

REAFFIRMATION & AMENDMENT

to the 2018 Extension of the 2008 Columbia Basin Fish Accords

among the

**Bonneville Power Administration (“Bonneville”), U.S. Army Corps of Engineers (“Corps”), and
Bureau of Reclamation (“Reclamation”)**

(“Action Agencies”)

and the

**Confederated Tribes and Bands of the Yakama Nation (“Yakama Nation”), Confederated
Tribes of the Warm Springs Reservation (“Warm Springs”), Confederated Tribes of the
Umatilla Indian Reservation (“CTUIR”), and Columbia River Inter-Tribal Fish Commission
 (“CRITFC”)**

(“Tribal Parties”)

This Reaffirmation and Amendment (**“Amendment”**) continues but also implements certain modifications to the 2018 Accord Extension (**“2018 Extension”**) of the 2008 Columbia Basin Fish Accords (**“2008 Agreement”**) among the Action Agencies and Tribal Parties named above (each individually a **“Party”** and all together the **“Parties”**). Collectively, this Amendment, the 2008 Agreement, and the 2018 Extension are **“the Accord.”**

RECITALS

A. The 2018 Extension was written to be in force “until the earlier of when the Action Agencies issue their final decisions on the Columbia River Systems Operations (“CRSO”) Environmental Impact Statement (“EIS”) and any associated consultation under the Endangered Species Act (“ESA”) for the Columbia River System, or September 30, 2022.”¹

B. In October 2018, after the 2018 Extension was signed by the Parties, President Donald Trump issued a presidential memorandum accelerating the Action Agencies’ timeline to complete the ongoing CRSO National Environmental Policy Act (“NEPA”) process. In response to this presidential directive, the Action Agencies revised their schedule for the CRSO NEPA process and associated ESA consultations. The Action Agencies now anticipate issuing a final record of decision for the CRSO EIS in September 2020.

¹ 2018 Extension, Section IV.C.1

C. In signing the 2018 Extension, the Parties supported the four-year funding and coordination commitments set forth in the 2018 Extension and its Attachments. The Parties still want to see the commitments of the 2018 Extension fulfilled through September 30, 2022. In addition, the Parties have agreed to work together to address production and hatchery operations and maintenance needs, including the establishment of a Hatchery Infrastructure Workgroup.

D. The Parties acknowledge that certain amendments to the 2018 Extension are necessary, appropriate, or acceptable. The Action Agencies are currently engaged in a variety of legal compliance processes, future Accords negotiations with the Tribal Parties, and discussions with other regional sovereigns. Given this evolving landscape, the Tribal Parties cannot presently assess whether the Action Agencies' final compliance actions and related regional commitments to the Tribal Parties and others will present an adequate combined response that addresses the Action Agencies' obligations under the Northwest Power Act ("NWPA"), Clean Water Act ("CWA"), ESA, NEPA or to Treaty trust obligations with respect to the Columbia River System.

E. Looking forward, the Parties seek to negotiate a new long-term Fish Accords agreement, which would continue the Parties' mutually beneficial cooperative approach to addressing the direct and indirect effects of the construction, inundation, operation, and maintenance of the Columbia River System on fish and some wildlife resources of the Columbia River Basin, including the "all H" – hatcheries, habitat, harvest, and hydrosystem – approach to salmon conservation.

The Parties therefore agree as follows:

ARTICLE 1. SCOPE AND PURPOSE

1.01 **Continuation of Fish Accords Commitments.** Subject to the terms and conditions of this Amendment, the Parties will continue to be bound by and carry out the provisions and mutual commitments of the 2018 Extension until the expiration or termination of the Accord as provided in this Amendment. Provided, that the provisions of this Amendment will supersede and control over any conflicting provisions in the 2018 Extension.

ARTICLE 2. AMENDMENTS

2.01 **Effective Date; Term of Extension.** This Amendment will be effective upon the signature of the last Party. It will remain in force until either September 30, 2022, or the date on which a new long-term Fish Accords agreement among the Parties becomes effective, whichever is earlier, unless the Accord is terminated earlier by a Party consistent with the “off-ramps” provided herein or in Section IV.D of the 2018 Extension.

2.02 **Removal of Affirmation of Adequacy Commitment.** During the term of the Accord as modified by this Amendment, the Tribal Parties will not be bound to affirmatively support in legal, policy, and technical forums the sufficiency of the actions taken by the Action Agencies to comply with the NWPA, ESA, CWA, and NEPA concerning the Columbia River System.

2.03 **Forbearance from Litigation.** Notwithstanding the above, during the term of the Accord as modified by this Amendment, the Tribal Parties agree not to take a position adverse to any Action Agency in litigation under the NWPA, ESA, CWA, or NEPA that directly implicates the operation, maintenance, configuration, mitigation, or non-operational conservation measures of the Columbia River System; this forbearance does not apply, however, to discharges into navigable waters which are not permitted under any applicable permit. Nor will the Tribal Parties take a position adverse to National Oceanic and Atmospheric Administration Fisheries (“NOAA”) or U.S. Fish and Wildlife Service (“USFWS”) in litigation under the ESA or Administrative Procedure Act regarding the adequacy of their July 2020 Biological Opinions for the Columbia River System. If a Tribal Party has compliance or other concerns regarding a proposed or final Action Agency action that are not satisfactorily resolved at the Accords table, the Tribal Party may exercise its option(s) to ‘off-ramp’ and withdraw from the Accord.

2.04 Continued Collaborative Compliance Engagement and No Surprises. The Parties will continue to collaborate and seek each other’s input on strategic considerations regarding the Action Agencies’ compliance with the NWPA, ESA, CWA, NEPA, and other regional compliance processes. While not the exclusive mechanism for ensuring broad collaborative engagement, the Parties will continue to employ a “no surprises” protocol in which the Parties’ points of contact advise each other in advance regarding decisions, actions, policies, or public comments that concern (1) the Action Agencies’ compliance with the NWPA, ESA, CWA, or NEPA concerning the Columbia River System, or (2) other matters addressed in the Accord. This no surprises protocol is intended to promote collaborative engagement among the Parties prior to any Party’s final decision, action, or comment so that the views of the applicable Parties are heard and considered before final decisions, actions, or comments are made. This provision is not intended to act as a constraint on any Party.

2.05 Off-Ramps.

(a) *Additional Off-Ramps.* In addition to the existing ‘off-ramps’ provided in Section IV.D of the 2018 Extension, the Parties agree to the following off-ramp provisions:

(i) A Tribal Party may withdraw from the Accord if it finds that, in its sole opinion, a proposed or final Action Agency action concerning the Columbia River System is not consistent with federal Treaty or trust obligations, or with the Action Agencies’ legal obligations under the NWPA, ESA, CWA, or NEPA.

(ii) A Tribal Party may withdraw from the Accord if it finds that, in its sole opinion, an Action Agency’s compliance obligations under the NWPA, ESA, CWA, or NEPA concerning the Columbia River System would not be fulfilled by the combination of the Action Agency commitments offered to the Tribal Parties for a new long-term Accords agreement and other related actions or commitments.

(b) *Immediate Withdrawal; Conditions Precedent.* A Tribal Party may immediately withdraw from the Accord under Section 2.05(a) above by giving written notice to the other Parties stating the effective date of withdrawal. However, before withdrawing, the Tribal Party will notify the other Parties of their concerns in writing, and make best efforts to meet and identify options for resolution. It is the Parties' mutual goal to resolve compliance concerns and other issues at the Accords table through the negotiation of a new long-term Accords agreement among the Parties if possible, rather than through litigation. (The immediate withdrawal rights provided in this Amendment do not alter the existing 'off-ramps' provided in Section IV.D of the 2018 Extension; *however*, notwithstanding Section IV.D.1.c of the 2018 Extension, the Parties agree that a Tribal Party's participation in litigation that would otherwise be precluded by the forbearance provision of this Amendment (Section 2.03, above) will constitute an immediate withdrawal by the Tribal Party.)

2.06 Maintaining Benefits from Columbia River System Operations. While working in good faith to negotiate a new long-term Accord Agreement, the Parties will, during the term of this agreement, continue to coordinate on Columbia River System operations in a manner that carries forward the intended benefits of the 2018 Extension operational commitments as supplemented by the Flex Spill agreement (improved biological benefits compared to 2018, power system performance at or better than 2018 levels, and feasible implementation criteria). At the same time, the Parties will creatively seek opportunities for "win-win" measures that further improve salmon survival, advance their understanding of it, and address the ever-changing ecological circumstances and energy needs of the Pacific Northwest. The Action Agencies will collaborate with the Tribal Parties at the earliest possible stages of considering these measures. If a Tribal Party determines that management of the Columbia River System by the Action Agencies during the term of this Amendment has prevented the Parties' realization of intended biological benefits of 2018 Extension operational commitments, as supplemented by the Flex Spill agreement, and further, if the Parties are unable to agree on an acceptable resolution utilizing the process described in 2.05(b) above, then the Tribal Party may withdraw from the Accord under an off-ramp, which is the exclusive remedy under this section 2.06 of the Amendment.

2.07 No Waiver of Rights or Responsibilities. By entering into this Amendment, no Party waives its right to assert any claims, arguments, or defenses now or in the future. Further, nothing in this Amendment indicates a commitment or obligates the Action Agencies to take any action or system operation that is not covered by environmental compliance.

ARTICLE 3. NEGOTIATION OF NEW LONG-TERM ACCORD

3.01 **Goals.** The Parties will work in good faith to negotiate a new long-term Accord agreement, which would establish mutual commitments among the Parties through the end of the ESA-coverage period provided by the 2020 Biological Opinions. Consistent with the Parties' intent to address and resolve issues collaboratively at the Accords table rather than through litigation, the new Accord agreement would include commitments sufficient to support affirmation of adequacy and forbearance provisions. The Parties want to reach agreement regarding a new long-term Accords package as soon as possible to avoid litigation, and will dedicate the necessary staff and resources to prioritize these negotiations.

3.02 **Policy Objectives.** The Action Agencies have an interest in developing a new long-term Accord agreement that preserves and promotes collaborative relationships with the Tribal Parties and that includes commitments sufficient to support affirmation of adequacy and forbearance. The following long-standing objectives reflect, without limitation, key interests of the Tribal Parties for a new long-term Accord agreement. While the objectives themselves will not necessarily become substantive terms of a future Accord Agreement, the Parties understand that these objectives inform the scope of matters that the Tribal Parties expect to discuss and will seek to address in the terms of any proposed long-term Accord agreement. The Action Agencies commit to engage with the Tribal Parties' in a collaborative effort to address these policy objectives in a mutually agreeable manner during the development of the long-term Accord agreement:

(a) Continue to operate in concert with a package of other Action Agency commitments and actions regarding compliance with the ESA, CWA, NWPA, NEPA, and be consistent with the Action Agencies' Treaty and trust responsibilities to the Tribal Parties, such that the actions agreed to in new long-term Accords together with the actions committed to in ESA Proposed Actions/Biological Opinions are agreed by the Parties to be sufficient to fulfill the Action Agencies' compliance obligations under the NWPA, ESA, CWA, and NEPA concerning the Columbia River System.

(b) Support Tribal sovereignty by affirming and enhancing Tribal management of Treaty fisheries and implementation of Treaty fisheries protection, restoration, and enhancement actions throughout the Tribal Parties' Treaty territories.

(c) Support regional efforts to address and mitigate the impacts of the federal hydro system on fish and wildlife and their habitat, to promote the health of the Columbia River Basin, and the development of regional solutions and agreements regarding the future of the Columbia River System.

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(d) Secure and expand upon the Parties' past accomplishments to meet current and future ESA and NWPA obligations (e.g. habitat protection and enhancement; artificial production; research and monitoring; working with the Action Agencies to develop and refine operational plans and infrastructure development).

(e) Ensure that culturally important non-ESA listed species receive equitable treatment and adequate mitigation to help meet Tribal goals and Action Agency NWPA responsibilities.

(f) Honor and protect the sovereign rights of the tribes to co-manage their treaty secured interests in the Columbia River Basin, including but not limited to anadromous fish, ecosystems, and cultural resources.

(g) Provide for Columbia River System operations and Action Agency mitigation actions that protect Treaty fisheries.

(h) Complement the *United States v. Oregon* management plan to support greater Treaty fishing opportunities.

(i) Maintain the bi-lateral Accords relationship and Accords "point of contact" forum, to ensure ongoing and direct communications between the Tribal Parties and the Action Agencies as they implement their full suite of authorities and responsibilities in the Columbia Basin that impact or potentially affect Treaty fish and wildlife resources and cultural resources.

(j) Maintain partnerships between the Tribal Parties and Action Agencies, as opposed to a return to adversarial litigation; and partner to implement mitigation projects in a manner that (1) emphasizes the role of federal Treaty and trust responsibilities, and (2) recognizes and respects the Tribal Parties' extensive project and resource management expertise, as long-term cultural stewards of their treaty resources and legal co-managers of treaty fisheries, regarding the biological, physical, cultural, and social environments within which they operate to manage their treaty fisheries and implement fisheries projects .

(k) Maintain flexibility to address Parties' concerns about emergent issues.

(l) Seek administrative efficiencies mutually beneficial to the Parties.

ARTICLE 4. SIGNATURES

Each Party is signing this agreement on the date stated opposite that Party's signature:

/s/ John L. Hairston

September 24, 2020

John L. Hairston
Acting Administrator and Chief Executive Officer
Bonneville Power Administration

Date

/s/ D. Peter Helmlinger

September 24, 2020

D. Peter Helmlinger, P.E.
Brigadier General, US Army
Division Commander

Date

/s/ Lorri J. Gray

September 24, 2020

Lorri J. Gray
Regional Director
Bureau of Reclamation
Columbia-Pacific Northwest Region

Date

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/s/ Delano Saluskin

October 7, 2020

Delano Saluskin (or authorized designee)

Date

Tribal Council Chairman

The Confederated Tribes and Bands of the Yakama Nation

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/s/ Raymond Tsumpti

October 23, 2020

Raymond Tsumpti
Chairman, Tribal Council
The Confederated Tribes of the Warm Springs Reservation

Date

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/s/ N. Kathryn Brigham

October 19, 2020

N. Kathryn Brigham

Date

Chair

The Confederated Tribes of the Umatilla Reservation

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/s/ Jeremy Takala

November 4, 2020

Jeremy Takala
Chair
Columbia River Inter-Tribal Fish Commission

Date

/s/ Ryan G. Smith

November 4, 2020

Ryan Smith
Secretary
Columbia River Inter-Tribal Fish Commission

Date