

**BONNEVILLE POWER ADMINISTRATION
ADMINISTRATOR'S RECORD OF DECISION
COLUMBIA BASIN FISH ACCORDS
MEMORANDUM OF AGREEMENT WITH
THE KALISPEL TRIBE**

July 3, 2012

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MOA WITH THE KALISPEL TRIBE

1.0 INTRODUCTION

The Kalispel Indian Reservation is located on the Pend Oreille River in Washington State, downstream of the Albeni Falls Project and Lake Pend Oreille in Idaho. The Albeni Falls Project is operated by the Army Corps of Engineers (**Corps**) as part of the Federal Columbia River Power System (**FCRPS**) from which the Bonneville Power Administration (**BPA**) markets power. The Tribe holds hunting, gathering, and fishing rights within the Kalispel Reservation, and also manages a water quality program within the reservation. The Tribe has a strong interest in the protection and restoration of native fish such as bull trout, westslope cutthroat trout, and mountain whitefish. Because of these rights and interests, the Tribe is affected by the management of the FCRPS in the upper Columbia River, and in particular the Albeni Falls Project.

Although the Kalispel Tribe has long been a partner with BPA in implementing the Northwest Power and Conservation Council's Fish and Wildlife Program, the Tribe previously challenged the Corps' decisions regarding management of the Albeni Falls Project and the mitigation to address the impacts of its construction and operation on the natural resources of interest to the Tribe. Moreover, the Tribe has raised concerns that the **Action Agencies** (the Corps, BPA, and the U.S. Bureau of Reclamation) are focused primarily on impacts to lower river species, such as anadromous salmon and steelhead, without also sufficiently addressing effects on species and resources in the upper Columbia River Basin.

In 2008, the Action Agencies negotiated a series of agreements with other Columbia Basin tribes and states, focused primarily on anadromous salmon and steelhead listed under the Endangered Species Act, known as the Columbia Basin Fish Accords. The Kalispel are located in an area that does not have anadromous salmon or steelhead, but which does have important resident fish species such as bull trout. Because the Action Agencies and Kalispel Tribe believe that a Fish Accord could also be of benefit in the upper Basin for resident fish (e.g., like the Montana Accord), the agencies entered into negotiations to determine whether they could reach a similar agreement.

The result was the proposed Kalispel MOA with the parties being the Kalispel Tribe and the Action Agencies. Through this agreement, as with the other Fish Accords, BPA commits funding for nearly ten years to implement projects for the benefit of fish and wildlife, in this case with a particular focus on bull trout, a resident fish species listed for protection under the Endangered Species Act (ESA). Because this agreement is modeled after and contains much of the content of the similar Columbia Basin Fish Accords, the Kalispel agreement will also be known as a Fish Accord even though it includes actions to address wildlife mitigation as well and incorporates a unique approach to coordination and collaboration. The Kalispel agreement is known as the “**Kalispel Accord**” or the “**Kalispel MOA.**”¹

This Record of Decision describes what the Kalispel MOA contains and why BPA has decided to enter into it. This Record of Decision also documents BPA’s consideration of the environmental effects of entering into the MOA under the National Environmental Policy Act (NEPA).²

2.0 MUTUAL COMMITMENTS OF THE KALISPEL MOA

Under the terms of the Kalispel MOA, as with the terms of the other Fish Accords, the parties are committing to implement projects—to be funded by BPA—for the benefit of fish as well as wildlife affected by the FCRPS. Additionally, the Accord includes an Action Plan to be implemented by the Corps to address fish passage at Albeni Falls Dam and its operations as related to water temperature. The focal point of the Kalispel agreement is actions to address effects of the construction and operation of the Albeni Falls Project. The agreement is intended to work in concert with measures in the lower river to address salmon and steelhead, as well as to address bull trout, a species listed as threatened under the ESA. The agreement is also intended to work in concert with and help fulfill the Northwest Power and Conservation Council’s (Council) Fish and Wildlife Program and its priorities in the Intermountain Basin. Although the focus of mitigation in the Accords is generally on fish, the Kalispel MOA contains commitments for the benefit of wildlife impacted by the Albeni Falls Project. In addition, projects for the benefit of fish often carry wildlife benefits. As a result, although named a “Fish Accord,” the Kalispel MOA will benefit wildlife species as well.

In general, the agreement has four components: (1) a statement of the purpose and guiding principles; (2) mutual commitments regarding hydrosystem operations, including commitments regarding the forthcoming new ESA consultation regarding bull trout, and commitments regarding collaboration and coordination regarding water management operations; (3) mutual commitments regarding habitat and related actions; and (4) mutual commitments with respect to legal matters. The purpose of the following sections is not

¹ The terms “Accord,” “Fish Accord” “agreement” and “MOA” are used interchangeably throughout this decision; the Kalispel MOA is available at www.salmonrecovery.gov. The Kalispel Tribe is referred to as the “Tribe” throughout this decision.

² 42 U.S.C. § 4321 *et seq.* (2006).

to describe the Kalispel agreement in detail, as it speaks for itself, but to summarize some of its key provisions, including provisions unique to the Kalispel agreement.

2.1 Purpose and Principles

In the introductory sections of the agreement, the parties describe their intent to address direct and indirect effects caused by the construction (including inundation), operation and maintenance of fourteen hydropower projects of the FCRPS and Reclamation's Upper Snake Projects on fish and wildlife resources of the Columbia River Basin for a period of approximately ten years. In addition, the agreement aims to resolve issues between the Action Agencies and the Kalispel regarding compliance by the federal agencies under specific statutes—the Northwest Power Act,³ ESA, and the Clean Water Act (CWA)⁴—and to address the parties' mutual concerns for certainty and stability in funding for implementation of projects. The agreement is also intended to advance an enhanced level of cooperative and partnership-like relationship in implementation of the mutual commitments.

2.2 Hydro Commitments

2.2.1 Confirmation of hydro actions for FCRPS generally⁵

The Kalispel Tribe affirms its support for the hydro actions of the 2008 and 2010 supplemental National Oceanographic & Atmospheric Administration (NOAA) FCRPS Biological Opinions (BiOps) regarding salmon and steelhead. The agreement provisions addressing these hydro actions were taken from other Columbia Basin Fish Accords. Although the Kalispel Tribe is not focused on lower river issues, it was important to the Action Agencies that the Tribe confirm it would not challenge the FCRPS BiOps. The Tribe has signaled its acceptance because of how this agreement helps to bring better balance between the mitigation attentions for the upper Columbia as compared with the lower Columbia.

On August 2, 2011, the Oregon District Court issued an order remanding the NOAA FCRPS BiOps with direction to implement them through 2013 and issue a new opinion by January 1, 2014. The parties to the Kalispel MOA determined this order would not undermine their mutual commitments to the Kalispel MOA, and language was added to the MOA to address how the parties would proceed following a new or supplemental BiOp in 2014. For more information, see section 2.5.1, below.

³ Pacific Northwest Electric Power Planning and Conservation Act, 16 U.S.C. § 839 *et seq.*(2006).

⁴ Federal Water Pollution Control Act, 33 U.S.C. § 1251 *et seq.*(2006).

⁵ Section II.A and II.D of the Kalispel MOA.

2.2.2 USFWS 2000 Bull Trout BiOp & Re-initiation of Consultation⁶

In December 2000, the United States Fish and Wildlife Service (USFWS) issued a BiOp regarding the effects of the operation of the FCRPS on a variety of species listed under the ESA, including the threatened bull trout (*Salvelinus confluentus*). That BiOp included a number of terms and conditions to be implemented at Albeni Falls, including a feasibility study of passage for adult and sub-adult bull trout at Albeni Falls Dam. Based on the results of the study, the Corps and BPA will consult with USFWS, as necessary, on the decision to reestablish fish passage at the dam.

In September 2010, the USFWS issued a final rule revising the designated critical habitat for bull trout. Lake Pend Oreille and the Pend Oreille River were included in the designation. The Kalispel MOA acknowledges that the Corps and BPA are preparing to reinitiate consultation with the USFWS and commits the agencies to work collaboratively with the Tribe before and during the consultation process and to fully consider the Tribe's recommendations and proposals.

One of the issues for negotiation was how the Corps, BPA, and Tribe would coordinate on any proposed changes to the FCRPS as result of any re-initiated consultation on the bull trout. On the one hand, the agencies believed that with this Kalispel MOA, they were addressing the current interests of the Tribe in regards to resources of concern. On the other hand, the Tribe was not comfortable agreeing to support a BiOp regarding bull trout that might need changing based on new information, at least not without assurances of being consulted in regards to changes.

As a result, the parties agreed that the Tribe can provide the Corps and BPA with proposed changes to FCRPS operations, or suggestions regarding new or modified measures in response to the re-initiated consultation. The agencies agreed to fully consider the Tribe's recommendations, although they are not obligated by the terms of the agreement to accept them. If the agencies fully consider the Tribe's recommendations, the Tribe will not challenge any revised bull trout BiOp as a result of the re-initiated consultation. This illustrates the enhanced collaboration as noted above. Moreover, BPA anticipates that the collaboration will result in agreement with the Tribe regarding bull trout measures in any new or supplemental BiOp.

2.2.3 Operational issues at Albeni Falls Dam⁷

Because operations at Albeni Falls Dam can affect the Tribe's reservation downstream, the Tribe sought clearer coordination and collaboration efforts with the Corps and BPA regarding water management operations. A central purpose of the MOA "is to enhance the Tribe's ability to contribute its policy perspective and technical expertise" in

⁶ Section II.B of the Kalispel MOA. A determination of "feasible" includes consideration of what is technically, environmentally, cost-effectively, and legally justified to achieve the intended environmental benefit or purpose.

⁷ Section II.C of the Kalispel MOA.

discussions with the Corps and BPA regarding ongoing and proposed actions and operations at Albeni Falls Dam that may affect fish, wildlife, and water temperature.⁸

Two issues in particular were to be addressed initially: the bull trout passage study required by the 2000 USFWS BiOp, and an investigation of operational changes that could improve water temperatures for bull trout downstream of Albeni Falls. The long term objective is to operate Albeni Falls Dam in late summer and early fall to improve downstream water temperature for bull trout and other aquatic species in the Pend Oreille River. The first priority is to assess whether releases from Albeni Falls Dam can decrease downstream water temperature during this critical time period and be of benefit to bull trout.

Attachment C to the MOA is the Action Plan for fiscal year 2012. This Action Plan was drafted during negotiations through May 2012. Going forward, the Action Plan is to be updated prior to the beginning of each Federal fiscal year.⁹ Generally, the Action Plans will: document actions completed in the preceding year; identify priority actions for the upcoming year; and identify key actions, milestones, and funding for future fiscal years, within the framework of the MOA.

The 2012 Action Plan in Attachment C includes much more precision than its predecessor, which circulated for public review last summer. The plan calls for the following:

- Corps to collaborate with the Tribe to develop a preliminary report on bull trout passage at Albeni Falls Dam. The report will document work to date under the 2000 USFWS BiOp, aid in re-consultation, and inform the Corps' planning and funding processes should fish passage be determined feasible. A final report is expected late this summer.¹⁰
- Tribe to seek a surplus denil/waterfall trap structure and investigate the cost of a new one. Work with the Corps and BPA to install a trap by the spring of 2013.¹¹
- Corps and BPA to coordinate with the Tribe in developing Albeni Falls Dam operation plan to meet all project purposes and manage the dam adaptively, to the extent practicable, to ensure operations benefit fish and wildlife and are consistent with the ESA.
- The parties will meet approximately one month before Labor Day to consider post-Labor Day experimental water release as incorporated into the annual Water Management Plan.¹²
- The parties will collaborate on evaluating the effects of post-Labor Day releases on water temperatures and developing a policy recommendation and System

⁸ Section II.C.1 of the Kalispel MOA.

⁹ Section II.C.2.b of the Kalispel MOA.

¹⁰ Attachment C, section IV.A.1.a.

¹¹ Attachment C, section IV.A.1.b.

¹² Attachment C, section IV.A.2.

Operations Request for discussion among sovereigns.¹³ Action items in this process include the following:

- Modeling operational scenarios, including scenarios proposed by the Tribe.¹⁴
- Status update on modeling progress from the Corps.¹⁵
- Corps and Tribal technical staff interpret and assess model runs and determine next steps.¹⁶
- Corps prepares a technical report, which may include a written response from the Tribe, for submission to the policy team.¹⁷
- Policy team of the parties' representatives will discuss the Corps' technical report and resolve any significant outstanding technical conflicts with the goal of adopting a plan that specifies trigger conditions for a post-labor Day experimental release.¹⁸

In future years, the parties will build on the efforts begun in the 2012 Action Plan to pursue bull trout passage at Albeni Falls Dam.¹⁹ In addition, beginning in 2013 or 2014, the Corps plans to undertake two entrainment studies to inform the assessment of the feasibility for any downstream passage facility at Albeni Falls Dam. The Parties will also continue to coordinate Albeni Falls Dam operational releases to moderate downstream water temperatures to aid bull trout and other species in the Pend Oreille River.

*2.2.4 Winter operations flexibility*²⁰

In 2009, BPA asked the Corps to consider operating Albeni Falls Dam as had been done historically (but not in recent years) to use more of the available storage for power. The environmental effects of this proposal were evaluated by the Corps and BPA in the recently completed Environmental Assessment "Albeni Falls Dam—Flexible Winter Power Operations."²¹ This flexibility is important to BPA as it could help BPA market power more efficiently and more cost-effectively in the winter time. The Tribe agrees not to oppose the Environmental Assessment or flexible operations, provided that the Corps and BPA abide by the MOA, including the collaboration process.²²

2.3 Habitat and Related Commitments²³

¹³ Attachment C, section IV.B.

¹⁴ Attachment C, section IV.B.1-2.

¹⁵ Attachment C, section IV.B.3.

¹⁶ Attachment C, section IV.B.4.

¹⁷ Attachment C, section IV.B.5.

¹⁸ Attachment C, section IV.B.6.

¹⁹ Attachment C, section V.

²⁰ Section II.C.3 of the Kalispel MOA.

²¹ Issued on November 4, 2011. The Assessment is available at:

http://www.nws.usace.army.mil/PublicMenu/Doc_list.cfm?sitename=ALBENI&pagename=AFD_FWPO

²² Section II.C.3 of the Kalispel MOA.

²³ General language about habitat and other projects is located in Section III; specific information about the projects and their benefits is contained in Attachment B.

In the Kalispel MOA, the Tribes have identified projects for the benefit of fish (listed and non-listed resident fish) and wildlife, and BPA commits to funding the projects for the term of the Agreement with a specific budget, as summarized below.²⁴

2.3.1 Habitat protection and restoration for fish

BPA and the Tribe commit to projects to improve habitat to increase productivity of specific population groups of resident native fish, including westslope cutthroat trout and bull trout. BPA will also continue funding, as it has since the 1990s, for a largemouth bass hatchery that supports a fishery in Box Canyon reservoir to substitute for anadromous fish runs long blocked by FCRPS dams. In addition, BPA is providing funding to the Tribe to support the assessment of bull trout fish passage at Albeni Falls Dam; in this project, bull trout are monitored as to their likely region of origin, and their movements tracked to see what spawning area they select.

2.3.2 Wildlife actions²⁵

BPA funds an ongoing protection and enhancement project for wildlife as part of the Albeni Falls Wildlife Mitigation program. This program supports state and tribal entities in acquiring, improving, and managing habitat to permanently benefit of wildlife as mitigation for the impacts from the construction and operation of the Albeni Falls Dam. This Albeni Falls Wildlife program includes the Kalispel Tribe, as well as the Coeur D'Alene Tribe, Kootenai Tribe of Idaho, and the State of Idaho (through the Idaho Department of Fish and Game).

Under this MOA, the parties have agreed to a “fixed credit” approach, whereby for BPA’s funding of \$2.5 million, the Tribe promises to obtain at least 1,275 acres of suitable wildlife habitat to provide 2,869 habitat units (HUs). As between the parties, this will complete the Tribe’s role in wildlife mitigation acquisitions for the construction and inundation impacts from the Albeni Falls project, unless BPA enters into a broader settlement with the other Albeni Falls wildlife mitigation partners or otherwise increases mitigation for wildlife for Albeni Falls. In that case the Tribe and BPA can negotiate if additional funding is appropriate as part of broader settlement discussions.²⁶

2.3.3 Hatchery actions

The Kalispel MOA does not obligate BPA to fund a new hatchery. There is, however, a commitment by the parties to begin planning a potential new, or modify the existing hatchery, to support conservation of westslope cutthroat trout and bull trout that could assist with the restoration of genetically distinct populations of these native fishes to streams in Washington and Idaho. Under the terms of this agreement, tribal and BPA staff will work to develop a shared understanding of the scale, underlying assumptions, and premise for production from such a hatchery. Before the Tribe could submit a

²⁴ The projects will be implemented following successful completion of necessary environmental compliance requirements, see discussion under “General Provisions,” that follows.

²⁵ See projects 1, 2, and 3 of Attachment B.

²⁶ Section III.A.1(third bullet) of the Kalispel MOA.

proposal to the Northwest Power and Conservation Council’s Major Projects Review process (aka the three-step process), BPA and the Tribe in consultation with the states of Washington and Idaho would need to agree on the purpose and need for the project, its objectives, and identify potential cost share and co-management of affected fisheries. Potential funding for construction of any new hatchery facility, or modification of the existing, are not included in this MOA.

2.3.4 Impact assessments

As noted in the MOA, the parties did not agree on the extent of the impact of ongoing FCRPS operations on wildlife and resident fish species (as differentiated from impacts of the construction, including inundation, of Albeni Falls Dam), or the degree to which any such impacts have already been mitigated. The parties did not agree on the need for, or the efficacy of “loss assessments” in this context. The parties nonetheless agreed to take steps toward resolving these matters.²⁷ Included in the MOA is funding for two new operation effects assessments, one regarding wildlife operational effects,²⁸ and one regarding resident fish.²⁹ Over the past several months prior to completion of this MOA, the Tribe and Idaho entered into discussions regarding potential settlement of any outstanding obligations related to construction, inundation, and operations of Albeni Falls Dam. If the Tribe and BPA agree there are unmitigated operational impacts for wildlife, resident fish or both, funding provided to address those impacts will be discussed in negotiations with the Tribe, the State of Idaho and others and be aimed at reaching a longer-term strategy, which may include permanent settlement for any remaining wildlife and resident fish mitigation. The MOA does not identify funding for such mitigation during the term of the agreement beyond what is described in the fourteen projects covered in Attachments A and B.

2.3.5 Research, monitoring and evaluation, and other projects

BPA commits to funding the Tribe to undertake various research, monitoring, and evaluation (**RM&E**) projects in addition to the assessments described above. This includes a resident fish stock status above Chief Joseph and Grand Coulee Dams,³⁰ and funding in support of a Pend Oreille specific sub-basin data management project.³¹ BPA is also agreeing to fund as a separate line item project (rather than lump into individual project budgets) tribal support efforts for BPA’s cultural resource compliance under the National Historic Preservation Act when implementing other BPA-funded projects.³²

2.4 General Provisions Related to BPA-Funded Projects

The parties agree to certain general provisions for BPA-funded projects. First, all the projects funded are to be consistent with the Council’s Program, applicable ESA recovery

²⁷ Section III.A.3 of the Kalispell MOA.

²⁸ Project 3, Attachment B.

²⁹ Project 9, Attachment B.

³⁰ Project 8, Attachment B.

³¹ Project 12, Attachment B.

³² Project 11. Attachment B

plans, BPA's *in lieu* policy, and the data management protocols incorporated in the project contracts. The Kalispel Tribe is expected to continue reporting the results of its activities annually via BPA's PISCES database (or other appropriate databases).³³ BPA expects to issue implementing contracts to the Tribe, as well as to third party entities for the assessments, containing scopes of work and deliverables, as it does with any BPA-funded project for its direct program for implementing the Council's Program.

For non-hatchery projects identified as providing benefits to listed ESA fish (such as bull trout), the Tribe agrees to:³⁴

- Provide estimated habitat quality improvement and survival benefits from the project (or suite of projects) to a population or populations of listed species based on key limiting factors;
- Identify these benefits based on expert determination; and
- Support and defend these estimates of habitat improvement and survival benefits in appropriate forums.

For hatchery actions, the Tribe agrees to:³⁵

- Identify biological benefits associated with a hatchery project and support and defend the benefits;
- Obtain USFWS' determination that each hatchery project will not impede and where possible will contribute to recovery of ESA-listed species; and
- Secure or assist in securing all legally necessary permits for hatchery construction and operation, including with IDFG as further noted below.

In addition, the parties agree to coordinate their RM&E projects with regional RM&E processes.³⁶ As some of the habitat work is proposed to occur on federal lands managed by other federal agencies, the Tribe has affirmed that they will consult with the federal land managers and obtain necessary permits and approvals.³⁷ In response to comments by the IDFG during the comment period on the MOA, the parties have added additional language to confirm their intent to consult with IDFG and obtain any and all necessary permits or approvals when implementing the various fish and wildlife projects to be funded in Idaho.

2.4.1 Council and Independent Science Review Panel (ISRP) review

The parties expressly acknowledge the continuing role of the ISRP and Council in review of BPA-funded projects. The parties agree to actively participate in ISRP review of BPA-funded projects under this agreement, and to make reasonable adjustments to the projects to address that review and Council recommendations. In regard to the possible hatchery project, the Tribe will participate in applicable ISRP and Council three-step review processes, as well as coordinate with other resource managers involved in the

³³ Section III.C.1. of the Kalispel MOA.

³⁴ Section III.C.2. of the Kalispel MOA.

³⁵ Section III.C.3. of the Kalispel MOA.

³⁶ Section III.C.4. of the Kalispel MOA.

³⁷ Section III.C.5. of the Kalispel MOA.

relevant species management, including the Washington Department of Fish and Wildlife and the IDFG.³⁸

2.4.2 Replacement projects and adaptive management³⁹

The parties recognize that as projects proceed, a wide variety of factors may prevent the projects from being implemented as originally conceived. These factors could include:

- Problems arising during regulatory compliance processes for the individual project (e.g., ESA consultation, National Environmental Policy Act or National Historic Preservation Act review, or CWA permitting);
- New information regarding the biological benefits of the project (e.g., new information indicating a different implementation action is of higher priority, or monitoring or evaluation indicates the project is not producing its anticipated benefits);
- Changed circumstances (e.g., completion of the original project or inability to implement the project due to environmental conditions or other reasons, such as lack of access, or water); or
- Substantive non-compliance with the implementing contract.

Should a project not be implemented or completed because of such factors, BPA and the Tribe will negotiate a replacement project. The replacement project would be subject to the terms of the agreement, and would be the same or similar to the project it replaces in terms of target species, limiting factors addressed, mitigation approach, geographic area or sub-basin, and biological benefits provided.

In addition to replacement projects, the parties also may mutually agree to adapt the agreement on a broader scale based on new information or changed circumstances.⁴⁰ For example, if in year five of implementing the agreement, the parties conclude that more effort for on-the-ground work is appropriate, they can agree to shift the funding commitments from other areas (such as RM&E projects) to habitat restoration and protection.

2.5 Legal Commitments

Fundamentally, the Kalispel MOA as a whole represents agreement that the Action Agencies' salmon and steelhead and bull trout BiOp actions and the additional actions committed to in the MOA are a reasonable plan that all the parties support to protect and recover fish affected by the FCRPS and meet the legal mandates of the ESA, Northwest Power Act, and CWA for the next ten years. For the Kalispel MOA, the Tribe and the Action Agencies developed a set of actions that will bring significant biological benefits to fish and wildlife species. The parties have agreed to work to implement these actions as partners, rather than as adversaries, sharing in the monitoring and adaptation of actions towards a common goal. The legal commitments reflect these central principles.

³⁸ Section III.B.2. of the Kalispel MOA.

³⁹ Section III.E. of the Kalispel MOA.

⁴⁰ Section III.E.3. of the Kalispel MOA.

2.5.1 Forbearance⁴¹

Specifically, the Kalispel Tribe will not initiate, join in, or support in any manner ESA, Northwest Power Act, CWA, or Administrative Procedure Act suits against the Action Agencies or NOAA regarding the legal sufficiency of the NOAA FCRPS BiOps (of 2008 as supplemented in 2010), the Upper Snake BiOp, the USFWS FCRPS 2000 BiOp for bull trout, or the 2008 Columbia Basin Fish Accords. Nor will they initiate, join in, or support in any manner ESA, Northwest Power Act, CWA, or APA—which includes NEPA—suits against the Action Agencies, NOAA, or the USFWS regarding the effects on fish resources or water quality (relating to temperature and total dissolved gas) resulting from the operations of the FCRPS dams. The Tribe also agrees that its participation in ongoing and future BPA rate proceedings will be consistent with the terms of this agreement. The Tribe specifically acknowledges that it will not directly or indirectly support any FCRPS dam-breaching for the duration of the agreement.

On August 2, 2011, one day after the public comment period closed on the MOA, the Oregon District Court (Judge Redden) issued an opinion on the NOAA FCRPS BiOps (2008 as supplemented in 2010) regarding salmon and steelhead. The Judge found the BiOps adequate for implementation through 2013, but remanded it to NOAA to issue a new or supplemental BiOp by January 1, 2014, to address the issues identified, primarily relating to the certainty of habitat mitigation measures.⁴²

The parties discussed the implications of the ruling to the MOA, and agreed to add new language to the MOA in section IV.E.1, as follows (new language is underlined):

The Parties acknowledge that NOAA Fisheries has issued a BiOp for the FCRPS as of May 5, 2008, and Supplemental BiOp on May 20, 2010, and that there is litigation regarding these BiOps. On August 2, 2011, after this MOA was largely negotiated and vetted publicly, the District Court issued an opinion and order upholding these BiOps through 2013, and remanding to NOAA to issue a new or supplemental BiOp on January 1, 2014. The Action Agencies shall apprise the Tribe of the development of the BiOp resulting from this remand. The Parties acknowledge that section E.2 below is in effect once the future BiOp (or BiOp supplement) is issued such that this Agreement remains in force and the Parties will seek to preserve this Agreement. The Parties will meet within 60 days after issuance of the resulting BiOp to determine any appropriate steps, such as modifying the definition of “NOAA FCRPS BiOps” for this Agreement to expressly incorporate the resulting BiOp, or other steps consistent with the terms of this Agreement.

⁴¹ Section IV of the Kalispel MOA.

⁴² The opinion and order are available at:

<http://www.salmonrecovery.gov/ESADocuments/BiologicalOpinions/FCRPSBiOp/2010SupplementalFCRPSBiOp/CourtDocuments.aspx>

In effect, the Tribe supports the existing FCRPS BiOp as per the agreement, and is signaling its expectation that the new or supplemental BiOp in 2014 will also be sufficient for the Tribe to affirm its adequacy and the continuation of this agreement, although all parties preserve their options to discuss changes or other measures (including potential withdrawal, if necessary) as a result of any new or supplemental BiOp or additional litigation over that BiOp. The Tribe's commitment not to initiate, join in, or support lawsuits are predicated on the Action Agencies implementing the commitments in the BiOps and the MOA.

2.5.2 Affirmation of adequacy⁴³

In addition to agreeing to refrain from litigation, the Tribe also took the additional step of affirming with the Action Agencies that the package of actions contained in the BiOps and the MOA are an adequate combined response of these entities to address the federal government's duties to mitigate for the FCRPS effects under applicable environmental laws and regulations for the duration of the agreement.⁴⁴ For BPA, this affirmation of adequacy is critical, as it secures an understanding from the Tribe that no additional BPA funding is needed for the duration of the agreement in order for BPA to meet its obligations to mitigate for fish and wildlife unless otherwise agreed by BPA.

2.5.3 Good faith implementation and support⁴⁵

The parties agreed to good faith implementation—that they will work together, in partnership, to implement the mutual commitments in the agreement. The agreement sets up processes to communicate and coordinate with one another to address any problems. This explicitly includes best efforts to consult with each other prior to taking any action that could reasonably be interpreted as inconsistent with any part of the agreement, and taking actions to redress the point(s) of concern.

2.5.4 Changed circumstances, renegotiation/modification, dispute resolution and withdrawal⁴⁶

Consistent with the theme of the collaborative relationship commitments, the Fish Accords, including this Kalispel MOA, provide for informal dispute resolution—including voluntary mediation, if desired—should disputes arise during implementation.⁴⁷ The general commitment is to preserve the agreement, and to negotiate mutual resolutions or modifications as needed to resolve disputes.

The parties have agreed that, in some cases, a party may withdraw from the Kalispel MOA. Upon withdrawal, the party would no longer be subject to the commitments in the agreement. For example, if the Tribe withdraws, it would be free to litigate matters that they otherwise agreed to forbear litigating. If BPA withdraws, it would no longer be

⁴³ Section IV.B of the Kalispel MOA.

⁴⁴ See Section IV.B.4. of the Kalispel MOA.

⁴⁵ Section IV.D of the Kalispel MOA.

⁴⁶ Section IV.E of the Kalispel MOA.

⁴⁷ Section IV.F of the Kalispel MOA.

obligated to actions agreed to in the MOA, including funding commitments. BPA acknowledges, however, that should it withdraw, it expects to maintain funding it determines (along with the other Action Agencies) is necessary for statutory compliance, such as implementing FCRPS BiOps and the Northwest Power Act.⁴⁸

The parties identified the option of withdrawal for several circumstances, principally in the event of material events or in the event one party withdraws under one of these provisions, the other parties may also consider withdrawal.

2.5.5 Binding effect and judicial review

For the Tribe, assurances that BPA's commitments were binding such that they would become part and parcel of BPA's responsibilities regardless of who the Administrator may be, was critical. BPA views the Kalispel MOA as akin to BPA executing a programmatic contract: the commitments between BPA and the Tribe were developed with bargained for consideration, and BPA expects to implement them as such.

BPA believes that any judicial review of unresolved disputes regarding implementation of the terms of the agreement would be most appropriately resolved as other government contracts claims are—in actions for damages before the Board of Contract Appeals or the Court of Federal Claims.⁴⁹ The appropriate court will ultimately depend on the nature of the claim and the relevant court's jurisdiction.

2.5.6 Miscellaneous other provisions

All of the Fish Accords, including this Kalispel MOA, recognize that all activities undertaken pursuant to the agreements must be in compliance with all applicable laws and regulations,⁵⁰ such as NEPA and the ESA. In addition, there is a specific recognition that actions of the Corps and Reclamation are subject to the availability of appropriated funds from Congress.⁵¹ The term of the agreement is slightly less than ten years—from date of signature through midnight on September 30, 2021.⁵²

2.6 Funding Commitments for BPA, and Relationship to Ratemaking

A summary of the approximate total funding commitments BPA is making in entering into the Kalispel agreement is displayed in Table 1, below.

⁴⁸ Section IV.E.6 of the Kalispel MOA. BPA might agree to continue with some projects for support of Northwest Power Act commitments, for example, although not necessarily for the same scope, duration, or at the same budget levels identified in the Kalispel MOA.

⁴⁹ BPA is not designating a Contracting Officer at this time, but will do so should it become necessary in response to a claim unresolved by the parties to the Kalispel MOA.

⁵⁰ Section V.B of the Kalispel MOA.

⁵¹ Section V.H.3 of the Kalispel MOA.

⁵² Section V.A of the Kalispel MOA.

Table 1. BPA Funding Commitments, Total for Kalispel MOA, Over Term of Agreement, in millions of dollars

	EXPENSE	CAPITAL	TOTAL
Without inflation adjustment (i.e., Attachment A)	\$33,254,500	\$2,500,000	\$35,754,500
With inflation adjustment of 2.5% (per MOA terms) ⁵³	\$37,055,545	\$2,500,000	\$39,555,545

This summary does not take into account factors such as: the potential for shifts between expense and capital categories; the timing of capital investments and when payment of debt service begins and ends. This summary does illustrate the maximum BPA expects to provide in direct support of the projects committed to in the agreement.

BPA will begin implementing the Kalispel MOA commitments immediately. BPA had already included the anticipated cost of implementing the Kalispel MOA in its revenue requirements for fiscal years 2012 and 2013, and in the preliminary proposed budget for fiscal years 2014 and 2015. In the future, BPA will continue to include its costs of implementing the Kalispel agreement as part of its revenue requirement in its wholesale power rates.

3.0 PUBLIC REVIEW AND COMMENT

The key concepts underlying the Kalispel MOA, including a holistic approach to addressing the needs for fish and wildlife affected by the FCRPS and the kinds of projects appropriate for mitigation, have been developed over many years in a variety of public forums. Those public processes include the Council’s 2009 Fish and Wildlife Program and BPA’s programmatic fish and wildlife policy direction (addressed in BPA’s Fish and Wildlife Implementation Plan Environmental Impact Statement, known as the “**FWIP**” EIS, DOE/EIS-0312, April 2003, and adopted in a 2003 record of decision, or ROD).

In addition, many of the habitat and other non-hydro projects to be implemented under this agreement originated in the Council’s and BPA’s 2007-2009 solicitation processes, which included multiple opportunities for public review. Similarly, efforts to mitigate specific impacts to ESA-listed salmon and steelhead have been included in the NOAA FCRPS BiOp collaboration, in which many regional sovereigns were extensively engaged, and which included opportunities for public review. The initial Fish Accords, (similar in concept and reciprocal commitments to the Kalispel MOA) were released for public comment in April 2008. The Council undertook an amendment process for the Columbia River Basin Fish and Wildlife Program in 2009, including opportunities for public comment; the 2009 amendments included express adoption of the measures in the Accords. Conclusively, the Kalispel MOA was released for public comment in July 2011. All of these forums provided opportunities for public review and public

⁵³ As originally negotiated, BPA agreed to provide an annual inflation adjust of 2.5 percent to all expense budgets beginning in fiscal year 2012. With the execution of this MOA in fiscal year 2012, the inflation adjustment will begin in 2013.

comment.⁵⁴ The specific public review process for the Kalispel MOA is discussed below.

3.1 Public Review of the Kalispel MOA

After negotiations with the Kalispel were completed, the proposed agreement was announced through a press release, posting on the government's salmon recovery website, www.salmonrecovery.gov, and letters to interested persons. The proposed Kalispel MOA was posted on July 1, 2011, with public comment sought through August 1, 2011. BPA also sent notice to its entire *BPA Journal* mailing list (approximately 3500 members).

BPA received six comments in response. Comments can be viewed at the BPA website: <http://www.bpa.gov/applications/publiccomments/CommentList.aspx?ID=132>

In follow up with one of the commenters, BPA determined that the comment was not intended for the Kalispel MOA, and so it was not considered further.⁵⁵ BPA considered all remaining comments in its decision whether to enter into the Kalispel MOA. In the following section, BPA addresses the substantive comments received.

3.2 BPA Analysis of Comments

3.2.1 Comments from BPA customer organizations

BPA received comments from several organizations representing BPA customers and ratepayers, including Northwest RiverPartners, the Public Power Council, and PNGC Power. All three entities expressed some support for the Kalispel MOA, but also raised concerns about the increasing costs of BPA's fish and wildlife mitigation program. They expressly request that BPA consider taking a "top down" rather than a "bottom up" approach to its fish and wildlife program implementation, as there are concerns that individual agreements such as this are producing a piecemeal approach to the budget. In addition, they asked that as BPA implements the program, it look for ways to prioritize its spending, and to reduce or eliminate spending on non-priority matters.

BPA uses a "top down" perspective when considering the value of long-term agreements like the MOA. This approach gives perspective to the magnitude and complexity of the FCRPS mitigation responsibility that is being addressed, as well as how the agreement will improve the biological- and cost-effectiveness of the investments. Such agreements result in commitments that may reduce flexibility, but they also capture the longer-term

⁵⁴ A summary of many of these forums and their public review opportunities was included in the Record of Decision for the Shoshone-Bannock Fish Accord, and is incorporated by reference here, see section 4.1 of that Decision, available at:

http://www.bpa.gov/corporate/pubs/RODS/2008/ShoBan_MOA_ROD_FINAL.pdf

⁵⁵ A summary of many of these forums and their public review opportunities was included in the Record of Decision for the Shoshone-Bannock Fish Accord, and is incorporated by reference here, see section 4.1 of that Decision, available at:

http://www.bpa.gov/corporate/pubs/RODS/2008/ShoBan_MOA_ROD_FINAL.pdf

value that comes when the Parties share an understanding of the mitigation obligation and how the obligation will be addressed. The Kalispel MOA provides many qualitative benefits that are difficult to value: agreement on the FCRPS operations; certainty of funding for mitigation projects to address FCRPS impacts on resident fish and wildlife; benefits to listed species; an explicit commitment to collaboration among the Parties relative to Albeni Falls Dam operations and configurations; and the Tribe's support and commitment for fulfillment of Northwest Power Act, ESA, CWA, and NEPA obligations through 2021. This represents an optimal convergence of "top down" planning with "bottoms up" implementation.

In addition, these commenters (particularly Northwest RiverPartners) also had concerns about specific provisions in the MOA, as follows:

Montana operations

RiverPartners asked why the "flow actions" section referenced the Council Program for so-called Montana operations, instead of the FCRPS BiOp. All prior Accords (produced at the same time as the FCRPS BiOp) referenced the Council Program which contained the Montana operations measures that were then adopted into the FCRPS BiOp for salmon and steelhead. In this Kalispel agreement, the reverse is now true; the Council's 2009 Program includes the Montana operations as described in the FCRPS BiOp. Either way, the Montana operations (as identified in the program and the FCRPS BiOp) are expressly referenced.

Open-ended obligations?

The BPA customer groups also identified a number of provisions that they believe may be too open ended, leaving the door open for future funding requests by the Tribe. The areas of concern were: (1) language about mitigation for the winter operations flexibility proposal; (2) the potential for expanded wildlife commitments to the Kalispel should a wildlife settlement increase the number of HUs; and (3) the commitment by BPA to fund operational impact assessments.

Winter operations flexibility. During negotiations for this agreement, BPA proposed that the Corps operate Albeni Falls Dam during the winter months to utilize a larger portion of the authorized operating range to improve power production. This was an important initiative for BPA, and BPA sought the Tribe's support for this proposal to be documented in the agreement. During much of the period that the Kalispel MOA was being negotiated, however, the environmental analysis of the proposed winter operations was ongoing.⁵⁶ The Tribe was not willing to endorse the proposed operations while the environmental analysis was continuing, as the Tribe had concerns about potential impacts of the proposal to tribal resources.

After the Kalispel MOA public comment period closed, but before this agreement was executed, BPA and the Corps completed their environmental analysis for the proposed

⁵⁶ See http://efw.bpa.gov/environmental_services/Document_Library/AFD-FWPO/

winter flexibility operations. Consequently, the Tribe agreed not to support or participate in challenges to the Albeni Falls Dam Flexible Winter Operation Final Environmental Assessment or flexible winter power operations. In addition, the parties agreed to support specific elevation levels for Lake Pend Oreille.⁵⁷

Nevertheless, the Tribe remained concerned about impacts from *ongoing* operations of Albeni Falls Dam which it felt would be exacerbated by the potential for increased winter operations. BPA did not agree that there would be an exacerbation, but also recognized that some actions to address gaps in knowledge and effects regarding impacts to bull trout would not be inappropriate. As a result, BPA agreed to provide some additional funding to the Tribe (a total of \$300,000 over a two year period) for additional work in relation to bull trout passage and entrainment.⁵⁸

Additional wildlife funding remains possible, but only if settlement occurs. The Tribe and BPA agree that the capital commitment BPA is providing to the Tribe under this agreement will complete the wildlife mitigation obligation for BPA to be implemented by the Tribe for Albeni Falls construction and inundation effects. The Tribe was aware, however, that BPA has sought to engage with other mitigation partners for the remaining obligations for the Albeni Falls wildlife mitigation program. The Tribe was concerned that if there were an increase in additional HUs to address a settlement, that it would be unfair for them to be precluded from an additional share of the expanded mitigation. BPA was not opposed to entertaining further discussion on the issue when attempting to negotiate a global settlement package if that package endorsed wildlife obligations larger than what is assumed in this MOA. Thus, the Tribe and BPA “will negotiate *whether*” additional wildlife funding to the Tribe is needed, in the circumstances of a particular settlement approach to maintain fairness, in the event that approach expands BPA’s current view of overall wildlife obligations. BPA would only undertake a settlement if it were a cost-effective means of addressing a defined outstanding obligation. And BPA would ensure an opportunity for public comment on a draft settlement before deciding whether to sign one. In sum, any additional wildlife funding—other than that to operate and maintain existing project areas—will be negotiated and ensure additional consideration from the Tribe in the form of either permanent mitigation credit or hold harmless commitments guaranteeing rate payers that no valid, enforceable claims for additional wildlife mitigation exist for Albeni Falls.

Operational impact assessments. For both the operational effects assessments committed to in this MOA (for wildlife and resident fish), BPA agrees to provide funding to help address such effects, but only *if* such effects are identified, and *if* such effects are not already addressed by past and on-going mitigation efforts.

This provision does not commit or open the door for additional funding during the term of the MOA. In the long run, however, BPA would like to reach agreement with the

⁵⁷ Section II.C.3 of the Kalispel MOA.

⁵⁸ Letter from F. Lorraine Bodi, BPA Vice President Environment, Fish and Wildlife, to Glen Nenema, Chairman Kalispel Tribe of Indians (Nov. 2, 2011).

Kalispel Tribe, the State of Idaho, and others on a *permanent* settlement of wildlife and resident fish issues, including mitigation for construction, inundation, and operations. BPA expects that if the Tribe and BPA agree that there are unmitigated operational impacts, funding to help address those impacts would be discussed in negotiations with the Tribe, the State of Idaho, and others aimed at reaching a longer-term strategy, which could include permanent settlement for wildlife and resident fish mitigation. Any such settlement would be subject to further public review and input.

Operational impact studies will help provide basic data as to whether there are unmitigated losses, and will facilitate discussions about future resolution. Much progress in mitigation, including land acquisition and restoration, has already been made toward this long term goal, but a final resolution is still desirable for ratepayer certainty and ramp down of mitigation actions. The Tribe in particular has been an excellent partner in pursuing beneficial, cost-effective habitat projects that contribute in a major way to long-term resolution.

Use of non-native species for resident fish substitution

As articulated by RiverPartners, some BPA customers are concerned with BPA's support of non-native fish for resident fish substitution. Problems can arise with the introduction of non-native fish, including the potential that BPA could have future obligations to remove such non-native fish because of impacts to endangered species.

Substitution for anadromous fish losses has long been a component of the Council's Fish and Wildlife Program, in recognition of the burden on fishing communities for the loss of anadromous salmon. The Program sets forth some principles that guide mitigation in blocked areas, including that:⁵⁹

When full mitigation by improving the abundance of native fish species is not feasible, manage non-native fish to maximize the use of available and existing and improve habitats, while complementing state and local regulations, in order to provide a subsistence and sport-fishing resource, without adversely affecting native fish populations.

BPA notes that the Tribe's request here is part of an ongoing program (recommended for funding by the Council beginning in the mid-1990s) to supplement largemouth bass in Box Canyon reservoir. While the primary mitigation approach is to recover native salmonids, the relatively warm-water environment of Box Canyon provides an important sport and tribal subsistence fishery. The habitat characteristics of Box Canyon reservoir where the largemouth bass supplementation is targeted is dramatically different from the tributary habitat targeted for bull trout and other native species mitigation and restoration, such that habitat overlap is limited and interaction very unlikely. It is possible that reliance on resident fish substitution may diminish as habitat conditions are improved and more conducive to survival of native species. Through long-term planning, the Tribe may propose to modify the existing hatchery to support native species.

⁵⁹ 2009 Columbia River Basin Fish and Wildlife Program, at page 12.

Term of the MOA extending beyond FCRPS BiOp and other Accords

The customers note that this agreement will end several years after the term of the other Fish Accords, and queried how BPA intends to manage the different end points of the Fish Accords, and what the obligations would be under this Kalispel MOA if or when a new FCRPS BiOp is developed in 2018 or before.

The actions funded under the Kalispel MOA are targeted at resident fish, and bull trout in particular. From this standpoint, the later term of the Kalispel MOA better tracks the most relevant BiOp (i.e., the bull trout BiOp of 2000) and the reinitiated consultation that occurs. Managing a later end point for this MOA as compared with the other Fish Accords is not expected to pose a problem. As to a new FCRPS BiOp, given that a new or supplemental FCRPS salmon and steelhead BiOp has been ordered, the parties to the Kalispel MOA addressed that by adding new language to the MOA; see discussion in section 2.5.1 above.

3.2.2 Comments from Idaho Fish and Game

The Idaho Department of Fish and Game (IDFG) expressed concerns in three general areas: first, that the Accord was not sufficiently clear regarding the authority and jurisdiction of IDFG regarding BPA-funded fish and wildlife projects within the State of Idaho, especially in terms of explicit recognition to consult and obtain the approval of IDFG for a variety of the proposed activities; second, that the Accord implied that operational coordination with the Action Agencies might be limited to the Tribe rather than including IDFG and other stakeholders; and lastly, that the proposed BPA wildlife funding unilaterally determined allocation of wildlife habitat unit credits with other Albeni Falls wildlife mitigation partners, such as IDFG, without consultation and agreement.

Of course the MOA does not redefine the scope of the State's or Tribe's legal jurisdiction regarding fish and wildlife management in the State of Idaho. The MOA is an agreement between the Action Agencies and Tribe, and fundamentally addresses that relationship. BPA's agreement to fund activities by the Tribe does not bypass any regular processes and procedures to obtain a project's approval prior to implementation. As compliance with the law is assumed for all activities (see section V.B., which indicates that "All activities undertaken pursuant to this Agreement must be in compliance with all applicable laws and regulations") the parties to Accords did not generally see the need to call out specific consultation, approval, and permitting requirements at the programmatic level (and indeed, IDFG did not raise similar concerns in regards to the Accord with the Shoshone-Bannock Tribes, also in Idaho). The few exceptions were in areas that the issue has come up in the past, e.g., in regards to hatchery projects. The MOA explicitly states that the project would have to obtain all necessary permits for construction and operation⁶⁰ and also that all such projects would require completion of the Council

⁶⁰ Section III.C.3, third bullet, of the Kalispel MOA.

review process (which gives IDFG additional opportunities to express any concerns programmatically).

The specific comments IDFG has about individual project implementation will be addressed by the Tribe and BPA as those projects are implemented.⁶¹

Regarding the concerns IDFG raised about the wildlife commitments, BPA is not obligated to allocate certain amounts of mitigation opportunity to each of the entities who undertake the wildlife mitigation for Albeni Falls (IDFG, the Kalispel Tribe, the Coeur D'Alene Tribe, and the Kootenai Tribe of Idaho). BPA's mitigation duty is to the resource: fish and wildlife. BPA seeks to achieve the best mitigation it can given the projects and funding available. BPA tries to provide equitable access to funding among qualified, competent project sponsors, but there is no requirement to do so or to provide specific allocations. While the Albeni Falls mitigation partners themselves had created some operating guidelines to manage the habitat mitigation proposals submitted to BPA in allocations the partners agreed upon, due to various unresolved disputes within the working group the operating guidelines are no longer being followed by the members.

That said, the Kalispels offered to finalize and cap their role in helping BPA mitigate Albeni Falls construction and inundation effects on wildlife by obtaining 2,869 additional HUs. Given the imprecision and regional disagreements related to the Albeni Falls loss assessment and crediting processes, BPA's level of wildlife funding in the MOA fits within a reasonable estimate of what mitigation remains—plus it assures the Tribe's permanent support as to the adequacy of current mitigation levels. In addition, the wildlife funding commitment does not create any kind of inherently inequitable balance in terms of options and areas for the remaining HUs and other mitigation partners. BPA will continue to work with IDFG and others to fairly address the remaining Albeni Falls wildlife habitat needs, whether by additional land acquisitions or enhancements and restoration of lands already under management.

BPA otherwise appreciates IDFG's support for the "fixed credit" approach for land acquisitions. All project sponsors, including IDFG, have had the opportunity to propose a fixed credit approach (using acres, HUs, or potentially other values) since BPA first broached the idea in 2006 and sought sponsors for a pilot program.⁶²

3.2.3 Comments from individuals

BPA received comments from two individuals, Ms. Birnbaum, and Dr. Pace. Ms. Birnbaum simply indicated her support for the MOA, and we thank her for the comment.

⁶¹ For example, IDFG expressed its interest in being involved in any assessment of operational effects of Albeni Falls Dam extending into Idaho. As noted in Attachment B, the assessment will be conducted by a third party contractor, with input from the Tribe. BPA will ensure that as part of the contract developed, consultation and coordination with IDFG will be included.

⁶² Go to <http://efw.bpa.gov/IntegratedFWP/policyframework.aspx> and look for the heading "Contracting Approach for Capitalizing BPA funded Wildlife Land Acquisitions" which includes links to the fixed credit proposal and a Q&A.

Dr. Pace commented that entering into the Kalispel MOA is flawed because it would create significant costs to ratepayers without benefits because of the linkage to the FCRPS BiOps, which Dr. Pace asserts are legally insufficient.

BPA notes that the funding provided to the Tribe in accordance with this MOA includes funding for ongoing, expanded, and new mitigation projects to help implement the Council's Fish and Wildlife Program and the USFWS' 2000 FCRPS bull trout BiOp. The MOA funding commitments are not insignificant, yet to a great extent simply provide certainty for costs BPA would likely incur anyway. Moreover, the focus of the agreement is not simply in support of actions to address salmon and steelhead as contemplated in the FCRPS BiOps. And, while Dr. Pace is correct in that, the Oregon District court remanded the FCRPS salmon and steelhead BiOps, they were upheld through 2013. The impact of Judge Redden's decision on August 2 in regards to this MOA is discussed above, in section 2.5.1.

Dr. Pace also asserts that the Tribe cannot demonstrate any interest in the Upper Snake Basin, and so there would be no reason to include the Upper Snake BiOp in the assessment of adequacy. Because this Accord was intended to be modeled and as protective as the other Accords, which included both the FCRPS and Upper Snake BiOps, the Action Agencies requested, and the Kalispel Tribe agreed to include forbearance of challenges to them in its agreement.

Dr. Pace also suggests that it would be inappropriate for BPA from a NEPA standpoint to tier the Kalispel MOA to BPA's Fish and Wildlife Implementation Plan Environmental Impact Statement and Record of Decision, but he does not provide any reason why this would be inappropriate. BPA's discussion of the tiering of its environmental analysis of the Kalispel MOA to that EIS is included in Section 6, below.

3.3 Changes Made to the MOA Since its Release for Public Comment in July

3.3.1 Changes in response to Judge Redden's Order

On August 2, 2011, a day after the public comment period closed on the review of the Kalispel MOA, Judge Redden of the federal district court in Oregon issued an opinion and order regarding the NOAA FCRPS BiOps, upholding them through 2013, but remanding for a new or supplemental biological opinion due in January of 2014. The parties conferred regarding the effect of that opinion on this MOA, and added language to section IV.E.1. Further discussion about this addition can be found in section 2.5.1, above.

3.3.2 Changes made in response to comments from IDFG

In response to comments by the Idaho Department of Fish and Game during the comment period on the MOA, the parties have added additional language to the MOA to ensure IDFG is part of wildlife and resident fish settlement discussions. Through its contracting with the third party for studying operational effects on resident fish, BPA will ensure Idaho is consulted and can provide input into the process. In fact, the Tribe, IDFG, and

BPA have met during the last few months to discuss potential mutually agreeable, long-term settlement of remaining obligations. The parties did not add special language calling out Idaho with regard to obtaining any and all necessary permits or approvals when implementing the various fish and wildlife projects to be funded in Idaho because that provision was already in section III.C.3.

3.3.3 Bull Trout Critical Habitat

The Fish and Wildlife Service in 2010 designated bull trout critical habitat across the basin. Consequently, the Action Agencies have begun a new biological assessment to address FCRPS effects—including Albeni Falls Dam—on bull trout and their critical habitat. Earlier draft of the MOA treated this reinitiated consultation as prospective. The final MOA treats it as a process underway and includes commitments to collaborate closely with the Tribe on the proposed action and Albeni Falls section of the biological assessment.

3.3.4 Revised Action Plan

One of the most important elements of the MOA to the Tribe is memorializing how the parties will collaborate and coordinate in planning for Albeni Falls Dam operations and future mitigation. Attachment C provides specific guidance for fiscal year 2012 on how the parties will work together as described in greater detail above in section 2.2.3.

3.3.5 Revising Dates

After the MOA was issued for comment in 2011, some timelines identified in the MOA and Action Plan related to Attachment C became outdated. The parties updated the timelines so the MOA will now expire after nearly ten years, in 2021. The parties did retain the 2013 date for when the inflation adjustment would begin.

3.3.6 Letter Agreement

As discussed above in section 3.2.1, BPA made commitments in a letter to the Kalispel Tribe's chairman in November 2011. The funding commitments, which related primarily to bull trout passage and entrainment, totaled \$300,000 and have been incorporated in Attachment A.

4.0 WHY BPA HAS DECIDED TO ENTER INTO THIS AGREEMENT

4.1 The Agreement Fulfills BPA's Mission and Strategic Objectives

BPA's mission includes providing mitigation of the FCRPS' impacts on fish and wildlife and providing an adequate, efficient, economical and reliable power supply. Achieving this mission requires BPA to balance competing interests and requirements in the delivery of the emission-free and economically valuable hydropower produced by the FCRPS, and in the protection and recovery of the fish and wildlife affected by that hydropower production.

4.1.1 The Kalispel MOA protects and recovers fish and wildlife

BPA believes that a collaborative and comprehensive approach to mitigating impacts to the FCRPS delivers the best opportunity for success. The Kalispel MOA provides for additional actions that assist in avoiding jeopardy and aiding in the recovery of ESA-listed bull trout species impacted by the FCRPS, and funds protection for other fish and wildlife species. With the commitments in this Kalispel MOA, the Action Agencies have enhanced their ability to meet their ESA and other responsibilities, such that the Tribe and the Action Agencies collectively agree that the Action Agencies will meet their statutory responsibilities for the ten-year term.

4.1.2 The Kalispel MOA supports an adequate, efficient, economical and reliable power supply

BPA provides for an adequate, efficient, economical and reliable power supply, one of the purposes of the Northwest Power Act,⁶³ in multiple ways. BPA seeks to keep rates as low as possible in accordance with sound business principles, and to manage the power aspects of the FCRPS to meet reliability standards and the other purposes of the system.⁶⁴ BPA's decision to enter into the Kalispel MOA helps fulfill these purposes. The agreement brings to BPA and its customers a greater level of certainty about BPA's fish and wildlife costs over a longer time. Instead of every two or three years encountering open-ended requests for fish and wildlife funding from the Tribe, there is now more certainty and stability to the funding. This helps BPA plan its costs and manage its financial risks, and aids the Tribe in delivering cost-effective mitigation with ratepayer funds.

4.1.3 BPA's compromises to reach agreement are reasonable

As is the nature of a contract, the parties to the Kalispel MOA had to make some compromises in their respective positions and objectives to reach agreement. For BPA, key compromises came in regards to the level of support the Tribe was willing to make regarding the USFWS's decision that will come out of the ESA section 7 consultation that the Action Agencies are preparing for. BPA, and the Tribe, also receive funding stability and predictability under the MOA, serving ratepayer and tribal interests alike.

Ultimately this agreement advances a new, more intensive way to collaborate with other sovereigns in management of an FCRPS dam. The coordination and collaboration opportunities with the Kalispel Tribe are cutting edge in terms of a collaborative relationship. The mitigation responsibilities of the Actions Agencies for effects on fish and wildlife of Albeni Falls is a good opportunity for this collaboration because of the Tribe's comprehensive planning, focus on native species restoration, collaboration with other stakeholders in the Pend Oreille Basin, and emphasis on on-the-ground benefits to fish and wildlife.

⁶³ 16 U.S.C. § 839(2) (2006).

⁶⁴ Flood Control Act of 1944, 16 U.S.C. § 825s (2006).

4.2 The Kalispel MOA Is Consistent With and Supports BPA's Legal Obligations

BPA's authority and ability to enter into this agreement is provided by federal statutes. Since BPA's inception, Congress has afforded the BPA 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 BPA's statutory purposes.⁶⁵ This includes the express authority to make payments from the Bonneville Fund to implement BPA's legal responsibilities, including its legal responsibilities under the ESA and the Northwest Power Act.⁶⁶ BPA is imbued with considerable flexibility and discretion when entering into arrangements such as this Kalispel MOA, provided that BPA uses that flexibility and discretion to fulfill one or more of its statutory duties. In this section, BPA describes how the Kalispel MOA is both consistent with and helps BPA fulfill its statutory duties and other federal obligations.

4.2.1 Trust responsibility to tribes

The relationship between the federal government and the Kalispel Tribe is governed by statutes, regulations, executive orders, and judicial decisions. The federal government also has a trust responsibility to Indian tribes. A specific enforceable trust responsibility may arise when a federal agency receives statutory direction to manage tribal resources. Absent a specific responsibility, agencies have a general responsibility influenced by the treaties and internal policies and guidance, such as BPA's Tribal Policy (1996), and Executive Orders such as Executive Order 13175 (2000) regarding consultation and coordination with Indian tribal governments.

BPA fulfills trust responsibilities with tribes by meeting the statutory obligations prescribed in general statutes applicable to all federal agencies, such as the National Environmental Policy Act, and in statutes tailored specifically to BPA's activities, such as sections 4(h)(10) and (11) of the Northwest Power Act. BPA seeks to give special consideration to tribal views and concerns pursuant to BPA's Tribal Policy,⁶⁷ through government-to-government consultation and careful review of tribal concerns when making decisions that could affect tribal resources.⁶⁸

The Kalispel MOA demonstrates BPA's commitment to supporting tribal interests and the government's general trust responsibility to the Tribe. In general, BPA's commitment to this agreement supports Kalispel tribal resources and the Kalispel community, especially by engaging the tribe in a new, much more collaborative and coordinated relationship with built in structures to capitalize on the value that the Tribe's

⁶⁵ Bonneville Project Act, 16 U.S.C. § 832a(f) (2006).

⁶⁶ Federal Columbia River Transmission System Act of 1974, 16 U.S.C. § 838i(b) and § 838i(b)(12) (2006).

⁶⁷ See http://www.bpa.gov/corporate/About_BPA/tribes/link.

⁶⁸ For a detailed discussion of BPA's trust responsibility, see section 2.8 of the Administrators Record of Decision for the 2003 Safety-Net Cost Recovery Adjustment Clause Final Proposal; see also the NEPA Record of Decision for BPA's Fish & Wildlife Implementation Plan Final EIS, available at http://www.efw.bpa.gov/environmental_services/nepadocs.aspx.

perspective can bring to Albeni Falls management and mitigation decisions. BPA's implementation decision includes a wide variety of habitat protection and restoration actions that help protect and restore resident fish and wildlife that are important to the Tribe, including on-reservation tribal harvest. In addition, BPA's financial and technical support of tribal resource management expertise promotes tribal participation in mitigation activities that in turn provides economic opportunities and support to tribal sovereignty. While the agreement does not resolve all outstanding issues, the parties recognize that the mutual commitments are consistent with the Tribes' reserved rights and the United States' trust obligation.⁶⁹

4.2.2 Endangered Species Act

The Kalispel MOA makes commitments of BPA funding intended to benefit ESA-listed and non-listed fish as well as wildlife. All actions contained in the Kalispel MOA are expected to benefit the listed fish species of the Basin, or if not addressed specifically to such species, will be neutral in effect on them. Specific projects will undergo additional environmental compliance, including obtaining permits from appropriate regulators and consultation with the U.S. Fish and Wildlife Service, as appropriate, to assure that all actions funded comply with the ESA.

4.2.3 Northwest Power Act

Under section 4(h)(10)(A) of the Northwest Power Act, BPA must use the Bonneville Fund and BPA's other authorities to protect, mitigate, and enhance fish and wildlife to the extent affected by the development and operation of the hydro system in a manner consistent with the Council's Fish and Wildlife Program, the Council's power plan, and the purposes of the Act.⁷⁰ In this section, BPA documents how its decision to enter into the Kalispel MOA meets these standards and other elements of the Act.

4.2.3.1 Consistency with the Council's Fish & Wildlife Program

The Fish Accords, including this Kalispel MOA, would not have been possible without the Council's Fish and Wildlife Program to guide the development of the implementing projects. The Program provides the framework for all of the projects proposed for BPA's funding under this MOA. Most of the projects for BPA funding have already received ISRP review and a recommendation from the Council to fund them. Many of the projects support the survival and recovery of bull trout, and therefore are supportive of the 2000 bull trout BiOp, which is incorporated into the Program and therefore consistent with it. All the projects are intended to provide biological benefits addressing limiting factors for fish and wildlife species identified in the Council's Program, including its sub-basin plans, or to fulfill other Council Program goals, such as wildlife and resident fish mitigation. As a result, BPA believes the Kalispel MOA projects as proposed are all consistent with the Council's Program.

⁶⁹ Section IV.H of the Kalispel MOA.

⁷⁰ 16 U.S.C. § 839b(h)(10)(A).

BPA's duty to mitigate "in a manner consistent with" the Council's Program is a programmatic requirement that applies to BPA's overall efforts. It is not required for every individual project.⁷¹ Nonetheless, the parties agreed to submit the MOA projects, as needed, to the ISRP for review⁷² and the Council for recommendation. Should a project be found not to be consistent, BPA and the Kalispel Tribe will work to address the inconsistency, or find an alternative project.

4.2.3.2 Compliance with the *In Lieu* Provision of the NW Power Act

Under section 4(h)(10)(A) of the Northwest Power Act, Congress expressly limited BPA's authority to provide protection, mitigation, and enhancement in the "in lieu" provision, which states:

Expenditures of the Administrator pursuant to this paragraph shall be in addition to, not in lieu of, other expenditures authorized or required from other entities under other agreements or provisions of law.⁷³

As explained by the House of Representative's Interior Committee, "other fisheries efforts outside this Act . . . are expected to continue and to be funded separately."⁷⁴

Thus, if another entity is authorized or required under other agreements or provisions of law to undertake an activity, BPA cannot fund the activity under the authority of section 4(h)(10)(A) unless BPA's funding is in addition to, not in lieu of that other entity's funding. The *in lieu* provision helps ensure that BPA's funding for fish and wildlife protection, mitigation and enhancement under section 4(h)(10)(A) is additive to on-going and future mitigation conducted by others, and is not simply supplanting other efforts outside of the Northwest Power Act.

Under the terms of the Kalispel MOA, projects to be implemented comply with the *in lieu* provision. BPA most recently interpreted that provision in its 2007-2009 fish and wildlife implementation decision, in which BPA provided express ratings and a ratings key for all projects proposed for BPA funding at that time.⁷⁵ BPA has now also reviewed the projects under the MOA to ensure that they comply with the *in lieu* provision. Half of the projects are ongoing or expanded ongoing projects that received *in lieu* review in

⁷¹ In this respect, the duty to be consistent with the program is analogous to the duty to provide fish and wildlife "equitable treatment" with the other authorized FCRPS purposes. *See, e.g.,* NW Env't'l Defense Center v. Bonneville, 117 F.3d 1529, 1533 (9th Cir. 1997) ("While each power marketing action that affects the system implicates the equitable treatment provision, BPA may properly exercise its obligation by ensuring equitable treatment for fish on a system-wide basis"); *see also*, Confederated Tribes of the Umatilla Indian Reservation v. Bonneville, 342 F.3d 924, 931 (9th Cir. 2003).

⁷² 16 U.S.C. § 839b(h)(10)(D) (2006).

⁷³ 16 U.S.C. § 839b(h)(10)(A).

⁷⁴ H.R. Rep. No. 976, 96th Cong., 2d Sess., pt. 2, at 45. *See also* 126 Cong. Rec. H9846 (daily ed. Sept. 29, 1980) (Rep. Lujan: section 4(h)(10)(A) would "insure that the program will not call for measures already being implemented to protect, mitigate, and enhance fish and wildlife").

⁷⁵ Letter from Greg Delwiche, VP Environment, Fish and Wildlife/BPA to Dr. Karier, Chair, Northwest Power and Conservation Council, February 9, 2007, and *in lieu* table attachment. Available at <http://www.efw.bpa.gov/IntegratedFWP/policyframework.aspx>.

2009. After considering past analysis, BPA reaffirmed that all the ongoing projects are either no other entity is authorized to fund or BPA's funding is in addition to what others are required to do. The other half of the projects are new. Reviews of each one showed that they too are all either not authorized for other entities to fund or that BPA's funding is in addition to what others are required to do. Therefore, the Kalispel MOA projects comply with the *in lieu* provision.

4.2.3.3 The Agreement Supports Equitable Treatment for Fish and Wildlife

The Northwest Power Act requires that BPA exercise its FCRPS management responsibilities "in a manner that provides equitable treatment for . . . fish and wildlife with the other purposes for which such system and facilities are managed and operated."⁷⁶ The Council has described equitable treatment as "meeting" the needs of salmon with a level of certainty comparable to that accorded the other operational purposes."⁷⁷ Historically, BPA has provided equitable treatment on a system-wide basis primarily by implementing the Council's integrated fish and wildlife program and relevant Biological Opinions related to FCRPS operations.⁷⁸ The Columbia Basin Fish Accords, including the Kalispel MOA, continue this tradition. The Kalispel MOA supports BPA's commitments in the FCRPS Biological Opinions for salmon, steelhead, and bull trout. The MOA also goes beyond mitigation for ESA-listed species and includes commitments for other species of interest affected by the FCRPS. Overall, the Kalispel MOA in combination with the BiOp provides a higher level of financial and operational certainty for fish and wildlife, further solidifying BPA's efforts to manage the FCRPS equitably for fish, wildlife, and power.

4.2.3.4 Consistency with the Council's Power Plan

In its most recent Power Plan, the Sixth, adopted in February of 2010, the Council included Appendix M, Integrating Fish & Wildlife and Power Planning.⁷⁹ In its analysis, the Council made several general findings, including that:

- New resources and conservation are required to maintain the power supply's adequacy, in particular for summer peaking needs;
- Increased costs for fish and wildlife and reduced revenues due to operations for fish result in increased electricity prices, but the power system remains economical in a broad affordability sense; and

⁷⁶ 16 U.S.C. § 839b(h)(11)(A)(i).

⁷⁷ Council Program 1992, Vol. II. p. 9.

⁷⁸ See, e.g., BPA, System Operation Review Environmental Impact Statement Record of Decision, page 14 (Feb. 21, 1997) (selecting an FCRPS operating strategy in which "[c]onflicts between power and fish are resolved in favor of the fish, providing equitable treatment of fish and wildlife with the other purposes for which the FCRPS is operated"); BPA, Fish and Wildlife Implementation Plan Environmental Impact Statement, pages 2-33 to 2-36 (Apr. 2003) (summarizing how BPA provides equitable treatment in FCRPS management); FCRPS Action Agencies, Biological Assessment for Effects of FCRPS and Mainstem Effects of Other Tributary Actions on Anadromous Salmonid Species Listed under the ESA, pages 1-9 to 1-15 (Aug. 2007) (describing the FCRPS' overhaul—structural and operations changes for fish since 1994).

⁷⁹ Council Sixth Power Plan, Appendix M (2010), available at

http://www.nwcouncil.org/energy/powerplan/6/final/SixthPowerPlan_Appendix_M.pdf

- That there are a number of uncertainties around the operation of the hydro system which can have both positive and negative effects.

In its Power Plan, the Council largely focused on the operational side of fish and wildlife mitigation (in particular hydropower operations and configuration changes to address fish) because these have the most direct effect on power supply. In terms of actions to be taken under the Power Plan, there are several that are related to fish and wildlife program implementation, including:

BPA-6. Fish and wildlife. Bonneville should meet its fish and wildlife obligations.

F&W-1. Long-term planning coordination. The Council will work with federal, state, tribal, and other entities through existing forums to expand the discussion of long-term fish and wildlife and power planning integration.

F&W-3. Analytical capability. The Council will work with Bonneville and other federal action agencies, federal and state fish-and-wildlife agencies and tribes, and other regional entities (in particular the Independent Economic Analysis Board, the Independent Scientific Advisory Board, and the Independent Scientific Review Panel) to analyze the physical, economic, and biological impacts of alternative operations for fish and wildlife and to develop ways of improving the cost-effectiveness of fish and wildlife programs.

By entering into the Kalispel MOA, BPA would help fulfill and be consistent with a number of the identified actions in the Power Plan. As discussed above, entering into the MOA helps BPA meet its fish and wildlife obligations for wildlife and resident fish, in a manner consistent with the Council's Fish and Wildlife Program, thus supporting Power Plan Action item BPA-6. In addition, the commitments to water management coordination identified in the MOA as between the Corps, BPA, and the Tribe to discuss operations and effects to potentially improve water quality conditions for fish help support Action item F&W-1 regarding long-term planning, and F&W-3 regarding analytical capabilities. Thus, the Kalispel MOA is consistent with and specifically supports actions in the Council's Power Plan.

4.2.4 Clean Water Act

The Kalispel MOA provides additional support for state and tribal water quality standards, particularly through the water management operation commitments and the investigation of operating Albeni Falls Dam in later summer and early fall to improve downstream water temperature for bull trout and other aquatic species.⁸⁰ In addition, funding for habitat actions will help support water quality standards. For example, with the agreements, BPA will support a variety of actions that will directly benefit water quality in the Basin. These actions include a variety of watershed restoration projects that will help to improve water quality in fish-bearing streams, such as culvert

⁸⁰ See Section II.C.1.a of the Kalispel MOA and Attachment C, Action Plan, section 4.

replacements, riparian habitat protection and enhancement (plantings). All of these actions help support BPA's commitments to protecting and enhancing the water quality of the Basin.

Some projects that BPA is funding may also produce temporary impacts to water quality due to instream work. As discussed in more detail in the NEPA section below, evaluations and permits necessary to protect water quality will be a part of implementation of site-specific projects.

4.2.5 National Historic Preservation Act (NHPA)

BPA already funds and participates in the FCRPS Cultural Resources Program, a substantial program for addressing the power-related impacts of the FCRPS on historic resources (including cultural resources) under the NHPA. This program is part of the direct funding BPA provides to the Corps and the Bureau of Reclamation for the power share of operations and maintenance of the FCRPS. The Kalispel MOA doesn't alter or affect that program or its associated funding. In addition, as described below in the NEPA section, as projects are implemented under the MOA, BPA will consider and address the effects of the actions on cultural and other historic resources under the NHPA.

5.0 NATIONAL ENVIRONMENTAL POLICY ACT ANALYSIS

Under the National Environmental Policy Act (NEPA),⁸¹ BPA has assessed the potential for environmental effects related to entering into the Kalispel MOA.

Because the Kalispel MOA involves commitments related to BPA's fish and wildlife mitigation and recovery efforts, BPA has reviewed the Fish and Wildlife Implementation Plan Environmental Impact Statement (**FWIP EIS**)⁸² and the Fish and Wildlife Implementation Plan Record of Decision (**FWIP ROD**),⁸³ to determine if BPA's participation in the MOA falls within the scope of the FWIP EIS and ROD. As discussed in more detail below, BPA has determined that the decision to enter into the Kalispel MOA is adequately covered within the scope of the FWIP EIS and the Preferred Alternative (**PA 2002**) Policy Direction that was adopted by BPA in the FWIP ROD, and that entering into the Kalispel MOA would not result in significantly different environmental effects from those examined in the FWIP EIS.

BPA therefore has decided to tier its NEPA Record of Decision (**NEPA ROD**) for the Kalispel MOA to the FWIP EIS and ROD. (The NEPA ROD is included here as section 5 of the Administrator's ROD for the Kalispel MOA). As part of this decision, BPA will conduct additional project-specific environmental review as appropriate for the activities to be funded by BPA under this MOA. This additional review will be conducted prior to implementing the specific projects.

⁸¹ 42 U.S.C. § 4321 *et seq.*

⁸² DOE/EIS-0312, April 2003.

⁸³ FWIP ROD, October 31, 2003.

5.1 Fish and Wildlife Implementation Plan EIS and ROD

BPA developed the Fish and Wildlife Implementation Plan EIS in response to fish and wildlife administration issues that were identified in the 1995 Business Plan EIS⁸⁴ and Business Plan ROD.⁸⁵ The underlying need for the FWIP EIS was to establish a comprehensive and consistent policy to guide the implementation and funding of the agency's fish and wildlife mitigation and recovery⁸⁶ efforts under existing statutes and policies. The FWIP EIS is intended to support a number of decisions related to fish and wildlife mitigation and recovery necessary to comply with BPA's responsibilities, including decisions by BPA related to: funding fish and wildlife mitigation and recovery efforts; funding BPA's share of the Council's Fish and Wildlife Program; funding capital improvements at FCRPS projects related to fish; funding fish and wildlife research, monitoring, and evaluation; and funding cultural resources mitigation.⁸⁷

The FWIP EIS recognizes that reaching regional consensus on a solution for addressing fish and wildlife mitigation and recovery efforts is an extremely difficult task. The EIS discusses the many factors contributing to this difficulty, including uncertainty and disagreement regarding the science in support of mitigation and recovery, competing resource demands, and differing values and priorities among various groups in the region.⁸⁸ The EIS also describes how various regional policies have created conflicting priorities for fish and wildlife mitigation and recovery efforts.⁸⁹ These conflicting priorities are based in part on differing views and uncertainty concerning the science underlying these efforts. Nonetheless, the EIS recognizes BPA's need to move forward with a policy for fish and wildlife mitigation and recovery efforts so that the agency can efficiently proceed with funding and implementing these efforts in a comprehensive manner.⁹⁰

The FWIP EIS considered a wide range of potential Policy Direction alternatives for BPA's fish and wildlife mitigation policy. Five basic alternatives were identified and evaluated in the Draft FWIP EIS: Natural Focus, Weak Stock Focus, Sustainable Use Focus, Strong Stock Focus, and Commerce Focus. These five basic Policy Direction alternatives span the full range of reasonably foreseeable directions for fish and wildlife policy, ranging from policies perceived as favoring the natural environment to those that

⁸⁴ Business Plan EIS (DOE/EIS-0183, June 1995) and Business Plan ROD, August 15, 1995.

⁸⁵ In the Business Plan EIS and ROD, BPA adopted a market-driven approach to guide its overall business practices. In accordance with this approach, BPA fully participates in the competitive market for power transmission, and energy services, and uses success in the market to ensure the financial strength necessary to fulfill its numerous and varied mandates and obligations. BPA also operates in a manner that is more cost-conscious, customer-focused, and results-oriented. As part of its market-driven approach, BPA has been working towards "reinventing" its fish and wildlife program to emphasize better results, effectiveness, and efficiency.

⁸⁶ BPA uses the phrase "mitigation and recovery" to address its responsibilities to fish and wildlife under the Northwest Power Act ("mitigation), the ESA ("recovery"), and other laws.

⁸⁷ FWIP EIS, Section 1.4.2.

⁸⁸ FWIP EIS, Section 1.1.

⁸⁹ FWIP EIS, Section 2.3.2.3.

⁹⁰ FWIP EIS, Section 1.2.

may be perceived as favoring the economic and social environments. In addition, the EIS includes a Status Quo alternative that serves as a baseline against which all alternatives can be compared. Developed from within the range of the five basic Policy Direction alternatives, the Final FWIP EIS also includes a preferred alternative, the Preferred Alternative Policy Direction (PA 2002).

The FWIP EIS assesses the environmental consequences on the natural, economic, and social environments of adopting a variety of policy directions. By design, the analysis in the FWIP EIS is a policy-level evaluation, and thus is more qualitative than quantitative. The analysis is based on relatively predictable relationships between changes to the environment (air, land, and water) and the consequences for fish, wildlife, and humans.⁹¹ The analysis in the FWIP EIS compares the potential environmental impacts for the possible range of implementing actions for fish and wildlife recovery under each Policy Direction with the Status Quo as of 2002. By considering the numerous potential fish and wildlife actions in the region, the FWIP EIS inherently provides a cumulative assessment of potential environmental impacts from BPA's funding and implementation of these actions.

The FWIP EIS incorporates by reference many of the Federal documents that have addressed, either directly or indirectly, fish and wildlife mitigation and recovery actions in the region.⁹² One of these documents is the Columbia River System Operation Review Environmental Impact Statement (**SOR EIS**)⁹³, which evaluates a range of system operating strategies for the multiple uses of the FCRPS. In its SOR ROD (February 1997), BPA selected a system operating strategy to: support recovery of fish species listed under the ESA by storing water during the fall and winter to meet spring and summer flow targets; protect other resources by managing detrimental effects caused by operations for ESA species by establishing minimum summer reservoir levels; provide public safety through flood protection and other actions; and provide for reasonable power generation. The FWIP EIS builds upon and updates information in the SOR EIS concerning generic fish impacts, hydro operations, multiple river uses, and cultural resource data.

The FWIP EIS also collects and sorts the many and varied proposed and ongoing actions for fish and wildlife mitigation and recovery in the region.⁹⁴ These actions, referred to as Sample Implementation Actions, are organized in the FWIP EIS in tables for each Policy Direction alternative. These sample actions are representative of the types of actions that are consistent with the various alternatives.

⁹¹ FWIP EIS, Section 5.3.1.2.

⁹² FWIP EIS, Section 1.3.3.

⁹³ DOE/EIS-0170, Nov. 1995.

⁹⁴ FWIP EIS, Volume III.

5.1.1 Watershed Management and Wildlife Mitigation Program EISs

The FWIP EIS incorporates by reference BPA's Watershed Management Program EIS⁹⁵ and Wildlife Mitigation Program EIS.⁹⁶ These two programmatic EISs were the result of an examination by BPA in the mid-1990s of the environmental consequences of its routine fish and wildlife program activities, including implementation of projects to carry out the Council's Program. The Watershed Management Program EIS provided a comprehensive analysis of different program alternatives for addressing BPA's watershed management projects, including riparian restoration and other vegetation management techniques; in-channel modifications and fish habitat improvement structures; various land management techniques; and other watershed conservation and rehabilitation actions. In the Watershed Management Program ROD (August 1997), BPA decided to implement a program to support this wide range of potential actions intended to benefit fisheries, fish habitat, and aquatic ecosystems in the region.

Similarly, BPA's Wildlife Mitigation Program EIS provided a comprehensive analysis of different program alternatives for addressing BPA's wildlife mitigation projects, including land acquisitions and management; habitat restoration and improvements; installation of watering devices and riparian fencing; and other conservation actions. In the Wildlife Mitigation Program ROD (June 1997), BPA decided to implement a program to support this wide range of potential wildlife mitigation actions.

In these programmatic EISs and their associated RODs, BPA chose to adopt a set of prescriptions to standardize the planning and implementation for the majority of its mitigation and recovery projects. In accordance with these prescriptions, BPA completed a NEPA document called a Supplement Analysis for each site-specific action under the appropriate programmatic EIS. In each Supplement Analysis, the agency considered the environmental consequence of a proposed activity and made a determination concerning whether the activity was generally consistent with the programmatic EIS. By adopting the prescriptions, BPA was able to implement its numerous watershed and wildlife projects with greater efficiency and consistency.

For about a ten-year period, BPA prepared over 340 Supplement Analyses under the Watershed Management and Wildlife Mitigation Program EISs. Each of these documents has confirmed that the environmental consequences for routine fish and wildlife mitigation activities are predictable and that, although there can be short-term adverse effects from these activities, they continue to have net positive and increasingly beneficial impacts to fish and wildlife across the basin. The Supplement Analysis process provided legally required environmental analysis while simultaneously expediting direct on-the-ground benefits to fish and wildlife and also saving ratepayers' funds.

⁹⁵ DOE/EIS-0265, July 1997.

⁹⁶ DOE/EIS-0246, Mar. 1997.

5.1.2 BPA's Adoption of a Policy Direction from the FWIP EIS

Through the FWIP ROD, BPA adopted the Preferred Alternative 2002 as its policy direction for funding and implementing its fish and wildlife obligations. PA 2002 focuses on enhancing fish and wildlife habitat, modifying hydroelectric power operations and structures, and reforming hatcheries to both increase populations of listed fish stocks and provide long-term harvest opportunities.⁹⁷ PA 2002 is essentially a blend of the Weak Stock and Sustainable Use Alternative Policy Directions that were identified in the FWIP EIS. The Weak Stock Alternative emphasizes human intervention to support recovery of weak fish stocks and wildlife populations that are listed or proposed for listing under the ESA or that have other legal protections. The Sustainable Use Alternative emphasizes human intervention as part of a goal to rebuild and maintain sustainable fish and wildlife populations to promote expanded harvest and recreation opportunities.

The PA 2002 Policy Direction incorporates both BPA's mitigation obligations and ESA obligations. Sample Implementation Actions for PA 2002 can be found in the sample implementation action tables for the Weak Stock Focus and Sustainable Use Focus alternatives.⁹⁸ PA 2002 reflects regional fish and wildlife policy guidance and considers extensive public input. It is also consistent with the fish and wildlife component in BPA's earlier Business Plan decision.

5.1.3 Programmatic Utility of the FWIP EIS and ROD

As previously mentioned, the FWIP EIS was intended to support a number of decisions related to BPA's funding and implementation of fish and wildlife mitigation and recovery efforts.⁹⁹ In adopting the PA 2002, BPA demonstrated a commitment to support subsequent decisions involving the funding and implementation of fish and wildlife mitigation and recovery efforts that specifically support the PA 2002. The FWIP EIS and ROD document a tiering strategy for making subsequent fish and wildlife policy decisions.¹⁰⁰ This strategy connects some program or site-specific projects (once their details and impacts are known) to the policy-level analysis in the EIS.¹⁰¹ For each subsequent decision as appropriate, BPA reviews the FWIP EIS and ROD to determine if the proposed action is adequately covered within the scope of the PA 2002 evaluated in the EIS and adopted in the ROD. If the action is found to be within the scope of this alternative, the Administrator may make his decision for the proposed action under the FWIP EIS and ROD. This approach to decision making allows the BPA Administrator to implement decisions concerning some fish and wildlife mitigation and recovery actions in a timely, comprehensive manner¹⁰².

⁹⁷ FWIP EIS, Section 3A.

⁹⁸ FWIP EIS, Volume III.

⁹⁹ FWIP EIS, Section 1.4.2.

¹⁰⁰ FWIP EIS, Section 1.4.1 and Figure 1-6; FWIP ROD Figure 1, page 15.

¹⁰¹ FWIP EIS, Section 3.4.3.

¹⁰² FWIP ROD, page 13.

Using this tiering approach, in February 2007 BPA prepared a NEPA ROD¹⁰³ tiered to the FWIP EIS and ROD for its fiscal year 2007-2009 Fish and Wildlife Project Implementation Decision (**07-09 F&W Decision**). This tiered ROD addressed BPA's decision to implement certain new and ongoing fish and wildlife projects for fiscal years 2007 through 2009. The projects included in the 07-09 F&W Decision were designed to help meet BPA's responsibilities to protect, mitigate, and enhance fish and wildlife affected by the development and operation of the Columbia River Basin hydroelectric dams from which BPA markets power. In the tiered NEPA ROD, BPA found that the majority of the projects included in the 07-09 F&W Decision were routine actions requiring no further NEPA documentation, but that would be subject to a "validation" process. Through this process, BPA committed to reviewing each project to ensure all applicable tribal, local, state, and federal laws and regulations in addition to NEPA have been addressed prior to implementation. For non-routine projects (e.g., new artificial production projects) included in the 07-09 F&W Decision, BPA prepared additional NEPA documentation as appropriate.

Subsequently, as the 07-09 F&W Decision was ending—concurrently with the Council's amendment of its Fish and Wildlife Program in 2009—BPA needed to conduct a new NEPA analysis for the Council's 2009 Program amendment. Building upon the foundation of the FWIP Policy and the programmatic NEPA analysis for the 07-09 Program, BPA prepared a Supplement Analysis to the FWIP and determined based on that analysis that many of the proposed actions that BPA may take to implement the amended Council's Program would again be within the scope of the FWIP EIS, and were considered in and are consistent with PA 2002.¹⁰⁴ As with the 07-09 F&W Decision, BPA expected that any new projects proposed for implementation consistent with the Council's Program would be routine fish and wildlife mitigation and recovery efforts which would undergo the validation process, but require no further NEPA documentation. As before, non-routine projects (e.g., new artificial production projects) would be evaluated for additional NEPA analysis and documentation.

5.2 Environmental Analysis for the Kalispel MOA

BPA's decision to enter into the Kalispel MOA will provide BPA funding and implementation commitments for actions and resource objectives for fish and wildlife mitigation and recovery, with an emphasis on commitments that will support resident fish species such as bull trout and wildlife. Activities funded under the Kalispel MOA can be grouped into roughly three categories of projects: ongoing, new, and expanded.

The ongoing projects already went through ISRP and Council review, and have been reviewed under NEPA through the NEPA ROD for the 07-09 F&W Decision or the 2009 Supplement Analysis for the FWIP EIS. Prior to implementation, these projects are

¹⁰³ BPA's NEPA ROD is available at: http://www.bpa.gov/corporate/pubs/RODS/2007/FY07-09_FW_Record_of_Decision_Final.pdf.

¹⁰⁴ Supplement Analysis for the Fish and Wildlife Implementation Plan EIS (DOE/EIS-0312/SA-03)(October 5, 2009).

required to proceed through the validation process, as discussed above. These ongoing projects thus have already been reviewed under NEPA by BPA.

New projects or expanded projects proposed in this Kalispel MOA were not included in the 07-09 F&W Decision, so they were not addressed in the 07-09 F&W Decision NEPA ROD. The 2009 Supplement Analysis, however, addresses any new projects that may be proposed under the Council's 2009 Program. New and expanded projects in the Kalispel MOA are routine fish and wildlife mitigation and recovery efforts within the scope of the Council's Program, and which would be subject to the validation process protocol, but which typically require no further NEPA documentation. New non-routine projects (e.g., new artificial production projects) would be evaluated for additional NEPA analysis and documentation needs.

BPA has considered its decision to enter into the Kalispel MOA both at a policy level and at the project-specific level. At the policy level, a review shows that the general environmental impacts that could occur as a result of entering into the Kalispel MOA are adequately covered by the FWIP EIS. At the project level, a review of the FWIP EIS shows that potential environmental effects associated with the types of projects to be funded under the Kalispel MOA would not be significantly different from those described in the FWIP EIS. In addition, the types of projects to be funded under the Kalispel MOA are consistent with and thus within the scope of the PA 2002 that was adopted in the FWIP ROD. A further discussion of these evaluations follows.

5.2.1 Policy Level Evaluation

Chapter 5 of the FWIP EIS describes potential impacts of fish and wildlife actions that could occur as a result of each of the Policy Directions considered in the EIS. Overall environmental impacts associated with each Policy Direction are discussed in Section 5.3 of the FWIP EIS. Environmental impacts associated with PA 2002 – the Policy Direction ultimately adopted by BPA in the FWIP ROD – are identified in Section 3A.3 of the FWIP EIS.

Under the Kalispel MOA, BPA will fund projects providing for long-term, overall beneficial effects on fish and wildlife. These actions may also have associated side effects that are not the primary objective of the action but that occur nonetheless. Although these side effects likely would be relatively minor at the individual sites, when the individual projects under the Kalispel MOA are considered together, these impacts would occur over many acres. These types of aggregate impacts were considered in Chapter 5 of the FWIP EIS, and more specific to the PA 2002, in Section 3A of the FWIP EIS.

Impacts from the projects under the Kalispel MOA could add to past, present, and future negative impacts occurring from other human activities in the region. For example, mitigation projects may add to the reduction in available grazing lands in the region. Prescribed burning of mitigation lands might add to existing or future regional air quality problems. To the extent to which projects would create or aggravate negative existing effects on any given resource, they would be mitigated for as described in general terms

in the FWIP EIS. Federal, state, tribal and local laws and regulations will be followed, and coordination and consultation with appropriate federal and state agencies, tribes, and private landowners will be performed for all projects.

Overall, the projects included in the Kalispel MOA would provide net benefits to water quality, fish and wildlife habitat, and other natural resources such as soils and vegetation. These resources would be positively affected through projects involving watershed restoration activities that would improve large woody debris recruitment and retention, and water temperature regulation. These projects, as well as the other projects described in the MOA, also would be expected to result in overall benefits for both ESA-listed and non-listed fish and other aquatic and wildlife species within the region. Although there continues to be uncertainty concerning the science underlying fish mitigation and recovery as was described in the FWIP EIS, the projected biological benefits identified in this MOA demonstrate that the MOA will enhance overall fish mitigation and recovery efforts in the region.

BPA also expects that mitigation for the hydro system will be made significantly more effective through a common approach supported by this and the other Accords. Although the immediate area addressed by the Kalispel MOA is blocked to anadromous fish runs, the commitments related to changes to hydro operations/facilities affirmed in this MOA regarding adaptive management, spring spill and transport, and summer spill will result in cumulative benefits for resident fish and other aquatic species by aiding in migration and increasing long-term population levels. The habitat protection and enhancement commitments affirmed in this MOA will also have a beneficial effect on resident fish and other aquatic species by increasing long-term population levels. The MOA will provide for habitat protection and enhancement activities for weaker fish stocks/populations, which should increase listed as well as non-listed fish species, plants, and animals that are important to tribes. Tribal fish harvest would generally improve as naturally spawning and hatchery-produced fish populations increase.¹⁰⁵ While the ongoing uncertainty concerning the role of hatcheries that was described in the FWIP EIS continues, the net cumulative effect to listed species from hatchery-related actions under the Kalispel MOA is expected to be beneficial because of the role of hatcheries in aiding recovery of weak stocks, and because of efforts included in the MOA to minimize or avoid impacts to naturally spawning fish. Cumulative benefits to fish also would include improved spawning and rearing habitat and easier access to all habitats through the modification or removal of obstructions, and the provision of more suitable habitat for both ESA-listed fish and non-listed aquatic species. These types of net benefits from fish projects were recognized in the FWIP EIS.¹⁰⁶ In the long term, the Kalispel MOA is expected to render these same beneficial effects.

Overall benefits to wildlife also would occur as a result of implementing wildlife mitigation actions under the Kalispel MOA. The process of acquiring and managing lands will protect existing habitat values and ensure habitat availability for fish and wildlife species in the future. Human populations would also benefit from lands acquired

¹⁰⁵ FWIP EIS Section 3A.3.3.

¹⁰⁶ See FWIP EIS Sections 3A.3, 5.2, and 5.3.

as part of future actions under the MOA, as opportunities for recreation will be maintained (e.g., wildlife viewing) and aesthetic values will be preserved. Potential negative impacts to human populations, such as removal of land from human use or the loss of local tax revenue, would affect only a small portion of the lands available for such uses within the Columbia River Basin. Land acquisitions may in some instances also provide additional protection for cultural resources. Vegetation management techniques would help to control invasive species that are currently limiting vegetation diversity. The reestablishment of native plant species would benefit fish and wildlife, as well as traditional Native American cultural uses.

BPA's ratepayers would fund the agency's share of the costs related to implementation of the Kalispel MOA. Levels of funding for the Fish and Wildlife Program and uncertainties surrounding fish and wildlife mitigation requirements (e.g., court-related actions related to the FCRPS and Upper Snake Biological Opinions) continue to be a major concern for many regional entities. The economic effects associated with these types of projects are described in Section 3A.3.2 of the FWIP EIS. BPA expects to provide up to a total of \$39,555,545 (includes expense with inflation plus capital funds) in direct support of the projects committed to in the Kalispel MOA. BPA expects to fund implementation commitments for the MOA in fiscal year 2012-2013 from existing forecasted spending.¹⁰⁷

Beyond fiscal year 2013, BPA expects to include its costs of implementing the MOA as part of its revenue requirement for its wholesale power rate proposals. The Kalispel MOA provides for a long-term plan that would provide BPA's customers more certainty for fish costs and power rates, and provide greater predictability and stability in funding and accountability for results of project implementation.

Entering into the Kalispel MOA is not expected to have negative implications related to climate change. The projects under the MOA would likely have beneficial effects related to climate change as these projects would enhance riparian and other habitats, and provide more shade instream. Hydro power operation actions supported under the MOA to benefit listed species are not expected to significantly factor into climate change. Any replacement power generation that may be required as a result of these actions would not result in significant changes in overall regional air emissions.

PA 2002 emphasizes human management, in a least-cost manner, to recover listed species and restore and maintain sustainable populations for fish and wildlife while recognizing that ultimately the fate of the listed species may be significantly determined by weather and ocean conditions rather than human action.¹⁰⁸ The regional environment will likely change in ways that cannot be accurately predicted. Ocean conditions can change with consequent effects on fish and wildlife and are largely beyond human ability to manage. It is important to understand and measure the magnitude of marine condition effects on salmon, however, because it is important to understand the partitioning of

¹⁰⁷ Costs of implementing the Kalispel MOA were forecast and included in the Integrated Program Review for the 2012-2013 rate period.

¹⁰⁸ FWIP EIS Chapter 3A-2.

survival between the freshwater and marine systems and because ocean conditions are recognized as a major cause of poor survival and declining populations. The relative success of mitigation efforts in freshwater habitats cannot be accurately estimated if survival in freshwater is confounded with ocean survival. Mortality related to ocean conditions may in fact overwhelm the effects of any action taken in the freshwater portion of the anadromous fish life-cycle, resulting in misinterpretation of the effects of management actions taken in the hydro corridor or Basin tributary streams.¹⁰⁹

In sum, while there could be some short-term localized impacts from projects under the Kalispel MOA, entering into the MOA would provide overall net benefits to fish and wildlife populations, their habitats, and water quality, as well as to other natural resources. These impacts and benefits were recognized and considered in the FWIP EIS. The program-level environmental impacts that could occur as a result of entering into the MOA are adequately covered by this EIS.

5.2.2 Project-Specific Evaluation

Through its experience with completing Supplement Analyses and other NEPA documentation for hundreds of fish and wildlife projects over the past ten or so years, BPA has a detailed, fact based understanding of the adverse environmental consequences associated with individual mitigation and recovery projects—like those in the MOA. These associated effects were also identified and evaluated in the FWIP EIS. Section 5.2 of the FWIP EIS provides a comprehensive discussion of potential environmental impacts that can result from implementation of project-specific fish and wildlife actions. This discussion addresses the four primary categories of fish and wildlife projects, otherwise known as the “Four Hs”: hydro operations, habitat, hatcheries, and harvest. Specific impacts associated with fish and wildlife projects under each of these categories are discussed and analyzed in detail in Section 5.2.3 of the EIS, and also covered in a more general sense in Section 5.2.2 of the EIS.

As discussed in the FWIP EIS, some adverse environmental impacts associated with individual fish projects are unavoidable (i.e., cannot be fully mitigated). These adverse impacts, however, are often temporary and short-term. Soils are typically disturbed during the implementation phases of most projects. This disturbance can cause sediments to enter adjacent surface waters during project implementation. Ground disturbing activities also have the potential to impact cultural and historic resources. In many cases it is not possible to avoid removing some existing vegetation as part of project implementation. Fish and wildlife can be disturbed by noise and human activity in project vicinities. Some loss of local revenue and taxes can occur in cases where commercial land uses are halted as part of a fish or wildlife project (e.g., retiring a grazing lease) or land is acquired for the purposes of fish or wildlife mitigation. Access restrictions and impacts to recreation can also occur in an attempt to protect sensitive habitats or during project implementation. Experience has shown that compliance with federal, state, and local regulatory requirements are central to addressing any adverse

¹⁰⁹ FWIP EIS Chapter 3A-2, 5-29.

effects and minimizing them through best management practices, restrictions, and mitigation measures.

Environmental impacts of individual projects under the Kalispel MOA would largely be the same as these impacts that were described in the FWIP EIS. The fish and wildlife projects to be implemented under the MOA are generally of the same type as those considered in the FWIP EIS.¹¹⁰ For specific habitat actions under the Kalispel MOA, potential environmental impacts could include temporary loss of riparian vegetation; increased water temperature; sedimentation to waterways; local reductions in visibility and air quality due to smoke from prescribed burning; and herbicide use. All of these potential impacts are not significantly different than those identified and considered in Section 5.2 of the FWIP EIS.

5.2.3 Consistency with the PA 2002

Entering into the Kalispel MOA and funding the associated projects are consistent with the PA 2002 Policy Direction that has been adopted by BPA in the FWIP ROD for several reasons.

First, the focus of the PA 2002 is to protect weak stocks of fish and achieve biological performance standards, as set forth in the BiOps, while sustaining overall populations of fish (both ESA-listed and non-listed) and wildlife for their economic and cultural value.¹¹¹ The PA 2002 includes enhancing fish and wildlife habitat, modifying hydro operation and structures, reforming hatcheries to increase listed stock populations, restoring and maintaining sustainable populations of fish and wildlife, and providing harvest opportunities in the long-term.¹¹²

The main purpose of the Kalispel MOA projects is to aid in recovery of ESA-listed species and the restoration and maintenance of sustainable populations of fish and wildlife in the Columbia River Basin. This purpose will be pursued through a variety of actions, including hydro system operations/facilities, fish and wildlife habitat enhancements and hatchery improvements. The Kalispel MOA is intended to address legal mandates for the FCRPS under the ESA, the Northwest Power Act, and the CWA; provide greater certainty and stability in the funding and implementation of projects for the benefit of fish and wildlife in the basin; and foster a cooperative and partnership-like relationship in implementation of the mutual commitments in the MOA. In addition, the MOA and its projects are consistent with the fish and wildlife related actions that were identified as sample implementation actions for the PA 2002 in the FWIP EIS.

Second, the PA 2002 includes measures to address naturally-spawning native anadromous fish and hatchery-produced native anadromous fish, recognizing that larger populations are a better condition than status quo. PA 2002 also supports projects to enhance habitats for anadromous fish in order to increase production and maintenance of

¹¹⁰ See FWIP EIS, Vol. III and Appendix H.

¹¹¹ FWIP EIS Section 3A.

¹¹² The dam breaching aspects under the Weak Stock Focus alternative are not part of the PA 2002.

harvestable levels of anadromous fish, as well as to protect and enhance critical habitat for listed anadromous fish. The Kalispel MOA supports hydro system measures committed to in the FCRPS BiOp. These projects and activities are consistent with the anadromous fish measures included in the PA 2002.

Third, the PA 2002 provides measures to improve conditions for resident fish and aquatic species, such as protection and enhancement of weak stock habitat, further modification and limits on the hydrosystem, and reforming hatcheries with a focus on conservation. Not only do these measures enhance resident fish populations, but they can further tribal interests and serve to fulfill their cultural needs. The Kalispel MOA includes proposed projects to benefit native resident fish that are consistent with the measures included in the PA 2002. These provide for improving/enhancing degraded habitats, deepening/narrowing stream channels, improving water quality, and restoring diversity to the aquatic biota with instream structures and bank protection measures.

Fourth, the PA 2002 considers that a balanced management approach for both listed and non-listed fish and aquatic species should be used. This Policy Direction allows for substantial human intervention to protect habitat and enhance degraded habitat for fish and wildlife, especially in areas designated as critical habitat. Projects under the Kalispel MOA target fish populations and habitat including both ESA-listed and non-listed species. These projects include: habitat acquisition, restoration, protection and enhancement measures; suppression of non-native species, and restoration of passage for bull trout. Under the terms of the MOA, the Tribe will work with the Council and ISRP on project reviews. These actions are consistent with the approach to addressing habitat under the PA 2002.

Fifth, the PA 2002 adopted erosion and sedimentation reduction throughout the Columbia River Basin as part of a more active land use and water management strategy. It gives priority to improving water quality and habitat for ESA-listed stocks of fish. The PA 2002 states that habitat protection and enhancement efforts would use a watershed or ecosystem approach – i.e., a more comprehensive look at a sub-basin and its biological needs.¹¹³ The PA 2002 addresses instream water quantity and the amount of stream/river habitat by managing to reduce or avoid adverse effects of water withdrawals and increasing instream water quantity. Aquatic habitat benefits are included in the projects under the Kalispel MOA. These projects also will support the PA 2002 water habitat goals for sedimentation, temperature and dissolved oxygen by enhancing riparian and stream bank habitats, and reducing water temperature in tributaries of the Columbia River. These actions are consistent with the approach to addressing water quality under the PA 2002 as well.

Finally, the Kalispel MOA, and the projects it identifies, has been designed to be consistent with the Council's Program (including sub-basin plans), as amended; the Northwest Power Act's science and other review processes; applicable ESA recovery plans; and applicable data management protocols adopted by the Action Agencies. Based on current information, BPA believes that the MOA and the projects identified for

¹¹³ FWIP EIS page 3A-11.

implementation are consistent with the Council's Program. This approach is consistent with the PA 2002's goals of developing and implementing mechanisms for carrying out the BPA's fish and wildlife obligations with the government and people of the region.

Overall, the Kalispel MOA and the projects to be funded under it are consistent with the PA 2002 Policy Direction analyzed in the FWIP EIS and adopted by BPA through the FWIP ROD. The objectives of the MOA are consistent with the purposes and goals of the PA 2002. In addition, the types of projects included in the MOA are similar to those that were considered as typical projects under the PA 2002. Finally, the MOA and the projects to be funded generally reflect the Sample Implementation Actions for the PA 2002.

5.3 Additional Environmental Review

While this decision document addresses the policy decision to enter into the Kalispel MOA, BPA recognizes that additional environmental review will be needed for future implementation of some projects under the MOA. All activities undertaken pursuant to this MOA must be in compliance with all applicable federal, state, local, and tribal laws and regulations. For example, the ESA requires federal agencies to minimize or avoid adverse impacts to threatened or endangered plant, fish and wildlife species. In accordance with the Clean Air Act (CAA), project managers are required to coordinate with state officials to ensure that any activities impacting air quality would be minimal and within state-defined limits. The CWA regulates discharges into surface waters including adjacent wetlands. The NHPA requires federal agencies to take into account the effects of their undertakings on historic properties including cultural resources. In addition, there are a myriad of state and local regulations that protect sensitive resources that are applicable to fish and wildlife project actions. For projects on Indian reservation lands, tribes often have laws and regulations that parallel many federal, state and local laws and ordinances.

Thus, prior to the implementation of any BPA-funded activities under this MOA, BPA will conduct additional environmental review as necessary. For ongoing projects already being implemented under the Council's Program, BPA will implement its validation process for these projects. In this process, BPA reviews each project to ensure all applicable tribal, local, state, and federal laws and regulations in addition to NEPA have been addressed prior to implementation. Examples of typical compliance requirements that could be addressed in the validation process include those of the ESA, NHPA, CWA, CAA, and others.

BPA staff will document compliance with these and other applicable laws and regulations as part of the contract management process. Results of the validation process will be tracked and accessed through Pisces, a web-enabled software application that assists BPA and its fish and wildlife program participants manage projects and their implementation contracts throughout the Columbia River Basin. These results will also be made available to the public on an ongoing basis throughout the period of the decision as new information about environmental compliance actions becomes available.

As to the new projects included in the MOA, as well as the ongoing projects where the scope is expanded, many of these projects involve routine land acquisition, watershed management, and other mitigation actions. Because these routine projects have predictable environmental effects that have already been analyzed in the FWIP EIS, the Watershed Management Program EIS, and the Wildlife Mitigation Program EIS, and because these projects are implemented under the guidance of the 2009 Council Program for which a Supplement Analysis was conducted, these routine projects will require no further NEPA documentation beyond this decision document prior to implementation. Nonetheless, these projects will be reviewed through the validation process described above. BPA staff will work with the Tribe to ensure that all applicable requirements have been met and are appropriately documented. The best management practices, restrictions, and mitigation measures imposed through the regulatory process will ensure that any project-specific adverse effects to water quality, habitat access, habitat elements, channel conditions and dynamics, flows, and watershed conditions will be brief, minor, and timed to occur at times that are least impacting.

In addition to these routine projects, there are three types of projects that BPA has determined will require additional NEPA analyses beyond this decision document and the validation processes prior to implementation:

- (1) Projects that are not consistent with the PA 2002 adopted in the FWIP ROD;
- (2) Projects that meet the criteria for the Council's Step Review Process (such as new fish production facilities, or other large-scale capital-intensive projects) which includes review by the Council and the Independent Science Review Panel at three different phases;¹¹⁴ or
- (3) Projects that involve substantial modification to an ongoing fish production program (for example, expansion of the program to include a new species).

In addition to the projects automatically requiring additional NEPA analysis, BPA may determine during the validation process or otherwise that there are complicating factors that make the FWIP EIS and the validation process an inappropriate basis for providing NEPA analysis and documentation for a given project and therefore additional NEPA analysis is required. These factors may include controversy over effects on resources, special regulatory requirements (federal, state, or local), the participation of other federal agencies (where environmental review methodologies may differ), unprecedented actions (with accompanying uncertainty in impacts), or extraordinary environmental circumstances. For such projects, BPA will determine the appropriate strategy to comply with NEPA on a case by case basis.

¹¹⁴ See Northwest Council, *Three Step Review Process*, <http://www.nwcouncil.org/LIBRARY/2006/2006-21.htm>

6.0 CONCLUSION

I have decided to enter into the Kalispel MOA as an addition to the Columbia Basin Fish Accords. This action, which is a final action under 16 U.S.C. § 839f(e)(5), is based on the foregoing background and analysis. As reflected in that analysis, the Kalispel MOA will help mitigate the impacts of the FCRPS on fish and wildlife species—particularly bull trout listed under ESA—with projects that are expected to produce significant and measurable biological benefits. The Kalispel MOA will provide greater certainty and stability to mitigation funding commitments by BPA, which helps BPA manage its financial risks. The Kalispel MOA results in the parties' agreement that the Action Agencies will meet their statutory responsibilities for the ten-year term. The Kalispel MOA will help BPA meet its trust responsibilities to the Tribes. The Kalispel MOA will reinforce a productive, collaborative approach with the Tribe.

Risks to BPA of signing this MOA are relatively small and adequately mitigated by the collaborative commitments, the legal forbearance and affirmation of adequacy, and the requirement for good faith implementation; by the commitments to regulatory and other review processes for project implementation, and for negotiation of replacement projects as needed; and, in the worst case, by the ability to withdraw from the MOA.

Based on a review of the FWIP EIS and ROD, BPA has determined that entering into the Kalispel MOA falls within the scope of the PA 2002 alternative evaluated in the FWIP EIS and adopted in the FWIP ROD. This decision is a direct application of the PA 2002, and is not expected to result in significantly different environmental impacts from those examined in the FWIP EIS, and will assist BPA in accomplishing the goals related to the PA 2002 alternative that are identified in the Fish and Wildlife Implementation Plan ROD. Therefore, the decision to implement the Kalispel MOA is tiered to the Fish and Wildlife Implementation Plan ROD.

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Stephen J. Wright
Administrator and Chief Executive Officer