

*L. Kern*

6/20/91

FISHERIES SETTLEMENT AGREEMENT FOR MCNARY DAM  
WASHINGTON SHORE FISHWAY ATTRACTION WATER SYSTEM  
HYDROELECTRIC PROJECT  
(FERC Project No. 10204)

between

NORTHERN WASCO COUNTY PEOPLE'S UTILITY DISTRICT

AND

NATIONAL MARINE FISHERIES SERVICE

U.S. FISH AND WILDLIFE SERVICE

COLUMBIA RIVER INTER-TRIBAL FISH COMMISSION

OREGON DEPARTMENT OF FISH AND WILDLIFE

WASHINGTON DEPARTMENT OF FISHERIES

WASHINGTON DEPARTMENT OF WILDLIFE

YAKIMA INDIAN NATION

(COLLECTIVELY DEFINED AS "FISHERIES AGENCIES")

This FISHERIES SETTLEMENT AGREEMENT FOR THE MCNARY DAM WASHINGTON SHORE FISHWAY ATTRACTION WATER SYSTEM HYDROELECTRIC PROJECT (Agreement), executed as of the 1st day of July, 1991, is between Northern Wasco County People's Utility District (District) and the Fisheries Agencies as defined below.

WITNESSETH

WHEREAS, the District and the Fisheries Agencies, in response to the request of the Federal Energy Regulatory Commission to work out a mutually satisfactory arrangement, have negotiated this Settlement Agreement to require that the District provide funds for compensation of anadromous fish resource impacts arising from the construction and operation of the Project;

WHEREAS, the Fishery Agencies desire that the funds provided by the District under this Agreement be deposited in a special account to be available to fund fishery mitigation measures as directed pursuant to the terms of this Agreement; and

WHEREAS, the District has agreed to fund an irrevocable Trust Fund established by the Fisheries Agencies to provide financial assurance that such fishery mitigation measures will be expeditiously implemented.

NOW, THEREFORE, the District and the Fisheries Agencies agree as follows:

1. Purpose.

The purpose of this Agreement is to establish an arrangement that provides for the compensation for unmitigatable losses to juvenile anadromous fish caused by Project passage. Because the impacts of the Project are not currently susceptible to evaluation or practical evaluation and current methods do not

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allow impacts to be addressed through Project modifications and facilities, this Agreement relies on a Fisheries Compensation Trust Fund to compensate for these losses.

2. Definitions.

a. BPA means the Bonneville Power Administration, a power marketing agency of the United States Department of Energy and its agents, successors, and assigns.

b. Committee means the Fishery Compensation Committee established under Section 6 for the purpose of reviewing and selecting fisheries compensation proposals to be funded with monies available in the Trust Fund.

c. Contract Year means the twelve month period starting October 1 through and including September 30 of the following calendar year. The initial Contract Year is that portion of the 12 month period starting on the Date of Commercial Operation through and including the following September 30. The last Contract Year shall be that portion of the 12 month period between the end of the last full Contract Year and the termination of this Agreement.

d. Corps means the United States Army Corps of Engineers.

e. Council means the Pacific Northwest Electric Power and Conservation Planning Council created under section 4 of the Pacific Northwest Electric Power Planning and Conservation Act, P.L. No. 96-501.

f. Date of Commercial Operation means the date that the District completes performance testing of the Project and accepts the Project as available for normal commercial operation for the production of electric power.

g. District means the Northern Wasco County People's Utility District, a municipal corporation of the State of Oregon, located and serving electric power consumers in Wasco County, Oregon.

h. Escalation Quotient for the initial ten Contract Years means the Index for such year divided by the Index for the year 1995. The Escalation Quotient after the initial ten Contract Years may be modified by the parties pursuant to Section 4.b.

i. FERC means the Federal Energy Regulatory Commission.



j. Fish and Wildlife Program means the Program adopted and revised by the Council pursuant to the Northwest Power Act.

k. Fisheries Agencies means National Marine Fisheries Service, U.S. Fish and Wildlife Service, Columbia River Inter-tribal Fish Commission, Oregon Department of Fish and Wildlife, Washington Department of Wildlife, Washington Department of Fisheries and Yakima Indian Nation.

l. Index for any Contract Year means the index for the gross national product last published prior to the commencement of such year by the Bureau of Economic Analysis of the United States Department of Commerce in the table for Implicit Price Deflators for Gross National Product included in the Survey of Current Business, or any similar replacement index as may be agreed upon by the Parties.

m. Parties means the District and the Fisheries Agencies.

n. Project means the District's proposed McNary Dam Washington Shore Fishway Attraction Water System Hydroelectric Project (FERC Project No. 10204) located at the Corps' McNary Project.

o. Trust Fund means the Fisheries Mitigation Trust Fund established by the Parties pursuant to the terms of this Agreement.

3. Term.

a. This Agreement shall be effective when signed by the District and each of the Fisheries Agencies and shall remain in effect until the earlier of the expiration of the license issued by FERC (or any extension thereof) or the date the operation of the Project is terminated by the District, provided, that Section 5 and Section 6 shall remain in effect until the termination of the Trust Fund.

b. During the term of this Agreement, any Party may commence negotiations with the other Parties to modify the terms of this Agreement and/or the license in whole or in part. If the negotiations are (i) successful, the Parties will petition FERC for approval to modify the terms of the Agreement and/or the licence in whole or in part; or (ii) not successful after a period of 120 days, any Party may independently petition FERC for the imposition of changed requirements regarding this Agreement and proceed in any forum with jurisdiction over the Project to change such requirement.



4. Fishery Compensation in General.

a. The Parties agree i) that the impacts of the Project on anadromous fisheries are not currently susceptible to evaluation or practical quantification; ii) that methods of addressing these impacts suffer from the same difficulty in evaluation and quantification; and iii) as a result of i) and ii), an alternative approach to fishery mitigation for the Project, a Fishery Mitigation Trust Fund, is warranted.

b. At the end of the tenth Contract Year, and each ten year interval thereafter, the parties may agree to modifications of i) the annual amount of the trust fund deposit by the District; ii) the Escalation Quotient that shall apply; and iii) any other matters agreed on by the parties. In the alternative, the parties may agree that the District will cease operating the Project for electric power generation from one hour before sunset to one hour after sunrise between May 1 and August 31 of each year. In the event the parties are unable to agree to a revised amount of Trust Fund deposit or Escalation Quotient, the District may either pay an amount into the Trust Fund for the ensuing ten year period using an Escalation Quotient determined in the manner applicable to the previous ten year period or cease operating the Project for electric power generation from one hour before sunset to one hour after sunrise between May 1 and August 31 of each year.

c. If evaluation methods can be developed in the future and can be agreed on by the parties, future evaluation of Project impacts can be conducted and may provide the basis for modification of the Agreement, as provided for in Section 3 b.

5. Trust Fund.

a. On or before the Date of Commercial Operation the Parties shall establish a Trust Fund and appoint a third party Trustee acceptable to all Parties.

b. Subject to the provisions of Section 4.b. above, on or before the Date of Commercial Operation, and on or before the beginning of each Contract Year thereafter, the District shall deposit in the Trust Fund the Annual Amount. In the event the Project is not capable of producing power for any period longer than 30 consecutive days in any Contract Year, the amount paid into the Trust Fund for the following year shall be reduced by the amount determined by multiplying the amount paid by the District in such Contract Year by the fraction whose numerator is



the number of days in such period(s) and whose denominator is 365.

The Annual Amount shall be determined for all Contract Years, except the initial and final Contract Years on the basis of \$110,000 (1995 dollars), multiplied by the Escalation Quotient, as described by the following formula:

$$A = \$110,000 \times EQ$$

where:

A = Annual Amount  
EQ = Escalation Quotient

The Annual Amount for the initial and final Contract Years shall be the Annual Amount for such Contract Year under the above formula, multiplied by the fraction whose numerator is the number of days in such Contract Year and whose denominator is 365.

c. The money in the Trust Fund shall be invested by the Trustee in accordance with sound business practice. Principal, interest and other earnings of the Trust Fund shall be deposited in the Trust Fund and become funds available for disbursement in accordance with this Agreement. The Trustee shall have full and independent authority to withdraw, invest, and reinvest the amounts contained in the Trust Fund, in accordance with sound business practice. Reasonable administrative costs of the Trustee may be funded from the Trust Fund with the approval of the Committee, but the Trust Fund may not be used to reimburse Committee members for normal participation of Committee functions.

d. The Trustee shall make payments from the Trust Fund at the direction of a majority of the Fishery Compensation Committee pursuant to Section 6 below. Upon payment, such funds shall no longer be considered part of the Trust Fund. Once paid by the District, Trust Fund monies shall remain in the fund and shall be irrevocable; provided that any funds remain in the Trust Fund four years after the termination of this Agreement shall be paid by the Trustee to the District.

#### 6. Fishery Compensation Committee.

a. An advisory committee (Committee) shall be established to review and select mitigation activities to be funded with monies available in the Trust Fund. Each of the following parties shall appoint a voting representative to serve as a

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member of the Committee at the appointing entity's expense: National Marine Fisheries Service serving as chairperson, US Fish and Wildlife Service, Columbia River Inter-Tribal Fish Commission, Oregon Department of Fish and Wildlife, Washington Department of Wildlife, Washington Department of Fisheries, Yakima Indian Nation and the District. BPA, FERC and the Corps shall be invited to appoint a representative to serve as a nonvoting member of the Committee. Other entities which have administrative responsibility related to improvement of naturally reproducing anadromous fisheries above McNary Project may be invited to become nonvoting members of the Committee at their expense.

b. The members of the Committee will decide how to conduct the meetings and how to select activities to be funded and the disbursement of Trust Fund monies.

c. Measures funded from the Trust Fund shall be subject to the following criteria:

(i) the measure must mitigate impacts to anadromous fish stocks located above McNary Dam;

(ii) the measure shall be coordinated with other measures being implemented to mitigate impacts to fish stocks above McNary Dam and shall be consistent with the Council's Fish and Wildlife Program. Priority shall be given to measures which augment measures recommended in such Program and which are not otherwise funded;

(iii) natural production measures which assist or improve the survival and production of naturally reproducing stocks shall have priority over any other measure;

(iv) measures may include production assistance, but shall not include a conventional hatchery program where fish are raised in a hatchery, released from the hatchery, and return to the hatchery;

(v) measures shall be consistent with the legal rights, obligations and authority of the Parties;

(vi) where measures are equally effective in terms of their biological objectives, the least cost measure shall be selected; and

(vii) measures shall minimize costs of administration to make best use of limited funds.



In the event the Committee is unable to agree by simple majority vote upon competing alternatives, the monies in the Trust Fund shall accumulate until such agreement occurs.

d. The Trustee shall account for the revenues and expenditures from the Trust Fund using normal accounting procedures. At the end of each Contract Year, the Committee shall make assignments to its members and prepare a report regarding: (i) the measures undertaken; (ii) additional costs of operation and maintenance for actions and programs funded by the Trust Fund; (iii) the monies expended by the parties, and (iv) an evaluation of the success of measures and recommendations for future modifications.

#### 7. Districts Obligations and Third Parties.

a. The Fisheries Agencies agree that this Agreement (as it may be modified) satisfies any District obligation to compensate for any unmitigatable losses to juvenile fish caused by turbine passage at the project, for the term of the agreement. The Fisheries Agencies further agree that this agreement will constitute their recommendations or prescriptions for juvenile fish passage compensation to the FERC under the Federal Power Act and the Fish & Wildlife Coordination Act, and that it satisfies the District's responsibilities for such passage under the Pacific Northwest Electric Power Planning and Conservation Act (P.L. 96-501).

b. The Fisheries Agencies agree that the District shall not be liable for: (i) actions taken with monies provided from the Trust Funds; (ii) additional costs of operations and maintenance for actions and programs funded by the Trust Fund; and (iii) misuse, mismanagement, or negligent use of the Trust Funds.

c. There are no third-party beneficiaries of this Agreement. Nothing contained in this Agreement is intended to confer any right or interest on anyone other than the Parties, their respective successors, assigns and legal representatives.

#### 8. Choice of Law.

The provisions of this Agreement relating to the administration and operation of the Trust Fund shall be interpreted under the laws of the state of Oregon. All other provisions of this Agreement shall be interpreted under Federal law and be governed through FERC process and procedures.



9. FERC Notices.

The Committee shall notify FERC's Portland Regional Office of all official meetings of the Committee and shall also file a copy of the Annual Report prepared under Section 6(d) with such Office.

10. Assignment.

This Agreement shall inure to the benefit of, and shall be binding upon the respective successors and assigns of the parties to this Agreement.

11. Execution in Counterparts.

This Agreement may be executed in counterparts. A copy with all original executed signature pages affixed shall constitute the original Agreement, and shall be retained by the National Marine Fisheries Service, Environmental and Technical Services Division. NMFS shall distribute true copies of the Agreement with the executed signature pages to all Parties to the Agreement.

IN WITNESS WHEREOF, the Parties have caused this Agreement to be executed the day and year first above written.

NORTHERN WASCO COUNTY PEOPLE'S  
UTILITY DISTRICT

Date: \_\_\_\_\_, 1991

By: \_\_\_\_\_

Title: \_\_\_\_\_

NATIONAL MARINE FISHERIES  
SERVICE

Date: \_\_\_\_\_, 1991

By: \_\_\_\_\_

Title: \_\_\_\_\_



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The Committee shall notify FERC's Portland Regional Office of all official meetings of the Committee and shall also file a copy of the Annual Report prepared under Section 6(d) with such Office.

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NORTHERN WASCO COUNTY PEOPLE'S  
UTILITY DISTRICT

Date: \_\_\_\_\_, 1991

By: \_\_\_\_\_

Title: \_\_\_\_\_

NATIONAL MARINE FISHERIES  
SERVICE

Date: 8/1/ \_\_\_\_\_, 1991

By: Ronald A. Schmidt

Title: DIRECTOR