16 U.S.C. §§ 839b(h) and 839f(a), the Federal Columbia River Transmission System Act, 16 U.S.C. § 838i(b), or the Bonneville Project Act, 16 U.S.C. §§ 832a(c)-(f), to acquire real property and assist in the acquisition and transfer of real property.

E. BPA also has obligations under the Endangered Species Act ("**ESA**"), 16 U.S.C. §§ 1531-1544, including but not limited to specific obligations identified in the National Marine Fisheries Services' 2008 Willamette Project Biological Opinion ("**NMFS' Willamette Biological Opinion**") to continue implementing the Willamette Basin Mitigation Program and to complete additional habitat protection and restoration projects (collectively referred to as "**ESA obligations**"), implemented under the "Willamette BiOp Habitat Restoration Program."

F. Grantor and BPA entered into a programmatic Memorandum of Agreement, dated [MONTH, DAY], 2010 ("**MOA**"), in which BPA agreed to fund the acquisition by Grantor of real property interests to permanently protect and enhance important fish and wildlife habitat in the Willamette Basin, where it either currently exists or at one time existed, in exchange for supporting BPA's partial fulfillment of Northwest Power Act and ESA obligations, and in exchange for Grantor conveying to the United States either a conservation easement (for fee acquisitions) or third Party rights of enforcement, entry, and inspection (for conservation easement acquisitions).

G. Grantor, operating under the MOA and with BPA's funds and approval, has acquired fee title ownership of certain real property, known as the [INSERT NAME OF PROPERTY] (the "**Protected Property**"), situated in [INSERT COUNTY], Oregon, and now desires to convey a conservation easement over the Protected Property to the United States.

IN CONSIDERATION OF THE FOREGOING RECITALS, THE PARTIES AGREE AS FOLLOWS:

I. CONVEYANCE AND CONSIDERATION

Grantor hereby voluntarily conveys to the United States of America and its assigns, as a perpetual and irrevocable real property interest, an easement for conservation purposes (the "**Conservation Easement**"), created and implemented under applicable state and federal law, including Oregon Revised Statutes §§ 271.715 to 271.795, over, under, upon, and across the Protected Property, situated in [INSERT COUNTY], State of Oregon, legally described in **Exhibit A** ("**Legal Description of the Conservation Easement**"), and shown in **Exhibit B** ("**Aerial Photo of the Conservation Easement**"), free of encumbrances except as specifically set forth in **Exhibit C** ("**Agreed-Upon Encumbrances**"). The true consideration for this conveyance is [INSERT HERE $ AMOUNT, WHICH SHOULD BE THE TOTAL PURCHASE PRICE PROVIDED BY BPA IN ESCROW] provided by BPA to Grantor to acquire fee title ownership of the Protected Property, and other good and valuable consideration.

II. CONSERVATION PURPOSE AND VALUES

A. Conservation Purpose

It is the purpose of this Conservation Easement ("**Purpose**") to protect the Conservation Values (defined in Section II.B, below) in perpetuity. Grantor's (and Grantor's successors and assigns, hereinafter impliedly included with reference to Grantor) use of, or activities on, the Protected Property shall comply with the terms of this Conservation Easement, not harm or interfere with any of the Conservation Values, and allow for the enhancement of the Conservation Values through active or natural restoration processes, or both, and for reasonable and appropriate public use. In the event that there is a conflict between the Grantor's uses or activities and the Purpose of this Conservation Easement, the Purpose must be construed broadly. In agreeing to fund this purchase, BPA acknowledges that the management plan for the Protected Property described in Article V of this Conservation Easement and submitted by Grantor and approved by BPA fundamentally supports wildlife habitat mitigation in the Willamette Valley. Both Parties intend a long term collaborative relationship that respects the legitimate authority of BPA to protect the conservation values of the Protected Property, and of Grantor to engage in routine and regular management decisions implementing the management plan.

B. Conservation Values

The Protected Property, in its present state, comprises approximately [INSERT ACRES] including [INSERT SUMMARY OF IMPORTANT FEATURES, *e.g.*, "riparian forest, floodplain, and side channel habitat important to ESA-listed fish species, immediately adjacent to and upstream of 'Big Island,' a 100-plus-acre-complex owned and managed by the Grantor for conservation"]. The Protected Property possesses "**Conservation Values**" consisting of "significant natural, aesthetic, scientific and educational" values

that are part of a "relatively natural habitat of fish, wildlife, or plants or similar ecosystem" as that phrase is used in Section 170(h)(4)(A)(ii) of the Internal Revenue Code); and "natural, scenic, or open space" values, as those terms are used in Oregon Revised Statute § 271.715; and include important species, habitat, and other important ecosystem attributes protected under the ESA, NMFS' Willamette Biological Opinion, the Council's Program, and the Oregon Conservation Strategy. The Conservation Values of the Protected Property that either existed or currently exist specifically include the following:

> [INSERT DESCRIPTION OF PROPERTY, INCLUDING WILDLIFE VALUES, PROPOSED RESTORATION ACTIVITIES, AND OTHER IMPORTANT FEATURES AS DESCRIBED IN THE PROJECT PROPOSAL FORWARDED TO BPA AS PART OF THE PROJECT APPROVAL PROCESS DESCRIBED IN THE MOA, SECTION E 1. THROUGH E 7.]

The Conservation Values may periodically fluctuate or trend toward long-term change, due to either natural events such as wildfire, floods, interdecadal climate events, and long-term climate change or active restoration activities

III. PERMITTED AND PROHIBITED USES

A. Permitted Uses

Grantor reserves, for itself and its successors and assigns, the right to use the Protected Property in any and all ways which fulfill the Purpose of this Conservation Easement (Section II.A) and which are not otherwise prohibited or limited by the Conservation Easement.

B. Prohibited Uses.

Prohibited uses of the Protected Property include those generally listed below. As stated in the Purpose (Section II.A), however, Grantor's use of, or activities on, the Protected Property must not harm or interfere with any of the Conservation Values, and thus the Parties acknowledge that the list below is not exhaustive. Except as otherwise provided herein or authorized in the approved management plan described in Article V, the following uses are prohibited:

1. All residential, commercial, or industrial uses of the Protected Property;

2. Division, partition, subdivision, or any other form of de facto subdivision of the Protected Property. The Protected Property may not be sold, transferred, exchanged, or otherwise conveyed except as a single property in its current configuration, subject to the restrictions on conveyance provided in Section VI.B below;

3. Using any part of the Protected Property as part of the gross area of other property not subject to this Conservation Easement for the purposes of determining

density, lot coverage, or open space requirements under otherwise applicable laws, regulations or ordinances controlling land use and building density;

4. Depositing trash, ashes, garbage, and waste, hazardous or toxic waste, inoperable vehicles, bio-solids or any other material, except as allowed under applicable federal, state, and local laws;

5. With the approval of the State Land Board[5], excavating, dredging, or removing loam, gravel, soil, rock, minerals, sand, hydrocarbons or other materials;

6. Otherwise altering the general topography and hydrology of the Protected Property, including but not limited to building of roads, ditches, levees, berms, dikes, and flood control work; except for work related to habitat management, restoration, and enhancement, as identified and approved in the management plan, and/or other agreement between the Parties;

7. Granting any easement, lien, or other property interest for any purpose, in whole or part, (including but not limited to water rights, multi-year leases, and licenses), or any other right to use the Protected Property for any purpose without the written consent of BPA;

8. Placement of any signs or billboards, except signs stating the conditions of access to the Protected Property, property identification signs, boundary markers, directional signs, signs posting the Protected Property against trespass, memorial plaques, interpretive signage and temporary signs indicating that the Protected Property is for sale may be posted; and

9. Any other use that the Grantor and BPA agree has a material negative impact on one or more of the Conservation Values

IV. RIGHTS CONVEYED TO BPA

A. General Rights

BPA is the acquiring federal agency having jurisdiction and control over the Conservation Easement. Therefore, in addition to any other identified right in this Conservation Easement, BPA has the right to:

1. Access and inspect the Protected Property at all reasonable times upon reasonable notice (which may be by phone or electronic mail) to determine compliance with this Conservation Easement.

2. Prevent any activity on the Protected Property inconsistent with this Conservation Easement, the MOA, or any management plan developed and adopted by the

[5] Applicable for easements granted by Oregon only; all others should expressly prohibit excavating without further qualification.

Parties pursuant to the terms of the MOA, and to require the restoration of areas or features of the Protected Property that are damaged by any inconsistent use or activity (see Section VI.E, Enforcement).

3. Ensure the Grantor does not sell, transfer, exchange, or otherwise convey the Protected Property, nor assign any rights, without following the procedures outlined in the MOA and this Conservation Easement.

4. Should the Grantor fail to do so, retain and maintain the right to use any and all of the water rights associated with the Protected Property, and to protect those rights from threat of abandonment or forfeiture under relevant law. BPA may, after providing 90 days' written notice to the Grantor, enter upon the Protected Property and take actions reasonably necessary to maintain the validity of the water rights.

B. Future Negotiations for Transmission Right-of-Way Easement. If BPA, after conducting necessary environmental reviews, determines that a transmission right-of-way easement is necessary or appropriate on any land where it has funded all or a significant portion of the acquisition of fee interest, ODFW shall negotiate a perpetual transmission right-of-way easement with BPA. BPA represents that any such transmission right-of-way easement will only include transmission lines, poles, and structures (*i.e.*, will not include substations); ancillary communication and transmission equipment appurtenant to those transmission lines, poles, and structures; and access roads only where reasonably necessary. Moreover, a condition of siting a new transmission easement on the mitigation property is that the facility must not have permanent, long-term significant effects on the conservation values protected with the underlying acquisition.

BPA shall initiate any such negotiation by making a written request to ODFW to begin negotiations, and by providing draft transmission right-of-way easement language. Parties shall meet within 45 business days of the postmark or e-mail date to begin in-person negotiations. In the negotiations and the final transmission right-of-way easement, BPA shall, at a minimum:

1. Recognize the purposes for which the underlying fee or conservation easement was acquired.

2. Fund any necessary appraisal to ensure that the fair market value of the transmission right-of-way easement was captured in the agency's contribution or proportionate contribution to the fee title acquisition.

3. Use reasonable efforts to accommodate ODFW's preferences for siting any transmission facilities.

4. Use reasonable efforts to accommodate ODFW's preferences for siting, designing, using, and maintaining any necessary access road(s).

5. Fund appropriate mitigation measures identified during negotiations or as part of the environmental analysis for the transmission right-of-way under NEPA, the ESA, the Clean Water Act, or any other applicable state or federal laws.

V. AFFIRMATIVE OBLIGATIONS

A. Affirmative Management Obligations

Grantor will ensure that the Protected Property will be managed to fulfill the Purpose of this Conservation Easement (see Section II.A), and comply with the MOA, any other contract between the Parties, the management plan approved for the Protected Property, and applicable laws.

Desired Future Conditions. The Parties agree that the following represents the minimum desired future condition of the Protected Property, to be supplemented by goals from any management plan:

a. management maintains existing fish and wildlife habitats in the condition described in the project proposal as referenced in the MOA section II.E.1-7;
b. natural regeneration occurs where such regeneration is appropriate and consistent with the Conservation Values; and
c. noxious weeds are controlled to the extent reasonably possible to maximize the Protected Property's Conservation Values.

Management Plan. Grantor shall develop a management plan for the Protected Property.

1. Grantor shall complete a draft management plan and submit it to BPA for review and approval within 18 months after conveyance of the Conservation Easement. The draft management plan must:
   a. provide for management of the Protected Property to achieve and maintain the Desired Future Conditions described in this Article;
   b. follow and comply with BPA's applicable NEPA documents, including BPA's Fish and Wildlife Implementation Plan Final Environmental Impact Statement and Record of Decision,[6] which includes specific planning steps;
   c. address management methods and, if necessary, mitigation for all resources addressed in the pertinent NEPA document; and
   d. identify activities Grantor proposes to undertake to restore or enhance the habitat for fish and wildlife and to operate and maintain the habitat and identified Conservation Values of the Protected Property in perpetuity.

2. BPA shall review the draft management plan, and any subsequent amendments of the plan, to ensure conformance with this Conservation Easement and pertinent procurement contracts or other agreements between Grantor and BPA. BPA shall consult with Grantor regarding any concerns it has about the draft of any proposed management plan or amendment to a management plan prior to making a decision about whether to approve the plan or amended plan. BPA shall base its decision on whether the management plan fulfills the purposes stated in this Conservation Easement, and BPA shall provide its decision in writing if requested by Grantor. BPA's approval does not indicate BPA's support for any particular

[6] http://www.efw.bpa.gov/environmental_services/Document_Library/Implementation_Plan/

action or any responsibility for any planned actions in any way. If BPA does not approve a management plan or proposed amendment to a plan, Grantor may request dispute resolution as described in this Conservation Easement.

3. Prior to approval of the initial management plan, Grantor shall not undertake any ground-disturbing activities on the Protected Property, unless reviewed and approved by BPA in advance or expressly allowed in an easement or other agreement. However, Grantor may undertake ground-disturbing activities (without prior BPA review or approval) if ODFW determines that prompt action is necessary to deal with an emergency (including, but not limited to, response to a hazardous waste incident).

4. The actions approved through any management plan must be intended to effectuate the Conservation Purposes of this Conservation Easement and fully protect the Conservation Values in perpetuity. Management plans must adhere to the terms of this Conservation Easement and must neither impliedly amend nor terminate this Conservation Easement.

B. Effect of Funding Limitations

Grantor's obligations under this Conservation Easement are conditioned upon Agency's receiving funding, appropriations, limitations, allotments, or other expenditure authority sufficient to allow Grantor, in the exercise of its reasonable administrative discretion, to meet its obligations under this Conservation Easement. Nothing in this Agreement is to be construed as permitting any violation of Article XI, section 7 of the Oregon Constitution or any other law regulating liabilities or monetary obligations of the State of Oregon. Grantor represents that it has sufficient appropriations and limitation for the current biennium to discharge its obligations under this Conservation Easement until July 31, 2011. Grantor shall employ good-faith efforts to request and seek funding, appropriations, limitations, allotments, or other expenditure authority sufficient to allow Agency to perform its obligations following July 31, 2011, and throughout the term of this Conservation Easement. If Grantor is unable to discharge its obligations under this Conservation Easement due to lack of funding, appropriations, limitations, allotments, or other expenditure authority, BPA, after notice to Grantor, may, but is not required to, discharge the obligation and if BPA does so, Grantor shall reimburse BPA for BPA's actual costs incurred in discharging the obligation upon receipt by Grantor of funding for purposes of this Conservation Easement.

VI. ADMINISTRATIVE MATTERS

A. Nature of the Conservation Easement

This Conservation Easement is a perpetual and irrevocable less-than-fee real property interest (whether characterized as a conservation easement, a covenant, an equitable servitude, or some other less-than-fee interest) immediately vested in the United States of America and its assigns, running with the land and burdening Grantor's successors and assigns.

B. Future Conveyance of Fee Interest and Grant of Less-than-Fee Interest
Grantor shall not sell or convey the Protected Property, or any part of the Protected Property, or grant any easement or other less-than-fee interest that would encumber the Protected Property, without first notifying BPA in writing and obtaining the written approval of BPA, which BPA may not unreasonably withhold, condition, or delay.

C. Assignment of Rights and Obligations
Prior to any assignment of rights or management obligations under this Conservation Easement, Grantor shall notify BPA in writing. BPA shall not unreasonably withhold, condition, or delay approval of the assignment; assignment by operation of law (*e.g.*, name change, merger of corporate entity) does not require BPA approval. Grantor shall provide a copy of the assignment to BPA.

D. Termination and Amendment

1. Termination Standard. This Conservation Easement may be voluntarily terminated by agreement only if a subsequent, unexpected change in the conditions of or surrounding the Protected Property makes impossible the continued use of the Protected Property for the Conservation Purpose and any Conservation Values set forth herein. Neither of the following will be grounds for termination, unless the change is such that it becomes impossible to use the Protected Property for the Conservation Purpose and any Conservation Values set forth herein:
    a. Changed environmental conditions related to climate change or other natural events, for example wildfire, river channel migration, erosion or avulsion.
    b. Changed economic conditions making termination more profitable, including future, potentially more profitable economic development opportunities.

2. Termination Process. If the Parties agree to voluntarily terminate this Conservation Easement and have met the above termination standard, the Parties shall terminate this Conservation Easement by executing and recording an instrument appropriate for the purpose.

3. Proceeds after any Termination. If this Easement is involuntarily terminated and proceeds result from such involuntary termination, BPA is entitled to either: 1) receive its share of the proceeds, if any, in proportion to the amount BPA contributed to the fee title acquisition, or 2) apply its share of the proceeds, if any, to another conservancy acquisition under the procedures detailed in the MOA.

4. Amendment. This Conservation Easement may be amended only by agreement of the Parties, who must properly document, execute, and record any amendment. Amendments based on changed conditions may be made only when the Purpose of the Conservation Easement is impractical to achieve, and when the effect of the

amendment is to benefit, or at least cause no harm, to the Conservation Values (for example, amending the Conservation Easement to place further restrictions on the use of or activities on the Protected Property). Parties may not use amendments to impliedly terminate the Conservation Easement or remove any portion of the Protected Property from its terms.

E. Enforcement

BPA has the right, but not the obligation, to enforce the terms of this Conservation Easement, including conducting any necessary monitoring and reporting. The following provisions detail the process for formal enforcement actions.

1. Notice of Violation and Corrective Action. If BPA determines that the Grantor or its representatives, successors, or assigns violates or threatens to violate the terms of this Conservation Easement, BPA will give a written notice (which may include e-mail) to the Grantor of such violation and demand corrective action sufficient to cure the violation ("**Notice of Violation and Corrective Action**"). Where the violation involves injury to the Protected Property or any of its Conservation Values resulting from any use or activity inconsistent with the Purpose of the Conservation Easement, BPA may require restoration of the injured portion of the Protected Property or any Conservation Value to its prior condition, in accordance with a plan approved by BPA.

2. Grantor's Response or Failure to Respond. Grantor shall respond in writing (which may include e-mail) to BPA's Notice of Violation and Corrective Action within 30 calendar days of delivery, including a statement of the Grantor's position and a summary of the arguments supporting that position, and the name and title of the executive or official who will represent the Grantor, and any of the persons who will accompany the executive or official, in Negotiation. Parties shall then proceed to Negotiation within 45 days of delivery of Notice of Violation and Corrective Action, as described in Section VI.E.3 below. If the Grantor fails to respond within 30 calendar days, BPA may pursue a legal action as described in Section VI.E.5 below.

3. Negotiation. After BPA's Notice of Violation and Corrective Action has been delivered and the Grantor has issued a written response within 30 calendar days, as described above, the Parties shall attempt in good faith to resolve any dispute arising out of or relating to this Conservation Easement by negotiating between executives and/or officials who have authority to settle the controversy. Within 45 calendar days after BPA's delivery of Notice of Violation and Corrective Action, representatives of both Parties shall meet at a mutually acceptable time and place, and thereafter as often as they deem reasonably necessary, to attempt to resolve the dispute. All reasonable requests for information made by one Party to the other will be honored. If the matter has not been resolved within 60 calendar days after BPA's delivery of Notice of Violation and Corrective Action, or if the Parties fail to meet within 45 calendar days after delivery of the Notice, either Party may propose mediation (Section VI.E.4 below) or initiate legal action (Section VI.E.5 below).

4. Mediation. In the event the dispute has not been resolved by Negotiation or corrective action as provided in Sections VI.E.1 and 2 above, the Parties may agree to participate in mediation. The mediator will not render a decision, but will assist the Parties in reaching a mutually satisfactory agreement. The Parties shall share equally the costs of mediation. The first mediation session must commence within 30 days from Party agreement to mediate. If the matter has not been resolved within 60 days of the first mediation session, or the Parties have not agreed to mediation, BPA may initiate legal action (Section VI.E.5 below).

5. BPA's Initiation of Legal Action. BPA may pursue an action at law or in equity in a court having jurisdiction to enforce the terms of this Conservation Easement: (1) to enjoin the violation, ex parte as necessary, by temporary or permanent injunction; (2) to require the restoration of the Protected Property or any Conservation Value to the condition that existed prior to any such injury; and (3) to recover any damages to which it may be entitled for violation of the terms of this Conservation Easement. The remedies described in this paragraph are cumulative and will be in addition to all remedies now or hereafter existing at law or in equity.

6. The Grantor's Initiation of Legal Action. In the event that the Grantor seeks determination as to the legal meaning or effect of this Conservation Easement, or as to any alleged violation hereof by BPA, and if such determination or dispute is not resolved by Negotiation or Mediation, the Grantor is entitled to bring judicial action including actions existing at law or in equity.

7. Emergency Enforcement. Notwithstanding the other provisions of Section VII.D above, if BPA determines that circumstances require immediate action to prevent or mitigate significant damage to one or more of the Conservation Values, BPA may undertake reasonable actions to remove, eliminate or mitigate damages to the Protected Property without notice to or permission from the Grantor or without waiting for the Grantor to take an action. BPA may also pursue its remedies under Section VII.D without prior notice to the Grantor or without waiting for the period provided for cure to expire.

F. Attorney Fees

In the event of litigation involving this Conservation Easement each Party shall bear its own costs and attorney fees, including those incurred on appeal.

G. Public Access

This Conservation Easement shall not be construed to create a right in the general public of use of or access to the Protected Property. The Parties acknowledge the value of public recreational and educational use of lands protected under this Agreement, especially hunting and fishing. The Grantor retains the authority to regulate all public uses of that land, without BPA review or approval other than that provided expressly in the MOA or this Easement, as long as such public access does not violate this

Conservation Easement or thwart its Purposes (section II.A); complies with the management plan and obligations in the MOA; and follows all applicable laws, regulations, and appropriate best management practices.

H. Water Rights

To the extent permitted by the terms of any water right associated with the Protected Property, Grantor shall use the amount of water to which Grantor is legally entitled, in the place and manner to which Grantor is legally entitled, for a beneficial purpose without waste, for the protection of Conservation Values and other uses set forth in this Conservation Easement and the management plan. Grantor shall not abandon any or all of its water rights by virtue of non-use. Grantor shall also not transfer, change the point of diversion, change the purpose of use, or otherwise significantly change any water right without receiving approval from BPA. If Grantor is not able to exercise the full extent of any water rights, Grantor shall either contact BPA for assistance with leasing, selling, or donating any surplus water to instream uses or conduct its own transfer to instream uses after receiving BPA approval.

I. Approval Timelines

Where this Conservation Easement grants or requires BPA approval, unless provided otherwise, BPA shall complete its review and provide its decision within a reasonable time, typically within 60 business days after submission of a completed document from Grantor and completion of any necessary processes (such as NEPA compliance) by BPA. For amended or redrafted submissions, review should typically be within 30 business days. BPA shall not withhold its approval unreasonably.

J. Binding Effect

This Conservation Easement binds the Parties and their successors and assigns. Either Party may enforce the terms of this Conservation Easement in any court of competent jurisdiction.

K. Acts of God/Force Majeure

Nothing contained in this Conservation Easement entitles the United States or BPA to bring any action against the Grantor for any injury to or change to the Protected Property that causes a substantial degradation of habitat resulting from causes beyond the Grantor's control, including, without limitation, naturally caused fire, flood, storm, or earth movement, or from any prudent action taken by the Grantor under emergency conditions to prevent, abate, or mitigate significant injury to the property resulting from such causes. The Parties shall make all reasonable efforts to resume performance promptly once the force majeure is eliminated.

L. Ownership and Control, Incidents of Ownership

The Grantor acquired the Protected Property in fee, without any warranties or representations from the United States or BPA. As fee title owner, the Grantor has all management and operational control of the Protected Property and is responsible for all incidents of ownership of the Protected Property. To the extent permitted by Article XI, Section 7 of the Oregon Constitution, and subject to the limits of the Oregon Tort Claims

Act, ORS 30.260 through 30.300, the Grantor shall indemnify the United States and BPA from any costs or liability from any incident of ownership that may arise from the acquisition and management of the Protected Property. Such "**incidents of ownership**" include, but are not limited to, taxes, levies, assessments, hazardous waste response, cultural or historic resource mitigation or preservation, endangered species protection, noxious or invasive species management, and tort liability.

M. Hazardous Substances

To the best of Grantor's knowledge, there are no hazardous substances present in, on, or under the Protected Property, including without limitation, in the soil, air, or groundwater, and there is no pending or threatened investigation or remedial action by any governmental agency regarding the release of hazardous substances or the violation of any environmental law on the Protected Property, and there are no underground storage tanks located on the Protected Property. If, at any time, there occurs, or has occurred a release in, on, or about the Protected Property of any hazardous substances, the Grantor agrees to take all steps necessary to assure its containment and remediation without cost to BPA, including any cleanup that may be required, unless the release was caused by BPA, in which case BPA will be responsible for remediation in accordance with applicable law. Nothing in this Conservation Easement gives rise, in the absence of a judicial decree, to any right or ability in BPA to exercise physical or managerial control over the day-to-day operations of the Protected Property, or any of the Grantor's activities on the Protected Property, or otherwise become an operator with respect to the Protected Property within the meaning of the Comprehensive Environmental Response Compensation and Liability Act of 1980, as amended ("**CERCLA**"). To the extent permitted by Article XI, Section 7 of the Oregon Constitution, and subject to the limits of the Oregon Tort Claims Act, ORS 30.260 through 30.300, Grantor specifically agrees to release and hold harmless and indemnify BPA from and against all liabilities for violations or alleged violations of, or other failure to comply with, any federal state or local environmental law or regulation relating to hazardous substances, including, without limitation, CERCLA, by the Grantor in any way affecting, involving, or relating to the Protected Property, except to the extent such violations or alleged violations are caused by the acts or omissions of BPA.

N. Waiver

The failure of any Party to require strict performance of any term of this Conservation Easement or a Party's waiver of performance will not be a waiver of any future performance or of a Party's right to require strict performance in the future.

O. Notice

Any notice permitted or required by this Conservation Easement, unless otherwise specified, must be in writing, delivered personally to the persons listed below, or will 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:	**Notices to Grantor should be sent to:**
Director, Fish & Wildlife Program Bonneville Power Administration P.O. Box 3621 Portland, OR 97208-3621	Director ODFW 3406 Cherry Avenue NE Salem, OR 97303-6000

For notices specific to BPA's Real Property Services:

Manager, Real Property Services
RE: [INSERT BPA TRACT NO]
Bonneville Power Administration
P.O. Box 3621
Portland, OR 97208-3621

P. Exhibits
All attached exhibits are incorporated by reference herein as part of this Conservation Easement.

Q. Effective Date
This Conservation Easement vests when signed by Grantor and accepted by BPA.

R. Representations of Grantor and Covenant of Use and Enjoyment
Grantor hereby represents to the United States of America that Grantor is lawfully seized and possessed of the Protected Property in fee simple with a good and lawful right to convey the same, and that to the best of Grantor's knowledge, the Protected Property is free of any and all encumbrances and restrictions except those specifically set forth in Exhibit C. Grantor covenants to the United States of America that it and its assigns may have the use of and enjoy all the benefits derived from and arising out of this Conservation Easement.

(The remainder of this page has been left blank intentionally. Signature page follows.)

To have and to hold the Deed of Conservation Easement herein granted unto the United States and its successors and assigns, forever, IN WITNESS WHEREOF, the undersigned Grantor has executed this instrument this ____day of _____, 2010.

Grantor, OREGON DEPARTMENT OF FISH AND WILDLIFE

By:_____
Roy Elicker, Director

ACKNOWLEDGMENT

STATE OF OREGON)
) ss.
County of Marion)

This instrument was acknowledged before me on this _____ day of _____, 20__, by Roy Elicker as the Director and authorized representative of the Oregon Department of Fish and Wildlife, acting under authority granted to him by the Oregon Fish and Wildlife Commission.

_____
Notary Public for Oregon
My Commission expires: _____

ACCEPTANCE

This Deed of Conservation Easement is hereby duly accepted by the United States of America, this _____ day of _____, 2010.

Grantee, the United States of America

By:_____
Margareth H. Wolcott

Title:_____
Manager, Real Property Services,
Bonneville Power Administration, U.S.
Department of Energy

ACKNOWLEDGMENT

STATE OF_____)
) ss.
County of _____)

This instrument was acknowledged before me on this _____ day of _____, 20__, by Margareth H. Wolcott as the Manager, Real Property Services, and authorized representative of the Bonneville Power Administration, U.S. Department of Energy, acting under authority granted to her by the Department.

_____
Notary Public for _____
My Commission expires: _____

[INSERT EXHIBITS ON SEPARATE PAGES, INCLUDING:

- EXHIBIT A, LEGAL DESCRIPTION OF THE CONSERVATION EASEMENT
- EXHIBIT B, AERIAL PHOTO OF THE CONSERVATION EASEMENT
- EXHIBIT C, AGREED-UPON ENCUMBRANCES

FURTHER EXHIBITS TO BE CONSIDERED MAY INCLUDE MAP OF CONSERVATION EASEMENT ZONES WITH GPS POINTS, WATER SURVEY CERTIFICATE OR FORM, ACCESS ROAD MAP]

Attachment 8: COMMITMENTS FOR PRE-ACQUISITION, AQUISITION, AND POST-ACQUISITION EFFORTS

I. PRE-ACQUISITION

This attachment identifies the Parties' rights and responsibilities, and the processes they will employ, related to acquiring and managing interests in real property. Where a project under this Agreement involves an entity other than ODFW acquiring real property, then BPA shall enter into an agreement with that entity so it, not ODFW, has the rights and responsibilities identified in this attachment.

A. ODFW Obligations

1. Consultation with BPA Prior to Negotiations. Prior to or as early as praticable during any negotiations for acquisition of a real property interest, ODFW shall consult with BPA as follows:

a. Project suitability and pre-acquisition duties. ODFW and BPA (Project Manager and Real Property Services) shall consult about each Party's respective pre-acquisition duties to facilitate cost-effective and timely acquisition of any real property interest.

b. Relocation. BPA may have legal obligations to any person permanently displaced as a result of the acquisition process under the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. §§ 4601-4655 (**"Uniform Act"**), and its implementing regulations at 49 C.F.R. Part 24. Displaced persons may include any individual, partnership, corporation, or association occupying a dwelling on the property (residential or commercial tenant, with or without lease), using the property (storage, recreation, etc.), or conducting a business or farm operation on the property, who is required to move their residence, business, or farm operation from the real property, or moves personal property from the real property, or both, due to the acquisition. ODFW will assist BPA with Uniform Act compliance by:

i. Informing potential sellers about the Uniform Act, and providing them with BPA Real Property Services' contact information.

ii. Using site visits and document reviews as early opportunities to identify potential displaced persons, including making inquiries of the property owner and other relevant persons having knowledge about the property (for example neighbors, especially where the owner may be a long distance owner), noting any property uses or users and personal property (other than the owner's) that might indicate potential displaced persons.

iii. Contacting BPA Real Property Services immediately upon learning of any persons who may be or have been displaced, providing contact

information and assisting BPA to determine the nature (residential or commercial) and number of potentially displaced persons, the length of any tenancy or use, terms of any agreement between the displaced persons and seller, and copies of leases, rental agreements, or other documents describing the persons' occupancy and rights to use the property.

iv. Ensuring, to the maximum extent possible, that neither ODFW nor the seller takes any steps (either orally or in writing) toward having tenants, occupants, or other property users vacate a property or move personal property before consulting with BPA and receiving BPA's approval to act. Should any tenant, occupant, or other property user vacate the property or move personal property before receiving any notices to vacate, ODFW will immediately inform BPA and await direction from BPA as to what next steps to take.

If BPA determines that there are displaced persons, it shall follow the provisions of the Uniform Act and implementing regulations to provide for fair, uniform, and equitable treatment of affected persons. The cost of compliance with the Uniform Act shall be paid by BPA out of the Agreement funds for the particular acquisition.

2. Assisting with BPA's Due Diligence and Compliance Reviews. ODFW shall assist BPA in completing its pre-acquisition due diligence and compliance reviews (see Section I.B.2) by providing relevant available information requested by BPA. Specifically for BPA's National Environmental Policy Act (**"NEPA"**) compliance, ODFW will help BPA to identify potentially interested or affected parties, and will assist BPA to field and address public comments, as requested by BPA. ODFW shall provide any relevant documents or reports, and any updates to them, to BPA as early in the acquisition process as possible.

3. Assisting with Removing Unacceptable Encumbrances to Title. For acquisition of any real property interest, BPA conducts preliminary and final title reviews as part of its pre-acquisition due-diligence (see Section I.B.2.j). ODFW shall assist BPA as requested with removing any unacceptable encumbrances to title, where encumbrances have the potential to interfere with the purpose of the acquisition for fish and wildlife. ODFW shall particularly assist in identifying and attempting to extinguish, by purchase or other mechanism, any outstanding surface and subsurface mineral, gravel, oil, gas, and energy resources rights, interests, or reservations on a property, to the extent it is reasonably able to do so, unless otherwise agreed by the Parties. The cost of removal of encumbrances determined unacceptable by BPA shall be paid by BPA out of the Agreement funds for the particular acquisition.

4. Obtaining Information about Water Rights and Use. ODFW shall obtain information about the water use and rights appurtenant to any property prior to closing, with BPA

assistance as needed. ODFW shall use the BPA water survey form[7] as a starting point for both fee title and conservation easement acquisitions. For fee acquisitions, and as appropriate for conservation easement acquisitions where ODFW also plans to purchase or lease water, ODFW shall also obtain supporting water rights documents, including but not limited to certificates, permits, and licenses. This information will later help the Parties to: 1) identify place of use, point of diversion, and type of use, 2) provide evidence of ownership, 3) inform appropriate application and management of water in overall property management decisions and Management Plan, and 4) transfer instream any water rights that are not beneficially used on the property in accordance with a Management Plan approved by BPA.

5. Provide, or Review and Acknowledge, Baseline Documentation. For acquisitions of conservation easements, where ODFW will hold the conservation easement, ODFW shall provide a Baseline Document Report prior to closing to document the natural and manmade conditions of the property at the time of acquisition, and will allow BPA sufficient time to review and approve the document. For acquisitions of fee title where ODFW will own the property and the United States will hold the conservation easement, BPA shall prepare the Baseline Documentation Report within 24 months of closing. All Baseline Documentation Reports must follow the minimum standards below.

Baseline documentation may rely on and incorporate by reference other information already in the project file, such as title opinions, appraisals, or water rights certificates. At a minimum, the Baseline Documentation Report must include the following:

a. Background information – For example, documentary links to conservation easement (title, recording information if available, where on file, etc.), contact information of land owner (grantor), and any assigns, and users of the property, conservation easement location map, legal description of conservation easement area, conservation purposes and values for the conservation easement, tax lots and zoning, other contextual information of the property, including historical use information, adjacent land ownership, and description of public access.

b. Structures or Improvements – Descriptions, pictures, and maps showing the location size, use, and condition of all structures or improvements, *e.g.*, houses, barns, pumps, roads, paths, trails, and fences.

c. Utilities – Descriptions, pictures, and maps showing the nature and condition of all utilities, both above- and under- ground.

d. Aerial Photograph – Aerial photograph of property with overlay showing conservation easement boundaries.

e. Photo Points, Photo Point Map, Photos – Photo points established at all property boundaries and corners, linked to GPS coordinates and mapped, and four photos taken from each photo point in each cardinal direction, unless otherwise noted.

[7] BPA Water Survey form is available at http://www.efw.bpa.gov/IntegratedFWP/WaterSurveyForm.doc

f. Species List – List species occurring on or migrating through the property, indicating native or non-native and whether ESA-listed, based on available information, and indicate species important to the acquisition that were historically (but not currently) present on the property.

g. Habitat Type Map – Aerial photograph with habitat data overlays. This may be combined with some of the other maps; for example, a habitat type map may also provide GPS coordinates at boundaries and corners, include dimensions of existing structures, etc. This map may also help inform crediting decisions.

h. Hydrology and Soils, including topography – Description, including soil type data, maps, photos, etc. as appropriate.

i. Current Land Use and Landowner Activities – Description of land use and activities (*e.g.*, extent farmed, for what crops, what techniques and management practices used), including pictures as appropriate.

j. Water Use and Rights – Description of water use and rights, including documents obtained pursuant to Section I.A.5, and pictures of water lines, ditches, intakes, wells, use, etc. as appropriate.

k. Identification of Threats to the Easement - Descriptions, pictures, and documentary evidence of recorded and potentially unrecorded easements, leases, and permits, *e.g.*, any evidence of active mining, and a list of invasive weed species present on the property.

l. Acknowledgment (notarized signature) of the easement grantor and grantee that the Baseline Documentation Report represents full and accurate conditions of the property, and recording of the acknowledgement (but not the report).

Both ODFW and BPA Real Property Services will keep copies of the Baseline Documentation Report on file, labeled with the appropriate BPA Tract Number.

6. Closing Date. ODFW will consult with BPA before setting a closing date with the property owner. BPA discourages closing dates between August 15 and October 15.

B. BPA Obligations

1. Funding of Pre-Acquisition Activities. BPA shall fund ODFW's pre-acquisition activities (*e.g.*, appraisal, baseline report) from the budgeted amounts in this Agreement through intergovernmental contracts between the Parties or between BPA and ODFW's subcontractor(s). BPA will follow the procedures in the Bonneville Purchasing Instructions Manual[8] when issuing these contracts. In addition, BPA shall also fund the following pre-acquisition activities from the budgeted amounts in this Agreement: costs associated with BPA's real estate activities, such as securing its own title insurance; recording fees and other closing costs; the cost to remove unacceptable encumbrances;

[8] http://www.bpa.gov/corporate/business/bpi/

complying with the Uniform Act; environmental land audits and cleanups; and the costs of its own real estate services employees efforts). BPA shall not deduct the costs of its other salaried employees' pre-acquisition work (contracting, NEPA, ESA, etc.) from the Agreement budget.

2. Due Diligence and Compliance Reviews. BPA is responsible for complying with all applicable laws for its action of funding acquisition of real property interests. The following milestones, while not exhaustive, identify key steps in BPA's due diligence and compliance reviews:

a. Conducting site visit(s) and completing a Certificate(s) of Inspection and Possession as required by U.S. Department of Justice Title Standards (2001) ("**DOJ Title Standards**").

b. Reviewing or conducting appraisals to meet federal yellow book standards and any additional standards required under the BPA appraisal requirements and guidelines document.

c. Conducting or reviewing boundary or zone surveys, if required.

d. Completing or reviewing a Water Survey (using BPA Water Survey Form).

e. Conducting environmental review and compliance, including NEPA analyses and public notice processes, hazardous materials surveys (Environmental Land Audits, see Section I.B.3 below), National Historic Preservation Act (**"NHPA"**) consultation for cultural resources, and ESA compliance.

f. Reviewing or complying with the Uniform Act, including performing any relocation activities.

g. Reviewing the Purchase and Sale Agreement, to ensure consistency with this Agreement, Party intent, and the real property deed the Parties intend to record.

h. Reviewing any deed conveying fee interest to ODFW, including ensuring that it is in warranty deed form, and reviewing and approving any proposed deed of conservation easement.

i. Reviewing a Baseline Documentation Report provided by ODFW for acquisition of a conservation easement, or preparing a Baseline Documentation Report to be acknowledged by ODFW for acquisition of a fee estate (see Section I.A.6).

j. Reviewing preliminary and final title opinions as per DOJ Title Standards, including but not limited to ensuring accurate legal descriptions and resolving any issues that may inappropriately encumber title to be acquired by the federal government.

k. Reviewing escrow instructions prepared by ODFW or ODFW's agents, and preparing BPA's own escrow instructions, if escrow is used for the transaction.

3. Environmental Land Audits. BPA or ODFW, with review by BPA, shall initiate an Environmental Land Audit (ELA) as soon as possible following ODFW's proposal of an acquisition. An ELA typically consists of a Phase I Environmental Site Assessment to identify "**recognized environmental conditions**," characterizing the likelihood that contamination from hazardous materials, toxic substances, or petroleum products may exist on a property. If recognized environmental conditions are identified, BPA may require or perform a Phase II Environmental Investigation to provide guidance on the nature and extent of any contamination. The results from Phase I and Phase II processes will be used to determine if a Phase III Remediation (remedial actions or "**cleanup**" and use restrictions) is required. If cleanup of contaminated material or removal of solid waste or other remedial action is deemed necessary, this should typically be conducted by the seller prior to the transfer of any interest in real property.

II. ACQUISITION

A. Fee Title Acquisitions. Where ODFW acquires fee title with BPA funds, the following standards will apply:

1. BPA Draft, or Review and Approve. ODFW shall allow BPA sufficient time to draft the conservation easement (typically 40 business days depending on workload) or review and approve the conservation easement prior to closing.

2. Convey Conservation Easement to the United States. ODFW shall ensure that the property is permanently protected for fish and wildlife and their habitat by conveying to the United States of America and its assigns a deed of perpetual conservation easement, substantially similar to the form found in Attachment 4, except where the easement may be adjusted by ODFW and BPA according to the individual circumstances of a particular project.

B. Conservation Easement Acquisitions. Where ODFW acquires conservation easements with BPA funds, the following standards apply.

1. BPA to Review and Approve. ODFW shall allow BPA sufficient time, typically 40 business days depending on workload, to review and approve any proposed conservation easement prior to closing.

2. Form, Terms and Conditions of Deed of Conservation Easement. ODFW shall ensure that the property is permanently protected for fish and wildlife and their habitat by negotiating a conservation easement based upon the BPA conservation easement (Attachment 7 to the Memorandum of Agreement). The conservation easement must also include exhibits, including a map or aerial photo of the conservation easement, and the full Baseline Documentation Report if available at the time of acquisition (see Section I.A.6). If the Baseline Documentation Report is not available at the time of acquisition, it will be kept on file by ODFW and BPA when it is prepared, and may be later recorded.

3. **Third Party Right Insertion.** Where ODFW 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 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 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 in [cite section]. 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 ODFW 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 ODFW where BPA may reasonably act immediately to stop or mitigate a threat to conservation values), exercise all of the rights and remedies of ODFW and is entitled to all of the indemnifications provided to ODFW. If ODFW exercises the rights and remedies of the easement, then ODFW 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 ODFW and BPA jointly exercise the rights and remedies of the easement, then ODFW 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 easement. Except in the case of an emergency, BPA will attempt to give Grantor and ODFW notice prior to such entry and inspection, which notice may be by telephone or electronic mail.

C. Common Principles for Both Fee Title and Conservation Easement Acquisitions

1. Title in General Warranty Deed Form. ODFW shall strive to accept title by conveyance deed in general warranty form (as set forth in ORS § 93.850), but if it cannot secure a warranty deed, the Parties will coordinate to determine if another deed form complies with DOJ Title Standards for a particular project.

2. Future Conveyance of Real Property Interests

   a. Conveyance of Fee or Less-than-Fee where ODFW Owns Fee Interest. Where ODFW owns property in fee, prior to any future sale or other conveyance of the Protected Property, or any part of the property, and prior to any future grant of easement (or other less-than-fee real property interest, including but not limited to a long-term lease) encumbering the property, ODFW shall notify BPA of any

conveyance or grant in writing. BPA has the right to approve the conveyance of any less-than fee interest in writing, where approval will not be unreasonably withheld. The United States' easement will survive any conveyance by virtue of recordation, but ODFW shall nevertheless expressly reference the United States' Conservation Easement in any conveyance deed or document, whether conveying fee or less-than-fee interest; ODFW shall also reserve a perpetual right of ingress and egress to the Protected Property for BPA for management and monitoring purposes. ODFW shall provide BPA with a copy of any conveyance deed or document and grant of less-than-fee interest.

b. Conveyance of Conservation Easement where ODFW Holds Conservation Easement. Where ODFW acquires a conservation easement, prior to any conveyance of that easement, whether by donation or sale, or prior to a proposed exchange of conservation easement with another entity, ODFW must contact BPA's Manager, Real Property Services prior to initiating negotiations. Specifically, ODFW shall follow these criteria:

   i. here ODFW proposes to sell a conservation easement to another Party, BPA has the right to approve such sale. The United States' third Party rights must survive any sale.

   ii. Where ODFW proposes to donate a conservation easement to another Party, ODFW must first offer such donation to BPA. BPA then has 90 calendar days to either accept or reject such donation. If BPA, acting on behalf of the United States, accepts the donation, ODFW shall convey the conservation easement to the United States and its assigns, at no cost to the United States. If BPA rejects the donation, the United States' third Party rights must survive the conveyance by donation, at no cost to the United States.

   iii. Where ODFW proposes to exchange its conservation easement over one property for another conservation easement held by another Party over another property, ODFW and BPA shall follow the terms of this Agreement for the conservation easement to be newly acquired, including but not limited to performing due diligence and other pre-acquisition obligations set forth in Section I , and agreeing to the terms and conditions of a conservation easement as set forth in Section II. ODFW shall ensure that the United States' third Party rights are transferred to the conservation easement newly acquired by ODFW, at no cost to the United States.

5. Acknowledgment of Existing Transmission Facilities. If ODFW acquires a real property interest on which BPA has existing transmission related rights or facilities, ODFW shall acknowledge BPA's pre-existing rights. ODFW shall take title subject to BPA's pre-existing rights or facilities. ODFW shall promptly notify BPA if it thinks that any specific act or omission by BPA in relation to its transmission facilities may harm or interfere with the conservation values of a Protected Property.

D. Standards and Procedures for Closing

1. Consistency with BPA Financial Policy. ODFW shall provide information in its possession to BPA that will assist BPA in complying with financial policies in effect at the time of acquisition, including the Fish and Wildlife Capitalization Policy.[9]

2. Recording. ODFW or its agents (including any escrow agent) will record any and all deeds accepting fee title or conservation easements in the appropriate county recording office, together with any and all exhibits and other documents agreed to be recorded as part of the transaction, at closing. ODFW must provide copies to BPA. BPA will pay the recording costs from the funding provided under this Agreement.

3. BPA Acquisition Funding. After both Parties have completed their respective pre-acquisition tasks (see Section I), BPA shall make monetary transfers at times, amounts, and in escrow or direct accounts as agreed upon by the Parties. For each real property interest to be acquired, BPA may fund up to the purchase price, including the buyer's share of associated normal and reasonable closing costs (including recordation), excepting taxes. However, BPA will not provide any funding for a project (whether funding is proposed in whole or part) where ODFW, or other entities participating in the project, plan to pay more than what BPA, based on its own appraisal or review of other appraisals, determines to be the fair market value.

III. POST-ACQUISITION

A. ODFW Ownership and Management

1. Ownership and Control, Incidents of Ownership. Where ODFW acquires any real property interest, it does so without any warranties or representations from the United States or BPA. In the case of fee title acquisitions, ODFW shall take title to the property and have all management and operational control, and will therefore be responsible for all incidents of beneficial ownership. ODFW shall take all lawful actions, assume full responsibility, and not seek contributions from BPA for, incidents of ownership that may arise from the acquisition and management of the property. Such incidents of ownership include, but are not limited to, taxes, levies, assessments, hazardous waste response, cultural or historic resource mitigation or preservation, endangered species protection, noxious or invasive species management, and tort liability.

2. Assurances; Prohibited Uses

   a. Compliance with Law. In the implementation of this Agreement, ODFW must comply with all applicable laws, the Management Plan (Section III.B), if any, and any associated contracts.

   b. Prohibited Uses. Any activity that violates the purposes of this Agreement is prohibited.

B. Property Management Planning. Management plans will usually guide management of any real property interest that ODFW acquires to ensure compliance with this Agreement and any conservation easement granted over that property. Management plans are required for real property interests secured by other entities, unless both Parties

[9] http://www.efw.bpa.gov/IntegratedFWP/FW%20Capitalization%20Policy%2011-4-04.pdf

agree otherwise.

1. Management Plans. For ODFW projects that the Parties agree need management plans, ODFW shall typically complete a draft plan for BPA, collaboration group, and public review within 18 months after closing, and provide for management of the property to achieve and maintain an agreed upon desired future condition. The plan should follow and comply with BPA's applicable NEPA documents, particularly including BPA's Wildlife Mitigation Program, Watershed Management Program, and Fish and Wildlife Implementation Plan Final Environmental Impact Statements and Records of Decision,[10] which includes specific planning steps. Plans should address management methods and, if necessary, mitigation for all resources addressed in the pertinent NEPA document. The plan should identify activities ODFW proposes to restore or enhance the habitat for fish and wildlife and the activities to operate and maintain the habitat and identified conservation values of the property in perpetuity.

Each management plan will provide for management actions that protect, mitigate, or, enhance naturally self-sustaining native habitat or native-like habitat that supports indigenous fish and wildlife species of the area, particularly loss assessment target species and ESA-listed species. The management plan should identify activities ODFW believes are necessary to restore, rehabilitate, or enhance the property, and the activities ODFW believes are necessary to operate and maintain the habitat values of the property. Each plan should generally include information such as the following:

a. a description of the property including historical and present site conditions, a property inventory listing habitat types, resident species, water rights, and appurtenant infrastructure;

b. occurrence of threatened and endangered species and the results of any existing consultations regarding ESA-listed species;

c. occurrences of cultural and historic resources and the results of any existing consultations or surveys;

d. a description of the public access and tribal traditional and cultural uses allowed, if compatible with the habitat and resources to be protected on the property;

e. a statement of desired future conditions and goals;

f. management activities to achieve these goals, particularly addressing limiting factors identified in the Willamette Subbasin Plan, cultural resources, Indian

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10Wildlife EIS: http://www.efw.bpa.gov/environmental_services/Document_Library/Wildlife_Mitigation/
Watershed EIS:
http://www.efw.bpa.gov/environmental_services/Document_Library/Watershed_Management/
Implemntation Plan EIS:
http://www.efw.bpa.gov/environmental_services/Document_Library/Implementation_Plan/

treaty and trust resources, ESA biological opinion obligations and recovery planning commitments, and invasive species;

g. monitoring activities and adaptive management strategies; and

h. any documentation necessary to complete NEPA.

In developing the management plan ODFW shall invite public participation, including comments on a draft management plan, and seek the views of other agencies or Tribes.

ODFW may prepare a programmatic management plan for all projects that it implements, and possibly other entities working under this Agreement implement, to cover routine and common management practices for mitigation sites with similar characteristics. Site specific plans may then tier from the master programmatic plan to address unique characteristics, needs, and prohibitions for individual projects.

2. BPA's Right to Approve All Management Plans and Amendments. BPA has the right to review any draft management plan, and any subsequent amendments of the Plan, to ensure conformance with this Agreement, pertinent procurement contracts or other agreements between ODFW and BPA, and any conservation easement either held by ODFW or the United States. BPA will consult with ODFW regarding any concerns it has about the draft of any proposed amendment of a plan prior to making a decision about whether to approve the amended plan, and will provide its decision in writing if requested. BPA will base its decision on whether the plan fulfills the purposes stated in the conservation easement and this Agreement. BPA's approval does not indicate BPA's support for any particular action or any responsibility for any planned actions in any way. If BPA does not approve a management plan or proposed Amendment to a plan written by ODFW, both Parties agree to enter into dispute resolution under Section V.C. of the MOA.

3. ODFW Review of Other Entities' Management Plans. Where entities other than ODFW acquire land under this Agreement, BPA agrees to provide ODFW with a copy of that entity's written plan prior to approval. ODFW may choose, at its discretion, to review and comment to BPA and the other entity on such plans. If ODFW provides comments within the review and approval period accorded BPA, BPA must consider those comments when determining whether to approve the plan.

4. Ground Disturbing Activity Prior to Initial Management Plan Approval. Prior to approval of the initial management plan, ODFW shall not undertake any ground-disturbing activities, unless reviewed and approved by BPA in advance or expressly allowed in an easement or other agreement. . However, ODFW may undertake ground-disturbing activities (without prior BPA review or approval) if ODFW determines that prompt action is necessary to deal with an emergency (including, but not limited to, response to a hazardous waste incident).

5. Future Amended Management Plans or Proposals Submitted by Grantor. For conservation easements acquired and held by ODFW, it shall provide these documents or

proposals to BPA for its review and approval before ODFW decides whether to approve them.

6. Agreement and Easement Controls if Conflict. In the event of a conflict between any management plan and this Agreement or any easement either held by ODFW or the United States, the Agreement or easement will control. Management plans must follow this Agreement and the easement, and will neither impliedly amend nor terminate this Agreement or any easement.

C. Property Restoration and Enhancement

1. Compliance Reviews where Funding Provided by BPA. Where ODFW plans to use BPA funding to restore or enhance habitat on projects where ODFW will hold fee title or a conservation easement, the Parties shall proceed as follows.

a. NEPA. As between ODFW and BPA, BPA is the lead agency for any NEPA compliance. ODFW shall assist BPA in complying with NEPA which may include assisting BPA in the completion of supplement analysis that considers: (1) whether the proposed actions are substantially consistent with existing BPA NEPA analyses with regard to environmental concerns; or (2) whether there are significant new circumstances or information relevant to environmental concerns. BPA shall not deduct the cost of standard NEPA compliance activities (*e.g.*, a categorical exclusion, supplement analysis, or tiered Record of Decision) from the budget established by this Agreement. BPA shall deduct the cost of non-standard NEPA compliance activities, if needed, including but not limited to development of an Environmental Assessment or an Environmental Impact Statement, from the budget established by this Agreement.

b. Endangered Species Act. As between BPA and ODFW, BPA is the lead agency for any BPA-funded activity under the federal Endangered Species Act. ODFW's role will be solely in support of BPA's lead role. When property restoration or enhancement activities funded by BPA may affect species listed under the federal Endangered Species Act (ESA), 16 U.S.C. §§ 1531-1599, ODFW shall, at BPA's request, either (1) participate in applicable consultations or conferences conducted between BPA and NMFS or the United States Fish and Wildlife Service (the "**Services**") as appropriate under section 7 of the ESA (where BPA will obtain incidental take statements) or (2), where appropriate, consult or conference directly with the Services to obtain permits under section 10 of the ESA. Upon request, ODFW shall provide BPA with available information, materials, documents, and records to support necessary agency decisions about appropriate regulatory pathways, and for section 7 consultations or conferences. Moreover, when property management activities funded under this Agreement may affect federally ESA-listed species, ODFW shall not proceed with those actions nor violate the Services' prohibition on irretrievable commitment of resources until the satisfactory completion of requisite consultations or conferences as evidenced by incidental take statements or section 10 permits. To the extent required by applicable law, ODFW shall comply with terms and conditions of pertinent incidental take statements and with conditions of section 10 permits. BPA shall use amounts from the budget established by this

Agreement to fund ESA compliance only for projects under this Agreement.

c. Cultural Resources. ODFW shall integrate management planning for historic and cultural resources, as defined by the National Historic Preservation Act, with the habitat management practices described in the Management Plan or any amended Management Plan as a means of avoiding impacts to cultural and historic resources. If not previously completed or exempted, historic and cultural resource surveys may be required by BPA before any BPA-funded ground-disturbing activities related to habitat restoration and enhancement occur, and ODFW will coordinate with BPA cultural resources program staff. ODFW will also avoid sensitive sites, if at all possible, in implementing habitat actions. BPA shall use amounts from the budget established by this Agreement to fund historic and cultural resource compliance activities only for projects under this Agreement.

2. Enforcement, Including Annual Monitoring and Reporting. For acquisitions of fee estate where the United States holds the conservation easement, BPA will conduct any necessary monitoring and enforcement. For conservation easements acquired and held by ODFW with BPA funds:

a. ODFW shall enforce compliance with the easements in accordance with their terms, this Agreement, any management plans, relevant law, and its own "Conservation Easement Violation Response Policy," which does not currently exist but ODFW plans to develop. After the term of the Agreement, the Parties shall negotiate reasonable enforcement priorities given property needs and available funding.

b. During the term of this Agreement, ODFW shall provide BPA (Project Manager and Real Property Services) with an annual monitoring report documenting the conditions of the property. After consulting with BPA, ODFW may change its easement monitoring and enforcement policies applied to the conservation easement acquired with BPA funds, but those changes may not reduce the frequency or quality of the monitoring and reporting, unless BPA agrees in writing to the changes. At a minimum, the reports should generally include the following information:

    i. Any habitat quality monitoring or evaluation analyses undertaken or in progress.

    ii. Management or restoration activities undertaken or in progress.

    iii. The status and activities (general trend, such as continuing farming operations on the parcel, and major activities, such as building a garage) of any remaining users of the property, including the grantor, owner, tenants, etc.

    iv. Pictures taken from established photo points.

    v. Citations or reports related to the Conservation Values of any easement from any local, state, federal, or tribal natural resource management

agency, or from any enforcement action taken by ODFW.

vi. Any proposed management activities not identified in a Management Plan, or proposed changes to any Plan.

vii. Threats or potential threats to the Conservation Values being protected with the easement, including any problems encountered with easement enforcement.

After the term of the Agreement, the Parties shall negotiate reasonable monitoring and reporting requirements given property needs and available funding.

c. The United States will hold third Party rights in enforcement, entry, and inspection under any easement; thus BPA, as the agency having jurisdictional control, may, in a reasonable manner and at reasonable times, enter and inspect the easement area to determine compliance with the terms of any easement. Except in case of emergency, BPA will attempt to give Grantor and ODFW prior notice, which notice may be by telephone or electronic mail.

d. If either Party discovers a potential or actual violation with the terms of any easement, it will promptly notify the other in writing, describing the circumstances observed and the amount and extent of Conservation Values potentially or actually affected.

D. Future Negotiations for Transmission Right-of-Way Easement. If BPA, after conducting necessary environmental reviews, determines that a transmission right-of-way easement is necessary or appropriate on any land where it has funded all or a significant portion of the acquisition of fee interest, ODFW shall negotiate a perpetual transmission right-of-way easement with BPA. BPA represents that any such transmission right-of-way easement will only include transmission lines, poles, and structures (*i.e.*, will not include substations); ancillary communication and transmission equipment appurtenant to those transmission lines, poles, and structures; and access roads only where reasonably necessary. Moreover, a condition of siting a new transmission easement on the mitigation property is that the facility must not have permanent, long-term significant effects on the conservation values protected with the underlying acquisition.

BPA shall initiate any such negotiation by making a written request to ODFW to begin negotiations, and by providing draft transmission right-of-way easement language. Parties shall meet within 45 business days of the postmark or e-mail date to begin in-person negotiations. In the negotiations and the final transmission right-of-way easement, BPA shall, at a minimum:

1. Recognize the purposes for which the underlying fee or conservation easement was acquired.

2. Fund any necessary appraisal to ensure that the fair market value of the transmission right-of-way easement was captured in the agency's contribution or proportionate contribution to the fee title acquisition.

3. Use reasonable efforts to accommodate ODFW's preferences for siting any transmission facilities.

4. Use reasonable efforts to accommodate ODFW's preferences for siting, designing, using, and maintaining any necessary access road(s).

5. Fund appropriate mitigation measures identified during negotiations or as part of the environmental analysis for the transmission right-of-way under NEPA, the ESA, the Clean Water Act, or any other applicable state or federal laws.

The Parties will negotiate the terms and conditions of any transmission right-of-way easement in good faith, in accordance with applicable law. If negotiations fail, or a right-of-way easement is not finalized in a timely manner (where "timely" means enough time to accommodate BPA's need for a final decision, allowing at least 60 business days for negotiation and finalization of a transmission right-of-way easement), then BPA's authorities to pursue a necessary or appropriate transmission right-of-way easement are unaffected by this Agreement. BPA shall not deduct any funds from the budget established under this Agreement for any activities related to granting a transmission right of way under this section.