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January 7, 2009

## DECISION MEMORANDUM

**TO:** Council Members

**FROM:** Mark Fritsch, project implementation manager  
John Shurts, general counsel

**SUBJECT:** Council decision on within-year project-funding request for *Oregon Fish Screens Project*, Project 1993-066-00 and in-lieu discussion

**PROPOSED ACTION:** Staff recommends that the Council support the request for \$198,302 for Fiscal Year 2009 to be added to the expense budget for Project 1993-066-00.

### BUDGETARY/ECONOMIC IMPACTS

The total requested amount is \$198,302 in expense funds in Fiscal Year 2009. This amount is in addition to the Fiscal Year 2008 - 2009 funding recommendations.

### BACKGROUND

On October 15, 2008, the Council staff presented the requests and reviewed the schedule for the within-year budget adjustment requests for the fourth quarter of Fiscal Year 2008. These fourth-quarter requests, reviewed in July, August, and September, will be treated as an amendment to the start-of-year budget for Fiscal Year 2009.

As part of these within-year adjustments, the Oregon Department of Fish and Wildlife (ODFW) requested \$198,302 in additional expense funds in Fiscal Year 2009 for Project 1993-066-00 to cover the anticipated loss of Mitchell Act funds. Project 1993-066-00 provides protection for ESA Threatened Mid-Columbia Steelhead and Bull Trout, and the State Sensitive Mid-Columbia Chinook, Westslope Cutthroat, and Redband Rainbow Trout, along with multiple resident fish species in the John Day, Umatilla, and Walla Walla basins, through the installation or replacement of out-dated fish-protection screens and passage devices on irrigation diversions (\$1,027,000 capital in FY '09) and then through the on-going operation and maintenance of those screens. At the same time, this project shares personnel, equipment, facilities, and expertise with the Mitchell Act-funded program to perform operation and maintenance on existing fish protection and passage devices. For this reason, while Project 1993-066-00 funded the installation of screens, it has had minimal expense program costs associated with operation

and maintenance (only \$10,000 recommended for FY '09). This is because of the support of the Mitchell Act funds, along with a separate ODFW cost share, to cover most of the o&m costs. The Mitchell Act contribution to the screen o&m costs is now being reduced, and so ODFW is seeking additional expense funds from Bonneville to maintain its ability to do the o&m on these screens.

Bonneville representatives and Council staff raised concerns that this request presents an “in-lieu” issue for Bonneville. At the Council meeting in Missoula, Montana on October 15, 2008, the Fish and Wildlife Committee noted that other within-year budget requests have also referenced the recent loss of Mitchell Act funding. Because of the complex relationship between Mitchell Act programs and funds and Bonneville’s funding of the Council’s fish and wildlife program, and because of the Council’s need to understand the implications of the loss of the Mitchell Act funds, on October 20<sup>th</sup> the Council sent a letter to Bob Lohn, NOAA Fisheries regional administrator, requesting a presentation regarding the status of the Mitchell Act funding in the Columbia River Basin. The Council specifically asked NOAA to address the implications and the magnitude of the loss of the Mitchell Act funds and the criteria used for apparent cuts to the Mitchell Act program.

In response to the letter, NOAA Fisheries staff made a presentation to the Fish and Wildlife Committee on November 18, 2008 titled *Mitchell Act Appropriations - Related to the Oregon Fish Screens Project*. Based on the NOAA presentation the Committee recommended that the Council defer a decision regarding the ODFW request in part to allow legal staff to prepare for a discussion with the Council about their current understanding of the distribution of Mitchell Act funds and the possible “in-lieu” issue the loss of those funds presents for Bonneville.

## **ANALYSIS**

It is important that these screens be maintained. The Council’s program has long supported the installation and refurbishing of numerous screens through the *Oregon Fish Screens Project*. The screens provide immediate and long-term protection for the natural production of both listed and non-listed anadromous and resident fish species in the John Day, Umatilla, and Walla Walla subbasins (and in the early years the Deschutes and Grande Ronde). The ISRP commented during the Fiscal Year 2007 - 2009 review that the project provides direct, long-term benefits for salmon and other aquatic species (ISRP document 2006-6). Providing fish protection at irrigation diversions by implementing effective fish screening devices and removing barriers and/or improving passage is a fundamental part of the program in many subbasins in the Columbia River Basin.

The actions implemented under this particular project include both new installation and replacement of outdated fish protection and passage devices on private irrigation diversions.<sup>1</sup> As outlined in the Fiscal Year 2007 - 2009 project proposal form, the project has installed 189 gravity fed diversion screens, six pump screens and six fish-ways. In addition, project personnel provide operations and maintenance to 315 gravity diversion screens and 125 pump screens.

The project received a favorable review from the ISRP for Fiscal Year 2007 - 2009. The Council in turn recommended Bonneville funding for the project at \$10,000 in expense and

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<sup>1</sup> During the mid-1990’s, NOAA Fisheries (NOAA) set new criteria and guidelines for fish protection needs of endangered fish species, this design criteria is still used today.

approximately \$1,064,000 in capital funds per year. The Council did so knowing the project would also receive o&m funding through the Mitchell Act program and a cost share from ODFW, receiving \$250,000<sup>2</sup> from ODFW and \$680,000 from Mitchell Act funds per year for Fiscal Year 2007 and 2008. In Fiscal Year 2009 the project will again receive the \$250,000 from ODFW, but it is anticipating receiving only \$481,700 in Mitchell Act funds. Hence, the request for additional funds from Bonneville in Fiscal Year 2009.

This project contributes to the cost shares associated with providing many of these fish protection and passage devices on private diversions.<sup>3</sup> Local watershed councils in the John Day, Umatilla and Walla Walla depend on this project to complement their restoration efforts, as do the other projects that are currently funded through the program (e.g., John Day Watershed Restoration, Project 1998-018-00).

For these reasons, the staff recommends that the Council emphasize to ODFW, NOAA and Bonneville that a way needs to be found to preserve the funding for the o&m on these screens. The obvious problem with turning to Bonneville for additional funds is that it may run afoul of the “in lieu” prohibition in Section 4(h)(10)(A) of the Northwest Power Act. That section provides:

*Expenditures of the Administrator pursuant to this paragraph shall be in addition to, not in lieu of, other expenditures authorized or required from other entities under other agreements or provisions of law.*

The in-lieu provision is not a matter of policy. It is a matter of law that prohibits Bonneville from funding an action in lieu of funds authorized or required from others. The prohibition applies even if the expenditure of Bonneville funds in the particular instance might seem a sensible policy, and it is a prohibition Bonneville ought not to assert unless the situation is quite clearly within its terms. The point of the in lieu provision is to ensure that Bonneville mitigation efforts and expenditures under the Power Act lead to additional mitigation in the basin, not just a reshuffling of the mitigation status quo, in which the actions end up the same as they would otherwise and just the funding source is different. The legislative history of the Power Act adds little but to restate the provision, with this one additional point of emphasis: “Other fisheries efforts outside this Act, for example, are expected to continue and to be funded separately.” (House Interior Committee Report at p. 45)

At least on the surface, the situation here with the Oregon Screens Project seems to present a classic in lieu problem. NOAA is authorized to use Mitchell Act funds for screens and other purposes, and has been using it for o&m on these screens. NOAA still is authorized to use its funds for this purpose – the Mitchell Act authorization and appropriation language has not changed. But the amount of Mitchell Act funds available no longer covers all the costs of all the Mitchell Act activities, and so NOAA is reducing the Mitchell Act funding allocated to certain activities (e.g., screens) in order to preserve funding allocated to other activities (e.g., production). Turning to Bonneville to replace the loss of Mitchell Act screen funds may seem a sound and even necessary policy, but it may also be said to be a Bonneville expenditure that is

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<sup>2</sup> Measure 66 (Lottery Funds)

<sup>3</sup> To comply with Oregon State Law 498.301.

now “in lieu of” an expenditure authorized and heretofore available from NOAA under the Mitchell Act. And if so, Bonneville is prohibited from using its funds in this way.

There are a couple of factors that complicate the in-lieu analysis. First, it is unclear how we ended up in a situation in which Bonneville provided the capital funding to install screens, yet another entity (NOAA under the Mitchell Act) provides the o&m funding, a factor that may now prevent Bonneville from funding o&m on the very screens it paid to have installed, even as the other funding is reduced. We assume there was some sort of agreement, formal or informal, between Bonneville and NOAA on how to divide the responsibility. If so, that agreement should still govern, and this may be a problem between federal agencies that they need to find a way to work out. We have asked this question of Bonneville, but do not yet have an answer.

Second, as simple as the in-lieu provision looks on its face, it can get maddeningly difficult to understand in application. Here, it is hard to understand the role of the in-lieu provision if we truly have a situation in which funding previously available to an activity becomes no longer available due to funding restrictions (i.e., the activity is no longer “funded separately”). If that is truly the situation, and it may or may not be here, can it be said that without the Bonneville funding we will *lose* mitigation, and thus the Bonneville funds are not in lieu but additional?

These are not questions that the Council is ultimately going to resolve. Bonneville will have to make the ultimate in lieu legal determination. We raise them only because we think there are reasons why the in-lieu prohibition may not so clearly apply in this situation after all.

Based on these considerations, staff believes that the Council’s recommendation to Bonneville should have these elements: First, the Council should recommend that Bonneville provide the additional expense funds for the screens in Fiscal Year 2009 as requested by ODFW *conditioned on* Bonneville being able to conclude that the in-lieu prohibition does not apply. The Council should request a written explanation from Bonneville if the agency concludes that the in-lieu provision does apply to prohibit Bonneville funding. Second, if Bonneville concludes that the in-lieu provision simply will not allow additional Bonneville funding, the Council should request that NOAA, Bonneville and ODFW meet and work out another way to ensure the restoration of other funds to the screen o&m as a priority expenditure. Finally, the Council should ask of NOAA and Bonneville that it find a way to fund the screen program in full in Fiscal Year 2010 and beyond, including full restoration of Mitchell Act funding if that is the only legal way to fund these screens.