

BONNEVILLE POWER ADMINISTRATION
ADMINISTRATOR'S RECORD OF DECISION
2008 COLUMBIA BASIN FISH ACCORDS
MOA WITH THE SHOSHONE-BANNOCK TRIBES

November 6, 2008

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1.0 INTRODUCTION

To improve fish survival and habitat, and to advance fish recovery in the Columbia River Basin, the Bonneville Power Administration (BPA) on May 2, 2008, entered into four agreements, known as the Columbia Basin Fish Accords, with four tribes, two states, and two other federal agencies. The agreements address fish affected by federal dams of the Federal Columbia River Power System (FCRPS), with a focus on salmon and steelhead listed under the Endangered Species Act. The agreements will result in numerous new projects and dedicated funding for certain on-going projects throughout the Columbia River Basin for the next 10 years. The agreements also marked a turning point for the parties, ushering in a collaborative partnership rather than continuing with an adversarial relationship.

BPA has subsequently decided to enter into a fifth Columbia Basin Fish Accord with the Shoshone-Bannock Tribes of the Fort Hall Indian Reservation in Idaho. Through this agreement, as with the Accords entered into in May, BPA is committing funding on a long-term basis to implement projects for the benefit of fish and wildlife in the Basin. The agreement recognizes the role of the Shoshone Bannock Tribes as co-managers of fish and wildlife resources. This agreement with the Shoshone-Bannocks will be known as part of the 2008 Columbia Basin Fish Accords (the Accords), and will be referred to as the “Sho-Ban MOA.”¹

The purpose of this Record of Decision is to describe what led to this agreement, what the agreement contains, and why BPA has decided to enter into it. This Record of Decision also documents BPA’s consideration of the National Environmental Policy Act (NEPA) in entering into the Sho-Ban MOA.²

¹ The terms “Accord,” “Fish Accord” “agreement” and “MOA” are used interchangeably throughout this Decision; the Sho-Ban MOA is available at www.salmonrecovery.gov. The Shoshone-Bannock Tribes are referred to as the “Tribes” throughout this Decision.

² 42 U.S.C. § 4321 *et seq.*

2.0 BACKGROUND

2.1 Litigation Leads to Collaborative Remand

Litigation over the impacts of the FCRPS on threatened and endangered fish species has engulfed the Army Corps of Engineers, the Bureau of Reclamation and BPA (collectively, the Action Agencies) and regional interests for well over a decade. Under the Endangered Species Act (ESA),³ the Action Agencies consult with the National Oceanic and Atmospheric Administration, National Marine Fisheries Service (NOAA) regarding the effects of the FCRPS on listed salmon and steelhead. NOAA evaluates the Action Agencies' proposed operations and mitigation actions, and issues a Biological Opinion (BiOp) addressing whether or not the Action Agencies are avoiding jeopardy to the species and avoiding destruction or adverse modification of their critical habitat. There have been a series of BiOps issued by NOAA, and lawsuits over the BiOps have invariably followed.

In May 2005, the federal district court in Oregon overseeing the BiOp litigation *National Wildlife Federation v. National Marine Fisheries Service* found the 2004 FCRPS BiOp flawed and remanded it to NOAA. The court also ordered NOAA, the Corps, and the Bureau of Reclamation to collaborate with sovereign states and tribes to develop items to include in the FCRPS proposed action, clarify policy issues, and reach agreement or narrow the areas of disagreement on scientific and technical information.

The parties to the FCRPS remand collaboration process were NOAA, the Action Agencies, four states (Idaho, Montana, Oregon, and Washington), and seven tribes (the Confederated Tribes of the Colville Reservation, the Confederated Tribes of the Umatilla Indian Reservation, the Confederated Tribes of the Warm Springs Reservation of Oregon, the Confederated Tribes and Bands of the Yakama Indian Nation, the Kootenai Tribe of Idaho, the Nez Perce Tribe, and the Spokane Tribe of Indians). NOAA and the Action Agencies filed quarterly status reports, developed with the input of the states and tribes, with the court throughout the remand period. A goal of the collaborating sovereign parties was to identify actions for salmon and steelhead to be used by the Action Agencies in developing a new proposed reasonable and prudent alternative.

2.2 Collaboration Leads to Negotiations

One of the benefits of the collaboration process for the BiOp remand was the development of a closer working relationship amongst the sovereign parties to the litigation, despite their conflicting litigation views. As the sovereign parties' policy, technical, and legal staffs worked together, common goals and interests were more readily identified. Beginning in 2006, several of the sovereign parties began to explore

³ 16 U.S.C. § 1531 *et seq.*

the potential for resolving their mutual issues through negotiations. The parties recognized that years of litigation focused attention in the courtroom and directed attention away from the mutual work on the ground for the benefit of fish that all are engaged in. In addition, the litigation has been a tremendous drain on parties and their staffs, taking up time and resources that might be better spent working together as partners focusing on strategies and actions to improve environmental conditions for fish and wildlife.

By the middle of 2007, negotiations were underway in earnest. The participants sought to resolve outstanding issues, to resolve litigation matters, and to set forth long-term mutual commitments among them for the benefit of fish and wildlife in the region. The participants sought to keep discussions confidential in order to be as candid as possible and to produce the best outcome. The Action Agencies approached all of the sovereigns in the collaborative remand of the BiOp litigation, but not all the sovereigns expressed an interest in or need for negotiations. The participants explored whether negotiations could develop with all sovereigns at a single negotiating table, but that proved unworkable. As a result, the negotiations for each Accord were conducted separately, although the Confederated Tribes of the Umatilla Indian Reservation, the Confederated Tribes of the Warm Springs Reservation of Oregon, the Confederated Tribes and Bands of the Yakama Indian Nation, the Nez Perce Tribe, and the Columbia River Inter-Tribal Fish Commission joined together in negotiations with the Action Agencies.

The Shoshone-Bannock Tribes did not participate in the BiOp remand collaborative process, as they had not been a party to the BiOp litigation. This was not for lack of interest (or concern) on their part in regard to the BiOp. The Shoshone-Bannock Tribes have been actively interested and engaged in addressing the effects of the FCRPS on fish species, particularly Snake River fish.⁴ NOAA and the Action Agencies discussed the status of the FCRPS BiOp remand with the Shoshone-Bannocks in September of 2007, and also noted that negotiations with other sovereigns were in play to develop possible long-term agreements to resolve issues. The Tribes expressed an interest in similar negotiations, so in the fall of 2007, the parties began to discuss the possibilities for such an agreement. A draft “template” MOA (that had also been utilized as a template with other sovereigns in negotiations) was shared with the Tribes, and negotiations began.

The negotiations proceeded off and on during the first part of 2008. The parties were not, however, able to conclude negotiations prior to the issuance of the May 5, 2008 FCRPS BiOp. In July of 2008, the Shoshone-Bannocks proposed to intervene in the new litigation over the 2008 BiOp, and also indicated an interest in continuing negotiations in hopes of reaching agreement. Negotiations accelerated during the summer months and the parties were able to resolve their issues and come to a proposed agreement in early September.

⁴ The Shoshone-Bannock Tribes were the first to petition for the listing of a Columbia Basin salmon species as endangered when they petitioned for the listing of the Snake River sockeye in 1990, see 55 Fed. Reg. 22924 (June 5, 1990).

3.0 MUTUAL COMMITMENTS OF THE SHO-BAN MOA

Under the terms of the Sho-Ban MOA, as with the terms of the other Accords, the parties are committing to implement projects, to be funded by BPA, for the benefit of fish (and in this MOA, wildlife as well) affected by the FCRPS. The focal point of the Sho-Ban agreement are actions to help ocean-going (anadromous) fish listed under ESA, including Snake River Sockeye, Snake River spring/summer Chinook, and Snake River steelhead. The agreement also provides actions to help other fish in the Basin, including non-ocean-going (resident) stocks in Idaho such as the ESA-listed bull trout, as well as for non-listed resident species, such as Yellowstone cutthroat trout. The agreement is intended to work in concert with the final BiOps for the FCRPS and Upper Snake projects, as well as the BiOp for the *U.S. v. Oregon* management plan, developed by NOAA and released on May 5, 2008. Although the focus of mitigation in the Accords is on fish, the Sho-Ban MOA also contains several commitments for the benefit of wildlife impacted by the FCRPS. In addition, projects for the benefit of fish often carry wildlife benefits. As a result, although named a “Fish Accord,” the Sho-Ban MOA should be considered of benefit to 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 and related efforts, including research, monitoring and evaluation; (3) mutual commitments regarding habitat and hatchery actions; and (4) mutual commitments with respect to legal matters. The purpose of the following sections is not to describe the Sho-Ban agreement in detail, but to summarize some of its key provisions, including provisions unique to the Sho-Ban agreement.

3.1 Purpose and Principles

In the introductory sections of the agreement, the parties describe their intent to address direct and indirect effects of 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 ten years. In addition, the agreement aims to resolve issues between the Action Agencies and the Shoshone-Bannocks regarding compliance by the federal agencies under specific statutes—the Northwest Power Act,⁵ ESA, and the Clean Water Act (CWA)⁶—and to address the parties’ mutual concerns for certainty and stability in funding for implementation of projects. The agreement is also intended to foster a cooperative and partnership-like relationship in implementation of the mutual commitments.

⁵ Pacific Northwest Electric Power Planning and Conservation Act, 16 U.S.C. § 839 *et seq.*

⁶ Federal Water Pollution Control Act, 33 U.S.C. § 1251 *et seq.*

3.2 Hydro Commitments

3.2.1 Performance standards and adaptive management

Under the agreement, the parties confirm and concur in the use of hydro performance standards, targets and metrics as described in the FCRPS BiOp.⁷ This includes, for example, juvenile dam survival as the overarching performance standard for operation of the system—96% dam passage survival for yearling Chinook and steelhead and 93% for subyearling Chinook, based on empirical survival data.

The parties also acknowledge and support the adaptive management approach proposed by the Action Agencies in their August 2007 Biological Assessment and in the FCRPS and Upper Snake BiOps. This adaptive management includes two comprehensive reviews of the status and performance of each evolutionarily significant unit (ESU). The parties will participate in the design and analysis of those comprehensive reviews. If performance is not on track, the parties will discuss options for corrective action.⁸

3.2.2 Research, monitoring, and evaluation⁹

The parties also acknowledge the importance of maintaining and improving research, monitoring, and evaluation (RM&E) to inform decisions on population status assessments and improve management action effectiveness. The parties acknowledge that the combined BiOp and agreement commitments provide that RM&E. The Action Agencies committed to extensive RM&E in the RPA in the FCRPS BiOp,¹⁰ and while BPA is not committing to new RM&E projects in the Shoshone-Bannock MOA, BPA is providing ten-year commitments to on-going Shoshone-Bannock RM&E activities in support of the BiOp, including a portion of the Idaho Supplementation Studies project, as well as Snake River Sockeye habitat and limnological monitoring (including a restoration of funding that had been reduced in the FY 07-09 period).¹¹ The Salmon River Habitat Enhancement Project also includes monitoring of salmon and steelhead populations and their response to habitat actions in the Salmon River subbasin of the Snake River.

3.3 Habitat and Hatchery Commitments

In the Sho-Ban MOA, the Tribes have identified projects for the benefit of fish (listed and non-listed, anadromous and resident fish), and BPA commits to funding the projects for

⁷ Section II.A.1 and II.A.2 of the Sho-Ban MOA.

⁸ Section II.A.2 of the Sho-Ban MOA.

⁹ See Section II.A.3 of the Sho-Ban MOA.

¹⁰ FCRPS BiOp (NOAA Fisheries, May 5, 2008), RPA 50-73.

¹¹ Sho-Ban MOA, Attachment A (projects 4 and 5); see also the project narratives for these projects in Attachment B to the MOA.

the term of the Agreement with a specific budget.¹² Some examples are summarized below.

3.3.1 Habitat protection and restoration for fish

In the Sho-Ban MOA, the parties are committing to projects to improve spawning and rearing habitat to increase productivity of specific population groups of listed salmon and steelhead, as well as native resident species such as the Yellowstone cutthroat trout. Projects will be located in the Salmon River subbasin of the Snake River (including among others the East and Yankee Forks of the Salmon River, and the Upper Salmon) as well as in streams and riparian habitat of the Fort Hall reservation.

The types of projects BPA is funding include:¹³

- Designing and building in-channel pool forming structures in tributaries to improve spawning and juvenile rearing habitat;
- Riparian plantings to improve cover and shade for fish-bearing streams;
- Providing new road culverts, designed to be more fish-friendly and allow or improve access to quality habitat;
- Decommissioning roads to decrease sedimentation into fish-bearing streams;
- Reconnecting off-channel habitats to tributaries;
- Protecting fish habitat permanently through fee title or conservation easement acquisitions; and
- Improving instream flows in fish bearing streams through purchase or lease of water rights.

The Shoshone-Bannock Tribes have summarized all of the habitat projects that will provide benefits to listed ESUs and have estimated the benefits using the methodology linked to limiting factors developed in the remand collaboration.¹⁴

3.3.2 Group B steelhead actions

The Sho-Ban MOA provides particular actions for the ESA-listed Snake River steelhead, including the Group B steelhead of the Salmon River system. BPA-funded actions in this MOA aimed to provide substantial survival benefits to this stock include:

- Habitat enhancement and restoration projects¹⁵ and
- Nutrient enhancement—selected Snake River basin streams will be given additional nutrients as a food source for fish.¹⁶

¹² The projects will be implemented following successful completion of necessary environmental compliance requirements, see discussion under “General Provisions,” that follows.

¹³ Section III.A and Attachment B of the Sho-Ban MOA.

¹⁴ Estimated benefits tables, Attachment B of the Sho-Ban MOA (at the end, unpaginated).

¹⁵ See, e.g., Projects 9 and 10, as well as 12b (Attachments A and B of the Sho-Ban MOA).

¹⁶ See Project 11 in Attachment B of the Sho-Ban MOA.

3.3.3 Wildlife Actions

BPA and the Shoshone-Bannock Tribes have an existing on-going protection and enhancement project for wildlife as part of the overall Southern Idaho Wildlife Mitigation program. In this project, BPA provides funding to the Tribes for the maintenance of acquired lands to protect the wildlife benefits of those lands, and to acquire additional targeted wildlife habitat, which is then protected and managed in perpetuity for the benefit of wildlife species. Under this Sho-Ban MOA, BPA has agreed to continue providing funds for acquisition for the next ten years at the rate of \$1.655 million (in qualifying capital acquisitions) per year, with an increase in maintenance funding as well to maintain the newly acquired lands. In addition, however, BPA is willing to expend up to an additional \$3.335 million in any given year (for a total of \$5 million) on a case-by-case basis.¹⁷ For example, if the Tribes determined that a particular property was available in a certain year, with a purchase price of more than the planned \$1.655 million budget, up to \$5 million, BPA may provide the funding for that purchase if BPA has sufficient notice and capital funds available.

3.3.4 Hatchery and supplementation actions

BPA is making funding available to the Tribes for the development of the Crystal Springs Hatchery for the proposed production of Snake River sockeye, steelhead and spring/summer Chinook, and for production of Yellowstone cutthroat trout.¹⁸ BPA is also providing funding for construction of an adult holding/spawning facility in the Yankee Fork of the Salmon River to utilize the locally adapted Chinook and steelhead stocks produced in the Crystal Springs Hatchery programs.¹⁹ In addition, BPA is providing support for Snake River sockeye, steelhead, and spring/summer Chinook supplementation efforts by the Tribes.²⁰ BPA is committing to providing the planning, and operation and maintenance funding for these facilities as well.²¹

As discussed further in the “General Provisions” section below, before proceeding with new or expanded hatchery actions, the activity must have a NOAA determination that the action will not impede and, where possible will contribute to, recovery of ESA-listed species. In addition, new and in some cases expanded actions will undergo additional site-specific NEPA and other environmental compliance review.

3.4 General Provisions Related to BPA-Funded Projects

Under the terms of the agreement, 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 plans, BPA’s *in lieu* policy, and the data management

¹⁷ See Project 6 in Attachments B and note 2 of Attachment A.

¹⁸ See Project 7(a) in Attachment B of the Sho-Ban MOA.

¹⁹ See Project 7(b) in Attachment B.

²⁰ See Project 12 in Attachment B.

²¹ Section III.B.2.

protocols incorporated in the project contracts.²² The Shoshone-Bannock Tribes are expected to continue reporting the results of their activities annually via BPA's PISCES database (or other appropriate databases).²³ BPA expects to issue implementing contracts to the Shoshone-Bannocks, 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, the Shoshone-Bannock Tribes agree to:²⁴

- Provide estimated habitat quality improvement and survival benefits from the project (or suite of projects) to a population or populations of listed salmon and steelhead based on key limiting factors;
- Refine the estimates during the course of the agreement if it appears benefits may significantly deviate from the original estimates; and
- Support these estimates of habitat improvement and survival benefits in appropriate forums.

For hatchery projects, the Tribes agree to:²⁵

- Continue to make available identified biological benefits associated with hatchery projects included in the agreement, and support those biological benefits;
- Obtain a NOAA or U.S. Fish and Wildlife Service 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.

The Shoshone-Bannock Tribes have also agreed that, with a few exceptions, the Action Agencies commitments to hatchery projects are adequate for 30 years, such that no new requests for hatchery actions will be forthcoming.²⁶

In addition, the parties agree to coordinate their RM&E projects with regional RM&E processes (particularly those needed to ensure consistency with the FCRPS BiOp RM&E framework).²⁷ As some of the habitat work is proposed to occur on federal lands managed by other federal agencies, the Tribes have affirmed that they will consult with the federal land managers and obtain necessary permits and approvals.²⁸

²² Section III.C.1 of the Sho-Ban MOA.

²³ Section III.C.2.

²⁴ Section III.C.3.

²⁵ Section III.C.4.

²⁶ Section IV.B.2 of the Sho-Ban MOA. One of the exceptions is that the Tribes may request additional funding in year 15 if new information or changed circumstances indicate that additional hatchery actions are needed. Such requests will not be a violation of the agreement, and the Action Agencies are not obligated by the agreement to fund such requests.

²⁷ Section III.C.5.

²⁸ Section III.C.6.

3.4.1 Council and Independent Science Review Panel (ISRP) review

Throughout the negotiations for the Fish Accords, the parties recognized the importance of making their commitments track the Northwest Power Act processes for review of projects to implement the Council's Program, including review by the ISRP.²⁹ BPA also gave particular consideration to the Council's February 21, 2007, letter expressing the criteria important to the Council for any possible long-term agreements.³⁰ As a result, the Fish Accords, including this Sho-Ban MOA, expressly acknowledge the continuing role of the ISRP and Council in review of projects.³¹ 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.³² In regard to hatchery projects, the Tribes will participate in then-applicable ISRP and Council 3-step review processes,³³ as well as coordinate with other co-managers in the State, such as the Idaho Department of Fish and Game.³⁴

BPA and the Shoshone-Bannock Tribes are interested in finding ways to streamline the applicable processes, in coordination with the Council, so that Council and ISRP reviews are focused on new activities, and perhaps grouped by subbasin. As a result, in the Sho-Ban MOA, the parties agree to work with the Council to streamline and consolidate project reviews by recommending that the ISRP:³⁵

- Review projects collectively on a subbasin scale;
- Focus reviews of on-going or longer-term projects on future improvements/priorities; and
- Minimize or abbreviate re-review of on-going projects unless there is a significant project scope change since the last ISRP review.

3.4.2 Replacement projects and adaptive management³⁶

In regard to non-hatchery projects funded by BPA (e.g., habitat projects), 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

²⁹ 16 U.S.C. § 839b(h)(10)(D).

³⁰ Letter from Tom Karier, Chair, Northwest Power and Conservation Council, to Steve Wright, BPA Administrator, February 21, 2007.

³¹ Section III.D of the Sho-Ban MOA.

³² *Id.*

³³ *Id.*

³⁴ Section III.B.2 (third bullet).

³⁵ Section III.D.2 (first bullet).

³⁶ Section III.E.

- 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.

In order to maintain the substantive biological benefits committed to in this agreement, should a project not be implemented or completed because of such factors, BPA and the Shoshone-Bannock Tribes 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 and/or subbasin, and biological benefits provided. The replacement project concept does not apply to hatchery actions as a general matter. If a hatchery project is not able to be implemented because of physical infeasibility or inability to be modified in a manner that meets regulatory requirements, BPA's funding commitment to that hatchery action is discharged, subject to provisions that allow for a five year extension of capital funding under certain circumstances.³⁷

In addition to replacement projects, the parties also may mutually agree to adapt the agreements on a broader scale based on new information or changed circumstances.³⁸ For example, if in year 5 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.

3.4.3 BPA budgeting and planning requirements³⁹

Because the management of the BPA funding commitments under the Fish Accords, including the Sho-Ban MOA, is complex, the parties have agreed to some general principles for managing and tracking them, as discussed below. In addition, to address inflationary pressures, BPA will provide an annual inflation adjustment of 2.5 percent per project in the agreements beginning in fiscal year 2010.

The parties recognize that it is unlikely that all the new and expanded projects will expend their annual average budget in fiscal years 2009 and 2010 due to start-up issues. New work, and in some cases expanded work, requires additional BPA contracting, permitting, and environmental review. Given that this agreement is being executed with fiscal year 2009 already underway, "ramp up" provisions are needed. As a result, BPA is committing to funding in fiscal year 2009 approximately one-third of the average planning levels shown for each project, and up to 75 percent of that level in fiscal year

³⁷ Section IV.B.2.

³⁸ Section III.E.3.

³⁹ Section III.F.

2010. Full planning levels are expected to be implemented starting in fiscal year 2011. These ramp up provisions apply only to expanded and new projects, and for expansions of existing projects, the ramp up provision applies to only the expanded portion of the budget.

The parties recognized that, historically, there is a difference of approximately seven percent on average between BPA's planned expenditures for implementing projects as part of its direct program for fish and wildlife, and the actual spending (what BPA is invoiced for). BPA will plan to fund 100 percent of the funding agreed to across the agreements, but if the actual spending by the Tribes averages 93% in the aggregate, BPA remains in compliance with its commitments under the Sho-Ban MOA.

One of the most complicated aspects of managing long-term project funding is what happens when a project is either under-spending its planned budget, or seeks to exceed that budget. Carrying over funding from year-to-year is a problem for BPA because it means that the important work designed to address biological benefits is not being implemented in the expected timeframe. Carrying over funding can also create a financial "bow wave," where work is not performed for several years, and then suddenly much of the delayed work occurs at one time or in one year. This can present unacceptable financial pressures for BPA. As result, the parties have agreed to a general framework for managing "carry overs"—including descriptions of annual project budget flexibility, and the limits on how long unspent funding can be carried over (two contract years) before it will no longer be available. The parties also developed special rules for carry over of the ramp up year funding.

As BPA begins to implement these accounting measures in the Sho-Ban MOA, as well as in the other Columbia Basin Fish Accords, there may be adjustments made to streamline the processes of managing the funding and tracking the spending. Any such adjustments will be coordinated with the implementing Accord partner and documented. BPA and the other Columbia Basin Fish Accords parties have coordinated and generally agreed to some revised guidelines that streamline these processes. BPA has shared these guidelines for streamlined processes with the Shoshone-Bannock Tribes and anticipates continuing discussion and coordination regarding BPA's management of budget planning and tracking of the spending committed to under this and the other Accords.

3.5 Legal Commitments

Fundamentally, the Accords as a whole represent the parties' agreement that the Action Agencies' BiOp actions and the additional actions committed to in the Accords 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 Sho-Ban MOA, the Shoshone-Bannocks and the Action Agencies mutually 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. While no one is assuming guaranteed success, all are committed to the mutual effort and believe there is a high probability of success. The legal commitments reflect these central principles.

*3.5.1 Forbearance*⁴⁰

For BPA, one of the chief benefits of the Accords is obtaining a measure of peace with the Shoshone-Bannock Tribes, who had expressed concern about the measures identified for listed species, particularly regarding Snake River species, and who were prepared to intervene in the litigation involving the 2008 BiOps to ensure their concerns were heard. This peace will allow the parties to put their energies toward implementation of actions to protect and restore the listed and unlisted species affected by the FCRPS, and will provide some cost predictability for BPA ratepayers. As expressed in the forbearance sections of this agreement, the parties have resolved their differences and decided to focus on implementation of actions to benefit fish rather than litigate with each other.

Specifically, the Shoshone-Bannock Tribes 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 FCRPS and Upper Snake BiOps. Nor will they initiate, join in, or support in any manner ESA, Northwest Power Act, CWA, or APA suits against the Action Agencies or NOAA regarding the effects on fish resources and water quality (relating to temperature and total dissolved gas) resulting from the operations of the FCRPS dams. The Tribes also agree that their participation in on-going and future BPA rate proceedings will be consistent with the terms of this agreement. The parties specifically acknowledge that they will not directly or indirectly support the implementation of FCRPS dam breaching for the duration of the agreement.

For the Shoshone-Bannock Tribes, their commitments not to initiate, join in, or support lawsuits are predicated on the Action Agencies implementing the commitments in the BiOps (FCRPS and Upper Snake) and the MOA. In addition, the Tribes' commitment not to advocate for dam breaching during the term of the agreement is based on acknowledgment by the Action Agencies that nothing in the agreement can be interpreted or represented as the Tribes' rescinding or altering their positions regarding breach of federal dams. It is also based on an acknowledgment that, if after the second comprehensive review (see adaptive management discussion under hydro commitments above), the status of Snake River ESUs is not improving and contingent actions are needed, the Tribes may advocate that actions to implement Snake River dam breaching after 2017 should be initiated.

⁴⁰ Section IV of the Sho-Ban MOA.

3.5.2 *Affirmation of adequacy*⁴¹

In addition to agreeing to refrain from litigation, the Shoshone-Bannock Tribes also took the additional step of affirming with the Action Agencies that the package of actions contained in the BiOps and their 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, and to so affirm in appropriate forums, including NOAA's administrative record.⁴² For BPA, this affirmation of adequacy is critical, as it secures an understanding from the Shoshone-Bannocks 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.

3.5.3 *Who is covered by the commitments*

For BPA, it was important to be clear about expectations that forbearance, and particularly affirmations of adequacy, were applicable to all the representatives of the parties entering into these agreements. As a result, the Sho-Ban MOA specifies how the entities are covered. For the Action Agencies and Tribes, the commitments apply to these parties, their staff, any persons hired or volunteering for them, any representative or organization under their guidance or control, and any person or entity that acts as an agent for a party.⁴³

3.5.4 *Council Program amendments*⁴⁴

As negotiations for this MOA were underway, the parties recognized the Council was preparing to develop amendments to the Fish and Wildlife Program, as it does in advance of Power Plan amendments on generally a five-year cycle. As recommendations from fish and wildlife managers are given deference by the Council in developing Program amendments, it was important to BPA that the parties match their recommendations and comments to the Council with the agreed-upon commitments in the MOAs. Thus, all the Fish Accords, including this Sho-Ban MOA, provide for this consistency. In this MOA, the parties identified specific recommendation language, reflecting the parties' mutual desire that the Council recognize the MOA actions as a whole, rather than broken up as individual projects outside the context of the mutual commitments.⁴⁵

3.5.5 *Good faith implementation and support*⁴⁶

The parties to the Sho-Ban MOA have agreed to good faith implementation—that they will work together, in partnership, to implement the mutual commitments in the

⁴¹ Section IV.B of the Sho-Ban MOA.

⁴² See Section IV.B.4.

⁴³ Section V.F.

⁴⁴ Section IV.C.

⁴⁵ *Id.*

⁴⁶ Section IV.D.

agreement. Because this represents a fundamental change in the relationships, the agreement recognizes that there may be disagreements as implementation proceeds. 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.

3.5.6 Changed circumstances, renegotiation/modification, dispute resolution and withdrawal⁴⁷

Consistent with the theme of the collaborative relationship commitments, the Fish Accords, including the Sho-Ban MOA, provide for informal dispute resolution—including voluntary mediation, if desired—should disputes arise during implementation.⁴⁸ 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 Sho-Ban MOA. Upon withdrawal, the party would no longer be subject to the commitments in the agreement. For example, if the Tribes withdraw, they would be free to litigate matters that they otherwise agreed to forbear litigating. If BPA withdraws, it would no longer be obligated to actions agreed to in the MOA, including funding commitments consistent with the MOA. BPA has agreed, however, that should it withdraw, it will maintain funding it determines (along with the other Action Agencies) is necessary for FCRPS BiOp implementation, and will also fund any other actions that it separately agrees to continue funding.⁴⁹

The parties identified the option of withdrawal for several circumstances, principally: in the event of material non-compliance with the agreement not resolved by dispute resolution; in the event of material effects relating to BiOp litigation; in the event of a “force majeure” affecting a Party’s performance;⁵⁰ or in the event one party withdraws under one of these provisions, the other parties may also consider withdrawal. In addition, the parties may, by mutual agreement, consider negotiation or withdrawal for changed circumstances other than those enumerated in the agreement.

The provision regarding material effects relating to BiOp litigation (whether FCRPS, Upper Snake, or the *U.S. v. Oregon* BiOp) signals the importance to all parties of receiving BiOps that are upheld in any subsequent litigation. From BPA’s perspective, this is critical for supporting the implementation of the agreement—BPA will have to re-examine the significant financial commitments in this Sho-Ban MOA and the other Fish

⁴⁷ Section IV.E.

⁴⁸ Section IV.F.

⁴⁹ Section IV.E.5. 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 Sho-Ban MOA.

⁵⁰ Section V.I.2.

Accords, if as a result of BiOp litigation, BPA is obligated to undertake additional actions that are financially material. Withdrawal is not, however, a decision to be taken lightly by BPA or any other party.

Under the terms of the Sho-Ban MOA then, if a court subsequently rules against any of the BiOps and orders (directly or through a resulting amended BiOp, whether through court-ordered mediation or not) additional actions that are either financially material to an Action Agency, or that materially constrain the Corps or Reclamation from meeting FCRPS purposes, or that materially constrains the actions in the *U.S. v. Oregon* Management Plan, the parties must meet to review those actions, and determine an appropriate response. If renegotiation is not successful, withdrawal is allowed. The parties discussed, but ultimately decided not to define “material.” As a result, what is “material” will be determined in the specific context and circumstances in which it may arise.

3.5.7 Binding effect and judicial review

For the tribal parties to the Accords in particular, including the Shoshone-Bannocks, 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 Sho-Ban MOA as akin to BPA executing a programmatic contract: the mutual commitments between BPA and the Tribes were developed with bargained for consideration, and BPA expects to implement them as such. To provide additional assurance to the Tribes of its commitments, BPA agrees that in addition to the remedy of withdrawal, the Tribes may challenge in any appropriate forum asserted non-compliance with the terms of the Agreement, including judicial review of BPA’s actions.⁵¹ The judicial review provision is expressly limited to BPA in recognition of its unique authority amongst the Action Agencies to make binding funding commitments, not contingent on appropriations from Congress (although BPA’s budget submission and certain capital projects remains subject to further Congressional review).⁵²

BPA views the Sho-Ban MOA as analogous to a programmatic contract for goods or services. 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.⁵³ The appropriate court will ultimately depend, however, on the nature of the claim and the relevant court’s jurisdiction.

⁵¹ Section IV.E.4.

⁵² 16 U.S.C. sections 838b(d), 838i(a), and 839b(h)(10)(B).

⁵³ 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 Sho-Ban MOA.

3.5.8 Miscellaneous other provisions

All of the Fish Accords, including this Sho-Ban MOA, recognize that all activities undertaken pursuant to the agreements must be in compliance with all applicable laws and regulations,⁵⁴ 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.⁵⁵ The term of the agreements is approximately ten years—through fiscal year 2018 (from date of signature through midnight on September 30, 2018).⁵⁶ There are two exceptions to this term relating to hatchery commitments in the Sho-Ban MOA. First, should a hatchery action proposed in that agreement not begin construction by the last year of the agreement, BPA will continue to make the hatchery funding available for an additional five years.⁵⁷ Second, the Shoshone-Bannock Tribes agree that they will not seek additional funding for hatcheries from the Action Agencies for 30 years from the effective date of the agreement, subject to a few exceptions in recognition of unique circumstances.⁵⁸

3.6 Integration with the FCRPS/Upper Snake BiOps

The Action Agencies believe their proposed action for the BiOps, including the RPAs, will avoid jeopardy and will place the listed stocks on a trend toward recovery. The actions BPA is committing to fund under the Sho-Ban MOA not only provide greater specificity and detail for the actions already proposed, but also include additional actions to benefit listed fish. The actions committed to in the Sho-Ban MOA provide specificity as to the project, implementing entity, and funding for projects that fulfill an identified RPA activity. For example, under RPA No. 35, the Action Agencies will fund and implement projects to achieve population-specific habitat quality improvements by 2018.⁵⁹ Projects committed to in the Sho-Ban MOA will assist the Action Agencies in meeting that RPA

Projects included in the Sho-Ban MOA that contribute to habitat quality improvements called for under the BiOp include Project #9 (ESA Habitat Restoration/Rehabilitation) and Project #10 (Yankee Fork Floodplain Restoration). Others projects (e.g., Project #11, Salmon River Nutrient Enhancement) also contribute to the conservation of listed species.

3.7 Funding Commitments for BPA, and Relationship to Ratemaking

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

⁵⁴ Section V.B.

⁵⁵ Section V.I.3.

⁵⁶ Section V.A.

⁵⁷ Section IV.B.2.

⁵⁸ *Id.*

⁵⁹ FCRPS BiOp (NOAA Fisheries, May 5, 2008), Appendix, RPA No. 35 (pages 41-46 of 98).

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

	EXPENSE	CAPITAL	TOTAL
SHO-BAN	\$37	\$24	\$61

In Table 2, below, the commitments of the Sho-Ban MOA are displayed in total with the commitments made in the preceding Columbia Basin Fish Accords:

Table 2. BPA Funding Commitments, Total for 2008 Fish Accords, Over Term of Agreements, in millions of dollars

	EXPENSE	CAPITAL	TOTAL
THREE TRIBE	\$516	\$132	\$648
COLVILLE	\$158	\$46	\$204
IDAHO	\$52	\$13	\$65
MONTANA	\$0.05	\$16	\$16
SHO-BAN	\$37	\$24	\$61
TOTAL	\$763	\$231	\$994

This summary was developed by “rolling up” and rounding the annual BPA funding totals identified in the MOAs and associated project spreadsheets (it does not supersede the specifics of the MOAs themselves). This summary does not take into account factors such as: the prescribed ramp up periods (in which funding amounts from BPA are expected to be less than the described annual budgets for these projects in those years); the inflation adjustment of 2.5% beginning in fiscal year 2010; the potential for shifts between expense and capital categories; the timing of capital investments and when payment of debt service begins and ends, including BPA’s repayment to the Treasury of any power-share costs attributable to Corps or Reclamation actions in support of the Accords. Absent the prescribed inflation adjustments, however, this does illustrate the maximum BPA expects to provide in direct support of the projects committed to in the agreements.

BPA will begin implementing the Sho-Ban MOA commitments immediately. BPA expects to fund commitments for on-going projects and new commitments in fiscal year 2009 out of its overall existing Fish and Wildlife Program budgets (without reductions in other projects), and reserves if needed. For commitments in the Sho-Ban MOA for fiscal years 2010 and beyond, BPA expects to include its costs of implementing the Sho-Ban agreement as part of its revenue requirement in its wholesale power rates. The initial Integrated Program Review (IPR) workshops to identify program levels for fiscal years 2010-2011 have been completed, and the Close-Out Report will be issued shortly. BPA expects to hold an additional abbreviated IPR-type program review to identify and discuss any changes in program level forecasts in the spring of 2009. At that time, BPA will reflect any changes in its forecast of its fish and wildlife commitments, including any

new costs identified (such as for the Sho-Ban MOA) since the IPR Close-Out Report. During that process, BPA will take comments and consider those comments prior to concluding the process. Resulting forecast costs will be included in the revenue requirement for the final rate proposal for fiscal years 2010 and 2011. BPA expects to use a similar approach for the remaining rate periods of the agreement, expected to be every two years.

4.0 PUBLIC REVIEW AND COMMENT

The key concepts underlying the Sho-Ban MOA, including a holistic approach to addressing the needs for fish 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 2000 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, hatchery and other non-hydro projects to be implemented pursuant to these agreements had their genesis 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 fish have been included in the BiOp remand collaboration, in which many regional sovereigns have been extensively engaged, and which included opportunities for public review. And, finally, tying these things all together were the initial Fish Accords themselves, which BPA released for public comment in April of 2008, and the Sho-Ban MOA, released for public comment in September of 2008. All of these forums provided opportunities for public review and public comment, and are summarized below.

4.1 Processes Leading to the Accords, including the Sho-Ban MOA

4.1.1 The Council's 2000 Fish and Wildlife Program

In preparing the 2000 Fish and Wildlife Program, the Council solicited recommendations from the region's fish and wildlife agencies, tribes, and others, as required by the Northwest Power Act. After reviewing the recommendations, the Council prepared a draft Program and then conducted an extensive public comment period before finalizing the Program in December 2000. Since 2000, the Council has amended its program twice, once with the mainstem amendments in 2003, and again with the subbasin plans in 2005. In preparing the mainstem plan, the Council solicited recommendations from the region's state and federal fish and wildlife agencies, tribes, and others. The Council held an extensive public comment period on the draft mainstem plan before finalizing these program amendments. The Council also solicited recommendations for Program amendments in the form of subbasin plans so that they could adopt more specific biological objectives and measures for tributary subbasins and specific mainstem reaches. In May 2004, the Council received proposed subbasin plans for 57 subbasins of the Columbia River. These subbasin plans were developed collaboratively by state and

federal fish and wildlife agencies, tribes, local planning groups, fish recovery boards, and Canadian entities where the plans address transboundary rivers. The planning effort was guided by the Council and funded by BPA. The public was given an opportunity to review and comment on the draft subbasin plans.

4.1.2 BPA's FWIP EIS public processes

As discussed in more detail in the NEPA section of this Record of Decision, BPA prepared the FWIP EIS to help BPA establish a comprehensive and consistent policy to guide the implementation and funding of the agency's fish and wildlife mitigation and recovery efforts in the region. As part of developing the FWIP EIS, BPA conducted extensive public outreach to help determine the spectrum of fish and wildlife issues in the region, as well as the various regional proposals that had been suggested to aid in mitigation and recovery efforts over the years. Preliminary scoping for the FWIP EIS began in 1998 with the Council's Multi-Species Framework Project. Formal scoping for the EIS began in October 1999. The scoping process for the FWIP was then incorporated into the public meeting sessions for the Federal Caucus, and a total of 16 public scoping meetings were held throughout the Pacific Northwest in February and March 2000. BPA also participated in many ongoing processes concerning fish and wildlife that were occurring at the time of EIS preparation, such as the development of the Council's 2000 Columbia River Basin Fish and Wildlife Program. Information from these processes was included in the EIS.

For the FWIP EIS, BPA developed alternative policy directions based on multiple existing initiatives in the region. BPA also worked with the public and the agencies to identify the key issues that are necessary to address for any comprehensive fish and wildlife mitigation and recovery plan to be successful. These key issues were used to organize much of the analysis in the FWIP EIS (FWIP EIS, Section S3.3).

After public release of the Draft FWIP EIS in June 2001, BPA held six public meetings and workshops across the region to discuss the EIS and to receive comments. BPA arranged for opportunities to interact directly with interested members of the public and share ideas on specific aspects of the Draft EIS. During the comment period, BPA received approximately 400 individual comments. These comments were responded to in the final FWIP EIS (FWIP EIS, Section 8.1) and considered in the Administrator's decision to implement the PA 2002 Policy Direction.

4.1.3 2007-2009 BPA-Council solicitation

Many of the projects proposed by the parties for implementation as a part of these Fish Accords were initially proposed as part of the Council's 2007-09 project solicitation process. In October 2005, the Council, in coordination with BPA, solicited proposals from regional entities for projects that would protect, mitigate and enhance fish and wildlife affected by the development and operation of the FCRPS consistent with the Fish and Wildlife Program. All proposals, submitted by January 10, 2006, were posted on the

Columbia Basin Fish and Wildlife Authority website and available to the public.⁶⁰ The proposals were reviewed by the ISRP for scientific merit and consistency with the program, after which project sponsors were given an opportunity to respond to ISRP comments and questions.⁶¹ Proposals were then sent to local groups for review; the extent to which these local reviews were open to the public varied by location.⁶² Upon reviewing ISRP and local reviewer comments and deliberating at various Council public meetings, the Council released draft recommendations in mid-September 2006 on which projects should receive BPA funding. Those recommendations were open for public review and comment through October 6, 2006. In making its final project recommendations to BPA in November 2006, the Council considered the public comments on its draft along with the project proposals, the review report of the ISRP, the public comments on the panel's report, the prioritization recommendations from the various review groups organized by the Council, and other comments and information in the Council's administrative record. BPA relied on the ISRP review and Council recommendations in making its own FY 2007-2009 program funding decisions in February of 2007.⁶³

4.1.4 BiOp remand collaborative process

The BiOp remand collaborative process, including associated technical work groups involved hundreds of meetings over the past two years, with over 150 participants. While the collaboration itself was not open to public review, the public was represented by the various participating sovereigns (including states, tribes, and federal agencies). The results of the collaboration—the draft FCRPS and Upper Snake BiOps—were made public and comments solicited on October 31, 2007.⁶⁴

4.1.5 Public Review of the May 2008 Fish Accords

After the release of the draft BiOps in October of 2007, negotiations continued in regards to the initial four Fish Accord MOAs. After negotiations with each of the parties was completed, the proposed agreements were announced through press releases, a press call, and posting on the government's salmon recovery website during the month of April 2008, www.salmonrecovery.gov. BPA sought public comment on the proposal to enter into the agreements as negotiated, through April 23, 2008.

BPA received 39 sets of letters or e-mail comments in response to its request for comments. Comments were received from a wide variety of sources throughout the Basin, including from individual citizens, tribes, the State of Oregon, utility groups and other BPA customer organizations, and environmental organizations. Some expressed opposition to the agreements, others expressed support, and still others were unsure but

⁶⁰<http://www.cbfga.org/solicitation/components/forms/Allproposals.cfm>.

⁶¹<http://www.nwcouncil.org/library/isrp/isrp2006-6.htm>.

⁶²<http://www.nwcouncil.org/fw/budget/2007/Default.asp>.

⁶³<http://www.efw.bpa.gov/IntegratedFWP/policyframework.aspx>.

⁶⁴www.salmonrecovery.gov.

had concerns.⁶⁵ Following the close of the comment period, BPA reviewed all of the comments, sorted them by general theme or concern, and consulted with the other agreement parties about them as needed. All comments were considered by BPA in its decision whether to sign on as a party to the initial Accords, and its consideration of the comments were reflected in BPA's Record of Decision for entering into those initial four Fish Accords in May of 2008.⁶⁶

4.2 Public Review of the Sho-Ban MOA

After negotiations with the Shoshone-Bannock Tribes 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 Sho-Ban MOA was posted on September 18, 2008. BPA sought public comment on the proposal to enter into the agreement as negotiated, through October 20, 2008. BPA also sent notice to its entire BPA Journal mailing list (approximately 3500 members).

BPA received two comment letters in response to its request for comments. Letters were received from the Public Power Council, and from the State of Idaho through its Office of Species Conservation. Comments can be viewed at the BPA website: <http://www.bpa.gov/applications/publiccomments/closedcommentlisting.aspx>. Following the close of the comment period, BPA reviewed the comments and sought the views of the Shoshone-Bannock Tribes about them. All comments were considered by BPA in its decision whether to enter in to the Sho-Ban MOA. In the following section, BPA addresses the comments received.

4.3 BPA Analysis of Comments

4.3.1 Comments from the Public Power Council

The Public Power Council (PPC) submitted comments, expressing a general concern that this MOA was made without the involvement of BPA customers, and that BPA will continue to make similar agreements without customer involvement or input.⁶⁷

BPA acknowledges that the PPC is concerned about the development of the Sho-Ban MOA without the direct involvement of BPA customers in the negotiations. BPA believed, however, that in order to develop this agreement, confidentiality was important. Confidentiality during negotiations helps the parties to explore possible resolution without fear that preliminary or tentative positions are assumed to be final by third parties. That being said, however, BPA has periodically informally notified its customer

⁶⁵ Comments received regarding the initial Fish Accords can be viewed at the BPA website: <http://www.bpa.gov/applications/publiccomments/closedcommentlisting.aspx>.

⁶⁶ The ROD for the May 2, 2008 Fish Accords is available at: <http://www.bpa.gov/corporate/pubs/RODS/2008/>

⁶⁷ October 20, 2008 letter from the Public Power Council.

representatives, including PPC, of ongoing negotiations, including the Accords that were signed on May 2 as well as the Sho-Ban discussions. BPA will continue to informally make customers aware of any future similar discussions or negotiations that are underway, while seeking to preserve the confidentiality of the specific issues and positions in negotiations to ensure the most candid exchanges. BPA also believes that giving notice of the proposed agreement, and seeking the input of the region in helping to decide whether or not to enter into the proposed agreement, provides the necessary and appropriate transparency.

It is also important to note that the commitments made under the Sho-Ban MOA are consistent with the Council's Program, and specifically advance BPA's implementation of commitments made for support of the FCRPS BiOp. As such, the Sho-Ban MOA, and the other Fish Accords, were not developed in a vacuum nor do they make commitments in response to drivers of which regional interests are unaware. BPA pledges to also continue working with customers to ensure a common understanding of objectives reflected in these agreements and how to most effectively achieve them.

Rate impacts:

The PPC expressed concerns about the growth of fish and wildlife costs generally, and encouraged BPA to manage the new Sho-Ban commitments in a way that does not further increase expected FY 2010 and 2011 spending. As discussed previously in section 3.7, BPA expects to integrate the costs of implementing the Sho-Ban MOA in its revenue requirement for the FY 2010-11 power rate proposal. The IPR public process to review program level forecasts, including expected fish and wildlife costs, has already concluded, and did not include the costs of implementing the Sho-Ban MOA. BPA will identify any increased costs in relation to the Sho-Ban MOA in an abbreviated IPR-type program review in the spring of 2009.

BPA does not expect to diminish funding of any presently on-going non-Accord work in order to cover the costs of implementing Accord work, including the Sho-Ban MOA. Whether or not implementing the Sho-Ban MOA will further increase actual spending for FY 2010 and 2011 beyond what has already been planned cannot be determined at this stage. In the IPR for the FY 2010 to 2011 period, BPA forecast that its direct fish and wildlife program levels, including implementation of the Accords and BiOp, would require \$230 million in expense in 2010, and \$236 million in 2011, and \$70 million in capital in 2010 and \$60 million in 2011. These program levels were based on the estimated costs of meeting new Accord and BiOp commitments while preserving funding for the remaining portions of the Fish and Wildlife Program.

The forecast of FY 2010-11 fish and wildlife program levels in the IPR workshops reflect a range of uncertainty, especially with regards to precise timelines for initiation of new and expanded work. Specific timelines for initiation of work are difficult to forecast given the need for science review, contracting, and permitting precursors for individual project implementation. As such, it is possible, and even probable that the forecast fish

and wildlife program levels for FY 2010 and FY 2011 in the initial IPR will be sufficient to cover all Accord implementation costs, including the Sho-Ban MOA, as well as new BiOp commitments and continuation of the current Program (i.e., non-Accord and non-BiOp projects).

The PPC also opposes the automatic 2.5 percent inflation increase. BPA believes that a regular adjustment to reflect inflationary pressures is appropriate and necessary to maintain the quality, benefits and mitigation pace of the projects it is funding. BPA has not explicitly included inflation adjustments in its fish and wildlife program for some time, leading to concerns from implementing partners that the implicit effect has been a reduction in accomplishments for some projects over time. Various options were discussed during Accord negotiations, including higher percentages, or annual adjustments based on external inflation indices, such as the Consumer Price Index. BPA concluded that a predictable and reasonable flat percentage rate was an appropriate approach, providing some measure of response to inflationary pressures, but with a predictable and certain path. BPA reviewed past BPA-wide inflation assumptions and concluded that 2.5 percent is reasonable, neither on the high end nor the low end of what might reasonably be expected. BPA also concluded that such an inflation adjustment is important to enable a positive trend in mitigation activity and achievement of environmental and biological objectives, particularly with the upward pressure across most costs categories associated with this type of work. BPA is also addressing the application of an inflation adjustment in response to customer comments in its IPR process.

The PPC expressed uncertainty about whether the Sho-Ban MOA (along with the other Fish Accords) are the most cost-effective approach to meeting BPA's statutory requirements. The PPC indicates that the MOAs are not certain to achieve the goal of resolving the BiOp litigation, they do not include all regional entities, and they do not address all the hydrosystem mitigation responsibilities. As discussed further in section 5.0, BPA believes that the Accords, along with the BiOp commitments, presents a holistic, multiple strategy, comprehensive package of hydro operations and tributary mitigation projects covering all the "Hs" (hydro operations, habitat, hatchery and harvest) that is supported by a range of sovereign parties. This holistic and comprehensive package supported by expert tribes and states makes the Accords worth the additional expense to ratepayers. BPA firmly believes that other paths, such as additional significant and hydro-centric operational changes, would be less biologically sound, less cost-effective, would negatively impact reliability, and would likely be ultimately more costly to ratepayers than the approach reflected in the BiOp and the associated Accord commitments.

It's true that the Accords provide no guarantee of resolution of all litigation over the FCRPS BiOp. Nevertheless, BPA believes that the collaborative approach that has gained the support of many regional sovereigns, including some of the toughest reviewers of the efforts to address impacts to listed fish, signals a significantly higher likelihood of

success in litigation.⁶⁸ The Accords are the culmination of the collaborative process that was ordered by the Court, and represent an embrace of the all-H approach of the BiOp and a partnership among sovereigns focused on timely and effective implementation, with a strong, common interest to rebuild fish and wildlife impacted by the FCRPS.

Science review:

The PPC provided a general comment as to the importance of independent science review in helping evaluate the effectiveness of projects. The PPC remains concerned, however, about the ability for a proposed project to undergo expedited review, and in cases of replacement projects, no ISRP review. As a result, the PPC strongly encourages BPA to ensure that all projects go through the detailed scientific review, and that the effect of this review on BPA and Accord signatories in their decision making be transparent to the public.

BPA concurs with the PPC in the importance of science review, and notes that the Sho-Ban MOA, like the other Fish Accords, commits to ISRP review of projects. In many cases, the projects to be funded under the Accords have already undergone review by the ISRP (e.g., for on-going projects that will continue be funded through the Accords), in which case additional ISRP review would not be necessary. In other cases, there may be expansions of scope of existing projects, in which ISRP review is appropriate when there is a significant change in scope. New project proposals will generally require ISRP review, unless they are of the type that is not amenable to science review (e.g., administration-type contracts). Expedited review of projects still means science review will occur, and if a replacement project presents a significant change in scope, or is an entirely new project, then ISRP review of the replacement project would be expected. If, however, a replacement project under the Accords reflects project concepts and details that have already been reviewed, then subsequent ISRP review would not be necessary.

With regards to making information from a science review “feedback loop” publicly available, BPA, the Accord partners, and the Council have not yet identified specifically how the information will be made available to the public, but making such information available in a transparent manner is expected to be a part of any such process. BPA, the Fish Accord parties, and the Council are currently developing a “white paper” outlining the process for science review of project commitment in the Accords. BPA will solicit customer input and feedback on that white paper, and so the PPC and others will have an additional opportunity to weigh in on the use of science review in Accord implementation.

⁶⁸ Recently-filed motions for summary judgment in support of the FCRPS BiOp in the *NWF v. NMFS* litigation confirm that there is broad regional support for the new BiOp and the Accords. Unlike the last BiOp in 2004 that attracted support from two states and one tribe, this new BiOp with the additional support of the Accords has garnered the support of three states (Washington, Montana, and Idaho), and six tribes (the Colvilles, Salish-Kootenai, Kootenai of Idaho, Warm Springs, Umatilla, and Yakamas). The Shoshone-Bannocks are a now a seventh supporting tribe, though they are not participating in the litigation.

Restricting flexibility: The PPC suggests that the firm commitment of the MOAs might not be appropriate given the dramatic changes in fish and wildlife mitigation over the recent past, and that it would be more appropriate to provide flexibility to the region to most effectively mitigate for hydrosystem effects.

As the PPC acknowledges, certainty is one of the primary values of the MOAs, at least in terms of cost expectations for certain segments of BPA's traditional Fish and Wildlife Program partners. This certainty is not, however, matched with equal restrictions on flexibility to adapt the Accord commitments as circumstances may warrant. The Sho-Ban MOA, like all the Fish Accords, allows for adaptive management—both in terms of project-specific adaptation through the replacement project concept, but also in the ability to change the commitments more programmatically to address new information or changed circumstances.⁶⁹ This language is intended to allow the Accord partners to shift the focus of the Accord commitments at a programmatic level as needed. For example, if science review indicates that one type of mitigation action is far more effective than another in relation to habitat improvements, the Accord parties could programmatically shift the focus of Accord habitat projects to the more effective type. BPA will not be able to unilaterally make such adaptive changes and so in that sense BPA has more limited flexibility to respond to changes than it did prior to the Accords. BPA believes, however, that the benefits of the Accords, including identified benefits for listed species for which the Accord entity (in this case, the Shoshone-Bannock Tribes) will support in appropriate forums, a new and collaborative relationship with many of the region's sovereigns, the increased certainty as to fish and wildlife costs for ten years, and the commitment of legal adequacy for ten years, outweighs limits on its ability to take unilateral actions.

4.3.2 Comments from the State of Idaho

The State of Idaho, through the Office of Species Conservation, submitted comments supporting the majority of the actions identified in the proposed Sho-Ban MOA. The State did suggest, however, that the MOA should be modified to make explicit that funding of any off-reservation management actions is conditioned on the review and approval of the particular actions by the appropriate state entity or entities. This suggestion includes a request that work elements in habitat improvement projects need additional discussion, planning, and coordination with Idaho agencies before implementation can be considered. Idaho also raised particular concerns about the need for additional coordination regarding proposed supplementation actions.⁷⁰

BPA believes there is no need to modify the MOA because the coordination, review and approval by the State as appropriate are already a requirement of the MOA. As a general matter, the MOA makes clear that all activities undertaken pursuant to the agreement must be in compliance with all applicable laws and regulations.⁷¹ This assures that any required state permits or approvals (including associated discussion, planning and

⁶⁹ Section III.E.3.

⁷⁰ October 15, 2008 letter from the Office of Species Conservation, Idaho.

⁷¹ Section V.B.

coordination) are a requirement of performance under the MOA. In addition, the parties have highlighted the need for specific coordination in relation to hatchery projects. Specifically, in the development of the proposed Crystal Springs Hatchery and any outplanting or supplementation of fish into natural habitats, the Tribes are to obtain required reviews and approvals from others including through the Council and ISRP reviews, NOAA and/or USFWS review and approval as needed, and coordinating with other co-managers, including explicitly the Idaho Department of Fish and Game.⁷²

Idaho also expressed concern about proposed hatchery activities associated with the propagation and reintroduction of Snake River sockeye salmon. Idaho is concerned such activities are either duplicative or inconsistent with on-going State activities. BPA understands that Idaho has a keen interest in the management and implementation of Snake River sockeye recovery programs, and plays a major role in those recovery efforts. As described above and in the MOA, BPA expects that the Shoshone-Bannock Tribes will coordinate with Idaho and other partners in the sockeye restoration effort to ensure that the Tribes' activities complement, and do not duplicate nor supplant, other already on-going Idaho efforts.

4.4 Opportunities for Future Public Review of Site-Specific Project Implementation

As the parties begin implementing the projects committed to in these agreements BPA and/or the Shoshone-Bannocks may also engage in further public involvement activities for new site-specific actions. For example, while BPA is committing to making funding available for a new hatchery in this MOA, the planning, design, and construction of the hatchery must still undergo development and associated regulatory and compliance reviews, such as site-specific NEPA analysis. The degree of public involvement for a site-specific action such as hatchery development will be commensurate with the relative environmental impacts of, and public interest in, the proposed action. BPA and/or the Shoshone-Bannocks will make diligent efforts to discover potentially interested and affected parties, and will solicit information when appropriate. Interested and affected parties may include nearby landowners or other individuals, interest groups, tribes, and city, county, state, federal and regional agencies. Options to inform the public about project related actions include mailings, public notices, public meetings and workshops, notification in local papers and BPA's monthly newsletter, postings on the internet and radio advertisements, and one-on-one meetings. BPA will document site-specific public involvement as part of the validation process (described further in the NEPA section, Section 6 below). Activities requiring additional NEPA documentation may have public involvement obligations as outlined in the NEPA regulations.

5.0 WHY BPA HAS DECIDED TO ENTER INTO THIS AGREEMENT

5.1 The Agreement Fulfills BPA's Mission and Strategic Objectives

⁷² Section III.B.2, third bullet.

This agreement represents the continuation of an unprecedented commitment of the Bonneville Fund to the protection and recovery of fish species in the Basin. BPA is making specific, decade-long commitments to provide funding for the benefit of fish in a contract-like fashion directly with the Shoshone-Bannock Tribes. BPA is doing so because these commitments will help BPA meet its mission and related 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.⁷³ Although the provisions are not mutually exclusive, 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.

5.1.1 The Sho-Ban MOA protects and recovers fish

BPA believes that a collaborative and comprehensive approach to mitigating impacts to salmon and steelhead delivers the best opportunity for success. While there remain those who believe that continued litigation is the only sure path, the Accords, including the Sho-Ban MOA, demonstrate otherwise. In collaboration with the parties to the Accords, BPA is providing significant benefits to fish in a comprehensive program that addresses the four "Hs": habitat, hatcheries, harvest and hydro operations. These include actions that are in addition to the measures included in the Action Agencies' proposed action analyzed in the FCRPS BiOp. With a holistic approach that supports fish in all these aspects of their lifecycle, BPA believes it can better meet its mission. The Sho-Ban MOA, like the other Accord MOAs, addresses hydrosystem operations. The MOA also adds details and commitments that make off-site actions identified for FCRPS BiOp implementation more reasonably certain to occur, provide additional actions that assist in recovery of ESA-listed salmon and steelhead species, and fund protection for other listed and non-listed fish and wildlife species. With the commitments in this Sho-Ban MOA, the Action Agencies have enhanced their ability to meet their ESA and other responsibilities, such that the Tribes and the Action Agencies collectively agree that the Action Agencies will meet their statutory responsibilities for the ten-year term.

5.1.2 The Sho-Ban 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,⁷⁴ in multiple ways. BPA seeks to keep rates as

⁷³ See "BPA Mission," part of BPA's strategic direction for 2008-2014, published in July 2007, and available at http://www.bpa.gov/corporate/about_BPA/Strategy.cfm.

⁷⁴ 16 U.S.C. § 839(2).

low as possible given sound business principles, and to manage the power aspects of the FCRPS to meet reliability standards and the other purposes of the system. BPA's decision to enter into the Sho-Ban MOA as a part of the 2008 Columbia Basin Fish Accords is consistent with these purposes. Although the funding commitments BPA is making in the Sho-Ban MOA are large, and when combined with the existing Accords commitments, are extra-ordinary, they bring to BPA and its customers a greater level of certainty about BPA's fish costs over a longer time than ever before. Instead of every two or three years encountering open-ended requests for fish funding from these parties, there is now more certainty and stability to the funding. This helps BPA plan its costs and manage its financial risks.

BPA's preliminary estimate was that the May 2, 2008 Fish Accords and the cost to BPA of implementing new FCRPS BiOp commitment collectively may translate into wholesale power rates approximately 2-4 percent higher than they would otherwise be, all other things being equal. Entering into the Sho-Ban MOA is not expected to change that overall potential range because much (though not all) of the Sho-Ban MOA represents commitments by the Sho-Bans to implement projects and activities that BPA had already anticipated it would need to implement and that BPA had budgeted for.

Specifically, both ongoing projects funded by BPA under the Council's Program (including on-going commitments to the Shoshone-Bannocks), as well as projects addressing limiting factors for ESA-listed species that were included in the Action Agencies' Proposed Action and ultimately the RPAs of the new FCRPS BiOp were included in BPA's fish and wildlife budget planning for FY 2009-2011. Through the Sho-Ban MOA, BPA is committing funds that BPA had anticipated would be needed for implementing BPA's Northwest Power Act and ESA obligations, although a specific partnering entity to implement all the activities had not been identified.

BPA is also committing funds in the Sho-Ban MOA that it had not anticipated for Program or FCRPS BiOp implementation. These commitments—although significant relative to a single entity—nonetheless reflect a relatively small proportional increase in the total commitments BPA is making to implement the BiOp and Accords over the ten-year period. These factors, coupled with a fairly broad range of possible effect on rates (2-4 percent) lead BPA to conclude that the effect of implementing the Sho-Ban MOA is within this range.

While BPA seeks to avoid increasing power rates at all, and a 2-4 percent increase is to be avoided if reasonably possible, BPA believes that the value provided by the Accords (including this Sho-Ban agreement) is worth the increased costs to ratepayers. The Accords provide measurable benefits for fish; offer greater certainty of funding expectations; and obtain collaborative support for a holistic, comprehensive package of hydro operations and mitigation projects with the parties. BPA considered that alternative approaches, such as additional modifications to hydrosystem operations, would be less biologically sound, would negatively impact reliability, and would likely be more costly than entering into the Accords.

As described in Section 3.7, above, BPA will refine the estimates of the costs of implementing the Sho-Ban MOA as part of a subsequent public workshop to address changes in its fish and wildlife program levels since the initial public process for program levels for the FY 2010-2011 rate proposal concluded. Based on the workshop, expected in the spring of 2009, BPA will forecast the cost of implementing the Sho-Ban MOA and include that cost in the final revenue requirement component for its FY 2010-11 power rate proposal as appropriate. Subsequent workshops will be held in advance of future power rate proposals to help refine the estimates of agreement implementation costs.

5.1.3 BPA's compromises to reach agreement are reasonable

As is the nature of accords, the parties to the Sho-Ban MOA had to make some compromises in their respective positions and objectives to reach agreement. For BPA, the compromises came in agreeing to support some activities that BPA might otherwise assign a lower priority for funding. While all the activities proposed for implementation are consistent with the Council's Program (and are thus in compliance with BPA obligations under the Northwest Power Act), this does not mean that the activities would otherwise have been a priority for BPA. For example, development of the Crystal Springs Hatchery and associated outplanting of fish into natural habitat was not included in BPA's FY07-09 implementation decision. BPA supports the hatchery in this MOA because the proposed purposes for the hatchery and outplanting are consistent with the Council's Program, may contribute to recovery of listed and non-listed fish, and because the hatchery was very important to the Shoshone-Bannock Tribes. BPA is willing to support the hatchery now because of the significant reciprocal commitments from the Tribes in return, including forbearance and affirmation of adequacy.

Some may view BPA's funding for new hatchery actions as contrary to FCRPS priorities and the best available science. BPA's decision to support a set of hatchery actions with the Shoshone-Bannock Tribes is based on a variety of factors. There is an on-going scientific debate occurring in the region regarding the use of hatcheries in support of ESA-listed stocks and for production for harvest generally. That debate is not resolved, and BPA is not the federal agency with regulatory jurisdiction over hatchery development and production. Moreover, hatchery production is a mainstay of providing for tribal and non-Indian fisheries. BPA's commitment for funding hatchery actions will help protect severely depressed stocks (safety-net actions) and "jump-start" depressed populations in their natural habitat (supplementation); will help support reforms to address hatchery best management practices; will introduce fish where they are currently extirpated; and will support future harvest by the Shoshone-Bannock Tribes and others, particularly in terminal areas where fishing opportunities are few. BPA determined that, with the protections provided for in the agreement—including that the Tribes will obtain a NOAA determination that the hatchery project will not impede and where possible will contribute to recovery, and that the Tribes generally forbear from additional requests for hatchery actions for thirty years—BPA was reasonably able to support the Tribes' requests.

5.2 The Sho-Ban 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.⁷⁵ 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.⁷⁶ BPA is imbued with considerable flexibility and discretion when entering into arrangements such as this Sho-Ban 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 Sho-Ban MOA is both consistent with and helps BPA fulfill its federal obligations.

5.2.1 Treaty and trust responsibilities to tribes

The relationship between the federal government and the Shoshone-Bannock Tribes of Fort Hall are governed by a treaty, statutes, regulations, executive orders, and judicial decisions. In the Treaty of Fort Bridger, the Shoshone-Bannock Tribes reserved rights to hunt, and the Treaty has been construed to include the right to fish.⁷⁷ The Tribes' treaty interest in fish management (such as the *U.S. v. Oregon* process) has been acknowledged.⁷⁸ Treaties are federal laws that BPA is bound to observe and to uphold.

In addition to the recognition of treaty and other reserved rights, 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 its treaty and 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 section 4(h)(10)(A) of the Northwest Power Act. BPA seeks to give special consideration to tribal views and concerns pursuant to BPA's Tribal Policy,⁷⁹

⁷⁵ 16 U.S.C. § 832a(f).

⁷⁶ 16 U.S.C. § 838i(b) and § 838i(b)(12).

⁷⁷ *U.S. v. Oregon*, 913 F.2d 576, 586 n.8 (9th Cir. 1990), citing to *State v. Tinno*, 94 Idaho 759, 497 P.2d 1386 (1972).

⁷⁸ *U.S. v. Oregon*, *supra*, at 586.

⁷⁹ http://www.bpa.gov/corporate/About_BPA/tribes/link.

through government-to-government consultation and careful review of tribal concerns when making decisions that could affect tribal resources.⁸⁰

The Sho-Ban MOA represents a watershed event in BPA's relationship with the Shoshone-Bannock Tribes, and demonstrates BPA's commitment to supporting tribal treaty interests and the government's general trust responsibility to the Tribes. In general, BPA's commitment to this agreement supports Shoshone-Bannock tribal resources and the Shoshone-Bannock community. BPA's implementation decision includes a wide variety of hatchery; habitat; and research, monitoring, and evaluation, projects that help protect and restore anadromous and other stocks that generally support tribal harvest. BPA is also committing to continue its collaborative relationship with the Shoshone-Bannock Tribes developed over the course of negotiations, involving the Tribes in the monitoring and evaluation of our mutual implementation efforts. 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 treaty issues, the parties recognize that the mutual commitments are consistent with the Tribes' treaty or reserved rights and the United States' trust obligation.⁸¹

5.2.2 Endangered Species Act

The Sho-Ban MOA makes commitments of BPA funding intended to benefit ESA-listed and non-listed fish as well as wildlife. All actions contained in the Sho-Ban MOA are expected to be of positive benefit to the listed salmon and steelhead of the Basin, or if not addressed specifically to such species, will be neutral in effect on them. Implementation of specific projects will undergo additional environmental compliance, including consultation with NOAA Fisheries or the U.S. Fish and Wildlife Service, as appropriate, to assure that all actions to be implemented with BPA funding will be consistent with the needs of the listed species.

5.2.3 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.⁸² In this section, BPA documents how its decision to enter into the Sho-Ban MOA meets these standards and other elements of the Act.

⁸⁰ 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, http://www.efw.bpa.gov/environmental_services/nepadocs.aspx.

⁸¹ Section V.D.

⁸² 16 U.S.C. § 839b(h)(10)(A).

5.2.3.1 Consistency with the Council's Fish & Wildlife Program

The Fish Accords, including this Sho-Ban 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. All the projects are intended to provide biological benefits addressing limiting factors for fish 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 Sho-Ban MOA projects as proposed are all consistent with the Council's Program. 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 and is not required for every project. Nonetheless, the parties sought to bring support to their commitments by adopting this project-specific consistency approach. Indeed, many of the projects have already been reviewed and recommended by the Council.⁸³ Regardless, consistency with the Council's Program is a requirement of the MOA—should a project be found not to be consistent, BPA and Shoshone-Bannocks will work to address the inconsistency, or find an alternative project.

In addition to consistency with the Program, the projects will also be reviewed in accordance with Northwest Power Act review processes, including review by the ISRP and the Council.⁸⁴ Again, some projects have already undergone such review. Expanded and new projects will also undergo these reviews as needed. BPA expects to work with the Tribes and the Council to help refine review processes to avoid duplication of effort, and to focus the reviews.

5.2.3.2 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.⁸⁵

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."⁸⁶

⁸³ In the draft amended Columbia River Basin Fish and Wildlife Program published by the Council for public comment on September 2, 2008, the Council acknowledged that the initial Fish Accords were built largely on the Council's Program, and accepted the Accords as measures that are part of the Fish and Wildlife Program. Draft Amended Program, pages 105-106, available at <http://www.nwppc.org/library/2008/2008-11.htm>.

⁸⁴ 16 U.S.C. § 839b(h)(10)(D).

⁸⁵ 16 U.S.C. § 839b(h)(10)(A).

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 Sho-Ban MOA, projects to be implemented must meet BPA's *in lieu* policy. That policy was most recently updated with BPA's 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.⁸⁷ At this time, BPA has not finalized its approach for evaluating new projects (across its program, not just in relation to the Sho-Ban MOA) that haven't previously undergone *in lieu* reviews.⁸⁸

5.2.3.3 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."⁸⁹ The Council describes equitable treatment as "meet[ing] the needs of salmon with a level of certainty comparable to that accorded the other operational purposes."⁹⁰ 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.⁹¹ The Columbia Basin Fish Accords, including the Sho-Ban MOA, continue this tradition. The Sho-Ban MOA supports BPA's commitments in the FCRPS Biological Opinion. The MOA also goes

⁸⁶ 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").

⁸⁷ 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>.

⁸⁸ BPA has, however, explicitly noted in the Sho-Ban MOA that BPA is not responsible for addressing all of the impacts from mining activities in relation to the Yankee Fork Floodplain Restoration project, see Project #10 in Attachments A and B to the Sho-Ban MOA.

⁸⁹ 16 U.S.C. § 839b(h)(11)(A)(i).

⁹⁰ Council Program 1992, Vol. II. p. 9.

⁹¹ *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).

beyond mitigation for ESA-listed species and includes commitments for other species of interest affected by the FCRPS. Overall, the Sho-Ban MOA in combination with the BiOp provides a higher level of financial and operational certainty for fish, further solidifying BPA's efforts to manage the FCRPS equitably for both fish and power.

5.2.3.4 Consistency with the Council's Power Plan

In its most recent Power Plan, the Council recommended that "Bonneville should continue to fulfill its obligations for fish and wildlife."⁹² As the Council noted in describing this recommendation:

These obligations will be determined in a manner consistent with the requirements of the Northwest Power Act and the Council's Columbia River Basin Fish and Wildlife Program, and are not affected by the recommended changes in Bonneville's role [referring to recommended changes in Bonneville's role regarding the regional power supply].⁹³

As previously discussed, BPA's decision demonstrates its continuing efforts to meet its obligations to address the impacts to fish and wildlife from the construction and operation of the FCRPS consistent with the Northwest Power Act in a manner consistent with the Council's program. As such, BPA's decision is consistent with the Council's specific fish and wildlife recommendation to BPA in the Council's Power Plan.

5.2.4 Clean Water Act

The Sho-Ban MOA provides additional support for state and tribal water quality standards, particularly though the habitat actions proposed. For example, with the agreements, BPA will support a variety of actions that will directly benefit water quality in the Basin. These actions include funding for purchase and lease of water rights to improve stream flow and water quality; funding for improving irrigation delivery and use of water (again, to improve instream flows); and a variety of watershed restoration projects that will help to improve water quality in fish-bearing streams, such as culvert 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.

5.2.5 National Historic Preservation Act (NHPA)

⁹² The Fifth Northwest Electric Power and Conservation Plan, Document 2005-7 (May 2005), Action Plan, Action BPA-4 at page 23. Available at: <http://www.nwppc.org/energy/powerplan/plan/Default.htm>.

⁹³ *Id.*

BPA already supports a substantial program for addressing the power-related impacts of the FCRPS on historic resources (including cultural resources) of the Columbia River Basin consistent with the National Historic Preservation Act, known as the FCRPS Cultural Resources Program. This program is implemented as 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. Nothing in the Sho-Ban MOA is intended to alter or affect that program or its associated funding. In addition, as described below in the NEPA section, as projects are implemented pursuant to these agreements, BPA will consider and address the effects of the actions on cultural and other historic resources pursuant to the NHPA.

6.0 NATIONAL ENVIRONMENTAL POLICY ACT ANALYSIS

Pursuant to the National Environmental Policy Act (NEPA),⁹⁴ BPA has assessed the potential for environmental effects related to entering into the Sho-Ban MOA.

Because the Sho-Ban 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) (DOE/EIS 0312, April 2003, and the Fish and Wildlife Implementation Plan Record of Decision (FWIP ROD, October 31, 2003) 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 Sho-Ban 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 Sho-Ban 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 Sho-Ban MOA to the FWIP EIS and ROD. (The NEPA ROD is included here as section 6 of the Administrator's ROD for the Sho-Ban MOA). As part of this decision, BPA will conduct additional project-specific NEPA analysis and environmental review as appropriate for the activities to be funded by BPA under this MOA, particularly for new activities, and in some cases, for expanded activities. This additional review will be conducted prior to the implementation of the BPA-funded activity.

6.1 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 EIS (Business Plan EIS, DOE/EIS-0183, June 1995, and Business Plan ROD,

⁹⁴ 42 U.S.C. § 4321 *et seq.*

August 15, 1995).⁹⁵ 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 recovery⁹⁶ 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 (FWIP EIS, Section 1.4.2).

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 (FWIP EIS, Section 1.1). The EIS also describes how various regional policies have created conflicting priorities for fish and wildlife mitigation and recovery efforts (FWIP EIS, Section 2.3.2.3). 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 (FWIP EIS, Section 1.2).

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 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).

⁹⁵ 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.

⁹⁶ 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.

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 (FWIP EIS, Section 5.3.1.2). 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 (FWIP EIS, Section 1.3.3). One of these documents is the Columbia River System Operation Review Environmental Impact Statement (SOR EIS) (DOE/EIS-0170, November 1995), 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 Endangered Species Act 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 (FWIP EIS, Volume III). These actions, referred to as Sample Implementation Actions (SIAs), 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.

6.1.1 Watershed Management and Wildlife Mitigation Program EISs

The FWIP EIS incorporates by reference BPA's Watershed Management Program EIS (DOE/EIS-0265, July 1997) and Wildlife Mitigation Program EIS (DOE/EIS-0246, March 1997). 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 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.

In approximately a ten-year period, BPA has 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.

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

Through the FWIP ROD, BPA adopted the Preferred Alternative 2002 (PA 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 (FWIP EIS, Section 3A). 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 Endangered Species Act (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 SIA tables for the Weak Stock Focus and Sustainable Use Focus alternatives (FWIP EIS, Volume III). 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.

6.1.3 Tiering From 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 (FWIP EIS, Section 1.4.2). 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 strategy for making subsequent fish and wildlife policy decisions (FWIP EIS, Section 1.4.1 and Figure 1-6; FWIP ROD, Figure 1, page 15). This strategy connects program or site-specific projects (once their details and impacts are known) to the policy-level analysis in the EIS (FWIP EIS, Section 3.4.3). 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 fish and wildlife mitigation and recovery actions in a timely, comprehensive manner (FWIP ROD, page 13).

Using this tiering approach, in February 2007 BPA prepared a NEPA ROD⁹⁷ 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 intends to prepare additional NEPA documentation as appropriate.

⁹⁷ BPA's NEPA ROD is available at: http://www.bpa.gov/corporate/pubs/RODS/2007/FY07-09_FW_Record_of_Decision_Final.pdf.

In May 2008 BPA prepared a NEPA ROD tiered to the FWIP EIS and ROD for the four initial 2008 Columbia Basin Fish Accords. BPA decided to enter into the Accords with four tribes, two states, and two Federal agencies to provide 10-year commitments for fish restoration, particularly for Columbia River Basin salmon and steelhead. The FWIP ROD documented BPA's adoption of a policy direction (PA 2002) for the agency's fish and wildlife mitigation and recovery efforts. BPA reviewed the Accords and determined that the decision to enter into the Accords and to fund the associated activities was consistent with that policy and would not result in significantly different environmental effects from those examined in the FWIP EIS and ROD.

6.2 Environmental Analysis for the Sho-Ban MOA

BPA's decision to enter into the Sho-Ban MOA will provide BPA funding and implementation commitments for actions and resource objectives for fish and wildlife mitigation and recovery, with an emphasis on actions for strengthening Snake River populations of steelhead and salmon, including sockeye. These commitments will support implementation of the 2008 Biological Opinion issued by NOAA Fisheries for the FCRPS, the Upper Snake Biological Opinion, and also supports BPA's tribal trust and treaty relationship with the Shoshone-Bannock Tribes. Activities funded under the Sho-Ban MOA can be grouped into roughly three categories of projects: ongoing, new, and expanded. The projects that are ongoing have been through ISRP and Council review, and have been reviewed under NEPA through the NEPA ROD for the 07-09 F&W Decision. Prior to implementation, these projects are required to proceed through the validation process, as outlined in that ROD. These ongoing projects thus have already been reviewed under NEPA by BPA, and a decision has already been made concerning these projects through the 07-09 F&W Decision NEPA ROD. New projects, on the other hand, were not included in the 07-09 F&W Decision, so they were not addressed in the 07-09 F&W Decision NEPA ROD. Expansions of existing projects may, in some circumstances, be within the scope of that analysis, but other expansions are assumed to not have been addressed in the 07-09 F&W Decision NEPA ROD. The NEPA analysis for this Sho-Ban MOA therefore addresses the new projects included in this MOA, as well as the expanded projects that were not included in the 07-09 F&W Decision.

BPA has considered its decision to enter into the Sho-Ban MOA both at a policy level and at the project-specific level. At the policy level, a review of the FWIP EIS shows that the general environmental impacts that could occur as a result of entering into the Sho-Ban MOA are adequately covered by this 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 Sho-Ban MOA would not be significantly different from those described in the EIS. In addition, the types of projects to be funded under the Sho-Ban 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.

6.2.1 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 Sho-Ban MOA, BPA will fund projects providing for long-term, overall beneficial effects on fish and wildlife. Project actions will address effects of the FCRPS by improving habitat values within the Columbia River Basin, including the Snake River Basin (particularly the Upper Snake), and increasing and sustaining ESA-listed and non-listed fish populations. 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 Sho-Ban 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 Sho-Ban 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 at 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 with appropriate federal and state agencies, tribes and private landowners will be performed for all projects.

Overall, the projects included in the Sho-Ban 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 streamflow generation, sediment transport, large woody debris recruitment, and 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 restoration 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. Commitments related to hydro operations affirmed in this Sho-Ban MOA regarding adaptive management, spring spill and transport, and summer spill will result in cumulative benefits for listed fish by aiding in migration and increasing long-term population sizes, and opportunities are provided for aiding non-listed fish on an as-

needed basis. 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 Sho-Ban 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 natural spawners. Cumulative benefits to fish also would include improved spawning habitat and easier access to all habitats through the modification or removal of obstructions, and the provision of more suitable habitat for both listed and non-listed fish and other aquatic species. These types of net benefits from fish projects were recognized in the FWIP EIS (see Sections 3A.3, 5.2, and 5.3).

Overall benefits to wildlife also would occur as a result of implementing fish mitigation actions under the Sho-Ban 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 as part of future actions under the MOA, as opportunities for recreation are maintained (e.g., wildlife viewing) and aesthetic values are preserved. Potential negative impacts to human populations, such as removal of land from human use, 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.

Both anadromous and resident fish have great cultural significance to Native American Indian peoples. Salmon are a major food source and trading commodity for most Columbia Basin tribes. Tribal harvest, especially for anadromous fish, has been substantially reduced from historic levels. Most of the upriver anadromous fishing opportunities no longer exist. As documented in the FWIP ROD, the PA 2002 would likely have a beneficial effect on resident and anadromous fish by increasing their population levels through protection and enhancement of listed species habitat, reformation of hatcheries, and changes in hydro operations/facilities. General tribal fish harvest would improve as the naturally-spawning and hatchery-produced fish populations increased (FWIP EIS Section 3A.3.3). In the long-term, entering into the Sho-Ban MOA would be expected to result in these same beneficial effects. The MOA will provide for habitat protection and enhancement activities for weak stocks/populations, increasing listed species, as well as non-listed fish species, plants, and animal species that are important to tribal health, spirituality, and tradition.

BPA's ratepayers would fund the agency's share of the costs related to implementation of the Sho-Ban 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 \$61 million dollars (not counting the 2.5 percent inflation adjustment beginning in fiscal year 2010) in direct support of the projects committed to in the Sho-Ban MOA. BPA expects to fund implementation commitments for the MOA in fiscal year 2009 from existing forecast spending, and reserves if needed. Fiscal year 2009 expenditures will support on-going project commitments that have been budgeted for and will not affect current rates being paid by power and transmission customers.

Beyond fiscal year 2009, BPA expects to include its costs of implementing the MOA as part of its revenue requirement for its wholesale power rate proposals. For fiscal years 2010-2011, BPA will forecast the cost of implementing the Sho-Ban MOA as part of a public workshop to address changes in its fish and wildlife costs since the initial public process for program levels for the FY 2010-11 rate proposal was held. Based on the workshop, expected in the spring of 2009, BPA will forecast the cost of implementing the Sho-Ban MOA and include that cost in its final revenue requirement for its final power rate proposal for fiscal years 2010 and 2011. The Sho-Ban 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 Sho-Ban MOA would not be expected to have negative implications related to climate change. If anything, the projects under the MOA would likely have beneficial effects concerning climate change, as these projects would provide riparian and other habitat enhancement and greater shade cover. Actions supported under the MOA related to hydropower operations to benefit listed species are not expected to significantly factor into climate change because any replacement power generation that may be required as a result of these actions would not result in significant changes in overall air emissions on a regional basis.

In the *Comprehensive Analysis of the Federal Columbia River Power System and Mainstem Effects of Upper Snake and Other Tributary Actions* (August 2007),⁹⁸ the Action Agencies recognize that climate change could pose an additional threat to the survival and recovery of ESA listed salmon and steelhead in the Columbia River Basin. The Action Agencies considered this potential impact as part of term of the FCRPS and Upper Snake River BiOp processes. To a significant extent, the BiOp Reasonable and Prudent Alternative (RPA) already addresses potential impacts of climate change in its provisions for dry year strategies, predator management, and habitat protection and improvements. In addition, under the adaptive management approach, the Action Agencies will continue to monitor and assess potential climate change impacts on hydrological and fish conditions and provide a mechanism to implement additional actions if appropriate. Entering into the Sho-Ban MOA which provides additional measures for the benefit of fish and wildlife, will further provide support for populations in the face of impacts of climate change, particularly through efforts to open up

⁹⁸ http://www.salmonrecovery.gov/Biological_Opinions/FCRPS/BA-CA/CA/CA-Final.pdf.

additional habitat and stream access, and to provide for water flows and riparian habitat enhancement.

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 (FWIP EIS Chapter 3A-2). The natural 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 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 restoration 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 (FWIP EIS Chapter 3A-2, 5-29).

In sum, while there could be some short-term localized impacts from projects under the Sho-Ban 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.

6.2.2. Project-Specific Evaluation

Through its experience with completing Supplement Analyses and other NEPA documentation for fish and wildlife projects over the past ten years, BPA has a firm understanding of the adverse environmental consequences associated with individual fish- and wildlife-related mitigation and recovery projects. 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/or 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 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 effects and minimizing them through best management practices, restrictions, and mitigation measures.

Environmental impacts of individual projects under the Sho-Ban 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 (see FWIP EIS, Volume III and Appendix H). For specific hydro operation actions supported by the Sho-Ban MOA, potential environmental impacts could include exacerbating water quality issues associated with the hydro system operation, and impacts to reservoirs. For specific habitat actions under the Sho-Ban 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. For specific hatchery actions under the Sho-Ban MOA, potential environmental impacts could include impacting fish health and genetic traits of wild fish populations; reducing the reproductive success of ESA-listed fish; altering the quantity of prey species available in natural waterways as the numbers of hatchery fish found in the river systems increases; changing stream water quality due to hatchery effluent mixing with natural water systems; and habitat impacts in areas surrounding new facility construction. All of these potential impacts are not significantly different than those identified and considered in Section 5.2 of the FWIP EIS.

6.2.3 Consistency With The PA 2002

Entering into the Sho-Ban 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 listed and non-listed) and wildlife for their economic and cultural value.⁹⁹ The PA 2002 includes enhancing fish and wildlife habitat, modifying hydro operation and

⁹⁹ FWIP EIS Section 3A.

structures, and reforming hatcheries to increase listed stock populations, restore and maintain sustainable populations of fish and wildlife, and provide harvest opportunities in the long-term.¹⁰⁰

The main purpose of the projects included in the Sho-Ban MOA is to aid in recovery of listed species and restoration and maintenance of sustainable populations of fish in the Columbia River Basin. This purpose will be pursued through a variety of actions, including enhancement of fish and wildlife habitat and improvements of hatcheries. The Sho-Ban 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-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 more fish is a better condition than status quo. PA 2002 also supports projects to enhance habitat for anadromous fish in order to increase production and maintenance of harvestable levels of anadromous fish, as well as protecting and enhancing critical habitat for listed anadromous fish. The Sho-Ban MOA supports hydro measures committed to in the FCRPS BiOp. In addition, the Sho-Ban MOA supports and confirms the adequacy of efforts for lamprey committed to in the other Fish Accords.¹⁰¹ Hatchery production, operation and new facilities are proposed in the MOA for conservation and recovery and, where applicable and compatible, supplementation and substitution. 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 Sho-Ban MOA includes proposed projects to benefit native resident fish that are consistent with the measures included in the PA 2002. These measures include providing for improving/enhancing degraded habitats; deepening/narrowing stream channels, improving water quality, and restoring diversity to the spring-stream 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

¹⁰⁰ The dam breaching aspects under the Weak Stock Focus alternative are not part of the PA 2002.

¹⁰¹ Section IV.B.2, last bullet.

and wildlife, especially in areas designated as critical habitat. The Sho-Ban MOA meets this objective by ensuring that both listed and non-listed fish and aquatic species are addressed. Projects under the Sho-Ban MOA target fish populations and habitat including both ESA-listed and non-listed species, both anadromous and resident fish. These projects include: habitat acquisition and restoration and other habitat conservation methods; waterway nutrient enhancement; research, monitoring, and evaluation; and hatchery and related facilities development, operation, and production. The Sho-Ban MOA includes habitat protection and enhancement projects for listed fish and habitat enhancement for non-listed fish and wildlife. Under the terms of the MOA, the Tribes will work with the Council and ISRP on project reviews, and in particular BPA and the Tribes will recommend that the ISRP review projects collectively on a subbasin scale. 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 subbasin and its biological needs (FWIP EIS pg 3A-11). 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. Water habitat benefits are included in the projects under the Sho-Ban MOA. These projects also will support the PA 2002 water habitat goals for sedimentation by enhancing and managing riparian and stream bank habitats, and will support temperature and dissolved oxygen goals through actions reducing water temperature in tributary waters to the Snake River. These actions are consistent with the approach to addressing water quality under the PA 2002.

Finally, the Sho-Ban 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 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 Sho-Ban 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 SIAs for the PA 2002.

6.3 Additional Environmental Review

While this decision document addresses the policy decision to enter into the Sho-Ban 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 National Historic Preservation Act (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 NEPA analysis and environmental review as necessary. For ongoing projects included in the 07-09 F&W Decision, BPA will implement its validation process for these projects. As described in BPA's 07-09 F&W Decision NEPA ROD, BPA will review each project through a validation process 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 expanded projects where the scope is expanded beyond the 07-09 F&W Decision, 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/or the Wildlife Mitigation Program EIS, these routine projects will require no further NEPA documentation beyond this decision document prior to implementation. Nonetheless, these projects will be required to go through the validation process described above. BPA staff will work with the Tribes 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 two types of projects that BPA has determined will require additional NEPA analyses beyond this decision document and the validation processes prior to implementation. The first type includes projects that will always require additional NEPA analysis prior to implementation because they possess at least one of the two following characteristics: (1) they are required to go through the Council's 3-Step Review Process (such as new artificial production facilities, or other large-scale capital-intensive projects); or (2) projects that involve substantial modification to an ongoing artificial production program (for example, expansion of the program to include a new species).

The second type includes projects for which complicating factors emerge as the project develops, necessitating additional NEPA analysis. BPA may determine during the validation process or otherwise that there are complicating factors that make this decision document an inappropriate basis for providing NEPA analysis and documentation for a given project and therefore additional NEPA analysis is required. These complicating factors may include controversy over the effects to the quality of the human environment of the action, 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.

7.0 CONCLUSION

I have decided to enter into the Sho-Ban MOA as an addition to the 2008 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 Sho-Ban MOA will help mitigate the impacts of the FCRPS on fish and wildlife species, particularly Snake River salmon and steelhead listed under ESA, with projects that are expected to produce significant and measurable biological benefits. The Sho-Ban MOA will provide greater certainty and stability to mitigation funding commitments by BPA, which helps BPA manage its financial risks. The Sho-Ban MOA results in the parties' agreement that the Action Agencies will meet their statutory responsibilities for the ten-year term. The Sho-Ban MOA will help BPA meet its treaty and trust responsibilities to the Tribes. The Sho-Ban MOA will foster a new productive, collaborative approach with the Tribes.

Risks to BPA of signing this MOA are 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 Sho-Ban 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 Fish and Wildlife Implementation Plan 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 Sho-Ban MOA is tiered to the Fish and Wildlife Implementation Plan ROD.

Issued in Portland, Oregon, this sixth day of November, 2008.

/s/Stephen J. Wright _____
Stephen J. Wright
Administrator and Chief Executive Officer