

**BONNEVILLE POWER ADMINISTRATION**

**ADMINISTRATOR'S RECORD OF DECISION**  
**FOR**  
**2019 MEMORANDUM OF AGREEMENT**  
**BETWEEN THE KOOTENAI TRIBE OF**  
**IDAHO AND BONNEVILLE POWER**  
**ADMINISTRATION**

**February 22, 2019**

# 2019 MEMORANDUM OF AGREEMENT BETWEEN THE KOOTENAI TRIBE OF IDAHO AND BONNEVILLE POWER ADMINISTRATION

## 1.0 INTRODUCTION

As part of its ongoing efforts to protect, mitigate, and enhance fish and wildlife in the Columbia River Basin, the Bonneville Power Administration (“**Bonneville**”) has decided to enter into an agreement formalizing its partnership with the Kootenai Tribe of Idaho (“**Kootenai Tribe**” or “**Tribe**”)—collectively, “**the parties.**” The agreement addresses fish and wildlife affected by the development and operation of the Columbia River System, by protecting ecosystems that support Kootenai River white sturgeon, a protected species under the Endangered Species Act (“**ESA**”), burbot—a species of concern that has been considered for ESA protection, and wildlife. The agreement reinforces and extends the work begun under earlier agreements for up to four more years.

This Record of Decision describes Bonneville’s decision to enter the agreement, including factors leading to that decision and the contents of the agreement. Bonneville has documented its consideration of the National Environmental Policy Act (“**NEPA**”) in a separate categorical exclusion also issued today.

## 2.0 CONTEXT OF THE AGREEMENT

The mitigation projects under the umbrella of the agreement, and the relationship foundation upon which it is built, have a long history between the parties. In the interest of continuing what has proved to be an effective approach to addressing Bonneville’s fish and wildlife responsibilities in the upper Columbia River Basin, and preserving the collaborative partnership developed with the Kootenai Tribe, Bonneville agreed to explore this new agreement several years ago. Discussions were delayed, however, as the U.S. District Court for the District of Oregon’s remand of the 2014 Biological Opinion for effects of management of the Columbia River System, and subsequent spill injunction rulings, which added tremendous uncertainty regarding system operations during this interim period before the Columbia River System Operations NEPA process is complete. To address such uncertainty, the parties modeled this agreement on the recently completed Columbia River Fish Accord Extensions with two states, five tribes, and one tribal organization.<sup>1</sup>

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<sup>1</sup> See generally, ADMINISTRATOR’S RECORD OF DECISION FOR EXTENSIONS OF THE COLUMBIA BASIN FISH ACCORDS (Sept. 28, 2018), <https://www.bpa.gov/news/pubs/RecordsofDecision/rod-20180928-Extensions-of-the-Columbia-Basin-Fish-Accords.pdf>

The agreement includes a section highlighting the parties’ accomplishments from their lengthy collaboration.<sup>2</sup> The parties also acknowledge the results of the extensive efforts to overhaul the Columbia River System by the U.S. Army Corps of Engineers, Bureau of Reclamation, and Bonneville as successfully addressing the broad anadromous fish mandates of the Northwest Power Act<sup>3</sup>—to improve survival at system dams and provide flows of sufficient quality and quantity between dams to improve production, migration and survival of anadromous fish.<sup>4</sup>

With these achievements as a foundation, Bonneville decided to proceed with the agreement.

### **3.0 DESCRIPTION OF THE KOOTENAI AGREEMENT**

The parties are committing to continued implementation of projects for the benefit of fish and wildlife affected by the Columbia River System, with funding provided by Bonneville. Unlike the Columbia Basin Fish Accords, which focused on actions to help ocean-going (anadromous) fish listed as threatened or endangered under the ESA, the Kootenai agreement provides actions to help other fish in the Basin, including non-ocean-going (resident) stocks such as the ESA-listed bull trout and Kootenai River white sturgeon as well as resident fish species in the upper Columbia such as burbot and terrestrial wildlife. The agreement is intended to work in concert with the forthcoming Biological Opinions for the Columbia River System operations, developed by National Oceanic and Atmospheric Administration (“NOAA”) Fisheries and the U.S. Fish and Wildlife Service (“USFWS”) (as well as the existing Biological Opinion for the Upper Snake River Projects).<sup>5</sup> The agreement also contains several commitments for the benefit of wildlife impacted by the Columbia River System.

One important difference between this agreement and the Accords and Accord extensions is that the Kootenai Tribe is not seeking any changes to Columbia River System operations, or funding or other actions from the Corps of Engineers or the Bureau of Reclamation. As a result, the Corps and Reclamation decided they did not need to be parties to the agreement because it does not include any changes in Columbia River System operations, funding, or other actions from those agencies.

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<sup>2</sup> 2018 MEMORANDUM OF AGREEMENT BETWEEN THE KOOTENAI TRIBE OF IDAHO AND BONNEVILLE POWER ADMINISTRATION at § II.B (Dec. 2018) (*hereinafter* “KTOI MOA”).

<sup>3</sup> KTOI MOA § II.A.

<sup>4</sup> *See* Northwest Power Act, 16 U.S.C. § 839b(h)(6)(E) (mandating measures regarding survival and flow for anadromous fish in the Northwest Power and Conservation Council’s Columbia Basin Fish and Wildlife Program, with which Bonneville-funded mitigation is consistent); *id.* § 839(6) (“suitable environmental conditions” for anadromous fish are “substantially obtainable” from system operations and management).

<sup>5</sup> The Upper Snake River Projects are Minidoka, Palisades, Michaud Flats, Ririe, Little Wood River, Boise, Lucky Peak, Mann Creek, Owyhee, Vale, Burnt River, and Baker.

### 3.1 Purpose

For Bonneville, the purpose of the agreement is to continue the ongoing efforts to address its legal responsibilities to mitigate for the effects of the construction, inundation, operation and maintenance of fourteen dam and reservoir projects of the Columbia River System on fish and wildlife resources of the Columbia River Basin. In so doing, Bonneville balances its fish and wildlife responsibilities with its other statutory responsibilities and its strategic goals.<sup>6</sup> In addition, the agreement reflects continued alignment between the parties regarding compliance with the Northwest Power Act,<sup>7</sup> the ESA,<sup>8</sup> the Clean Water Act (“CWA”),<sup>9</sup> and NEPA.<sup>10</sup> The agreement also addresses the parties’ shared interest in certainty and stability in funding and implementation of cost-effective projects. As discussed below, the Kootenai Tribe volunteered substantial annual budget reductions for its long-term fish and wildlife projects. Those commitments helped Bonneville to, in turn, offer the Tribe budget certainty and flexibility and the extended cooperation provided by the agreement.

### 3.2 High Priority Actions

During the agreement, the parties commit to working together and supporting the following time-sensitive and critical goals and milestones that Bonneville identified as crucial points for alignment and coordination.<sup>11</sup>

- Issuance of NOAA Fisheries and USFWS Biological Opinions on the effects of the coordinated water management of the Columbia River System, including operations and maintenance of the dam and reservoir projects.
- Agreeing on fish operations, including spring and summer spill for fish passage, until the CRSO EIS ROD is issued.
- Collaborating to seek alignment of regional sovereigns in support of the Columbia River System Biological Opinions, including system operations, in appropriate forums.
- Coordinating and submitting complementary recommendations for amendments to the Columbia Basin Fish and Wildlife Program.<sup>12</sup>
- Finding efficiencies in project implementation that reduce administrative obligations related to project contracting, reporting, and, where appropriate, further streamline environmental compliance.

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<sup>6</sup> KTOI MOA § I.

<sup>7</sup> Pacific Northwest Electric Power Planning and Conservation Act, 16 U.S.C. §§ 839 *et seq.*

<sup>8</sup> Endangered Species Act, 16 U.S.C. § 1531 *et seq.*

<sup>9</sup> Federal Water Pollution Control Act, 33 U.S.C. § 1251 *et seq.*

<sup>10</sup> National Environmental Policy Act, 42 U.S.C. § 4321, *et seq.*

<sup>11</sup> KTOI MOA § III.A.

<sup>12</sup> See further discussion in § 3.8, below.

The Parties will meet at least annually to consider the results of their efforts to meet the milestones described in the agreement, and to report on their respective efforts, including specific actions taken and future strategies, to achieve those ends.

### **3.3 Support for Columbia River System Fish Operations**

The agreement commits the parties to collaboration on future fish operations, as described below.<sup>13</sup>

#### *3.3.1 Columbia River System Fish Operations*

For a decade the Kootenai Tribe has supported Bonneville and the position of the United States in litigation concerning Columbia River System operations compliance with the ESA, Clean Water Act, and NEPA. The Kootenai Tribe intends to continue supporting Columbia River System operations, provided that the biological conditions or performance of key fish populations are not materially affected by changes to Libby Dam operations that may occur in 2019 or beyond.

#### *3.3.2 Montana Operations*

As with the Montana Accord Extension,<sup>14</sup> in the agreement Bonneville committed to support current reservoir operations at Libby Dam (“**Montana Operations**”) as set forth in previous relevant biological opinions.<sup>15</sup> This includes variable discharge (variable Q or VARQ) as well as spring and summer operations developed as part of the Northwest Power and Conservation Council’s [2003 Mainstem Amendments](#).<sup>16</sup> The Kootenai Tribe expects to support the Columbia River System operations that will begin in 2019, provided that the biological conditions or performance of key fish populations are not materially affected by changes to Libby Dam operations. The parties are also in the process of investigating refined operations at Libby Dam that may improve conditions for fish and wildlife impacted by this multi-purpose project and do not adversely affect fish in the lower river. The parties will also discuss adjustments to winter and spring operations at Libby Dam, including consideration of the potential impacts of winter operations (i.e. winter power peaking) on the survival and recovery of native fish species.<sup>17</sup>

### **3.4 Bonneville’s Financial Commitments**

#### *3.4.1 Agreement Budgets*

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<sup>13</sup> KTOI MOA § III.B.

<sup>14</sup> 2018 EXTENSION OF THE 2008 COLUMBIA BASIN FISH ACCORDS MEMORANDUM OF AGREEMENT AMONG THE STATE OF MONTANA, BONNEVILLE POWER ADMINISTRATION, U.S. ARMY CORPS OF ENGINEERS, AND U.S. BUREAU OF RECLAMATION, §§ IV.B.1, 3 (*hereinafter* “Montana Extension”).

<sup>15</sup> KTOI MOA § III.B.2.

<sup>16</sup> *Id.* § III.B.1.

<sup>17</sup> *Id.* § III.B.2.b.

For the duration of the agreement—up to the end of federal fiscal year (FY) 2022—Bonneville commits to provide funding to the Kootenai Tribe to continue implementing specific projects, as described in the KTOI MOA Attachment A: Kootenai Tribe of Idaho Project Portfolio, which shows the project budgets. Total funding commitments are listed below.

**TOTAL: \$48,546,942 Expense and \$5,000,000 Capital**

#### *3.4.2 Comparison to Prior Year Period*

For expense funding commitments, the first year budget under the agreement will provide approximately \$3 million in savings for Bonneville’s Fish and Wildlife Program compared to the Kootenai Tribe’s budget in FY17, which was \$14,209,674. Kootenai Tribe worked proactively with BPA to identify \$1.2 million in savings in FY 2018, and the agreement captures an additional \$1.8 million in savings in FY 2019.

Like the recently signed Columbia River Basin Fish Accord Extensions, the agreement with the Kootenai Tribe does not provide for inflation increases.

The budget reductions from past year levels were negotiated to ensure that projects continue to provide biological benefits that support fulfillment of Bonneville’s responsibilities. Specifically, Bonneville consistently focused budget discussions on promoting efficient use of funds (*e.g.*, cost-share), seeking to ensure that aspects of project work were not redundant, adjusting the pace of project implementation, and limiting contract work elements related to travel and training.

#### *3.4.3 Specific Budget Commitments and Provisions*

Consistent with the budget commitments under the Accord Extensions, the total amount of funds that the Kootenai Tribe may spend in a single fiscal year—including any unspent carry forward funds from any prior fiscal years—shall not exceed 120% of the budgeted amount for that year set forth in Attachment A, unless Bonneville and the Tribe agree otherwise.<sup>18</sup> This cap governs requests for changes in the timing of implementation and distribution of funding, through preschedules, reschedules, or budget transfers.

The agreement allows for both parties to request voluntary budget adjustments that a party determines may be needed to address the year-to-year variability associated with Bonneville’s financial circumstances.<sup>19</sup> In the case of deteriorating financial conditions, Bonneville may call on the Kootenai Tribe to voluntarily reduce expenditures in a given fiscal year, while selecting such reductions so as to not compromise compliance with ESA responsibilities or other legal obligations. Any funds saved through agreed-upon reductions to expenditures in a given year

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<sup>18</sup> KTOI MOA § III.C.2.b.

<sup>19</sup> *See id.* § III.C.2.c.

would be available for use in the following years of this agreement, subject to applicable budget rules.

Conversely, if Bonneville’s financial condition improves, the Kootenai Tribe may request that Bonneville increase its funding commitments or allowed annual expenditures, including relief from the 120% budget cap or other budget rules described above.<sup>20</sup> The parties understand that failure to reach agreement on a party’s requested increase or decrease in funding, as described above, may, under some circumstances, meet the conditions of one or more of the off-ramps in the agreement.<sup>21</sup>

### **3.5 Hatchery Commitments**

The agreement does not include new or additional hatchery actions beyond those already funded by Bonneville under the long-term Memorandum of Agreement between Department of Energy, Bonneville Power Administration, and the Kootenai Tribe of Idaho for the Kootenai River Native Fish Conservation Program White Sturgeon and Burbot Hatchery Facilities signed in 2013.<sup>22</sup>

### **3.6 Habitat Commitments**

The agreement provides for continued funding from Bonneville for existing habitat projects to improve spawning and rearing habitat for Kootenai River white sturgeon, which is listed for protection under the ESA, as well as burbot, a species of concern, and other resident fish and wildlife.<sup>23</sup> These are ongoing, longer term habitat projects that have been vetted by the Independent Scientific Review Panel (“**ISRP**”) and continuously recommended for funding by the Council. Any new or expanded habitat projects beyond those included in Attachment A must provide or facilitate on-the-ground benefits through mitigation that addresses the parties’ priorities, such as habitat enhancement actions important for listed species.<sup>24</sup>

The parties will also continue their long-term collaboration to protect and enhance wildlife and wildlife habitat. Funding will be provided for the Tribe’s Albeni Falls Wildlife Mitigation project to help cover the costs of operating and maintaining 1,139 acres already purchased with ratepayer funds for wildlife mitigation.<sup>25</sup> Funding will also continue for the operations loss mitigation project that the Tribe implements in coordination with the Montana Department of Fish, Wildlife, and Parks.<sup>26</sup> This project protects and enhances important riparian and floodplain habitats to provide dual benefits—that is, benefits for both resident fish and wildlife.

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<sup>20</sup> *See id.*

<sup>21</sup> *See, e.g.*, § III.C.2.c.

<sup>22</sup> *See id.* § III.E.

<sup>23</sup> *See id.* § III.F.

<sup>24</sup> *See id.* § III.F.2

<sup>25</sup> *See id.* Attachment A, Project 1992-061-05.

<sup>26</sup> *See id.* Attachment A project 2002-011-00

### **3.7 Project Administration and Efficiencies**

The projects in Attachment A will be administered under separate and discrete intergovernmental contracts—including specified work elements, milestones, site-specific environmental compliance, and deliverables.<sup>27</sup> Once executed, the intergovernmental contract will govern all activities for the associated project, and all contracting actions will comply with the Bonneville Purchasing Instructions<sup>28</sup> and with applicable laws and regulations, including NEPA, the ESA, and the National Historic Preservation Act.

Additionally, to promote cost savings and maximize biological returns on investment, the parties will seek efficiencies in project administration.<sup>29</sup> Such efficiencies will focus on actions to streamline contracting and reporting, and, where possible, environmental compliance, such as through the use of ESA Section 7 programmatic habitat improvement consultations.<sup>30</sup> The parties also anticipate savings and efficiency associated with the benefits of project bundling, multi-year contracting, and cost-sharing that the agreement will help to facilitate.

### **3.8 Northwest Power and Conservation Council’s Columbia Basin Fish and Wildlife Program**

The parties have also agreed on particular matters concerning the relation of their joint and respective fish and wildlife mitigation efforts to the Council’s Program and Program amendment process.

#### *3.8.1 An Established Mitigation Framework*

The parties recognize that, at almost 40-years-old, the Council’s Program represents an established framework for mitigating the effects of the Columbia River System on wildlife.<sup>31</sup> Within that framework, Bonneville has relied on guidance in past Council Programs in making extensive, long-term investment in mitigation projects and equitable treatment for fish and wildlife. With that foundation, the parties now intend to ensure that the benefits to fish and wildlife from such commitments continue to accrue, while also stabilizing the cost of those benefits.<sup>32</sup>

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<sup>27</sup> See *id.* § III.G.

<sup>28</sup> *Id.* See also, BONNEVILLE POWER ADMIN., BONNEVILLE PURCHASING INSTRUCTIONS (2018), available at <https://www.bpa.gov/Doing%20Business/purchase/Pages/default.aspx>.

<sup>29</sup> KTOI MOA § III.D.

<sup>30</sup> See, e.g., U.S. Fish and Wildlife Service. 2013. Formal Section 7 programmatic consultation on BPA’s Columbia River Basin Habitat Improvement Program. Oregon Fish and Wildlife Office, Portland, Oregon. TAILS no. 01EOFW00-2013-F-0199.

<sup>31</sup> See, e.g., KTOI MOA § III.H.

<sup>32</sup> See *id.* § III.H.1.



### 3.8.2 *Council Program Amendment Process*

In anticipation of the agreement, the parties coordinated prior to submitting their recommendations for amendments to the Council's Program. The agreement commits the parties to coordinate their comments on recommendations, and comments on the draft Program amendments, and do so in a timely manner that avoids surprising each other.<sup>33</sup>

The parties will also continue to participate in ISRP review of projects funded under the agreement.<sup>34</sup> The parties will look for opportunities to coordinate with the Council on streamlining and consolidating ISRP project reviews.

### 3.8.3 *Passage and Reintroduction Above Columbia River System Dams*

Unlike the recently signed Accord Extensions, the agreement with the Kootenai Tribe does not include provisions regarding the Council's three-phase approach for investigating passage and reintroduction of anadromous fish above Chief Joseph and Grand Coulee dams. Instead, this agreement simply observes in a footnote that translocation of anadromous fish above Columbia River System dams is a sensitive issue requiring adherence to the agreement's "no surprises" protocols.<sup>35</sup>

## **3.9 No Surprises, Affirmations of Adequacy, Regional Support, Legal Provisions, and Withdrawal**

### 3.9.1 *Good Faith Implementation and No Surprises*

As in the Accord Extensions, the parties to this agreement commit to good-faith implementation and support, including an advance coordination commitment—colloquially known as "no-surprises." Specifically, the provision says that "[e]ach Party will make best efforts to consult with other parties prior to taking any action that could reasonably be interpreted as inconsistent with any part of this Agreement."<sup>36</sup>

### 3.9.2 *Affirmative Support*

Despite not having a prior Accord-like agreement, the Kootenai Tribe has consistently volunteered its affirmative support of Bonneville for the last decade in matters related to Columbia River System legal compliance and litigation. Through this agreement the parties formalize that relationship. The Tribe commits to continuing its support of Bonneville's commitments under the agreement and in ESA consultations, and finds that these commitments

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<sup>33</sup> See *id.* § III.H.3.

<sup>34</sup> See *id.* § III.H.4.

<sup>35</sup> See *id.* footnote 10.

<sup>36</sup> See *id.* § III.I.1.c.

constitute adequate compliance for the ESA, the Northwest Power Act, the CWA, and NEPA with respect to the Columbia River System.<sup>37</sup>

These affirmations are of vital importance to Bonneville, because they confirm that with respect to the Kootenai Tribe, no additional Bonneville funding is needed to meet Bonneville’s fish mitigation responsibilities during the term of the agreement.

#### *3.9.4 Regional Support for Columbia River System Operations*

Unlike the recently signed Accord Extensions, the Kootenai agreement does not include an attachment summarizing the current status of planning for anadromous fish operations for the Columbia River System. The parties made this choice because the Kootenai Tribe’s primary interest with regard to Columbia River System operations is with Libby Dam operations described in the Council’s 2003 Mainstem Amendments as “the Montana operations.” The provisions in this agreement related to Montana operations mirror the provisions on operations in the Accord Extension with the State of Montana.<sup>38</sup>

In keeping with the Accord Extensions, the parties support system operations that preserve and enhance Bonneville’s ability to sustain its statutory obligations to continue providing competitive cost-based electric power and transmission services and fulfilling other valuable public service responsibilities for the region.<sup>39</sup> These responsibilities include the protection, mitigation and enhancement of fish and wildlife affected by the development and operation of the Columbia River System, while helping assure the region an adequate, efficient, economical, and reliable power supply.

#### *3.9.5 Columbia River System Operations Environmental Impact Statement*

The agreement supports the Kootenai Tribe’s full and open participation in the Columbia River System Operations Environmental Impact Statement (**EIS**) process. Following the Tribe’s Cooperating Agency Memorandum of Understanding for developing the EIS, and to facilitate informed and open involvement in that process, Bonneville will provide the Tribe with advanced notice and copies of the draft and final EIS.<sup>40</sup> Moreover, as a cooperator the Tribe will retain the right to comment on all issues during the public draft and final EIS public review and comment process, including dam breaching, and suggestions for different or additional alternatives for system operations.

#### *3.9.6 Term*

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<sup>37</sup> See *id.* § III.J.

<sup>38</sup> Montana Extension, § IV.B.3.

<sup>39</sup> KTOI MOA § III.J.3.

<sup>40</sup> See *id.* § III.J.4.

Unless either party withdraws under an applicable off-ramp (discussed below), the agreement will be in effect until the earlier of (1) when Bonneville issues its final decision on the Columbia River System Operations EIS and any associated consultation under the ESA, or (2) September 30, 2022.<sup>41</sup> The parties will meet to discuss potential modification or extension at least one year before the agreement expires.<sup>42</sup> If, however, the agreement terminates prior to September 30, 2022, the parties may elect to extend the Agreement through FY 2022.

### *3.9.7 Off-ramps, Renegotiation, and Withdrawal*

The agreement allows for either party to withdraw under certain circumstances, principally: in the event of material non-compliance with the agreements not resolved through negotiation, or in the event of material effects relating to biological opinion litigation.<sup>43</sup> In addition, the agreement allows either party to withdraw under specific circumstances. For example, one off-ramp focuses on financial circumstances.<sup>44</sup> Inclusion of a financial off-ramp is crucial to Bonneville to accommodate the current uncertainties surrounding the agency's general financial condition, including the potential added financial impacts of any new fish and wildlife costs, such as those that may be triggered in response to increased costs for fish and wildlife responsibilities associated with either the outcome of a NOAA Fisheries or USFWS consultation, or a judicial order concerning the implementation or sufficiency of a Columbia River System biological opinion. A financial off-ramp is also available for material changes to Bonneville's financial condition due to energy market conditions, river flows, litigation, or other external factors that affect the agency's financial health and associated ability to sustain fulfillment of its multiple statutory responsibilities.

To address the uncertainties facing the Kootenai Tribe, the agreement includes an off-ramp for environmental conditions or events that negatively impact reasonable expectations regarding near-term biological conditions or performance of key fish populations and Libby Dam operations.<sup>45</sup>

Finally, off-ramps are available in the event of either party's material non-compliance with the terms of the agreement or initiation of litigation challenging the sufficiency of the agreement commitments to meet federal obligations for the Columbia River System, including under the ESA, NEPA, Northwest Power Act, or CWA.<sup>46</sup>

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<sup>41</sup> *See id.* § III.K.3.

<sup>42</sup> *See id.* § III.K.2.

<sup>43</sup> *See id.* § III.L.1.a-b.

<sup>44</sup> *See id.* § III.L.1.d.

<sup>45</sup> *See id.* § III.L.1.e.

<sup>46</sup> *See id.* § III.L.1.c.

In the event of an off-ramp condition, either party may seek to renegotiate or withdraw from the agreement. Under the withdrawal process, however, the parties will attempt to preserve the agreement through a 90-day good faith effort to renegotiate its terms in a manner that obviates the concerned party's need to withdraw.<sup>47</sup>

### **3.11 Changes from the Draft to the Final Agreement**

After the draft agreement was released for public review, the parties made minor edits, primarily to ensure legal and technical accuracy, for administrative and clerical matters, and for correcting typographical, formatting, and grammatical errors.

## **4.0 PUBLIC REVIEW AND RESPONSE TO COMMENTS**

Bonneville elected to post the draft agreement for public review and respond to the comments it received as part of the agency's ongoing commitment to public involvement and open decision making. The comment period remained open until December 1. One public comment was received. The comment did not address the terms of the agreement with any specificity, but rather expressed general opposition to some of the ways that Bonneville has chosen to approach its fish and wildlife responsibilities. For the reasons explained in this Record of Decision, Bonneville finds that the commitments in the agreement will help to fulfill those responsibilities.

## **5.0 WHY BONNEVILLE HAS DECIDED TO ENTER THE AGREEMENT**

### **5.1 The Agreement is Consistent with Bonneville's Strategic Plan**

As explained in its 2018-2023 Strategic Plan ("**Strategic Plan**"), Bonneville intends to hold program costs, by business line and including Fish and Wildlife, at or below the rate of inflation through 2028.<sup>48</sup> For Fish and Wildlife, this applies to new commitments as well.<sup>49</sup> Commitments such as the agreement are a subset of Bonneville's larger Fish and Wildlife Program as a whole, and the associated agreement budget is likewise a subset that is fully contained within the Fish and Wildlife Program's overall budget. Therefore, under the Strategic Plan, the cost of the agreement—including use of any carry-forward funds as allowed under the budget commitments described in section 3.4.3 above—within the established Fish and Wildlife budget, which in turn will be held at or below the rate of inflation.

Furthermore, the agreement takes into account the dynamic energy market in the West, the uncertainties of mitigation costs such as spill for fish passage, and other factors affecting Bonneville's overall financial condition, which spurred development of the Strategic Plan in the

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<sup>47</sup> See *id.* § III.L.2.

<sup>48</sup> See BONNEVILLE POWER ADMIN., BPA 2018-2023 STRATEGIC PLAN, 12, 39, available at <https://www.bpa.gov/StrategicPlan/StrategicPlan/2018-Strategic-Plan.pdf>.

<sup>49</sup> *Id.* at 39.

first place. The factors underlying this financial condition are not described in detail in the agreement, but they are widely available in the public domain and underscore Bonneville’s need to bring greater cost discipline to all aspects of its business and operations.<sup>50</sup> To that end, Bonneville’s Strategic Plan identifies strengthening financial health as its first strategic goal, and establishes specific objectives to achieve this goal.<sup>51</sup> These topics have been discussed extensively by the parties.

With this backdrop, Bonneville negotiated the agreement to increase focus, certainty, and stability in its fish and wildlife costs. Complementing the broader, agency-wide efforts to strengthen its financial health and manage costs—including by stabilizing its fish and wildlife costs—while continuing to deliver fully on Bonneville’s mission,<sup>52</sup> the agreement includes numerous provisions and mechanisms aimed at savings. Further, an underlying principle in the agreement is Bonneville’s intent to manage the cost of Columbia River System fish operations; habitat protection and enhancement; hatchery management; and research, monitoring and evaluation as “separate components under a unified fish and wildlife mitigation budget,” meaning that a cost increase in one area would be offset by decreases in another.<sup>53</sup> One recent example is the 2018 Spill Surcharge, where Bonneville decided to offset a portion of additional costs associated with court-ordered spill for fish passage by reducing Fish and Wildlife Program expenditures.<sup>54</sup> To manage these costs in a more sound business way, and meet Strategic Plan objectives, including for Bonneville’s overall Fish and Wildlife program, the agreement includes the following administrative provisions:

- Budget reductions in the Tribe’s Attachment A projects.
- Agreement that Bonneville may call for additional voluntary expenditure reductions.<sup>55</sup>
- Commitments to seek efficiencies and streamline project management and implementation.<sup>56</sup>

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<sup>50</sup> See, e.g., BONNEVILLE POWER ADMIN., ADMINISTRATOR’S DECISION, IMPLEMENTATION OF THE FY 2018 SPILL SURCHARGE, at 1-5 (June 2018), available at [https://www.bpa.gov/Finance/RateCases/surcharge18/surcharge18documents/Spill\\_Surcharge\\_Implementation\\_FY2018\\_06-21-2018.pdf](https://www.bpa.gov/Finance/RateCases/surcharge18/surcharge18documents/Spill_Surcharge_Implementation_FY2018_06-21-2018.pdf) (discussing energy market conditions, cost of court-ordered spill, and other factors as contributing to Bonneville’s precarious financial condition and its corresponding need to implement cost-management actions across the agency) [hereinafter Spill Surcharge ROD].

<sup>51</sup> See generally Strategic Plan (identifying objectives such as improving cost-management discipline, building financial resiliency, prioritizing fish and wildlife investments based on biological effectiveness and mitigation for impacts of the Federal Columbia River Power System, and managing fish and wildlife program costs at or below the rate of inflation).

<sup>52</sup> See Strategic Plan at 3 (Bonneville vision is to be “an engine of the Pacific Northwest’s economic prosperity and environmental sustainability,” providing high reliability, low rates, responsible environmental stewardship and regional accountability.”).

<sup>53</sup> See KTOI MOA § III.

<sup>54</sup> See Spill Surcharge ROD at 5.

<sup>55</sup> KTOI MOA § III.C.2.c.

<sup>56</sup> See *id.* § III.D.

- An off-ramp allowing withdrawal in the event of material negative change in Bonneville’s financial conditions.<sup>57</sup> The ability to terminate 90-days after triggering an off-ramp.<sup>58</sup>

## 5.2 The Agreement Supports Bonneville’s Legal Responsibilities

In executing the agreement Bonneville will use its authority provided in section 4(h)(10)(A) of the Northwest Power Act.<sup>59</sup> Since Bonneville’s inception, Congress has afforded the Bonneville Administrator broad discretion to enter into “such contracts, agreements, and arrangements, . . . upon such terms and conditions and in such manner as he may deem necessary” to fulfill Bonneville’s statutory purposes.<sup>60</sup> This includes the express authority to make payments from the Bonneville Fund to implement Bonneville’s legal responsibilities, including its legal responsibilities under the Northwest Power Act and the ESA.<sup>61</sup> Bonneville’s Administrator is imbued with considerable flexibility and discretion when entering into agreements such as Accords, provided that Bonneville uses that flexibility and discretion to fulfill one or more of its statutory duties. As described in this section, the agreement is both consistent with and helps Bonneville fulfill its federal responsibilities.

### 5.2.1 Northwest Power Act

The agreement recognizes the overhaul of the Columbia River System undertaken by the Action Agencies since the mid-1990s.<sup>62</sup> These system improvements, in both project configuration and operations, address the broadly stated anadromous fish mandates in the Northwest Power Act by improving survival at the dams and ensuring flows of sufficient quality and quantity to improve fish production, migration, and survival, thus meeting the sound biological objectives for juvenile and adult survival.<sup>63</sup> Through this overhaul, and the operations that accompany it, Bonneville has helped provide and continues to provide fish and wildlife equitable treatment with the other purposes of the system.<sup>64</sup>

Columbia River System operations are not, however, governed by the agreement. Operations beginning in 2019 will be guided in particular by regional agreements, ESA section 7

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<sup>57</sup> See *id.* § III.L.1.d.

<sup>58</sup> See *id.* § III.L.2.

<sup>59</sup> See 16 U.S.C. § 839(b)(h)(10)(A).

<sup>60</sup> 16 U.S.C. § 832a(f).

<sup>61</sup> 16 U.S.C. § 838i(b); § 838i(b)(12).

<sup>62</sup> KTOI MOA § II.A.

<sup>63</sup> 16 U.S.C. § 839(b)(h)(6)(E).

<sup>64</sup> The discussion and analysis of how the Accords provided equitable treatment in the 2008 Accords ROD also applies to the KTOI MOA. See, Bonneville Power Administration, ADMINISTRATOR’S RECORD OF DECISION, COLUMBIA BASIN FISH ACCORDS § 5.2.3.3 (May 2008) (*hereinafter* “2008 Accords ROD”).  
[https://www.bpa.gov/news/pubs/PastRecordsofDecision/2008/MOA\\_ROD.pdf](https://www.bpa.gov/news/pubs/PastRecordsofDecision/2008/MOA_ROD.pdf)

consultations currently underway with NOAA Fisheries and the USFWS, as well as myriad other laws and regulations governing management of the Columbia River System.<sup>65</sup>

The agreement includes commitments in Attachment A for continuing to fund and implement extensive on-the-ground protection, mitigation, and enhancement work that directly benefits fish and wildlife and their habitats affected by the development and operation of the Columbia River System. All of the ongoing projects have been vetted in the past by the ISRP and recommended for funding by the Council. Because the commitments maintain ongoing projects, Bonneville believes they remain consistent with the Council's Fish and Wildlife Program and the purposes of the Northwest Power Act.

This agreement focuses on resident fish such as bull trout, Kootenai River white sturgeon, and burbot, as well as wildlife. The "Montana operations," based on the Council's 2003 Mainstem Amendments to its Columbia River Basin Fish and Wildlife Program, are a key feature. In addition, the agreement reaffirms Bonneville's existing regional commitment to take reasonable actions to aid non-listed fish during emergencies when significant detrimental biological effects are demonstrated.<sup>66</sup>

Wildlife mitigation, a Bonneville responsibility under the Northwest Power Act and a component of the Council's Program, is also central to the agreement. Funding under the agreement will enable the Kootenai Tribe to continue to providing stewardship to over 1139 acres of wildlife habitat, purchased with ratepayer dollars, in northern Idaho.

Bonneville also supports the assurance of an adequate, efficient, economical and reliable power supply in the Pacific Northwest, one of the purposes of the Northwest Power Act,<sup>67</sup> in multiple ways. Bonneville seeks to keep rates as low as possible consistent with sound business principles, and to manage Columbia River System operations to support power system reliability needs and comply with applicable reliability standards. Signing the agreement is consistent with these purposes. To support the agency-wide cost management efforts underway, Bonneville has taken significant steps, in coordination with the Kootenai Tribe, to decrease funding commitments from recent levels, while continuing to bring Bonneville and its customers a level of certainty about fish and wildlife costs and offer expanded administrative provisions for managing all of the various mitigation costs as part of a single unified budget.

### 5.2.2 *Endangered Species Act*

The actions and commitments in the agreement, including Bonneville-funded projects in Attachment A, are intended to benefit ESA-listed fish as well as non-listed fish. For ESA-listed

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<sup>65</sup> See *id.* § III.B.3

<sup>66</sup> *Id.* § III.B.4.

<sup>67</sup> 16 U.S.C. § 839(2).

fish, the agreement actions help to support fulfillment of Bonneville’s commitments and responsibilities under the ESA.

Similarly, to the extent that Bonneville’s ESA responsibilities evolve during the term of the agreement—*e.g.*, as a result of section 7 consultations with USFWS for operation of the Columbia River System—Bonneville would work with the Kootenai Tribe to re-prioritize or re-focus agreement commitments and funding to address new or changed ESA responsibilities.<sup>68</sup> If Bonneville and the Tribe are unable to agree on a redirected focus, the added cost of ESA compliance on top of the existing agreement commitments could lead Bonneville to explore use of an off-ramp in order to redirect agency funds to support actions that address evolving ESA responsibilities.

### 5.2.3 Trust Responsibilities

Bonneville acknowledges that as an agency within the Executive Branch, it shares the federal government’s trust responsibilities to all Indian tribes. Bonneville fulfills these responsibilities first by meeting the statutory obligations prescribed in general statutes applicable to all federal agencies, such as NEPA, and in statutes tailored specifically to Bonneville’s activities, such as section 4(h)(10)(A) of the Northwest Power Act.<sup>69</sup> Further, Bonneville seeks to give special consideration to tribal views and concerns, especially when making decisions that may affect tribal resources, through government-to-government consultation with tribes pursuant to Bonneville’s Tribal Policy. Bonneville incorporates by reference the rationale and analysis in the 2008 Accords ROD regarding consistency with the Tribe’s rights and the United States’ trust obligation.<sup>70</sup>

## 6.0 NATIONAL ENVIRONMENTAL POLICY ACT

Following NEPA,<sup>71</sup> Bonneville has assessed the potential environmental effects that could result from entering into the agreement with the Kootenai Tribe.

The agreement is administrative in nature. The projects funded through the agreement would build upon and largely continue ongoing tribally-sponsored fish and wildlife habitat protection and enhancement projects and would not represent new commitments or proposals. These projects would continue to undergo site-specific environmental review, including NEPA

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<sup>68</sup> KTOI MOA § III.B.3.

<sup>69</sup> KTOI MOA § III.M.2.

<sup>70</sup> See 2008 Accords ROD § 5.2.1.

<sup>71</sup> 42 U.S.C. § 4321, *et seq.*



analysis. The agreement also includes support for management of the Columbia River System, but does not provide funding to the Kootenai Tribe for such actions.

Accordingly, Bonneville has determined that the adoption of the agreement is an administrative action necessary to support the normal conduct of Bonneville's business and does not require Bonneville to take any action that would have a potential effect on the environment.

More specifically, this proposal falls within Categorical Exclusion A1, Routine Business Actions, found at 10 C.F.R. § 1021, Subpart D, Appendix A, which provides for the categorical exclusion from further NEPA review of "Routine actions necessary to support the normal conduct of Department of Energy business limited to administrative, financial, and personnel actions." Bonneville has prepared a categorical exclusion determination memorandum that documents this categorical exclusion from further NEPA review, which is available at: [https://www.bpa.gov/efw/Analysis/CategoricalExclusions/cx/2018\(Cx\)ACCORDS\\_KTOI\\_FINALE\\_1.pdf](https://www.bpa.gov/efw/Analysis/CategoricalExclusions/cx/2018(Cx)ACCORDS_KTOI_FINALE_1.pdf).

## **7.0 CONCLUSION**

Bonneville has partnered with the Kootenai Tribe for more than two decades to develop, improve, and refine a shared approach to fish and wildlife mitigation in the Upper Columbia River Basin. The parties have shared a common purpose—to protect, mitigate, and enhance fish and wildlife affected by the Columbia River System, consistent with applicable law and the federal government's tribal trust responsibility. The agreement's bedrock principles of collaboration and open communication on Columbia Basin fish and wildlife matters, the adaptability that the substantive terms allowed, and the potential to more cost-effectively fulfill Bonneville's responsibilities—in a manner that continues to produce valuable results for fish and wildlife—provide value not achievable with annual project-by-project contracting.

Bonneville has therefore decided to execute the agreement. The parties understand the uncertain nature and complexity of Columbia Basin fish and wildlife matters as they execute this agreement, but the parties are satisfied that the terms provide them each with the flexibility they need to protect their interests. Moreover, in spite of these uncertainties, the parties have chosen to memorialize what certainty they can—that is, an ongoing commitment to productive collaboration and alignment in their efforts to protect, mitigate, and enhance fish and wildlife in the Columbia Basin, while promoting greater cost discipline and stability in those efforts.

For these reasons, and the others explained above, Bonneville has decided to enter into the 2018 Memorandum of Agreement between the Kootenai Tribe of Idaho and Bonneville Power Administration with the Kootenai Tribe of Idaho.

Issued in Portland, Oregon, February 22, 2019.

/s/ Elliot E. Mainzer

Elliot E. Mainzer

Administrator and Chief Executive Officer