



Burns Paiute Tribe

Fish & Wildlife Department

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Northwest Power and Conservation Council
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To Whom It May Concern:

The Northwest Power and Conservation Council have requested recommendations to amend the Council's Fish and Wildlife Program. The Burns Paiute Tribal Council has set forth the following recommendations in the attached document titled:

*Burns Paiute Tribe
Recommendations for Amendments to the
Northwest Power and conservation Council
2000 Columbia River Basin Fish and Wildlife Program*

The Tribe does appreciate this opportunity to provide comment and looks forward in working with the Northwest Power and Conservation Council in the near future.

Thank you,

Wanda Johnson
Tribal Chairwoman
Burns Paiute Tribe

Burns Paiute Tribe

Recommendations for Amendments to the

NORTHWEST POWER AND CONSERVATION COUNCIL

2000 COLUMBIA RIVER BASIN FISH AND WILDLIFE PROGRAM

Burns Paiute Tribe
Recommendations for Amendments to the
NORTHWEST POWER AND CONSERVATION COUNCIL
2000 COLUMBIA RIVER BASIN FISH AND WILDLIFE PROGRAM

The Burns Paiute Tribe recommends that the proposed amendments set forth in the *Columbia Basin Fish and Wildlife Authority Recommendations for Amendments to the Northwest Power and Conservation Council 2000 Columbia River Basin Fish and Wildlife Program* (“CBFWA Recommendations”) be included in the Northwest Power and Conservation Council Columbia River Basin Fish and Wildlife Program (“Program”), with the following modifications:

A. *Amendment 1.6: Integrate the Program the with the Clean Water Act*

The Burns Paiute Tribe recommends that the proposed language for integrating the Program with the Clean Water Act, set forth Amendment 1.6 of the CBFWA Recommendations, should be included in the Program, with the following revision:

The Council recognizes that the Columbia River and many of its tributaries are currently listed as water quality-limited water bodies. The Council understands that pollutants adversely affect several beneficial uses of the Columbia River Basin, including a healthy functioning ecosystem, fish passage and migration. The Council supports the region in meeting its collective Clean Water Act responsibilities and identifies measures that address water quality.

B. *Amendment 1.8: Clearly Define BPA’s Obligations in the Program, Consistent with the Northwest Power Act.*

The Burns Paiute Tribe recommends that the proposed language for defining Bonneville’s obligations in the Program, set forth Amendment 1.8 of the CBFWA Recommendations, should be included in the Program, with the following revision:

The Northwest Power Act directs the Council to request recommendations for “measures which can be expected to be implemented by the [Bonneville] Administrator.” The Northwest Power Act requires the Bonneville Administrator to use the Bonneville Fund “to protect, mitigate, and enhance fish and wildlife” affected by the development and operation of any hydroelectric project on the Columbia River and its tributaries ~~adversely affected by the production of hydroelectric power on the Columbia River~~ “in a manner consistent with” the Council’s Program.

C. *Amendment 2.1.4.2: Add Language Supporting Water Quality Measures in the Overarching Strategies and Measures Section.*

The Burns Paiute Tribe recommends that the proposed language set forth Amendment 2.0.6 of the CBFWA Recommendations should be included in the Program, with the following revision:

- *** • The Council calls on BPA and other Federal agencies responsible for managing, operating, and regulating Columbia River Basin hydroelectric facilities to develop water quality plans for total dissolved gas and temperature in the mainstem Columbia and Snake Rivers which includes a comprehensive update of both total dissolved gas and temperature with dam specific structural and operational objectives and implementation strategies to benefit juvenile and adult fish. ***

D. *Section 3.8.1.1: Biological Objectives and Status of Anadromous Fish in the Malheur Subbasin.*

Section 3.0 of the CBFWA Recommendations sets forth proposed amendments to the Program's ecological province, subbasin, and focal species provisions for anadromous fish. The Burns Paiute Tribe recommends that the language that follows more accurately describes the biological objectives and status of anadromous fish in the Malheur Subbasin than the recommended language set forth in §3.8.1.1 of the CBFWA Recommendations. The following language should therefore be included in the Program to describe the biological objectives and status of anadromous fish in the Malheur Subbasin:

Historically, the Malheur Subbasin was among the most productive spawning and rearing habitats for spring Chinook salmon, steelhead, and other anadromous and resident fish populations. Today, Chinook salmon, as well as all other runs of anadromous fish species native to the Malheur Subbasin, are extinct in the region.

The loss and continued elimination of anadromous salmonids in the Malheur Subbasin is due to a combination of factors primarily associated with migration blockage and poor survival through the FCRPS. Construction of Warm Springs Dam in 1919 and the construction of Agency Dam in 1934 first cut off the migration of anadromous fish to the upper Malheur River. Although large runs of Chinook salmon and steelhead still had access to parts of the Malheur Subbasin following the creation of these dams, the construction of Brownlee Dam on the Snake River in 1958 blocked anadromous fish from the Malheur entirely. The dams that make up the federal hydropower system have also played a significant role in the extirpation and continued elimination of

anadromous salmonids from the Malheur Subbasin. The construction and operation of federal dams throughout the Columbia River Basin threaten the survival of various life stages of anadromous salmonids in the lower reaches of the basin and contribute to decreased productivity that result in the inability to effectively pass fish above the Hell’s Canyon Complex. The cumulative impacts of federal and non-federal hydropower projects on anadromous fish passage and survival have prevented the restoration of healthy, naturally reproducing populations of salmon and steelhead in the Malheur Subbasin and impeded reintroduction efforts.

Objectives for anadromous salmonids in the Malheur Subbasin therefore include: (1) restoration of the spring Chinook salmon population to 25% of its historic abundance; and (2) the restoration and protection of the habitat needed to sustain anadromous and resident fish populations.

E. Section 3.8.1.2: Limiting Factors and Threats.

Section 3.8.1.2 of the CBFWA Recommendations sets forth strategies and measures for addressing limiting factors and threats to anadromous fish populations and their habitats in the Malheur Subbasin. The Burns Paiute Tribe recommends that the Program include the following measures for addressing Mainstem Columbia and Snake River Passage Effects (modifying the recommendation set forth in § 3.8.1.3.7 of the CBFWA Recommendations):

Mainstem Columbia and Snake River Passage Effects: See Section 2			
Strategy	Measure	Implementation Timeframe	Expected Response Timeframe
3.8.1.3.7: Mitigate for impeded and blocked passage	3.8.1.3.7a: Implement a mix of artificial propagation measures, habitat restoration actions, improved mainstem passage and survival in an integrated approach to restore anadromous fish returns to the Malheur Subbasin and to achieve objectives. <u>These measures will include, at a minimum:</u>		
	<ul style="list-style-type: none"> <u>Bonneville will fund the Burns Paiute Tribe to acquire, restore, and protect high priority habitat for all focal species (anadromous and resident). Bonneville will provide long term operation and maintenance funds for the protected habitat to promote the environmental conditions needed to restore the population to desired levels.</u> 	Immediate	10 + years

	<ul style="list-style-type: none"> • <u>Bonneville will fund restoration and protective measures on these acquired lands, which will benefit anadromous and resident focal species.</u> 	Immediate	10 + years
	<ul style="list-style-type: none"> • <u>Bonneville will fund feasibility studies to assess and plan the reintroduction of anadromous fish into the blocked area.</u> 	Immediate	10 + years
	<ul style="list-style-type: none"> • <u>Bonneville will fund a consumptive put and take fishery for the Burns Paiute Tribe.</u> 	<u>Consumptive put and take fishery to be operational by 2012</u>	Immediate

F. Amendment 5.1.1: The Program Should Define BPA’s In-Lieu Funding Restrictions.

The Burns Paiute Tribe has serious reservations about the way that Bonneville has interpreted the “in lieu” provision of the Northwest Power Act, and believes that Bonneville has over-emphasized per-project cost share as a method for avoiding in lieu issues. The Tribe recommends that the Council work with Bonneville, fish and wildlife managers, tribes, and other interested parties to develop principles to guide Bonneville in its interpretation of the Act’s in-lieu funding restrictions, and that these principles be incorporated into the Program. The Tribe further recommends that the Program clarify that per-project cost sharing should not necessarily be the primary, preferred, or default way of proving the absence of an in lieu problem.

The Tribe therefore recommends that the proposed language for defining Bonneville’s in lieu finding restrictions, set forth Amendment 5.1.1 of the CBFWA Recommendations, should be included in the Implementation Provisions section of the Program, with the following modifications:

The Northwest Power Act authorizes the Council, “in appropriate circumstances,” to include off-site enhancement measures in the program to achieve protection from -- and mitigation for -- development and operation of hydroelectric facilities. However, the Act prevents BPA from making expenditures where ratepayer funding merely substitutes for funding from other sources. Specifically, section 4(h)(10)(A) states:

The Administrator shall use the Bonneville Administration Fund and the authorities available to the Administrator under this chapter and other laws administered by the Administrator to protect, mitigate, and enhance fish and wildlife to the extent affected by the development and operation of any hydroelectric project of the Columbia River and its tributaries in a manner

consistent with the power plan, the fish and wildlife program adopted by the Council under this subsection, and the purposes of this chapter. 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.

Bonneville has a legal duty to protect, mitigate, and enhance fish and wildlife adversely affected by development and operation of the hydrosystem in the Columbia River Basin. Bonneville has the authority to carry out this duty through the funding of on-site protection and mitigation actions, offsite habitat and production enhancements, and associated monitoring, evaluation, and coordination activities. Section 4(h)(10)(A) of the Northwest Power Act merely places only a narrowly-defined limit on Bonneville's authority to fund these activities where expenditures by other entities have been appropriated or are legally required.

The Council will work with BPA, fish and wildlife managers and other interested parties to develop principles guiding BPA in its interpretation of the in-lieu funding restrictions of the Northwest Power Act. We recommend the following factors be considered:

- The in-lieu principles will be included in the Fish and Wildlife Program.
- The in-lieu principles will focus on whether expenditures are authorized and funding is available for another entity, not merely on whether an action is authorized.
- The first clause (i.e., “*expenditures authorized ... from other entities under other agreements or provisions of law*”), will be interpreted to apply only to public entities, and restricts BPA funding only when funding is actually available for the same activity, not merely when an agency is authorized to conduct an activity.
- The second clause (i.e., “*expenditures ... required from other entities under other agreements or provisions of law*”) will be interpreted to apply when expenditures are required under a FERC license or a court-ordered remediation, or under a provision of law that imposes a non-discretionary duty.
- While per-project cost sharing is one method of avoiding in lieu concerns, per-project cost sharing should not necessarily be the primary, preferred, or default way of proving the absence of an in lieu problem. Other remedies and methods for resolving in lieu issues will be explored and implemented.