



# COLUMBIA BASIN FISH AND WILDLIFE AUTHORITY

851 SW Sixth Avenue, Suite 260 | Pacific First Building | Portland, OR 97204-1339  
Phone: 503-229-0191 | Fax: 503-229-0443 | Website: [www.cbfgwa.org](http://www.cbfgwa.org)

Coordinating and promoting effective protection and restoration of fish, wildlife, and their habitat in the Columbia River Basin.

The Authority is comprised of the following tribes and fish and wildlife agencies:

Burns Paiute Tribe

Coeur d'Alene Tribe

Confederated Salish and Kootenai Tribes of the Flathead Reservation

Confederated Tribes of the Colville Reservation

Confederated Tribes of the Umatilla Indian Reservation

Confederated Tribes of the Warm Springs Reservation

Confederated Tribes and Bands of the Yakama Nation

Idaho Department of Fish and Game

Kootenai Tribe of Idaho

Montana Department of Fish, Wildlife and Parks

National Marine Fisheries Service

Nez Perce Tribe

Oregon Department of Fish and Wildlife

Shoshone-Bannock Tribes of Fort Hall

Shoshone-Paiute Tribes of Duck Valley

U.S. Fish & Wildlife Service

Washington Department of Fish and Wildlife

## Coordinating Agencies

Columbia River Inter-Tribal Fish Commission

Upper Columbia United Tribes

Compact of the Upper Snake River Tribes

October 4, 2007

Greg Delwiche  
Vice President for Environment, Fish and Wildlife  
Bonneville Power Administration  
P.O. Box 3621  
Portland, OR 97208-3621

Dear Mr. Delwiche:

As the Bonneville Power Administration continues to develop your "in lieu" policy for Fish and Wildlife Program funding, the Columbia Basin Fish and Wildlife Authority is providing the attached analysis which was developed for our Members from research on the history of the Northwest Power Act.

At this time, the document does not represent any final policy or legal opinion of the CBFWA or any of its member agencies. We hope it is helpful to you now as we continue to work towards resolution of this important issue.

Sincerely,

Daniel H. Diggs  
Chairman

Encl.

cc: CBFWA Members  
NPCC Council Members

(h:\w\mbrs\delwicheinlieutmsmtl\tr100407.doc)

# MEMORANDUM

October 4, 2007

**TO: Brian Lipscomb**  
**FROM: Joe Mentor**  
**RE: Bonneville Power Administration "In-Lieu" Funding Policy**

---

As you requested, I reviewed the Bonneville Power Administration's June 2007 draft in-lieu funding policy, and the questions included with the draft policy. My comments are summarized below.

## Background

The Northwest Power Act requires the Northwest Power and Conservation Council (Council) to develop a program to protect, mitigate and enhance fish and wildlife to the extent affected by hydroelectric development. The Act directs the Council to deal with the Columbia River and its tributaries as a system. In Section 4(h)(8), the 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.

The Act requires BPA to use the Bonneville Fund consistent with the Council's program. But the Act prevents BPA from making expenditures where ratepayer funding merely substitutes for funding from other sources. Specifically, section 4(h)(10)(A) requires that --

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.<sup>1</sup>

The in-lieu funding provision first appeared in the Act's legislative history as part of the May 15, 1980, Report of the Committee on Interior and Insular Affairs. The Committee's Section-by-Section analysis includes the following discussion of the in-lieu provision:

---

<sup>1</sup> 16 U.S.C. §839b(h)(10)(A).

BPA expenditures shall be in addition to, not in lieu of, other expenditures authorized or required to be made by other entities under other agreements or provisions of law. Other fisheries efforts outside this Act, for example, are expected to continue and to be funded separately.

H. Rep. 96-976, Part II, at page 45. There is nothing more in the Interior Committee's Report to explain the origin of the in-lieu provision.

At the Council's request, Bonneville has worked over the last year to develop a policy to identify "in lieu" funding issues.<sup>2</sup> On August 3, 2006, BPA Vice President Delwiche wrote to the Council to make the agency's concerns known for new proposals received during the joint FY 2007-09 solicitation process. According to Delwiche's letter, BPA may not support funding for proposals that previously have been funded.<sup>3</sup> On October 6, 2006, BPA's Fish and Wildlife Director William C. Maslen wrote to Council Chair Tom Karier to describe BPA's preliminary in-lieu ratings for ongoing projects.<sup>4</sup> Finally, in June 2007 BPA circulated a document entitled "BPA 'In Lieu' Interpretive Key and Ratings Systems," which articulates to BPA's emerging policy regarding in-lieu funding issues.

### Analysis

BPA's draft in-lieu policy suggests that in-lieu problems arise whenever another entity is authorized or required to undertake an activity. The draft policy asserts that an in-lieu problem may arise whenever an agency is authorized to undertake an action, regardless of whether funding actually is available.<sup>5</sup> BPA's reading of the in-lieu provision could implicate nearly every

---

<sup>2</sup> Memorandum from John Shurts, Northwest Power and Conservation Council, to Fish and Wildlife Committee, Northwest Power and Conservation Council (April 5, 2007)(*hereafter* Shurts Memorandum), available online at: [http://www.nwcouncil.org/news/2007\\_04/fw\\_bpa.pdf](http://www.nwcouncil.org/news/2007_04/fw_bpa.pdf).

<sup>3</sup> Letter from Gregory K. Delwiche, Vice president, Environment, Fish and Wildlife, Bonneville Power Administration, to Dr. Tom Karier, Chair Northwest Power Conservation Council (August 3, 2006), available online at: [http://www.cbfgwa.org/RegionalIssues/Correspondence/BPA/2006\\_0803BPAtoNPCC.pdf](http://www.cbfgwa.org/RegionalIssues/Correspondence/BPA/2006_0803BPAtoNPCC.pdf).

<sup>4</sup> Letter from William C. Maslen, Fish and Wildlife Director, Bonneville Power Administration, to Dr. Tom Karier, Chair, Northwest Power and Conservation Council (October 6, 2006)(*hereafter* Maslen letter), available online at: [http://www.cbfgwa.org/RegionalIssues/Correspondence/BPA/2006\\_1006BPAtoNPCC.pdf](http://www.cbfgwa.org/RegionalIssues/Correspondence/BPA/2006_1006BPAtoNPCC.pdf).

<sup>5</sup> See also Maslen letter, *supra* n.4, at page 3.

project recommended in the Columbia Basin Fish and Wildlife Program.<sup>6</sup> That is because, by definition, there is overlapping authority between the region's fish and wildlife management entities, which have statutory authority to protect and enhance fish and wildlife, and BPA's responsibilities under the Northwest Power Act to protect, mitigate and enhance the Basin's fish and wildlife resources.<sup>7</sup>

I read the in-lieu prohibition more narrowly than does BPA. In my opinion, the prohibition applies only when money is actually available to a public entity to be spent, or is required of either a public or a private entity as a non-discretionary expenditure. Thus in-lieu problems arise only if expenditures are available, having already been appropriated, or where legally required. An expenditure may be required, for example, under a Federal Energy Regulatory Commission license or a court-ordered remediation. Common sense suggests that the first clause of the lieu funding provision (i.e. where expenditures are authorized but not required) would apply only to public entities.<sup>8</sup> Otherwise funding would be prohibited altogether at any nonpublic project since a nonpublic entity presumably is authorized to spend money for any purpose whatsoever so long as it was not illegal. Consequently, I interpret the first clause of the in-lieu funding prohibition to prohibit BPA funding for an activity only where expenditures are authorized through appropriation by Congress or, in the case of a state agency, by a state legislature.

According to a recent study by the U.S. General Accounting Office, a "multilayered collection" of federal laws define federal responsibilities for Columbia Basin fish and wildlife.<sup>9</sup> Numerous federal laws create nationwide

---

<sup>6</sup> BPA suggests, notwithstanding the language of the statute, the problem can be cured by entering a cost-sharing agreement.

<sup>7</sup> It should go without saying that an agency can only undertake activities that fall within the scope of its authority. In fact, federal agencies are prohibited under the Anti-deficiency Act (31 U.S.C. § 1341) from accepting funds from other sources for otherwise unauthorized activities. The organic laws of Indian tribes authorize tribal governments to protect and enhance fish and wildlife, both within the boundaries of Indian reservations and in many instances even in ceded areas. Furthermore, fish and wildlife and land management agencies in the four Pacific Northwest states all are authorized to undertake programs to protect and enhance fish and wildlife and to protect and restore habitat.

<sup>8</sup> A possible exception is where a public program such as the U.S. Department of Agriculture's Conservation Reserve Enhancement Program (CREP) has made a grant or loan available to a private entity where private entities are eligible for assistance under a public funding program.

<sup>9</sup> U.S. General Accounting Office (GAO), *Columbia River Basin: A Multilayered Collection of Directives and Plans Guides Federal Fish and Wildlife Activities*, GAO-04-602 (June 2004)(2004 GAO Report).

responsibilities.<sup>10</sup> Many of these authorize federal agency funding for fish and wildlife protection.<sup>11</sup> Other federal laws provide basin-specific directives and authority.<sup>12</sup> Many federal laws provide agency-mission specific authority.<sup>13</sup> Finally, some federal laws provide project-specific authority.<sup>14</sup>

Admittedly, it isn't always easy to determine whether expenditures are authorized. There are several permutations. The first is where an entity is required to make expenditures. Mandatory funding requirements could arise under a license condition for a non-federal hydroelectric project, an enforcement order under the Clean Water Act, or under legislative mandate.<sup>15</sup> The second is where a specific earmark is included in an appropriations bill. Third is where a non-specific basin or mission-specific appropriation is provided, but a specific project or project is described in a congressional committee report. Fourth is where an agency's budget justification identifies a specific measure to support a budget request. Finally, the situation may arise where legislative history and the agency's budget request are silent, but where an appropriations request is made by an individual member of Congress or other extrinsic evidence clearly indicates that an appropriation has been justified to support a project or program for which BPA otherwise would provide funding.

I recognize the problem where an agency has received a non-specific, mission-related or agencywide appropriation. In these limited circumstances it may be appropriate for BPA to negotiate a cost-sharing agreement with another agency. But BPA's proposed in-lieu policy causes far more problems than it solves. BPA's paraphrase of the statute omits the word "expenditure" to reach an entirely different result than suggested by common sense and a plain reading of

---

<sup>10</sup> E.g., Endangered Species Act, 16 U.S.C. §§1531-1544; Federal Water Pollution Control Act (*i.e.*, Clean Water Act), 33 U.S.C. §§1251-1387; Fish and Wildlife Coordination Act of 1946, 16 U.S.C. §§661-666c; Federal Water Project Recreation Act, 16 U.S.C. §§4601-12 to 1-21.

<sup>11</sup> See 2004 GAO Report.

<sup>12</sup> E.g., Fisheries Restoration and Irrigation Mitigation Act of 2000, 16 U.S.C. §777; Mitchell Act, 16 U.S.C. §§755-757.

<sup>13</sup> E.g., Multiple-Use Sustained-Yield Act, 16 U.S.C. §§528-31; National Wildlife Refuge System Administration Act of 1966, 16 U.S.C. §§668dd, 668ee; National Indian Forest Resources Management Act, 25 U.S.C. §3101 et seq.

<sup>14</sup> E.g., Tualatin Federal Reclamation Project Act, Pub. L. No. 89-596, 80 Stat. 822; Yakima River Basin Water Enhancement Project Act, Title XII, Act of October 31, 1994; 108 Stat 4550, 5 Federal Reclamation and Related Laws Annotated 4039 (prelim. ed. 2001).

<sup>15</sup> E.g., Fisheries Restoration and Irrigation Mitigation Act of 2000, 16 U.S.C. §777; Mitchell Act, 16 U.S.C. §§755-757.

the statute. A fundamental principle of statutory construction is that courts will avoid an interpretation that creates an absurd result, or that frustrates the purposes of the statute. BPA's internet web site shows a fish and wildlife project list with nearly 1,000 individual projects. Carried to its logical extreme, BPA's reading of the in-lieu provision would disqualify hundreds of these projects from consideration for funding from the BPA Fund. BPA suggests that in-lieu funding problems can be cured through execution of a cost-sharing agreement. There is no basis in the statute or the legislative history for this interpretation. In short, BPA has created an unsupported solution to a problem that in most cases doesn't exist.

I agree the in-lieu funding prohibition applies whenever expenditures are required from another entity by law or agreement. An in-lieu problem potentially arises whenever another entity is authorized but not required to undertake an activity, but the prohibition applies only if funding is actually available and clearly identified for the same activity. The in-lieu prohibition in section 4(h)(10)(A) focuses on expenditures that are authorized from other sources, not on activities that may be authorized but not yet funded. To read this provision otherwise would prohibit BPA from funding projects undertaken by other public agencies with statutory authority to undertake the very action proposed for funding.

The statutory language regarding in-lieu funding restrictions is ambiguous and, unfortunately, the legislative history of the Northwest Power Act reveals little about congressional intent behind this provision. During final passage of the bill on the House floor, Congressman Lujan described the problem of fish enhancement as "one of the touchiest problems involved in the bill."<sup>16</sup> Congressman Lujan was the primary sponsor of the committee amendments to balance fish and wildlife and power interests. In his floor statement on final passage, Congressman Lujan explained that –

The job of both committees to whom the bill was referred was to bring out a bill that provides a regional answer to this regional problem and to make certain that none of the other States will have to pay, in any way, for that regional solution.<sup>17</sup>

Congressman Lujan was one of the floor managers of the House bill. His remarks, as well as those of the bill's sponsors, indicate that they saw the responsibility as a "new obligation on the region, the BPA, and other Federal agencies to protect, mitigate and enhance fish and wildlife."<sup>18</sup> Yet this was an

---

<sup>16</sup> 126 Cong. Record H9845 (daily ed. Sept, 1980)(Remarks of Rep. Lujan).

<sup>17</sup> *Id.*

<sup>18</sup> *See* 126 Cong. Record H10682 (daily ed. Nov. 17, 1980)(Remarks of Rep. Dingell).

obligation to be borne by the region's ratepayers, not by the federal taxpayers. BPA's interpretation would prohibit ratepayer funding even absent Congressional intent to provide federal appropriations for the same activity. The result is exactly the opposite of what Congress intended for the prohibition to accomplish.

### Conclusion

The in-lieu funding prohibition only applies in situations where expenditures are authorized or required, not when the underlying activity is authorized but funding isn't otherwise available. In most instances it is possible to determine the availability of funding for a public entity through appropriations acts, committee reports, agency justifications, and extrinsic evidence related to funding requests. A cost-sharing agreement may be appropriate in the situation of a non-specific agency-wide appropriation, but not otherwise as a precondition to BPA funding for an activity included in the Council's Fish and Wildlife Program.

BPA has included in its draft in-lieu policy several questions about how the specifics of how the in-lieu funding prohibition should apply. The questions in the draft policy apparently are intended to elicit comments on the agency's interpretation of the statutory provision. The nature of BPA's questions, however, demonstrates the need to reconcile more fundamental questions about the in-lieu funding provision in the Northwest Power Act. There appears to be significant disagreement between BPA on the one hand and the Council and fish and wildlife managers on the other about the effect of the in-lieu funding provision on BPA's authority to fund a fish and wildlife project where another entity is authorized – but not required – to undertake the same activity.<sup>19</sup> This disagreement should be reconciled before efforts are made to address specific questions of applicability of the in-lieu funding prohibition to a particular situation.

H:\WORK\MBRS\DelwicheIn-LieuPolicyMemo100407.doc

---

<sup>19</sup> See Shurts memorandum, *supra* n. 2, at page 3.