



COLUMBIA BASIN FISH AND WILDLIFE AUTHORITY

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Final

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 Fish, Wildlife & 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

DATE: April 8, 2008
TO: CBFWA Members
FROM: Brian Lipscomb, CBFWA
SUBJECT: Final Action Notes from the March 28, 2008 Members Teleconference

Columbia Basin Fish and Wildlife Authority (CBFWA) Members Special Teleconference Friday, March 28, 2008

Support material for the March 28th meeting is posted at
http://www.cbfwa.org/committee_main.cfm

Final Action Notes

Attendees: Jann Eckman, Tom Iverson, Pat Burgess, CBFWA
By Phone: Larry Peterman, MFWP; Ronald Peters, Cd'AT; Lynn DuCharme, CSKT; Gary James, CTUIR; Elmer Ward, CTWS; Billy Barquin, Haglund, Kelly, Horngren, Jones & Wilder LLP; Paul Kline, IDFG; Sue Ireland, KTOI; Rob Walton, NOAA Fisheries; Tony Nigro, ODFW; Dan Diggs, USFWS; Nate Pamplin, WDFW; Joe Mentor, Mentor Law Group, PLLC; John Platt, CRITFC; Brian Lipscomb, Neil Ward, CBFWA

Time Allocation: Objective 1. Committee Participation 100%
Objective 2. Technical Review %
Objective 3. Presentation %

ITEM 1: Introductions and Approve Agenda

Brian Lipscomb suggested that the order of the agenda be revised to allow for Joe Mentor's participation in the discussion regarding the transmittal letter. Joe is on vacation but has agreed to call in for the discussion.

Brian requested that the amendment recommendation discussion include:

- 1) Feedback from Sue Ireland on the Kootenai Tribe of Idaho's (KTI) position on the Anadromous Fish, Coordination, and Fish Passage Center sections.
- 2) Follow-up on Sections 2.3 Wildlife and 2.1.5.4 Fish Passage Center.
- 3) NOAA and USFWS position with regard to Section 5 Recommended Amendment to the Implementation Provisions.
- 4) One slight revision to Section 5 streamlining the process for project selection.
- 5) Discuss and review language that will precede the appendix.

Rob Walton added that NOAA had questions and comments and in some cases requests for clarifications and some suggested changes on other aspects of the recommendations.

Action: The Members approved the agenda as discussed. No objections.

ITEM 2: Final Draft Program Amendment Recommendations and Transmittal Letter

Discussion:

Amendment Recommendations: Billy Barquin, KTI, advised that under the **Section 3 Anadromous Fish**, KTI has determined that they will not abstain from that section provided that language is changed as requested. Billy added that the KTI's Tribal Resolution will support the CBFWA amendments and will state specific sections that they are supporting with emphasis on measures relative to the KTI. Sue Ireland added that KTI will sign also the CBFWA transmittal letter.

In follow-up to the discussion at the March 26th Members Teleconference, Sue Ireland stated that the KTI supports the edited language in **Amendment 2.0.4 Add Coordination Measures as a Strategy in the Overarching Section**, and the language in **Amendment 2.1.5.4. Fish Passage Center**.

Brian Lipscomb suggested and the Members discuss adding an additional bullet for consideration under **Amendment 2.1.5.4 Fish Passage Center** clarifying the role of the Fish Passage Center Oversight Board (FPCOB).

- Replace the language describing the Fish Passage Center Oversight Board (FPCOB) with the following to clarify it's role:

“The Council has established an oversight board for the Center, with representation from NOAA Fisheries, state fish and wildlife agencies, tribes, the Council, and others to provide policy guidance for the Center. ~~And to ensure that the Center carries out its functions in a way that assures regional accountability and compatibility with the regional data management system.~~ The oversight board’s responsibilities will ~~include conducting~~ ~~conduct an~~ the annual review of the performance of the Center and ~~developing~~ develop a goal-oriented plan for ~~next year’s~~ the Center’s operation to ensure that the Center carries out its functions in a way that assures regional accountability and compatibility with the regional data management system. The Center shall prepare an annual report to the oversight board and the Council, summarizing its activities and accomplishments. There will be no other oversight board or board of directors for the Center.”

Actions:

Under **Section 2.3.1 Include the Current Ledger for Wildlife**, the Members moved to accept the deletion of the last sentence in the first paragraph (i.e., references to Dworshak and State of Montana Settlement Agreements). No objections.

Under **Section 2.1.5.4. Fish Passage Center** the Members moved to accept the addition of the bullet clarifying the role of the FPCOB. No objections.

Transmittal Letter**Discussion:**

Brian Lipscomb recalled that in the March 26th Members teleconference, John Platt, CRITFC, raised concerns relative to the transmittal letter. Based on John's comments and concerns, the Members asked John to provide edits to the transmittal letter reflecting CBFWA's intent and to characterize the amendment submittal in a manner preserving individual agencies and Tribes consideration as to not minimize the importance of the document.

John Platt's edits to the letter consisted of the inclusion of the following paragraph:

In this regard, the CBFWA recommendations provide elements for a systemwide approach that is implemented by the agencies and Tribes' recommendations. It is thus the intention of the parties that the CBFWA and individual recommendations be read consistently. However, in the event of a perceived conflict between a Tribal or agency recommendation, and a CBFWA recommendation, it is the intention of the signatories that the Tribal or agency recommendation supersedes or overrides the conflicting CBFWA recommendation as a consequence of the deference due to the Tribes or agencies because of their statutory, treaty, or other legal

authorities.

John explained that the edit is intended to state that we don't want to see the CBFWA recommendations used as a means to resolve a conflict when it is the Tribe or agency that has the authority or sovereign power to make the recommendations. John stated that historically this was a problem (i.e., in 1990 and with the Integrated System Plan). John articulated that it is usually the general that overrules the specific, e.g., the subbasin plans do not provide for specific measures, they provide for general measures (i.e., improved flows). John added that there are recommendations for specific projects that run through each of the agencies and Tribes recommendations and those should take precedence.

**Members
Comments:**

Tony Nigro, ODFW, suggested that the letter emphasize that the amendments were built with the intent to ensure that what the individual agencies and Tribes recommend is consistent with the CBFWA recommendations but in the event that some other entity perceives a conflict we expect that those who appear to be in conflict be given an opportunity to clarify and confirm or otherwise explain why there is a conflict and give an opportunity to convey a relative standing.

Nate Pamplin, WDFW, added that he was unsure if added language was really helpful as it appears to give room for interpretation to dismiss the CBFWA recommendations. Nate added that no doubt individual Members are working to make sure that individual recommendations are consistent with the CBFWA package but we also must recognize that there are two entities external to CBFWA that have the same statutory authority under the Northwest Power Act and if their recommendations are inconsistent with the CBFWA package then this addition may submarine the CBFWA proposal.

Dan Diggs, USFWS, stated that the language seems to convey that an agency would be able to identify in their individual comments a different perspective. Dan asked how that goes along with the NPCC being able to make a decision between the CBFWA and the agency's individual perspective and how will CBFWA identify where an agency abstains on a particular issue when the recommendation goes forward.

With regard to Dan's question about abstention protocol, Brian Lipscomb responded that in the past, abstentions were addressed in the close of CBFWA correspondence.

Joe Mentor, Mentor Law Group, commented that the CBFWA recommendations are the recommendations of the agencies and Tribes that are signing and that CBFWA as an entity has the same standing as any other interested party. The significance of the CBFWA recommendations is in the fact that they are the recommendations of all the Members.

Joe Mentor stated that he disagrees with John Platt's perspective. Joe stated that the idea that general recommendations overrule specific recommendations turns the principles of interpretation around and instead it is quite the opposite that would be the result. If there are specific recommendations that are made by the same people signing the CBFWA recommendations, then those specific recommendations would prevail in the event that there is ambiguity. Joe stated that he has concerns about creating a conflict within the membership that does not exist. Joe added that the language of the Northwest Power Act states that the initial recommendations are entitled their due deference and there will be an opportunity through the process of commenting on each other's recommendations and on the draft plan to clarify any ambiguity that may exist.

Joe Mentor suggested some edits to the letter as follows: Retain the 1st and 2nd sentence of the paragraph added by John Platt. Delete the last sentence in the paragraph and replace it with language stating that these are collective recommendations that should not be read to conflict with the recommendations of individual members or to create an ambiguity, instead the individual recommendations complement those of the group.

Joe suggested removing the CBFWA Chair signature block and the cc block, but to include the page of Members' signatures. Joe also suggested that references to CBFWA recommendations be removed and referenced as collective recommendations.

Action:

Due to time constraints, the Members agreed that Brian Lipscomb, John Platt, Joe Mentor, Billy Barquin, and other interested Members would hold a conference call on Monday, March 31st to discuss draft edits toward a final transmittal letter based on the conversation held today. The transmittal letter would then be put before the Members on Wednesday, April 2nd. No objections.

Brian Lipscomb added that a notice or reminder will go out to Members on Monday morning should others wish to engage in the conference call. It was agreed that the call would take place at 12:00 p.m. on Monday, March 31st and will originate from the CBFWA office.

With regard to the paragraph regarding the **appendix** in the transmittal letter, given that the appendix is not yet available for Members review, Members stated discomfort with that paragraph in the letter. The Members suggested deleting “the comprehensive” in the first sentence and deleting the second sentence entirely. The language or disclaimer within the appendix paragraph was flagged for discussion on April 2nd.

NOAA’s Concerns within Amendment Recommendations Sections 1 and 2: Rob Walton stated concerns or requests for clarifications within these sections. Due to time constraints, Rob advised that he will direct NOAA’s concerns and requests to CBFWA staff by Monday morning, March 31st. In terms of **Section 5**, Rob reiterated that NOAA has already indicated in writing that they would abstain from **Amendment 5.1 Implementation Funding Provision** (in lieu measures, BPA capital, rate case, etc.) but NOAA may reconsider that stance by April 2nd. Rob stated that it is conceivable that NOAA will object to Amendment 5.1, but that has not been decided yet. Rob agreed that NOAA will attempt to provide a remedy to preserve consensus.

CBFWA staff will review NOAA’s concerns and requests for clarification and will provide a first cut response to Rob and then submit that to the Members via email by Monday afternoon March 31st with the intention to work through the issue April 2nd.

Consistency with Memorandum of Agreements (MOA): In the March 26th Members Teleconference, Bill Towey, CTCR, suggested that consideration be given toward consistency with pending MOA’s. Brian Lipscomb stated that the transmittal letter language staged for discussion in the March 31st conference call may serve to address this issue.

Amendment 5.2 The Project Solicitation Process: Gary James submitted additional language to complement the current language in the amendment: http://www.cbfwa.org/Committees/Members/meetings/2008_0328/Amendment_5.2_Edits_Gjames.doc. Gary stated he agreed with the current language but felt it was somewhat general and the language he is suggesting is intended to be more specific.

The Members discussed Gary’s suggested changes and agreed upon the following language at the close of the March 28th meeting:

This process would streamline and consolidate ISRP project reviews by recommending that ISRP: 1) review target solicitation projects collectively on a subbasin scale; and 2) minimize or abbreviate re-review of ongoing projects previously reviewed which are “linkage-confirmed” and thus still necessary to address continuing limiting factors and gaps; and 3) minimize or abbreviate re-review of ongoing project actions that are part a larger plan or program already subjected to ISRP review (e.g. wildlife management projects, hatchery operations projects, monitoring and evaluation projects, and subbasin habitat restoration programs, etc.).

Ron Peters, Cd’AT stated that he saw the language as clarification oriented and did not see an issue with it on behalf of the Cd’AT.

Billy Barquin, KTI, stated that the language is consistent with KTI’s perspective but he would have to review it with Sue Ireland to confirm agreement.

Action:

The Members moved to add the suggested paragraph to **Section 5.2 The Project Solicitation Process** with modifications discussed. No objections.

Abstentions: In follow-up to the questions asked earlier in the meeting by Dan Diggs, USFWS, the Members continued their discussion regarding the process of abstentions.

With regard to the issue of the KTI abstaining from the Anadromous Fish Section and possibly other sections, Billy Barquin stated that he was in agreement with the edited language suggested but added that the CBFWA amendment recommendations represent a large document and the reason for the KTI abstention from some sections is that they have not had an opportunity to fully analyze everything in the document. As a compromise, KTI has decided that instead of abstaining they will do a soft support calling out portions within the Kootenai Tribal Council Resolution that KTI have had the opportunity to analyze.

Rob Walton, NOAA, asked what it means to abstain and where will such notice get recorded. Brian Lipscomb stated that the abstention would be recorded in the transmittal letter or within the body of the recommendations.

Chairman Peterman stated that it was his understanding that we will take a final vote on April 2nd to adopt or abstain but hopefully not object.

Tony Nigro, ODFW, added that it was his understanding that with abstention we are not reserving the right to object later for reasons that we cannot explicitly state support for. That's different from stating that we are not going to object now but may object later.

Rob Walton, NOAA, stated that he will try to clarify this issue internally within his organization prior to the April 2nd Members teleconference.

With regard to how abstentions could be characterized, Tony Nigro suggested that the abstentions could be placed both in the document as a footnote and highlighted in the transmittal letter to avoid any confusion as to where individual members stand.

Tom Iverson, CBFWA, added that abstentions have always been handled as they occur as it depends on the nature of the abstention. In this regard, if the abstention is directed at one amendment within a section that may be handled differently than an abstention to an entire section.

Chairman Peterman suggested as a way to move forward that the Members revisit this issue on April 2nd if the process results in significant abstentions; otherwise we'll proceed as Tony Nigro suggested.

Plan for Obtaining Member Signatures on the Transmittal Letter: The Members directed Jann Eckman, CBFWA, to send out an email on Monday, March 31st requesting Members preference for obtaining their signatures (i.e., provide electronic signature, sign faxed copies, or other options). This will be finalized by the April 2nd Members teleconference.

April 2nd Members Teleconference: Nate Pamplin called to attention that the April 2nd teleconference is scheduled from 1:00 -4:00 p.m. Nate recommended that Members be prepared to work past 4:00 p.m. and until completion.

FYI:

Amendments Due to the NPCC on Friday, April 4, 2008

Next NPCC Meeting, April 15-16, 2008 in Whitefish, MT

Meeting Adjourned.