

Northeast Oregon Wildlife Agreement

Bonneville Power Administration

Nez Perce Tribe

September 1996

NORTHEAST OREGON WILDLIFE

MEMORANDUM OF AGREEMENT

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NORTHEAST OREGON WILDLIFE MEMORANDUM OF AGREEMENT

This Agreement is made on the Nez Perce Reservation between the Nez Perce Tribe (hereinafter Tribe) and the United States of America, acting through the Department of Energy and the Bonneville Power Administration (hereinafter BPA), and is binding on the parties, their successors and assigns.

RECITALS

- A. The Nez Perce Tribe (Tribe) is a Federally recognized Indian Tribe with governmental authority over the Nez Perce Reservation and treaty hunting, fishing, gathering and grazing retained rights in a larger area encompassing parts of the States of Washington, Oregon and Idaho described in the 1855 Treaty with the Nez Perce, 12 Stat. 957. The Tribe is organized under a constitution approved by the Commissioner of Indian Affairs. Under its constitution and consistent with its sovereignty, the Tribe has the power and responsibility to provide for the health, maintenance, and enhancement of wildlife. The Tribe has the authority to enter into this Agreement pursuant to Article VIII of the Nez Perce Constitution.
- B. BPA is a power marketing agency within the United States Department of Energy. The Pacific Northwest Electric Power Planning and Conservation Act, P.L. 96-501 (Act) directs BPA to protect, mitigate, and enhance fish and wildlife affected by the development and operation of federal hydroelectric projects of the Columbia River and its tributaries, in a manner consistent with the purposes of the Act, the program adopted by the Pacific Northwest Electric Power and Conservation Planning Council (Council) under subsection 4(h) of the Act, and other environmental laws.
- C. The Tribe has developed the Northeast Oregon Wildlife Mitigation Project (hereinafter Project). The Project has been approved by the Council and BPA. BPA has completed an Environmental Assessment, DOE/EA No. 1160 under the National Environmental Policy Act (NEPA), 42 U.S.C. 4321-4370c, and reached a finding of no significant impact (August 7, 1996) pursuant to Federal law.
- D. The project consists of the following parcels of land: the Helm Resources Inc. land (Attachment A) which consists of approximately 10,300 acres, and another approximately

6,200 acres to be acquired by the Tribe within the area delineated in Attachment B. The total land area to be managed is approximately 16,500 acres and is referred to as "the properties." The Tribe will dedicate the properties in the project to wildlife habitat protection and will manage the properties according to the terms of this Agreement and a management plan (Plan) that the Tribe will prepare; however, the specific properties within the project may vary from time to time as parcels are acquired or sold, consistent with this agreement.

E. The underlying purpose of the Agreement is to protect, mitigate, and enhance wildlife and wildlife habitat permanently, through the acquisition, protection and management of lands, so the parties have not included a term or termination provisions.

NOW THEREFORE IT IS AGREED BETWEEN THE PARTIES AS FOLLOWS:

1. BPA Obligations: (a) In consideration of the promises and covenants made and set out herein, BPA shall transfer to the Tribe \$3.0 million within 10 days of receipt of the signed Intergovernmental Contract #96-BI97175 and invoice from the Tribe, and BPA shall transfer an additional \$1.5 million to the Tribe on or before October 30, 1996.

(b) In addition to the acquisition funds and operation and maintenance funds, BPA shall reimburse the Tribe's costs of complying with federal real property acquisition law, including the Uniform Relocation Assistance and Real Property Acquisition Policies Act, 42 U.S.C. §§ 4601-4655; provided, for any acquisition involving potential relocation and other costs of \$5,000 or more, the Tribe shall enlist the assistance of BPA's Manager, Real Estate, before taking any action or making any commitments that will necessitate reimbursement by BPA under this paragraph.

(c) BPA will also provide additional funds for base-line HEPs to be done by the Tribe. Within one year after completing all acquisitions, the Tribe shall initiate HEP funding discussions with BPA.

2. Operation and Maintenance: (a) On or before the beginning of fiscal year 1998 (October 1, 1997), BPA shall start providing a reasonable amount of additional funds for continued operation and maintenance of the mitigation project to maintain or provide positive wildlife and/or wildlife habitat benefits. Reasonable is defined as sufficient funding to maintain the staff and equipment needed to protect habitat through limiting grazing trespass, maintaining the

property boundary fences, suppressing noxious weed infestations, and performing monitoring activities as delineated in the Plan, performing Habitat Evaluation Procedures (HEPs) as required in section 10(b) of this Agreement. The Tribe and BPA agree reasonable annual operation and maintenance will be provided, pursuant to an intergovernmental agreement to be signed by the Tribe and BPA on or before October 1, 1997, in one lump sum payment at the start of each fiscal year 1998 (October 1, 1997 - September 30, 1998), 1999 (October 1, 1998 - September 30, 1999), 2000 (October 1, 1999 - September 30, 2000) and 2001 (October 1, 2000 - September 30, 2001). The total dollar amount of funding for fiscal year 1998 will be \$411,393, for fiscal year 1999 \$227,734, for fiscal year 2000 \$235,325, for fiscal year 2001 \$242,917. For the fiscal years 1999 through 2001, these amounts are based on the assumption that all the planned acquisitions are complete and the Tribe is managing approximately 16,500 acres. If as of September 30 of 1998, 1999, or 2000 the Tribe is managing less than approximately 16,500 acres under this Agreement, the annual amount of operation and maintenance funding shall be reduced by \$13.80 in fiscal year 1999, \$14.26 in fiscal year 2000, and \$14.72 in fiscal year 2001 for every acre less than 16,000 acres, unless otherwise agreed by the parties. If the Tribe is managing in excess of 17,000 acres for the project prior to September 30, 2001, then the parties may renegotiate the amounts of operation and maintenance funding and submit the revised amounts to the Council or its successor for prioritization.

(b) By June 30, 2001 the parties shall make their best efforts to negotiate a long term operation and maintenance funding scheme for payment on an annual basis, through establishment of a trust fund, or by any other means agreed to by the parties. Funding negotiated for future operations and maintenance beyond what is described herein will be subject to a yearly prioritization process administered by the Council, its assigns or successors.

3. Tribal Obligations: (a) The monies provided pursuant to sections 1 and 2 above, any interest earned from them, and net income earned from the Properties shall constitute the Fund. The Tribe shall use the Fund to purchase and/or improve the Properties, conduct inventories, HEPs, develop a Management Plan, and to accomplish reasonable operation and maintenance.

(b) The Tribe will use the Fund to acquire approximately 16,500 acres of land within the area delineated in exhibit B of this Agreement. The Tribe may utilize its own processes in conducting any and all pre-acquisition activities, that include, by way of example, appraisals, drafting and presenting to sellers earnest money agreements, purchase and sale agreements, and conducting surveys; provided, the Tribe will comply with federal real property acquisition laws, such as the Uniform Relocation Assistance and Real Property Acquisition Policies Act, 42 U.S.C. §§ 4601-4655.

(c) The Tribe shall use the Fund to develop an inventory of the resources existing on the project lands. Based on the information obtained from the inventories the Tribe shall develop a site specific management plan (Plan) on or before September 31, 1999. The Plan will focus on habitat management concerns including the management of noxious weeds and the use of grazing and other means of manipulating habitat to reach desired conditions for wildlife, provided it may also address road closures, access, and other management practices designed to protect wildlife and their habitats. The Plan will be developed in consultation with the Bureau of Land Management, Oregon State Department of Lands, the Oregon Department of Fish and Wildlife, the U.S. Forest Service, local management entities, other interested entities and the public, and approved by BPA. The NEPA documents mentioned in Recital C will be incorporated by reference into the Plan. The Tribe will use the fund to manage the lands acquired through sale, easement, exchange or by other means to benefit wildlife, according to the Plan, the terms of this Agreement and the Environmental Assessment performed by BPA.

(d) The Tribe shall permanently protect the properties in the project as wildlife habitat on behalf of BPA, preventing any and all uses of the properties that are inconsistent with this Agreement, the Northwest Power Planning Council's Columbia River Basin Fish and Wildlife Program, and the Plan, which upon completion shall be incorporated herein and thereby made a part of this Agreement. Such prohibited uses include, but are not necessarily limited to:

- (i) Grazing of domestic livestock and feral horses and cattle on the properties unless used as a method to manage the properties for wildlife as outlined in the Plan,
- (ii) Timber harvesting, except such harvesting as is consistent with the Plan for the purpose of improving the properties as wildlife habitat, as is necessary for proper fire or land management, or protection of person or property as outlined in the Plan, and
- (iii) All residential, commercial, or industrial uses of the properties, that are not permitted in the Plan, with the possible exception of a home site for the project manager and the maintenance and use of the buildings, on the lands at the time they are acquired, for purposes furthering the intent of this Agreement.

Upon completion of the Plan, BPA's role will be limited to review of the Tribe's implementation of the Plan.

(e) Net revenue received from managing the properties, including conservation reserve program payments or other similar payments, may be used to pay costs associated with the land managed or be used to implement the Plan. Such revenues generated that are in excess of amounts needed to pay property taxes may be subtracted from O&M funds that would otherwise have been provided by BPA, unless otherwise agreed by the parties.

(f) The Tribe will have all management and operation control of the Project, and will therefore be solely responsible for all incidents of ownership of real property interests acquired with the Fund. The Tribe shall hold harmless and indemnify BPA from any liability from any incident of ownership that may arise in the implementation of the Plan. Such incidents of ownership include, but are not limited to, hazardous waste response, cultural resource mitigation, and tort liability. Should a catastrophic event, such as a wildfire, destroy or diminish the properties' values as wildlife habitat, the Tribe shall have no obligation to reproduce the properties' pre-existing wildlife values any faster than natural regeneration reproduces them.

4. Recording by the Tribe: For the Helm Resources Inc. property, and any other real property the Tribe acquires under this Agreement, the Tribe shall have this Agreement and a covenant, Attachment C, recorded with all appropriate authorities, at the time the Tribe takes title to or assumes control of such property. Within 30 days of recording(s), the Tribe shall submit to the BPA contracting officer a copy of the recorded documents showing the recording information. In the event the Tribe exercises its option to sell or exchange any of the lands acquired for mitigation, as authorized in Section 22 of this Agreement, the Tribe will revoke said covenant on land to be sold and attach the same covenant to new lands acquired.

5. Protection of Nez Perce Treaty Rights: Fishing, hunting, gathering, and Tribal cultural and religious activities on the properties according to Tribal custom and law shall not be prohibited by this Agreement.

6. BPA Monitoring: BPA shall have the right to enter upon the properties at reasonable times, having given the Tribe 5 day prior notice, to monitor the Tribe's compliance with this Agreement and to enforce its terms.

7. Tribal Reporting: Beginning August 30, 1997, and every August 30 thereafter, the Tribe shall provide BPA an annual report generally describing the real property interests in the Project, any HEP analyses undertaken or in progress, and management activities undertaken or in

progress. The Tribe shall also provide an accounting of the Fund, including any interest earned and/ or net income derived from the management of the Project.

8. Public Access: The public shall have reasonable access to the properties. The Tribe may regulate access, provided that access and transportation regulations shall apply equally to tribal members and non-tribal members. Nothing in this Agreement limits the authority or ability of the Tribe to manage the properties for public safety and wildlife habitat conservation, or to preserve and protect cultural, historic, and religious sites, and to carry out and protect the federally guaranteed rights of the Tribe and its members. Nothing in this Agreement limits or diminishes any treaty retained right or privilege of the Tribe or its members afforded under federal law as a result of the status of the Tribe or Tribal members, provided that treaty reserved rights will be exercised consistent with this Agreement.

9. Hunting Regulations: Nez Perce tribal members shall be subject to tribal regulation of wildlife harvest. All other hunters will be subject to the harvest regulations of the state where the project property is located.

10. BPA Credit: The Tribe shall support BPA's taking of the following protection, mitigation, and enhancement credit:

- (a) For having used BPA funds to purchase and manage property, BPA shall receive as a credit to wildlife mitigation under the Act an estimated minimum of 9,669 Habitat Units (HUs) based on evaluation of the land to be purchased and adjacent mitigation projects managed by other entities.
- (b) The Tribe will conduct HEPs for Downy Woodpecker, Song Sparrow, Yellow Warbler, Western Meadowlark, Mule Deer, Chukar, California Quail, and River Otter. The results of the HEPs shall be used to evaluate the full credit due. Should the actual HEPs result in a different number of HUs than is estimated in 10(a) above, BPA shall receive credit for the actual HUs determined.

Additionally, the Tribe agrees to obtain BPA's concurrence in its selection and evaluation of additional target species for the timber cover type present on the lands acquired. The additional species selected will also be counted in the project benefits.

- (c) For all properties: The parties may agree to conduct subsequent HEP studies at any time. The party requesting the study shall fund it unless the parties agree otherwise.
- (d) The Tribe agrees that BPA's expenditure of money is consistent with sections 4(h) and 10(e) of the Act. The Tribe shall support BPA's obtaining full credit for its expenditures with respect to protecting and managing existing habitat on the properties, and for habitat improvements when implemented on the properties, so long as BPA complies with the terms of this Agreement, including but not limited to BPA's obligation to provide funding for operation and maintenance of the properties necessary to maintain or provide positive wildlife and/or wildlife habitat benefits.
- (e) If BPA's wildlife mitigation responsibility is measured in acres, then BPA's responsibility to mitigate for wildlife shall be reduced by one acre for each acre protected under this Agreement when the habitat improvements agreed upon by BPA and the Tribe for the acre protected are implemented. If BPA's mitigation is measured in HUs then BPA's responsibility to mitigate for wildlife shall be based on a baseline analysis to be included in the Plan. Credit for habitat improved shall be based on the results of monitoring and evaluation activities delineated in the Plan. BPA may credit these HU's toward its mitigation duty for wildlife losses at any Federal Columbia River Power System project (1) agreed to by BPA, the Tribe and the Council, or (2) adopted by BPA consistent with the Northwest Power Act and applicable law. Provided, that if another crediting methodology is imposed by applicable law or by judicial decision, agreed to between BPA and the Tribe, and not overturned by any court of competent jurisdiction, that formula shall be used to recompute the credit provided in this part and the recomputed credit shall be used for all purposes, including the final determination of BPA's ultimate obligation to provide wildlife mitigation, protection and enhancement; however, in no event will any such recalculation affect BPA's obligations under this Agreement.

11. Limitation of Credit: The credit BPA obtains for the consideration paid to provide and maintain the project as wildlife habitat as required and provided in this Agreement shall not be affected or diminished as a result of the failure of the Tribe to carry out its obligations to maintain the properties as provided in this Agreement.

12. Binding Effect: This Agreement shall be binding on the parties and their assigns and successors. Either party shall have the right to enforce the terms of this Agreement as provided herein.
13. Dispute Resolution: BPA and the Tribe agree to submit in good faith any disputes regarding the implementation of this Agreement or the management of the properties to non-binding mediation. This provision shall be triggered when one party makes a written request for the other party to join in mediation. Within 30 days of this provision being triggered, the parties shall select a mediator, or if they are unable to select a mediator, each party shall select a mediator and the two selected will choose a third mediator who shall be the sole mediator. The parties shall use their best efforts to resolve the dispute in mediation. After a dispute has been in mediation for at least 60 days and there have been at least two mediation sessions, any party may initiate legal action to resolve the dispute. Except as provided in this part, pending completion of mediation no party shall initiate any legal proceeding except in aid of mediation.
14. Effective Date: This Agreement shall be effective when signed by the Chairman and Secretary of the Nez Perce Tribal Executive Committee as authorized by NPTEC resolution NP-96-608 (Attachment D); the Bureau of Indian Affairs; BPA's Group Vice-President of Environment, Fish and Wildlife; and BPA's Manager, Real Estate.
15. Contract Approval: If a court of competent jurisdiction finds that the portion of this Agreement that relates to the properties and its use or the ability of BPA to exercise its rights with respect to the property is unauthorized or not binding on the Tribe, this Agreement shall be terminated and the Tribe shall transfer any and all property rights in the Project and remit any remainder sums in the Fund to BPA, after which time the parties will have no further obligations to each other under this Agreement. Provided, that unless agreed to by the parties, the parties shall use their best efforts to enter into a new and binding agreement that carries out the intent of this Agreement. Any party may invoke the dispute resolution provisions of this Agreement to facilitate the negotiation of a new agreement.
16. Modification: The parties by mutual agreement may modify the terms of this Agreement. Any such modification shall be in writing signed by both parties.
17. Sovereign Immunity: BPA waives its sovereign immunity to the extent permitted by section 9(c)(5) of the Northwest Power Act, 16 U.S.C. § 839f(e)(5), for the purpose of any claim

or action for injunctive or declaratory relief by the Tribe arising out of this Agreement, and consents to suit in any court of competent jurisdiction. The Tribe waives its sovereign immunity for the purpose of any claim or action for injunctive or declaratory relief by BPA arising out of this Agreement, and consents to suit in any court of competent jurisdiction. The parties agree that at the time this Agreement became effective, the only court of competent jurisdiction would be a Federal court.

18. Applicable Law: Federal law shall govern the implementation of this Agreement and any action, whether mediated or litigated, brought or enforced.

19. Attorney Fees: In the event of litigation involving this Agreement each party shall bear its own costs and attorney fees, including those incurred on appeal.

20. Waiver: The failure of any party to require strict performance of any term of this Agreement or a party's waiver of performance shall not be a waiver of any future performance or of a party's right to require strict performance in the future.

21. Unexpended Funds: If the funds provided by BPA pursuant to paragraph 1 above are not depleted after acquisition of the properties, completion of the wildlife and vegetation inventories, the HEPs, and the development of the Plan, the Tribe may expend the remainder of the Fund for any costs associated with the management of the properties after obtaining BPA's concurrence.

22. Acquisition, Trade, Sale: If a sale or trade of real property interests would provide a net gain in HUs or aid in the fulfillment of the management objectives as stated in this Agreement and the Plan, then the Tribe may sell or trade any real property interest acquired with the Fund after ensuring the following conditions will be met:

- (a) concurrence by the BPA Fish and Wildlife Division Director,
- (b) the new real property interests are of equal or greater wildlife habitat value, as measured by a habitat evaluation procedure, to the species targeted in this Agreement, or aides in fulfillment of the Plan or facilitates management of real property already acquired, and
- (c) the Tribe will record a signed copy of Attachment C with all appropriate authorities, ensuring the real property interest being acquired through acquisition,

sale, or trade is permanently protected for wildlife and wildlife habitat as outlined in Section 4 of this Agreement

The Fund may be used to facilitate the acquisition, sale or trade or to perform HEPs related to it.

IN WITNESS WHEREOF, the parties have signed this Agreement below.

Bonneville Power Administration

By: _____
Alexandra B. Smith
Group Vice President
Environment, Fish and Wildlife

Date: _____

By: _____
John R. Cowger
Manager Real Estate

Date: _____

Nez Perce Tribe

By: _____
Samuel N. Penney, Chairman
Nez Perce Tribal Executive Committee

Date: _____

By: _____
Tonía Garcia, Secretary
Nez Perce Tribal Executive Committee

Date: _____

Reviewed By:

Bureau of Indian Affairs

By: _____
William G. Aubertin, Acting Superintendent
Northern Idaho Agency
Bureau of Indian Affairs

Date: _____

ATTACHMENT A

DESCRIPTION OF LAND OWNED BY
HELM RESOURCES INC.

ATTACHMENT A

DESCRIPTION OF LAND OWNED BY HELM RESOURCES INC.

ATTACHMENT B

DESCRIPTION OF AREA WITHIN WHICH
LAND ACQUISITION WILL TAKE PLACE

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ATTACHMENT B

DESCRIPTION OF AREA WITHIN WHICH LAND ACQUISITION WILL TAKE PLACE

ATTACHMENT C
COVENANT FOR RECORDING BY
THE NEZ PERCE TRIBE

ATTACHMENT C
COVENANT FOR RECORDING BY THE NEZ PERCE TRIBE

Covenant. This real property (interest) has been acquired by the Nez Perce Tribe with the assistance of Bonneville Power Administration (BPA), to help BPA in partially fulfilling its duty to protect, mitigate, and enhance wildlife habitat affected by the development of the Federal Columbia River Power System as required by section 4(h)(10)(A) of the Pacific Northwest Electric Power Planning and Conservation Act of 1980, 16 U.S.C. § 839 et seq. The Nez Perce Tribe made this acquisition backed by funds provided under a Memorandum of Agreement (MOA) between the Nez Perce Tribe and BPA (August 1996), which is incorporated by reference herein. To fulfill its promises to BPA under the MOA, the Nez Perce Tribe is recording this covenant.

The MOA and this covenant commit the Nez Perce Tribe, its successors and assigns, to use this real property (interest) for the public purpose of permanent protection, mitigation, and enhancement of wildlife and wildlife habitat, to allow reasonable public access to the extent the access does not interfere with the wildlife mitigation purposes of this acquisition, and to fully comply with the land management rules set out in the attached Memorandum of Agreement and any future management plan BPA and the Nez Perce Tribe subsequently agrees upon.

This covenant is meant to run with the land, providing permanent protection to the wildlife and wildlife habitat on behalf of BPA, its assigns and successors. However, the Tribe may revoke the covenant to permit a sale or trade of a real property interest pursuant to section 22 of the MOA.

By: _____
Samuel N. Penney, Chairman
Nez Perce Tribal Executive Committee

Date: _____

By: _____
Tonia Garcia, Secretary
Nez Perce Tribal Executive Committee

Date: _____

ATTACHMENT D

AUTHORIZING TRIBAL RESOLUTION

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ATTACHMENT D
AUTHORIZING TRIBAL RESOLUTION