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May 28, 2009

MEMORANDUM

TO: Council Members

FROM: Peter Paquet, Manager Wildlife & Resident Fish

SUBJECT: Wildlife Mitigation Crediting Forum

Background

In the 2009 Fish and Wildlife Program, the Council called for the initiation of a Wildlife Mitigation Crediting Forum to: 1) recommend a commonly accepted ledger of habitat units acquired; 2) recommend to the Council ways to resolve issues about accounting for habitat units; and 3) develop a common data base for tracking, assigning and recording habitat units. As part of the crediting forum, the Council will work with Bonneville and the managers to develop a comprehensive agreement on the proper crediting method for construction and inundation losses or strategies that will allow parties to reach long-term settlement agreements. Once completed, the Council will consider adopting the comprehensive agreement into the Program. Staff intends to initiate this process in the next several weeks with the fish and wildlife managers and Bonneville to establish the appropriate framework for these discussions. In addition, we would like to discuss some issues that such discussions raise, as well as some possibilities for bringing the issue to closure.

Discussion

First, with regard to the issues:

1. What is being negotiated?

Staff believes that the Council should provide its perspective on what is on the table for negotiation. We believe that the Council's Program directs that the negotiations should take place within the confines of the existing Fish and Wildlife Program. That is, the Council would not be asking the parties to negotiate whether or not the 2:1 crediting ratio is appropriate. That is a decision that is established by the 2009 Program. Rather, we understand that the Council would like the parties to explore mechanisms to meet

Bonneville's concerns about applying a systemwide or regional 2:1 crediting ratio and what that ratio implies about "protection credit". These mechanisms could take the form of criteria for allocating "protection" credits on more of a case-by-case basis, or other such concepts. A crucial question is will the parties come to the table given the sideboards of generally working within the confines of the adopted program.

2. How could the Council use the results of a proposed agreement?

If an agreement is struck and it is generally consistent with the Fish and Wildlife Program, then the Council could endorse the agreement or simply remain silent and let the parties proceed to work out the details. However, if a proposed agreement deviated significantly from the Council's Program, then the Council could not endorse it without amending the Program.

3. How could the Council respond if the parties fail to reach a negotiated solution?

If the parties could not reach a negotiated agreement, then the Council would be left with an adopted Program detailing crediting provisions in one manner, and Bonneville insisting that crediting be done according to its stated policies. The reconciliation of these inconsistent policies would likely be postponed until a future program amendment, with the region struggling through implementation in the face of divergent policies in the meantime. It would seem that the Bonneville policy would be applied in this situation, as it is insisting on agreement to its crediting policy as a matter of contract with sponsors of wildlife acquisition agreements. If there is no resolution, the Council could consider making a determination that the actions of the Administrator are not consistent with the program under section 4(i) of the Act. It is also possible that a legal challenge — most likely from a third party — would resolve the inconsistency through a court determination of whether Bonneville should be applying the program's crediting provisions or that expressed in the Bonneville policies.

Recommendations

Staff recommends that the Council provide explicit guidance to the parties by clearly defining its expectations for the forum discussions (i.e. are negotiations to take place within the context of the Council's F&W Program) and providing a sense of expected outcomes, including possible Council actions. Staff will work with the Fish and Wildlife Committee to develop the appropriate guidance for the forum discussions.