

MEMORANDUM OF AGREEMENT

between the

**MANASTASH CREEK IRRIGATORS,
BONNEVILLE POWER ADMINISTRATION,
WASHINGTON STATE DEPARTMENT OF FISH AND WILDLIFE,
KITTTAS COUNTY CONSERVATION DISTRICT, and
WASHINGTON ENVIRONMENTAL COUNCIL,**

regarding

THE MANASTASH RESTORATION PROJECT

The Manastash Creek Irrigators (Irrigators), Bonneville Power Administration (Bonneville), the Washington State Department of Fish and Wildlife (WDFW), Kittitas County Conservation District (KCCD), and Washington Environmental Council (Council) have agreed to: 1.) implement up- and down-stream fish passage improvements at existing water diversion facilities on Manastash Creek used by the Irrigators to divert water under rights they own and that the Washington State Superior Court confirmed in *Ecology v. Acquavella*, Yakima County Cause No. 77-2-01484-5 (*Acquavella*) and 2.) develop and implement a consensus flow enhancement plan for Manastash Creek. These two elements together are hereafter referred to as the "Manastash Project".

RECITALS

1. Parties.

- A. Manastash Creek Irrigators are farmers, ranchers and landowners who are individuals and entities that divert water from Manastash Creek at six (6) different locations on Manastash Creek, a tributary of the Yakima River in Kittitas County, Washington. They are a subset of the Manastash Creek Water Right Holders, a group constituting all water right holders on Manastash Creek. The six diversion locations are referred to herein as follows:
1. The Manastash Water Ditch Association (MWDA), identified in Appendix A, uses the diversion identified in Appendix A.
 2. The Keach/Jensen water right holders identified in Appendix B use the diversion identified in Appendix B.

3. The Hatfield Diversion (Hatfield) water right holders identified in Appendix C use the diversion identified in Appendix C.
 4. The Reed Diversion (Reed) water right holders identified in Appendix D use the diversion identified in Appendix D.
 5. The Anderson Diversion (Anderson) water right holders identified in Appendix E use the diversion identified in Appendix E.
 6. The Barnes Diversion (Barnes) water right holders identified in Appendix F use the diversion identified in Appendix F.
 7. All of the above water right holders are collectively referred to herein as Manastash Creek Water Right Holders. The Manastash Creek Irrigators are a subset of this group including representatives of MWDA and individual irrigators from Keach Ditch, Jensen Ditch, Hatfield Ditch, Reed Ditch, Anderson Diversion and Barnes Road Diversion, are signatories to this agreement and are referred to as the Irrigators. The signatories of the respective irrigators to this agreement represent only their own respective interests and do not represent any water right holders that are not signatories to this Agreement.
- B. Bonneville is a federal power marketing agency within the United States Department of Energy. In entering into this Agreement it is exercising its authorities under Section 4(h)(10) of the Pacific Northwest Electric Power Planning and Conservation Act, 16 U.S.C. § 839b(h)(10)(A), and other laws to help protect, mitigate, and enhance fish and wildlife affected by the federal hydroelectric projects in the Columbia River Basin.
 - C. The WDFW is an agency of the State of Washington whose statutory mandate is to preserve, protect, perpetuate, and manage the fish and wildlife of the state.
 - D. The KCCD formed under state law to provide private landowners in Kittitas county with technical and financial assistance to protect and improve the natural resources.
 - E. The Washington Environmental Council is a non-profit group working to protect Washington's environment and natural heritage for current and future generations by advocating for improved state protections and better enforcement of existing laws.
 - F. The individuals and entities described in Recitals (1)A-E are referred to herein as the "Parties."

2. Background.

- A. Manastash Creek is a tributary of the Yakima River which flows into the Yakima River west of Ellensburg. Manastash Creek provides irrigation water to about 4,000 acres; some acres have dual water rights with Kittitas Reclamation District or West Side Irrigating Company. In 2000, steelhead were listed under the Endangered Species Act and the Irrigators approached the KCCD about technical and financial assistance to assist with improvements to Manastash Creek fish passage.
- B. In February 2001, WEC sent a draft notice of intent to sue under the Endangered Species Act to the operators of the diversions, the WDFW, Kittitas Reclamation District and West Side Irrigating Company. Although WEC threatened litigation, it offered to sit down with the affected parties to develop a mutually agreeable plan which would enhance fish passage and instream flows in Manastash Creek while ensuring the viability of local agriculture. The Irrigators deny that they have violated the Endangered Species Act in any manner. Nothing in this agreement or any statement by a party made in the negotiation of this Agreement may be used as an admission in any manner that there has been any non-compliance with the Endangered Species Act or any other laws or regulations.
- C. Initial negotiations involved the Irrigators, WDFW, the Washington Department of Ecology (Ecology), Yakama Nation, Kittitas Reclamation District and the Washington Environmental Council. This group formed the Manastash Steering Committee, which focused on finding a way to eliminate the barriers to fish passage and unscreened irrigation water diversions on Manastash Creek by consolidating some of the irrigation diversions and redesigning the fish passage facilities along Manastash Creek. It was decided to consider flow enhancement as a later, second phase of the project. Through this collaborative effort, the Manastash Steering Committee secured commitments for funding from the State of Washington (\$2.24 million) and Bonneville (\$1.937 million). The funding appropriated by the Washington State Legislature is made available to the project through a grant from Ecology to the KCCD. The Bonneville funds were originally requested by WDFW, but all funds have been contracted to HDR Fishpro for engineering, permitting, design, and construction of fish passage facilities.
- D. In 2006, at the direction of the Manastash Steering Committee, KCCD submitted proposal number 2007-020-00 Manastash Creek Flow Enhancement as part of the FY 07-09 F&W Program Solicitation. In 2007, Bonneville approved funding for project flow enhancement measures in the amount of \$892,998 through FY 09. All parties have subsequently agreed to integrate both passage and flow components into a single project (2003-001-00) and that construction on the fish passage components of the project will proceed when the plan for enhancing flows in Manastash Creek has been developed and adopted by resolution of the Manastash Steering Committee.

NOW THEREFORE, THE PARTIES AGREE AS FOLLOWS:

I. Manastash Fish Passage Improvements

A. Description. As a result of the collaborative process described above, the Parties have developed a plan for improving fish passage that involves implementing the following Manastash Project elements or improvements:

1. At the existing Manastash Diversion, currently used by the MWDA and henceforth referred to as the "Consolidated Diversion":
 - a) The Hatfield, Reed, and Anderson diversions will be relocated and consolidated.
 - b) A fish screen and appurtenant structures will be designed and constructed to screen juvenile fish from the canal/ditch while allowing water diversion by the users to exercise their full adjudicated water rights.
 - c) The check dam and/or stream channel at the diversion facility will be modified, and/or fish passage structures will be installed, to achieve compliance with WDFW fish passage criteria.
 - d) The relocation and consolidation of the diversions are contingent on receiving the necessary approvals to change the point of diversion on applications filed with Ecology. If Ecology doesn't approve one or more of the applications for change in point of diversion, the consolidation will not occur, and Bonneville agrees to then work with the other parties to amend this Agreement to allow construction of individual fish passage improvements at the Hatfield, Reed, Anderson, and Manastash diversions
 - e) The facility design is depicted in Appendix G.
2. At the existing Hatfield, Reed and Anderson diversions, if consolidation is approved,
 - a) The existing diversion facilities will be removed by Bonneville and abandoned by the owners.
 - b) The stream channel will be restored by Bonneville to achieve compliance with WDFW fish passage criteria.
3. At the existing Keach/Jensen diversion,
 - a) A fish screen and appurtenant structures will be designed and constructed to screen juvenile fish from the canal/ditch while

allowing water diversion by the users to exercise their full adjudicated water rights.

- b) The check dam and/or stream channel at the diversion facility will be modified, and/or fish passage structures will be installed, to achieve compliance with WDFW fish passage criteria
 - c) The facility design is depicted in Appendix H.
4. At the Anderson Abandoned Dam, the full span concrete diversion structure will be removed by the KCCD to accommodate fish passage. The stream channel will be allowed to regrade naturally.
5. At the existing Barnes Road diversion,
- a) A fish screen and appurtenant structures will be designed and constructed to screen juvenile fish from the canal/ditch while allowing water diversion by the users to exercise their full adjudicated water rights.
 - b) A roughened channel within concrete walls (henceforth “fish ladder”) will be constructed adjacent to the screen and part of the overall new facility, to improve fish passage.
 - c) The facility design is depicted in Appendix I.

B. Effect on Water Rights of Parties to this Agreement. Except for the changes in points of diversion contemplated herein, nothing in this Agreement, nor in any of the references made in this Agreement or its recitals (including specific references to federal legislation, any programs adopted by the Northwest Power and Conservation Council, or pursuant to the Northwest Power Act), shall in any way limit, impair, define, diminish or prejudice any parties water right adjudicated in *Ecology vs. Acquavella* to divert, transmit, and use water for agricultural, irrigation, stock water, fish and aquatic life or domestic purposes, nor authorize any party to hinder, interfere with, or limit any such rights; provided that, nothing is intended to limit the application of Treaty nor federal or state law.

C. Permits.

1. Bonneville will comply with federal law requirements, including National Environmental Policy Act (NEPA) and Endangered Species Act compliance, and obtain federal permits, necessitated by the construction and initial testing of the Manastash Project improvements. Bonneville will provide non-monetary assistance to KCCD, the Irrigators, and any affected state or local agencies for compliance with the Washington State Environmental Policy Act and other state or local permits as needed.
2. Bonneville has completed NEPA and ESA compliance documentation for Manastash Project improvements at Barnes Road.
3. Bonneville will complete the NEPA and ESA compliance documentation for the Manastash Project improvements at the Consolidated Diversion and the Keach/Jensen diversions.
4. The Irrigators using the Consolidated Diversion will apply for the permits and authorizations from Ecology as required for changes in the points of diversion needed to complete the project. The Irrigators agree to cooperate fully and reasonably in requesting and processing the changes in point of diversion.
5. WDFW and the KCCD will apply for any remaining permits and authorizations needed to lawfully proceed with the construction of the diversions and fish passage and screening facilities.
6. No party will have an obligation to defend any other party's environmental compliance, permits, or authorizations as addressed in this section in a court or any other forum.

D. Design. Bonneville will design the Manastash Project improvements, as shown in Appendices G, H, and I that will comply with current fish screening and passage criteria as defined by state and federal standards. The Irrigators consent to allow Bonneville to design these facilities.

1. The Irrigators have the right to review and approve the design and construction plans for the Manastash Project improvements prior to BPA issuing a request for bids. Manastash Project improvements are being completed in stages. As facility design and construction plans are completed for each Manastash Project element (e.g Barnes Road fish screen and fish ladder, the Keach/Jensen fish screen and passage structures, or the consolidated diversion fish screen and passage structures), BPA will provide the plans through the KCCD to the Irrigators associated with each Manastash Project element. If the Irrigators associated with a given Manastash Project element have not rejected that element's design and construction plan in writing within 30 days of receipt

and transmitted such rejection to Bonneville through the KCCD, then Bonneville and the affected Irrigators shall be assumed to be authorized to proceed. If designs are rejected for a particular element the Agreement will, however, continue for the other Manastash Project improvements. Rejected designs may be remanded back to a technical sub committee as appointed by the Steering Committee for review.

2. Bonneville shall make reasonable efforts to give the Irrigators reasonable advance notice in writing of any changes in the design of the facilities being constructed after the associated Irrigators have reviewed and approved the designs pursuant to this Agreement

E. Construction

1. Parties understand that, due to funding limitations, Bonneville will not be solely responsible for funding all elements of the Manastash Project improvements listed above. Bonneville will fund each Manastash Project improvement to the extent possible up to the final BPA-approved funding level. The Parties intend that any remaining elements of the Manastash Project will be implemented using Ecology funds already available to the KCCD, up to the limit of those funds. Should the cost of constructing all facilities exceed the available funding through the KCCD and Bonneville, the Manastash Steering Committee shall work to locate and secure additional funding to complete the projects. Currently, the Parties expect that Bonneville will construct the Manastash Project improvements at the Consolidated Diversion and the Keach/Jensen diversion. The KCCD will construct one Manastash Project element using Ecology funds, the Barnes Road diversion. Bonneville and the KCCD will each be responsible for the facility or facilities that each entity constructs. Neither entity is responsible for the other's obligations.
2. Bonneville and the KCCD will coordinate the timing for their respective Manastash Project improvements with the Irrigators.
3. Bonneville and the KCCD shall give the Irrigators reasonable advance notice in writing of the place, date, and time of a final inspection of the construction of their respective Manastash Project improvement built under this Agreement. The Irrigators must make any objections to Bonneville's or the KCCD's performance in carrying out such construction at or before the final inspection. Any differences as to such matters shall be resolved, if possible, by negotiation and agreement of the parties.
4. By the time of the final inspection of the construction, Bonneville or the KCCD will leave the construction staging areas in a condition similar to that which existed prior to construction.

F. Access to Facilities.

1. The KCCD will assist BPA in obtaining all necessary and applicable access and occupancy easements, including temporary construction easements, for design, construction, operation, maintenance, replacement, monitoring, and evaluation of the Manastash Project improvements identified in Appendices H (Keach/Jensen) and I (Barnes) (except for the Kittitas County franchise agreement, which will be acquired and held by others) and for facilities, access routes, and construction staging areas shown in Appendix M. Bonneville will hold these easements and rights of way and transfer them to whatever entity or entities own the facilities at the time of project completion.
 - a. The real property acquisition activities shall comply with the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended, and regulations issued pursuant to that Act
 - b. Easements will generally be in the form of the sample included in Appendix K.
2. The Irrigators using the Consolidated Diversion agree to provide Bonneville easements over and across real property they own or otherwise control as necessary for the design, construction, operation, maintenance, replacement, monitoring or evaluation of the Manastash Project improvements described in Appendix G. Such rights easements shall be provided at no additional cost to Bonneville, the KCCD, or WDFW beyond the consideration provided by this Agreement.
3. The approved easements required in this section of the Agreement must be acquired before Bonneville solicits for construction contractors.

G. Facility Ownership.

1. With respect to all the Manastash Project improvements to be constructed under this agreement, Parties agree that Bonneville will retain title only to the following facilities:
 - a. The fish screens at
 - i. Barnes Road,
 - ii. Consolidated Diversion, and
 - iii. Keach/Jensen.
 - b. The concrete fish ladder adjacent to the screen at Barnes Road Diversion; and

- c. Other appurtenances to these fish screen facilities and the Barnes Road fish ladder necessary for their proper functioning, including, but not limited to, piers holding fish screens, up- and down-stream control gates, fish bypass pipes, trash racks, automated equipment, and security fences. See Appendix N for maps of the ownership boundaries at each facility.

BPA will not hold title to, own, control, possess or have any liability for the irrigation diversion/delivery features described below under Paragraph I.G.3. or any of the other Manastash Project improvements, including dams, stream grade controls or channel restoration features.

2. Title to the above named Manastash Project fish screen facilities and fish ladder, including those constructed by the KCCD under this Agreement, shall be vested in Bonneville for five (5) years beginning on the date of each facility's final construction inspection. All Parties acknowledge that Bonneville accepts ownership of these newly constructed facilities, easements, and rights-of-way only to facilitate their construction and seeks to divest itself of ownership expeditiously. Therefore, before the end of the second year of operation of each diversion facility, the Parties, convened by the Council and WDFW, will participate in developing a plan to (1) transfer ownership of the facilities to an entity or agency other than Bonneville or the Irrigators, and (2) establish operation and maintenance protocols. Each Party to this Agreement agrees to participate earnestly in such discussions in good faith and at its own costs.
3. Title to all other features of the Irrigators' irrigation facilities, including without limitation diversion dams, modifications thereto from the Manastash Project, gates, weir structures, measuring devices, diversion/conveyance canals, and other appurtenant structures shall be and remain vested in the current owners of the respective facilities subject only to the terms and conditions of this Agreement.

H. Instream Fish Passage Structures.

1. All parties desire to accomplish fish passage at the facilities in the most efficient manner to provide the greatest benefit. During the design phase, a cooperative decision was made to pursue "roughened channel" designs as opposed to more traditional concrete fish ladders at the Keach-Jensen and MWDA/Consolidated Diversion. This decision elevates the project beyond the minimum of meeting the state and federal passage criteria to agreeing on a solution that provides better habitat features and a more naturalized design.
2. Given the complexity of the design, construction and long-term monitoring required to achieve success, responsibility for these