

The Fish and Wildlife Lands Deskbook



Bonneville Power Administration's Deskbook for Fish and Wildlife Land Acquisition, Enhancement, Monitoring, and Enforcement Projects

Version 1.1, November 2016



Dedication

Dedicated to Jacilyn R. Margeson, Assistant General Counsel, whose guidance and expertise in real property law and policy made possible Bonneville's overwhelmingly successful fish and wildlife habitat protection and enhancement program.

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Acronyms

BPA	Bonneville Power Administration
BPI	Bonneville Purchasing Instructions
CBWTP	Columbia Basin Water Transaction Program
CE	Conservation Easement
CO	Contracting Officer
COTR	Contracting Officer's Technical Representative
CWA	Clean Water Act
CX	Categorical Exclusion (documenting NEPA compliance)
EA	Environmental Assessment
ECL	Environmental Compliance Officer (for BPA)
EIS	Environmental Impact Statement
ESA	Endangered Species Act
FCRPS	Federal Columbia River Power System
MV	Appraised Market Value
ISRP	Independent Scientific Review Panel
LIS	Land Information System (BPA Internal Software)
LMP	Land Management Plan
LUA	Land Use Agreement
MOA	Memorandum of Agreement
NEPA	National Environmental Policy Act
NHPA	National Historic Preservation Act
NOAA	National Oceanic and Atmospheric Administration
PSA	Purchase and Sale Agreement
ROD	Record of Decision
SHPO	State Historic Preservation Officer
THPO	Tribal Historic Preservation Officer
WAC	Wildlife Advisory Committee (of the Northwest Power and Conservation Council)



Why this Deskbook?

This deskbook is tailored specifically for projects that involve acquiring an interest in real property as part of the Bonneville Power Administration's ongoing efforts to fulfill its fish and wildlife mitigation responsibilities under the Pacific Northwest Electric Power Planning and Conservation Act and the Endangered Species Act. Successful, cost-effective, and efficient acquisitions further BPA's mission by helping achieve strategic objectives and fulfill mitigation agreements. The unprecedented reach of these mitigation efforts—guided by the Northwest Power and Conservation Council and its Columbia River Basin Fish and Wildlife Program, biological opinions, and numerous long-term agreements with states and tribes—demands that BPA staff be aware of their individual roles as stewards of these precious resources and ratepayer funds. Only with this awareness can BPA collaborate effectively across organizational lines to maximize the value of its efforts. This deskbook is one way BPA hopes to improve how it does business to more effectively deliver on the agency's mission and vision regarding fish and wildlife and maximize the value of this mitigation program.

This deskbook helps guide internal BPA staff in the steps necessary to successfully acquire, manage, monitor, and protect real property interests for the benefit of fish and wildlife. While it was developed for internal agency use, **nothing in this deskbook is protected or privileged information, so any part of it may be shared externally.**

- **Real property** includes lands and anything permanently affixed to lands, such as buildings and anything permanently attached to them, and water rights, with exceptions.
- **Real property interest** means a right in real property held by a certain person or entity. Types of real property interests are varied, and occur in a spectrum between fee title interest (ownership of all rights in real property) and less-than-fee title interest. Less-than-fee real property interests include, among other things, conservation easements, land or water right leases, right-of-way easements, and covenants running with the land.

This deskbook uses “**acquisition**” to refer to the purchase of real property interests, or to the process by which such a purchase occurs. The guidance for acquisition in this deskbook reflects Federal legal requirements, some applicable state statutory requirements, best standards and practices from the land

conservation community and over 25-years experience at BPA funding land acquisitions for fish and wildlife mitigation.

BPA project managers, contracting officers, and contracting officers' technical representatives (**COTRs**) working on a project involving an acquisition funded in whole or in part by BPA – even a small part – should follow the guidance in this deskbook. Whether a project includes 1 acre or 1000, or benefits resident fish, anadromous fish, or wildlife, this deskbook serves as general guidance and provides the underpinnings for BPA to fund acquisitions.

This deskbook guides acquisitions where project sponsors already have a memorandum of agreement (**MOA**) with BPA covering acquisitions and those who don't. For sponsors with an MOA, BPA should rely on the MOA to continue to guide acquisitions, unless amended, and this deskbook should guide anything that has been omitted from or is not clearly stipulated in the MOA. While this deskbook does not change the legal commitments in those existing agreements, it does provide the most up-to-date guidance on the Federal laws and BPA guidelines covering mitigation projects that involve real property interests.

The practices and procedures described in this deskbook do not constitute a final agency action but are instead intended solely as guidance. For projects where the sponsors do not have an MOA with BPA – probably the majority – following the procedures in this deskbook may eliminate the need for an MOA and cover everything necessary to successfully complete an acquisition from pre-acquisition planning to post-acquisition monitoring. And while this deskbook outlines BPA's real property acquisition processes for fish and wildlife projects in written format for the first time, for the most part the substance is not new. Thus, staff members who have worked on real property acquisitions in the past will find most of the guidance familiar.

The deskbook provides BPA staff the information they need when discussing duties and restrictions on property use with project sponsors and property owners. The deskbook includes:

- Templates, including template MOAs and easements, to help reduce project transaction time by clarifying and standardizing document preparation and interpretation.
- Information needed to facilitate data gathering in Pisces, BPA's land information system of records (aka **LIS**), and other appropriate databases, to account for and monitor fish and wildlife acquisitions.



Reading Tips

- Terms used in this deskbook for the first time will appear in bold font, and will be followed by a definition. Commonly used acronyms are defined in the List of Acronyms, after the table of contents.
- Sections outlined in a box explain specific issues in greater detail, provide detailed explanations or background information, or encourage a best practice.

Projects Covered by this Deskbook

This deskbook applies to all land acquisitions that BPA funds for fish and wildlife mitigation purposes. Whether the acquisition fulfills a fish or wildlife FCRPS objective, or is consequent of the ESA or Northwest Power Act, the guidelines and processes in this deskbook apply. This deskbook covers all mitigation projects that include BPA securing or acquiring any real property interests including water rights, fee title acquisitions, conservation easements, covenants, and other property interests. It does not apply where BPA funds other habitat-related mitigation activities but does not acquire a real property interest. For example, when BPA funds a culvert replacement, large woody debris installation, or riparian fencing, it generally does so through a contractor, and neither BPA nor the contractor acquires a legal interest in the underlying real property.

The primary real property interests covered in this deskbook include the following:

1. **Fee ownership** means buying the whole property. Fee acquisitions involve BPA funding a sponsor – usually a tribe, state or Federal agency, or non-governmental entity – to acquire property in fee title. Sponsors then grant BPA a conservation easement and access rights to the property.
2. **Conservation easements** are a permanent, non-possessory interest in real property imposing limitations or affirmative obligations on a landowner for conservation purposes. The restrictions remain even when the ownership changes. BPA funds sponsors to acquire easements and in return the underlying land owner grants BPA rights of entry and enforcement.

3. **Covenants** are restrictions placed on a property which are binding on the original landowner as well as successors in ownership. Covenants funded by BPA are conveyed by deed and recorded. Such deeds may include an **executory interest** for BPA. An executory interest vests ownership in BPA if certain conditions arise. For example, an executory interest may be triggered if habitat values fall below a predetermined minimum level.
4. **Life estates** refer to acquisitions in fee title that allow the seller or others to use or remain on the land until his or her death. This right cannot be passed on to an heir or an assign.
5. **Leases** give a person or entity the right to use the land or building for a specific time period, usually in exchange for compensation and create a lessor and lessee relationship.
6. **Water rights** establish the legal right to use water for purposes authorized by law – e.g., instream flow for fish and wildlife habitat – and can be conveyed by both operation of law (i.e., fee title purchase of the appurtenant real property to which the water right is attached) and individual purchase (i.e., purchase of water rights separate or severed from the land).

A **contract** or **MOA** is not a real property interest. BPA typically has a contract in place with sponsors and partners on a mitigation project as a companion document to help structure the transaction, define roles and responsibilities, and establish commitments.

Existing Policies Remain in Place

This deskbook relies on BPA’s existing policies. The following policies remain in effect and unchanged by this deskbook.

- **Bonneville Purchasing Instructions.**¹ These procurement guidelines control BPA’s acquisition of goods and services. BPA follows the “bip-ee” (**BPI**) in its fish and wildlife contracts providing for pre- and post-acquisition services on fish and wildlife habitat projects.
- **Capitalization Policy.**² This policy allows BPA to capitalize land acquisitions where the acquisition retires a known portion of an

¹ <http://www.bpa.gov/corporate/business/bpi/>

² <http://efw.bpa.gov/IntegratedFWP/FW%20Capitalization%20Policy%202011-4-04.pdf>

established fish or wildlife mitigation debt.

- **In Lieu Policy.**³ This ensures that acquisitions comply with the prohibition in the Northwest Power Act that prevents BPA from funding mitigation that other entities are responsible for.



A BPA attorney holding a mandible upside down.

- **Wildlife Crediting Policy.**⁴ This applies to wildlife habitat acquisitions unless expressly agreed otherwise. All BPA wildlife agreements either call for 1:1 credit or, in the case of the Willamette Wildlife Agreement, for example, set acreage requirements instead of using habitat units or crediting ratios. Absent other arrangements, this policy applies to all fish or wildlife habitat acquisitions made with BPA funds. In most cases, BPA and the project sponsor expressly address crediting in a letter or agreement related to the acquisition.
- **Tribal Policy.** BPA developed a policy in 1996 for consultation and coordination with federally recognized Indian tribes affected by BPA's work.⁵

Taking a Business-Like Approach to Land Acquisitions and Habitat Management

Land acquisitions comprise a significant portion of BPA's past and continuing fish and wildlife program expenditures. Consequently, BPA is obligated to invest on behalf of ratepayers to ensure what is being purchased provides real and lasting value to fish and wildlife. The positions described below provide a foundation for supporting the land acquisition elements of the fish and wildlife program.

³ See, e.g., BPA's 2007-2009 Fish and Wildlife Program decision documents.

http://efw.bpa.gov/IntegratedFWP/docs/2007/FY07-09_Decision_Enclosure_revised_2_26_07.pdf

⁴ <http://efw.bpa.gov/IntegratedFWP/WildCredMar02.pdf>

⁵ <http://www.bpa.gov/news/Tribal/Pages/BPA-Tribal-Policy.aspx>

- Each land acquisition that BPA funds must provide demonstrable or estimable value for fish or wildlife. Simply put, the Northwest Power Act directs the Administrator to “protect, mitigate, and enhance” fish and wildlife and their habitats, so every acquisition project under the program must help fulfill this obligation.
- Acquisitions should provide for long-term or **permanent habitat protection** and the means for achieving it. Absent a compelling reason to secure a real property interest for some limited duration rather than in perpetuity, acquisitions should include permanent, perpetual protection. BPA’s mitigation responsibility presumably lasts as long as the Northwest Power Act and the **Federal Columbia River Power System (FCRPS)** dams remain. The dams will have a finite life, but we don’t know how long that is. To ensure the mitigation BPA funds today is secure until the agency’s obligations expire or have been fulfilled, land acquisition protections should be permanent.
- The Northwest Power Act calls for mitigation for the effects of the FCRPS on fish and wildlife. These actions often provide both direct and indirect benefits to human communities. While the Northwest Power Act focuses expressly on fish and wildlife, BPA does not ignore the communities, particularly the tribes, deeply affected by the FCRPS dams. BPA embraces land acquisition projects that not only protect and mitigate fish and wildlife but also restore these resources to the communities and tribes that lost them. This approach protects tribal rights and promotes tribal sovereignty and independence.⁶
- Most successful land acquisition projects include public participation. Acquisitions acquired in fee, as well as some easements, often ensure appropriate **public access**. BPA or the sponsor provides **public notice** prior to an acquisition, especially to local governments, agencies, tribes, and local utility customers. Where it doesn’t interfere with the fish and wildlife purposes of the acquisition or its safe and effective management, BPA encourages project sponsors to include public access to the property as an integral part of the land management plan for each acquisition.

⁶ Although tribes are one of the largest sectors of BPA contractors for fish and wildlife mitigation work, the contracts are initiated as fish and wildlife mitigation to help BPA comply with the Northwest Power Act, ESA, and other statutes. Like any contractor, the tribes benefit from the employment opportunities, training, and income BPA projects provide. These projects also provide ancillary value of particular importance to tribes—such as the ability to purchase in-holdings within reservation boundaries or reestablish access to cultural resources. Because these contracts are primarily to protect and enhance fish and wildlife they are not considered contracts “for the benefit of Indians” as such contracts are defined in other statutes, such as the Indian Self-Determination Act, 25 U.S.C. § 450f.

- Land ownership liabilities – that is, the responsibility for all incidents of ownership and indemnity – remain with the entity that owns the real property. Sponsors bring many motivations and interests – beyond simply protecting fish and wildlife habitat – when they propose BPA fund a land acquisition. States and tribes in particular actively seek BPA funding because they derive ancillary social, political, cultural, and economic benefits from owning and managing land and its resources. BPA supports these other values to project sponsors from the acquisitions provided the primary focus of both acquisition and management is to protect fish and wildlife habitat. In addition, as land owners, project sponsors control access and management in ways that can increase liability and the costs of ownership beyond what BPA’s mitigation purposes require. Consequently, sponsors or landowners must assume all liability for all incidents of ownership.

Pre-Acquisition Steps

The steps necessary to close on an acquisition encompass requirements covering both Federal and state law. BPA’s acquisition process reflects sound business practices and follows recommendations from the Council. These steps have become more numerous and detailed over time for two reasons. First, BPA has added steps, such as an initial intake call, to help identify and minimize problems earlier, and maximize the likelihood of a successful acquisition. Second, legal requirements and acceptable industry standards have changed. BPA needed a more formal and consistent approach to both incorporate best management practices and ensure full legal compliance for each transaction. The pre-acquisition steps discussed in this section track and build on Work Element 5 – Land Purchase and/or Conservation Easement found on **PISCES**, BPA’s fish and wildlife contract management database which is available for free to the public.⁷

The table on the following page contains a list of pre-acquisition steps.

⁷ <http://efw.bpa.gov/contractors/pifaqs.aspx>

	Step/Deliverable	Description	Lead Entity	TIMEFRAME IN ONE-MONTH (30-DAY) INCREMENTS													
				1	2	3	4	5	6	7	8	9	10	11	12		
1	Submit completed intake form	Submit intake form and maps/aerial photo of the property	Sponsor														
2	Conduct intake call	Discuss acquisition; identify involved parties and their roles; and review process, timelines, and potential issues	All														
3	Provide copy of Land Acquisition Handbook	Share handbook, appraisal review guidelines, templates or examples with acquisition sponsor	BPA														
4	Submit preliminary title report to BPA	Provide prelim title report	Sponsor														
5	Develop relocation plan, if needed	BPA will develop relocation plan if there are eligible tenants on the property	BPA														
6	Determine if boundary survey is needed	Review legal description and determine if boundary survey is needed	BPA														
7	Conduct boundary survey	If legal description is not adequate or if boundaries will change, conduct survey and submit draft survey to BPA for review	Sponsor														
8	Assign BPA Federal Appraisal Reviewer	BPA assigns a Federal Appraisal Reviewer to answer questions and/or collaborate with appraiser	BPA														
9	Determine how best to acquire water rights	If water rights are in the process of being confirmed, they may need to be purchased in a separate transaction	All														
10	Negotiate MOA, if needed	Develop MOA or revise existing MOA if needed	All														
11	For conversation easement acquisitions, negotiate easement terms and conditions	Negotiate easement	All														
12	Conduct Phase 1 assessment and submit to BPA for review w/ findings	Conduct Phase 1 ELA and submit to BPA. If needed, conduct additional assessments	Sponsor														
13	Site clean-up	Clean up any hazardous waste issues identified in the phase 1 assessment, etc.	Sponsor/ Landowner														
14	Complete appraisal and submit to BPA for review	Submit appraisal to BPA for review. BPA's review process takes approximately 120 days.	Sponsor														
15	Complete voluntary sales agreement	Confirm with landowner that the transaction is voluntary	BPA														
16	Draft purchase and sale agreement	Draft PSA and submit to BPA for review	Sponsor														
17	For fee title acquisitions, negotiate easement terms and conditions	Negotiate no-cost easement to be held by BPA	All														
18	Complete baseline report	Complete baseline and submit to BPA for review	Sponsor														
19	Clear title	Discuss encumbrances and remove as required	All														
20	Conduct NEPA review	Conduct NEPA review, including ESA and cultural resources review	BPA														
21	Complete public notice process	Send notification letters to advise landowners and other interested parties; Run ad in local papers; This step must be completed 15 days prior to closing (preferably earlier)	BPA														
22	Pre-945 Check-in	Check in to make sure that all due diligence is completed or on track for 945 review. Title/legal description certified by BPA Surveyor	All														
23	Conduct final title review (aka 945 Review)	All documents must be final or near final in order for BPA to conduct the 945 review	BPA														
24	Receive authorization to spend funds	Obtain final F&W management approval and arrange for wire transfer	BPA														
25	Submit escrow instructions	Review and submit escrow instructions to title company for closing	All														
26	Close acquisition and record applicable documents	Recording of applicable documents	All														
27	Send copies to BPA	Send certified copies of closing documents, etc to BPA	Sponsor														

Timing. Acquisitions using Federal funds are time consuming. Project managers should remind sponsors early in discussions with sellers that they're working with Federal funds and with those funds come numerous procedural steps. Some acquisitions need extra time to clear the title; others have improper or flawed legal descriptions and require a survey. And BPA also uses property acquisition funding as a budget management tool, funding more acquisitions when other projects under perform and fewer when they over perform. A legally binding closing date should be coordinated in advance with BPA and not be established until BPA completes its review of the preliminary title report and approves the appraisal. Sponsors should inform sellers of these conditions early in the process to avoid unrealistic expectations and disappointment about closing.

A. Contracting. As applicable, sponsors should ensure that they have a current funding contract with BPA that covers the pre-acquisition. If the pre-acquisition work leads to a purchase, BPA will provide its share of acquisition costs provided through escrow, and not the sponsor's contract, at closing.

B. Initial Intake Call. Immediately upon identification of a potential acquisition and an interested seller, and prior to negotiations with the owner, the sponsor and BPA project manager should contact Real Property Services, the BPA environmental lead (environmental compliance and pollution abatement), public involvement, Legal Services, and Tribal Affairs to discuss project details and confirm the acquisition process and steps. Appendix III lists points to cover in an initial intake call.

This call and the checklist will inform early decisions regarding whether to pursue the property or encourage the sponsor pursue other alternatives. Issues that would cause BPA to decide to discontinue the attempt to acquire a property include, but are not limited to, the following examples.

- Properties ineligible for Farm Service Administration funding because of wetland filling or agricultural practices on highly erodible soils.
- Properties with hazardous wastes and toxic contaminants, noxious weeds and invasive species, or cultural resources that would require significant remediation.
- Certain clouds on title – that is encumbrances that would undermine the fish and wildlife purposes of the acquisition.
- Property recommended to mitigate for a dam that BPA has no mitigation responsibility (e.g., Idaho Power Company's Hells Canyon Complex) or has been fully mitigated (e.g., the Dworshak dam).

Jurisdictional Management. BPA is a Federal agency within the U.S. Department of Energy. Thus, BPA – like any other Federal agency involved in land acquisition and management – takes only jurisdictional management and control over a property. Actual ownership is vested in “the United States of America and its assigns,” where title is reviewed according to the standards set forth by the U.S. Department of Justice. Consequently, properties already protected by conservation easements or other similar restrictions funded by another Federal agency rarely provide additional demonstrable value to fish and wildlife habitat and the acquisition wouldn’t help fulfill BPA’s statutory mitigation responsibilities or reflect fiduciary responsibility to the rate payers.

C. Internal BPA Work. Historically a portion of the sponsor’s project budget provided by BPA is used to fund certain internal tasks that BPA staff perform to facilitate the acquisition process. Those tasks have involved assistance from Real Property Services – title and appraisal review, relocation assistance, and surveying; and Environmental Compliance – NEPA, ESA, environmental land audits, and cultural resources assessments. BPA does not charge the project budget for support from General Counsel, Public Affairs, or the Fish and Wildlife Division. BPA may need to charge the project budget to pay outside contractors assisting in this work. Initially, the BPA project manager works with the sponsor and develops appropriate work orders, contracts, and task orders.

D. Corporate Finance Review. Obtain corporate finance review of acquisitions that propose to use capital as opposed to expense dollars. BPA’s Financial Services office decides whether a project meets the agency’s capitalization policy.⁸ Project sponsors should work with the project manager to provide Financial Services an accurate description of the project to determine if it meets the capitalization criteria.

E. Preliminary Title Report. The preliminary title report provides ownership information, a legal description and a list of recorded encumbrances, such as easements, covenants, liens, and rights of way that affect the real property. It is important to obtain and review the title early on, in conjunction with Real Property Services and sometimes Office of General Counsel, to spot time-consuming issues that could slow or thwart the acquisition. For example, if a property lacks a proper legal description then a survey, boundary line adjustment, or quitclaim deed may need to be

⁸ <http://efw.bpa.gov/IntegratedFWP/FW%20Capitalization%20Policy%2011-4-04.pdf>

performed, prepared, reviewed, and recorded prior to closing to both ensure that the legal description is appropriate and that the encumbrance is lifted from title.

Along with the preliminary title report, sponsors should provide a topographic map showing the project area outlined in a format that allows verification of the legal description. This map needs to include property boundaries in relation to section, township, and range lines and any other features, such as roads, creeks, or lake shores that are part of the legal description. The map also needs to be at a scale sufficient to depict distances and features adequately to corroborate the written narrative description of the property.

F. Water Rights. Sponsors should work with the project manager to complete a **water survey form** (Appendix IX) in Pisces, and provide appropriate documentation supporting any water rights certificates, claims, permits, or licenses appurtenant to or applied to the property to support the statements made in the form. The form documents the existence and extent of legal water rights. If any water rights appurtenant to the property are proposed for exclusion from the purchase, BPA will work with the sponsor to assess the effects of not obtaining the water rights. The sponsor should explain why the water rights are not and why an owner's retained use of such rights will not adversely impact the conservation values



BPA is trying to protect. In some cases, an extent and validity determination may be required before acquisition of the water rights. Sponsors may also need to work with Real Property Services and General Counsel to adequately describe the water rights obtained or excluded from the purchase, for purposes of legally describing the water in the deed conveying the land, and in any purchase and sale agreement language.

Split Transactions for Water Rights. Properties with water rights critical to their success may need to be split into two transactions, with one closing for the land and one for the water after the water rights have been unambiguously established and documented, preferably by a state agency that oversees water rights.

G. Site Visit. Project managers should work with sponsors to ensure that all BPA staff who need to see the property have the opportunity to visit it early in the acquisition process. Staff who usually need to visit sites include Real Property Services, General Counsel, Public Affairs, and Environmental Compliance, as well as the Fish and Wildlife Division project manager.

H. Land Surveys. The cornerstone of an acquisition is the property's legal description, and the best legal descriptions are usually based on surveys. Without a legal description that meets U.S. Department of Justice and BPA standards, BPA will not fund an acquisition. BPA's Real Property Services must, at a minimum, review and approve all legal descriptions for proposed acquisitions – the sooner in the process that legal description issues are submitted to BPA for review, the sooner that issues can be spotted and addressed. BPA expects new or updated surveys for all acquisitions involving any of the following:

- Where legal descriptions do not close – i.e., the description does not describe a polygon that goes from point of origin around the property boundary and back to the point of origin.
- Where the title or other evidence indicates that the boundaries are in dispute.
- Where the sponsor contemplates any improvements to the land – e.g., structures, fences, roads, or trails along boundaries.
- Sites where the acquisition involves part of a larger property and new boundaries or tax parcels are being created or changed.
- When the property will be managed in distinct zones or for multiple purposes – e.g., an agricultural use zone and flood plain restoration zone or a building envelope.

The title evidence should include or be accompanied by a plat or plan, based on a survey by a licensed professional surveyor, sufficient for review by an attorney to locate the land described in the title evidence. Any encroachments or rights of way, on or over the land, should be shown or noted on the

survey. Survey work should be performed under the direction of a licensed professional surveyor, and the ultimate product should be suitable for recording as determined by BPA review. Surveys should be done according to county and state standards and should show easements of record and occupation lines. Sponsors should anticipate that BPA will need at least 60 days prior to closing to review any survey depicting land rights in which BPA has, or will have, a legal interest. For a complete list of Survey delivery standards please see Appendix XXIV.



I. Finalize MOAs, cost sharing arrangements, and other agreements. An MOA is a contract. Do BPA and a sponsor need a contract for a given project? While this deskbook may eliminate the need for many agreements by explaining the processes related to land acquisition and management, at times an MOA may further the goals of BPA and the sponsor and eliminate confusion about roles and responsibilities. Contact BPA's Office of General Counsel to inquire about developing a new agreement or reviewing an existing agreement for specific requirements of the acquisition.

BPA Funds Used for Cost-Share. Project sponsors and other Federal agencies often ask whether BPA can provide the non-Federal cost share in another agency's grant program. The answer will vary based on the Federal agencies involved.

BPA is a Federal power marketing agency within the U.S. Department of Energy. Instead of receiving annual appropriations from Congress, BPA funds its operations with revenue earned from its power and transmission marketing activities. Though these revenues originate from ratepayers rather than taxpayers, BPA's funds are Federal dollars, in part because BPA deposits its revenues into a special fund within the U.S. Treasury.

Many BPA projects involve sponsors who obtain funds from other Federal agencies. The grant programs run by the other Federal agencies typically call for a "non-Federal cost share" to complete the funding package for the project. BPA believes its funds retain their Federal character whether provided directly to another agency by BPA or through a mitigation partner. Only the granting Federal agency, however, can decide if its program accepts BPA funding as non-Federal funds. If the granting agency decides BPA funds are non-federal, then BPA can make its funding available to the mitigation partners to use as the non-Federal cost share.

WARNING: Funds provided by BPA do not meet the criteria for non-Federal funds for most programs administered by agencies within the Department of the Interior. To qualify for those programs, a statute must expressly authorize that agency's program to use BPA funding as a non-Federal match. Projects under the North American Wetlands Conservation Act cannot use BPA funds for either a non-Federal cost share or as "pooled" funds. Presently, only two Department of the Interior programs consider BPA funds for non-Federal cost share, based on express statutory language: the Yakima River Water Enhancement Project Act and the Fisheries Restoration and Irrigation Mitigation Act.

J. Conservation Easements. Many project sponsors propose conservation easement acquisitions for BPA to fund. Conservation easements vary in the restrictions and affirmative obligations placed on the underlying land owner's use of the property. Some conservation easements approach habitat protection with a **working landscape** perspective which allows timber harvest, farming, or grazing, for example, but in a manner and at a rate that still ensures protection of high quality fish and wildlife habitat. Proceeds are typically used to operate, maintain, and enhance the property. Other easements essentially restrict all activities that would harm or degrade any of

the **conservation values** – the site-specific features that make the property valuable mitigation habitat. The conservation easement may, however, allow activities to restore or enhance habitat that could adversely affect habitat temporarily for the benefit of species in the long-term (e.g., removing a dike to restore floodplain habitat).

Conservation easements become part of BPA’s mitigation portfolio in one of two ways. First, a sponsor can propose a project that calls for the acquisition of a conservation easement, without also acquiring the underlying fee. In such instances, the sponsor or another entity holds the easement and BPA is granted third party enforcement rights. See Appendix VII. Second, a sponsor can propose a project that calls for acquiring fee title of the property. In such instances, the sponsor almost always grants a conservation easement to the United States of America, acting by and through BPA, over the property. See Appendix V.

While not required, BPA may agree to develop a programmatic MOA with sponsors who plan to acquire more than a single conservation easement with BPA funds.

The MOA will make the concept-to-closing steps for the acquisitions clear, define post-acquisition obligations, and also provide a template for future easements customized to that entity and the kind of projects it plans to propose.

While each easement is unique, they all include provisions to protect the ratepayers’ investment in the property as well as the focal fish and wildlife habitat. BPA developed standard protective provisions after studying the easement language recommended by the Land Trust Alliance, an entity that provides advice and support to the land trust community. The Alliance tailors its guidance to meet the Internal Revenue Service’s requirements for tax deductible easement donations.⁹ BPA believes that its ratepayers deserve no less value for their dollar or protection of their investment than the taxpayers. In addition, BPA includes provisions that, based on experience, improve the clarity, coverage, or enforceability of the easement. Consequently, each easement should have all of the following elements. The template in Attachment VI illustrates and describes these elements more fully.

1. BPA’s real property interests in the easement – as a grantee or third party with rights of enforcement – must be conveyed to the **United**

⁹ 26 U.S.C. § 1.170A-14(h).

States of America and its assigns in a general warranty deed. Deeds should recite the true consideration, contain a legal description pre-approved by BPA of the property and the easement, and not include any reservations, exceptions, or clouds on title unless pre-approved by BPA. All Federal agencies take real property interests in the name of the United States and in accordance with DOJ title standards, and BPA is no exception.

2. The easement should perpetually protect the conservation values (e.g., fish and wildlife habitat) on the property.
3. If a project proposal is characterized as providing dual benefits—i.e., if it benefits both fish and wildlife—then the easement needs to protect both.

Dual Fish and Wildlife Benefits. Regardless of whether BPA funds a project using dollars identified for fish or for wildlife, projects often provide dual benefits, that is, they benefit both. If a project provides dual benefits, ratepayers deserve all credit that accrues—even if that credit isn't readily identifiable or agreed to at the outset. Where wildlife projects provide fish habitat attributes that help meet program goals and objectives, ratepayers expect to receive fish credit as appropriate.¹⁰

4. Easements must protect the conservation values from **material harm or interference**.

¹⁰ See, e.g., Wildlife Crediting Forum Report on Forum Deliberations January 2011—May 2011 adopted by the Council in September 2011. <http://www.nwcouncil.org/fw/wcf/>

BPA protects the conservation values in part by restricting any activity that would “materially harm or interfere” with them. This is defined as any action “significant



enough that a prudent person would expect [the grantor] to use every reasonable effort to avoid the adverse effects. It will include both permanent negative effects to habitat or on the life cycle of any species” listed as protected in the easement and any action that would violate a statute or regulation, such as the ESA. The term is intended to provide a consistent standard throughout the easement or agreement by which to gauge the significance of activities on the property. It is also intended to avoid confusion about allowable activities, particularly in working landscape easements or when restoration actions are contemplated by the parties to the easement. Restoration actions often temporarily interfere with the conservation values identified in the easement. The material harm standard distinguishes the trade-off between this kind of temporary harm, incurred for the long-term habitat health, and permanent degradation of habitat.

Because the significance of harm caused by an activity could be cause for disagreement between the parties, BPA will have sole discretion when deciding whether a particular harm rises to the level of “material.”

5. The conservation easement should permit **future BPA transmission facility development**. See Appendix VI. When BPA funds a fee acquisition with ratepayer dollars, it should receive the future right to acquire a transmission easement on such property at no additional cost. Why? By paying for the entire value of the property, BPA has already paid for the all the rights associated with the property once, and should not pay again at a later date if it needs a transmission

easement. Moreover, the number of conservation properties that already have transmission facilities show that properly sited and managed transmission facilities are compatible with conservation stewardship.

While these rights are critical to BPA's purposes, some entities worry that granting this right could either conflict with state statutes governing land in conservation or affect a project's Federal tax-exempt status. BPA, however, retains its condemnation authority over the property and in this way ameliorates such concerns. Moreover, the easement language does not increase the likelihood that BPA would site a transmission facility on the property. For these reasons, reserving future transmission rights in a conservation easement does not diminish that easement's value or the protection it provides. To the contrary, the language BPA uses to reserve future transmission rights explains how BPA will work with the fee owner and resource managers. Future facilities would be sited in a manner least intrusive to the conservation values being protected, and BPA will work to mitigate the adverse affects of the new facility. If BPA had to resort to condemnation, the sponsor would have less opportunity to influence how the new facility will be developed and maintained.

Under special circumstances, BPA may decide to forgo or modify the language it uses to reserve future transmission facility rights in an MOA or an easement. These are case-by-case determinations.



6. BPA generally expects that each acquisition or where appropriate, group of acquisitions, should have a **land management plan** that elaborates on how the rights and restrictions on the property will be exercised and honored. The template in Appendix XIII, developed with regional fish and wildlife managers, describes issues that land management plans should consider.

A project might not need a management plan if the easement includes restrictions and retained rights that need no further elaboration. Typically, such projects involve high quality habitat that remains in private ownership and which contemplate no new or different habitat management actions.

BPA retains the right to review and approve draft plans, or draft amended plans, before they become final. Draft plans also usually need to involve the public as described in greater detail in section IV.

K. Covenants. Covenants may be acceptable substitutes for conservation easements in rare circumstances. Covenants can be either affirmative or restrictive. Affirmative covenants commit the grantor to do something. Restrictive covenants prohibit certain actions. An affirmative covenant might, for example, commit a duty to protect conservation purposes. A restrictive covenant might prohibit development to single family dwellings. Covenants may be established for a limited duration or in perpetuity. In either case, the covenant binds the landowner and subsequent landowners, heirs, and assigns. Covenants can be included in the deed conveying fee, be recorded as a separate deed, or be a statement on a recorded plat or survey.

Covenants are rarely sufficient for BPA's fish and wildlife habitat mitigation purposes. Covenants are creatures of Old English law, and may have some legal vulnerabilities related to enforceability or survival of the covenant itself (e.g., the "privity of estate" requirement). For example, historically the person benefitting from a covenant had to own land adjacent to the parcel being restricted by the covenant. A covenant protecting the conservation values for BPA could, in some circumstances, be unenforceable if BPA didn't own land adjacent to the burdened property.

Modern legal developments emphasize blending covenants, easements, and servitudes into "equitable servitudes" so that the Old English rules no longer apply. Thus, some states, such as Washington, now treat conservation easements and covenants the same – as long as the less-than-fee interest in question is for conservation and open space purposes. Being cautious while this area of the law settles, BPA strongly favors conservation easements as the first tool in the mitigation toolbox. Given the difference in state laws and specific projects, BPA has not developed a template covenant to use for habitat acquisitions. Habitat project sponsors interested in covenants should be prepared to justify their preference for a covenant and address BPA's concerns. BPA does use covenants on some real property acquired for hatcheries because the parcels tend to be small and have little or no habitat value. Hatchery project sponsors should see Appendix VIII for a sample of a covenant for a hatchery.

L. Uniform Relocation Assistance and Real Property Acquisition Policies Act (Uniform Act). When BPA funds land acquisitions for fish and wildlife mitigation purposes, it is providing Federal financial assistance and

thus has certain responsibilities under the Uniform Act. Project managers and project sponsors should work together as early as possible in the first stages of an acquisition and coordinate with BPA's Real Property Services regarding Uniform Act obligations. At a minimum, before appraisals or environmental land audits begin, the project sponsor or the BPA project manager should notify Real Property Services of anyone other than the landowner who lives on or uses the property for any purpose, including grazing, mining, or agricultural use. If necessary Real Property Services will develop a Uniform Act compliance plan.



M. Complete appraisal to Federal Yellow Book standards.¹¹ The project sponsor should select and hire an appraiser familiar with Federal “Yellow Book” appraisal standards, established by the U.S. DOJ, which BPA follows. BPA staff can recommend appraisers in an area if a sponsor desires assistance with selection. For conservation easements, appraisers need special training and must perform the appraisal consistent with guidelines in Appendix IV.

Purchase and Sale Agreements. Sponsors that execute purchase and sale agreements before receiving BPA approval of the appraisal do so at their own risk – and the risk is committing to a selling price greater than what BPA will fund. For more information, see Section U below.

¹¹ Uniform Appraisal Standards for Federal Land Acquisitions at <http://www.justice.gov/enrd/land-ack/Uniform-Appraisal-Standards.pdf>

N. Review Appraisal. An assigned BPA Federal appraiser (BPA appraiser) reviews all appraisals submitted for fish and wildlife acquisitions. The reviews follow “Yellow Book” standards and the standards in Appendix IV. Appraisals not meeting these standards will be rejected. BPA appraisers require at least 120 days for an appraisal review – and the 120 days does not include the time it takes to fix any issues with the appraisal. Sponsors hoping to close an acquisition on or before the end of the Federal fiscal year, September 30, must therefore submit appraisals to BPA no later than June 1. Submitting an appraisal by June 1 does not, however, guarantee closing by September 30.

O. Hazardous Waste. Project managers need to coordinate with project sponsors to complete an environmental land audit (ELA) – i.e., a hazardous waste assessment. BPA can perform these audits or the project sponsor can hire its own contractor. If BPA does not perform the audit, BPA environmental staff will need to review and approve it. BPA typically does not release funds from escrow to the seller until any hazardous waste remediation activities or other recommendations identified in the audit are certified complete by the sponsor and inspected by BPA.

P. Environmental Compliance. BPA conducts environmental review for each acquisition. This includes compliance with requirements and procedures under the **National Environmental Policy Act (NEPA)**, the **National Historic Preservation Act (NHPA)**, the **Endangered Species Act (ESA)**, the **Clean Water Act (CWA)**, and other related laws.

NEPA – Simply funding an acquisition and transferring title doesn’t by itself have the potential to adversely affect the environment. So providing acquisition funds to a sponsor does not represent a commitment to undertake actions that may significantly affect the human environment. Likewise, funding an acquisition does not commit BPA to enable additional fish and wildlife mitigation; whether to fund additional mitigation involves a separate, later decision. At the time of acquisition, there also is often little to no available information concerning the type and nature of potential mitigation that could occur, and this limits BPA’s ability to analyze environmental effects. Consequently, BPA usually conducts NEPA review for the acquisition phase of a project separately from the mitigation and stewardship phases.

1. BPA’s action of providing funding for an acquisition typically falls within a categorical exclusion (CX) under NEPA.¹²

¹² Under the Department of Energy NEPA regulations, BPA typically applies either category B1.25

2. For each acquisition, a determination that it qualifies for a CX would be documented in an environmental clearance memorandum prepared by BPA's project environmental lead. All such environmental clearance memorandums are posted on BPA's external website and documented in Pisces under the NEPA section.
3. Acquisitions vary, however, as do subsequent mitigation projects, and they can present unique circumstances that may affect the proper NEPA compliance approach for that action; Consequently, BPA examines each proposed acquisition to ensure full NEPA compliance.
4. For any separate and subsequent fish and wildlife mitigation activities on a property that has been acquired by a sponsor, BPA's approach to NEPA compliance depends on the nature, extent, and timing of the proposed activities (see Section IV for more information on NEPA requirements for mitigation activities).

Public Notice and Public Involvement

Projects involving acquisition of real property interests always include public notice and sometimes also include public involvement. Public notice is just that: letting the public know about a forthcoming acquisition. BPA has a practice of providing the public, local governments, and nearby landowners of notice of new acquisitions. This is a good neighbor practice, but it's not legally required. Public involvement—the chance to participate in a decision making process—can be a legal requirement either imposed by BPA in a project sponsor's contract or by NEPA.

The chart and explanatory notes below provide general guidance on when public notice is appropriate and when public involvement is required.

(specific to property transfers for fish and wildlife habitat protection and management) or B1.24 (general transfer of property where use remains unchanged) to acquisitions. See, Subpart D, 10 C.F.R. § 1021.

	Public Notice	Public Involvement
Acquisition	Yes	No
Land Management Planning	Yes, when complete and posted on PISCES; may also be posted on BPA's public website.	Sometimes, if changes to the existing land use are being proposed and may cause significant effects on the environment.
Stewardship Agreement	Yes, done through environmental compliance (CX) notice	Yes, if any reasonably foreseeable stewardship actions trigger an EA or EIS
Ground disturbing restoration activities	Yes, if the action triggers a CX, an EA or EIS	Yes, if the action triggers an EA or EIS

- Acquisitions do not trigger public involvement because buying land does not create any environmental effects. Acquisitions are generally covered by categorical exclusions or the Fish and Wildlife Implementation Plan Programmatic EIS and its record of decision.
 - BPA posts its categorical exclusions on its external environmental compliance web site and the NEPA validation under the Fish and Wildlife Implementation Plan EIS in PISCES, so there is public notice of the acquisition and the NEPA coverage.
 - BPA also posts letters to adjacent landowners and other interested parties on its external website and purchases display ads in the local papers to notify the public of a forthcoming acquisition.
- Land Management Planning must consider the terms in the underlying agreement and easement for each acquisition, which will almost always require at least resource agency, tribal, and local government involvement. Public involvement should be part of the land management planning process if actions are proposed that may cause significant effects on the environment and thus trigger an EA or EIS to comply with NEPA. In addition, BPA may decide to conduct additional public involvement based on the type and location of the project.

- Stewardship agreements generally perpetuate the status quo and fund routine O&M actions that are included in the Fish and Wildlife Implementation Plan record of decision. If ground disturbing actions are reasonably foreseeable, BPA may either categorically exclude the actions—which may be done simultaneous with the acquisition—or prepare a supplement analysis, EA or EIS. Depending on the action and the NEPA compliance, public involvement may be required.
- Ground disturbing actions such as restoration activities may trigger the need for an EA or EIS. If so, the public will be notified and involved in the planning process.

Q. Cultural Resources. BPA must comply with the National Historic Preservation Act, which addresses cultural and historic resources. Historic resources may include, but are not limited to, archaeological sites above or below ground, rock images, structures, or artifacts, as well as cultural resources. Cultural resources include traditional cultural properties, which are associated with practices and beliefs of a living community.

BPA environmental staff lead NHPA compliance efforts. Staff archaeologists, working with information provided by the project sponsor and project manager, conduct a background literature search for the property to determine whether a cultural resources survey of the property will be necessary. Surveys are generally not required in advance of land acquisitions, because there is limited potential for ground-disturbing activity on the site. If a survey is necessary, it is conducted following development of plans or projects funded by BPA that include ground disturbing activity.

If a cultural resource survey is not required, compliance with NHPA is complete and no further action is necessary. If a reconnaissance-level survey becomes necessary, BPA's archaeologist and project manager will coordinate that effort with the sponsor. If a full survey is necessary, sponsors



must cooperate with BPA and its contractors as necessary. If the sponsor is a Tribe, the Tribe's cultural resources staff may contract with BPA to undertake the survey. As the agency proposing the Federal action, BPA remains responsible for review of the information and consultation under the NHPA. BPA makes and effects determination, and identifies appropriate mitigation, in consultation with the parties mentioned above.

R. Endangered Species Act. BPA activities involve a range of projects, some which have the potential to "take" or "harm" a species or habitats protected under the ESA. Usually, however, acquisition alone lacks the potential to harm a listed species, so ESA compliance is unnecessary until the land management planning and implementation phase of a project. See Section IV.

S. Other Environmental Laws. The location of a parcel, its existing condition, or other sensitivities could trigger the need for BPA to comply with other environmental laws such as the Clean Air Act, the Coastal Zone Management Act, and the Migratory Bird Treaty Act.

T. Baseline Documentation Report. The entity holding an easement as grantee should prepare the baseline report. BPA will typically contract with the project sponsor or grantee to prepare the report. For example, if a tribe is buying property in fee and BPA will hold the easement, BPA should prepare the baseline report. Baseline reports must document existing property conditions at the time of acquisition which include natural and man-made features and uses and relevant biological conditions on the land proposed for acquisition. The report should reflect the purposes for which the property is being acquired, and whether, or to what extent, the property currently exhibits the desired conservation values. In addition, the report should identify any existing limiting factors that may adversely affect the potential to maximize or retain its conservation values. Following the outline provided in Attachment XII will streamline and expedite the report drafting and review process. Funding for the report will come from the project budget. Reporting costs rarely exceed more than a few thousand dollars. See also Appendix XIII for a baseline acknowledgement form.

Documenting Fish Survival Benefits. For Accord projects, the sponsor and project manager should confer to determine if a fish survival benefit review or assessment needs to be produced.

U. Purchase and Sale Agreement. The sponsor should obtain a draft purchase and sale agreement from the seller after BPA approves the appraisal. BPA will review and comment on the draft as appropriate. All

sponsors should consult the template purchase and sale agreement provided in Appendix XII.

Purchase and sale agreements should always be contingent on two things. First, on BPA's processes and reviews, which may include but are not limited to NEPA, cultural resources, environmental land audits, hazardous waste response activities, title review, and permitting. Second, these agreements depend on the availability of funding.

Sponsors with experience securing acquisitions using BPA funds may choose to use their own purchase and sale agreements. Project managers should suggest others follow the sample provided in Appendix XII. BPA recommends that entities seek BPA review of draft agreements. Whether BPA reviews the draft agreement, the sponsor remains solely responsible for the commitments in the agreement.

Funding guarantees – or not... BPA will not make a legally binding commitment to fund a particular acquisition until it completes the Department of Justice title review *and* BPA either: (1) accepts, by signature, the conveyance document, or (2) provides a fully executed contract. Sponsors proceed at their own risk when they contract to purchase property, or purchase property, with the expectation of being reimbursed by BPA prior to one of the two conditions, above, being met. It is important for both sponsors and potential sellers of property to understand that BPA funding for pre-acquisition activities is an important step in the property acquisition process but does not guarantee funding for purchasing the property.

Why BPA doesn't reimburse property tax. BPA's longstanding position is that it does not fund or reimburse entities for payments to cover property or property-related excise taxes. Property taxes are payments in advance for the use and enjoyment of the property in the coming year, and as such are an incident of ownership that the owner needs to plan to pay for. Excise taxes, such as the one in Washington State, are dictated by statute and apply to all sellers. A project sponsor who agrees in an option or purchase and sale agreement to pay taxes does so at its own risk and should not expect BPA to reimburse these tax payments.

V. Public Notice. Public notice should take place a minimum of 15 days prior to closing on an acquisition, but many of the steps take several weeks to complete. Several months before closing, the project manager and environmental compliance staff will begin working with BPA Public Affairs staff and the project sponsor to develop a landowner and interested party

letter and map describing the property and purpose for the acquisition. If the project is unique or otherwise exceptional, then BPA may work with the sponsor to develop a fact sheet describing the purchase, its conservation value, and the partnerships that made it possible.

One of the purposes of the Northwest Power Act is to provide public participation in the development of the fish and wildlife program. This is to ensure that the program provides environmental quality in a cost-effective manner. BPA carries this spirit of public involvement into the program implementation process by coordinating with state, local, and tribal governments on actions that may affect them. Consequently, prior to making an acquisition, the project manager needs to ensure the sponsor is assisting BPA in providing **public notice** of the upcoming action. Acquisitions, however, do not require **public involvement**, e.g., the opportunity to provide input and influence site use and management decisions. Instead, BPA works to assist sponsors in providing public involvement when developing and amending land management plans.

Time for Public Notice. To ensure that BPA fulfills its commitments for providing low rates consistent with sound business practices, responsible environmental stewardship, and accountability to the region, BPA's regional relations – including tribal, power, and tribal account executives and staff – need time during the public notice process to contact stakeholders including elected officials, tribal governments and customers in proximity to the acquisition. Project managers and BPA public involvement staff should alert regional relations staff of pending acquisitions several weeks before publishing the public notice.

BPA provides public notice of all acquisitions.¹³ This notice informs the public of the proposed acquisition prior to it taking place. There are three primary modes of notice: 1) placement of newspaper ads in the community where the acquisition will take place; 2) mailing letters and maps to adjacent land owners and other interested parties; and 3) posting other information and maps on BPA's website. While BPA's notice does not initiate a public comment period, if anyone provides comments or expresses opinions about an acquisition prior to closing, BPA will consider them.

BPA usually places newspaper ads in two or more local publications at least 15 days before closing. A typical ad identifies BPA, the nature of the

http://www.fws.gov/refuges/realty/pdf/DOJ_2001.pdf

acquisition (e.g., fee or easement), the purpose of the acquisition, the sponsor and its partners, and the BPA website where additional information is posted. In the case of an easement acquisition, the ad may also identify the fee holder. Ads also include contact numbers for the project manager and the sponsor.

Letters to adjoining and nearby landowners, along with the map and other information, must be mailed at least 15 days prior to closing. BPA's environmental staff will develop a distribution list including all landowners within one-quarter mile of the property, interested parties, county commissioners, and affected tribes. Sample letters and maps are on BPA's website at <http://efw.bpa.gov/IntegratedFWP> and in Appendix II. Letters should not include personal information about property owners or individuals on the mailing list.

Coordinate Media Releases. With the public notice comes the opportunity to prepare for issuing press releases and press packets celebrating a new acquisition. Project managers should serve as a liaison and coordinate sponsors, Public Affairs staff, and environmental compliance staff to develop messages and materials that all participants in the project will use. Projects funded in whole or in part by BPA should highlight BPA's role and contribution in all written and electronic materials as well as in spoken statements. No information should be released to the media without prior BPA review.



W. U.S. Department of Justice (DOJ) Title Review.

Because BPA is obtaining certain real property interests in the name of the United States when it funds fish and wildlife habitat acquisitions – BPA is either obtaining a conservation easement or rights of enforcement and access to a

conservation easement – BPA must confirm that the United States is receiving sufficient title to those interests. This review, which is delegated to BPA by the Department of Justice (“DOJ”) and Department of Energy, involves identifying and eliminating title objections relating to outstanding rights, liens, or claims which, if not eliminated, might possibly defeat or adversely affect the title or cause losses to the United States. Analysis may include, for example, legal access, mineral rights, and other encumbrances to title or

reserved rights in the chain of title. Once the majority of the steps in the acquisition process have been completed and conservation easement is at or near proposed final form, BPA's Office of General Counsel will review the sufficiency of title, with support from BPA's Real Property Services (including proposed deeds, other information in the file, and the title report), and produce a preliminary title opinion in accordance with DOJ Title Review regulations and standards.¹⁴ See Appendix XVIII for a list of documents to provide for DOJ review. BPA has no authority to pay for an acquisition until the DOJ review process is completed and any problems with receiving sufficient title have been addressed. For all acquisitions, the DOJ review needs to include the nearly final draft easement and any draft deed intended to convey fee to avoid delays from repeated reviews.

Mineral Rights

Outstanding mineral interests on a property can be problematic for fish and wildlife acquisitions. They most often exist because property owners do not always hold rights to minerals and related materials (e.g., gravel) on or under the property, as mineral and other subsurface rights can be sold or reserved separately from the land itself. In the Columbia River Basin given historic and current interests in oil, gas, gravels, and hard rock minerals, it is not at all uncommon to have subsurface mineral rights "severed" from the surface ownership and held by a third party. Mineral interests are frequently held by railroads, mining and oil companies, and individuals.

If a title review shows outstanding mineral interests on or under the property, the owner of that interest may have express or implied rights to explore and extract (e.g. drill or dig), and remove those materials from the land without requiring permission from the property owner or easement holder. In addition, the property owner or easement holder may have limited ability to require mitigation or protection of property interests affected by the exercise of those mineral rights. Because the exploration or removal of minerals from a property (or near the property) can adversely affect title and cause loss to the government, plus interfere with the fish and wildlife purposes of the acquisition where there is potential to materially harm the fish and wildlife habitat or conservation values on the property, the project sponsor should undertake the following steps for *every* property proposed for acquisition.

- 1. Identifying outstanding mineral interests.** Valid mineral rights held

¹⁴ http://www.fws.gov/refuges/realty/pdf/DOJ_2001.pdf

by others will sometimes be identifiable from the preliminary title report for a property (see Section I.E). But a title search may not always reveal mineral interests, because many are unrecorded or recorded in a place not normally searched by title companies in review of the public record (e.g., BLM Office of Mineral Rights). Field observation to establish whether there are mineral interests associated with a parcel is important for the pre-acquisition and acquisition phases. Project managers, real property staff, and sponsors should confirm firsthand whether a property has any evidence of mining exploration or operations, or whether there is exploration or operation nearby that may affect the property. Knowledge of the history of the area may enable sponsors and managers to identify issues (e.g., coal mining history or gravel mining in recent past in nearby area). Real Property Services and the Office of General Counsel and BPA's staff geologists can help ensure identification of any mineral interests in relation to the property. In addition, BPA's Office of Pollution, Prevention, and Abatement may need to review findings or conduct a joint site visit in order to ensure that historic or current mining activities on or near the property do not pose a liability for remedial action and cleanup. Because identifying and addressing mineral rights can take time and may affect the project's feasibility, mineral rights should be identified as early in the acquisition process as possible.

- 2. Evaluating the effect of outstanding mineral interests.** If mineral rights held by a third party are identified, the Office of General Counsel, staff geologists, and Real Property Services will help the project manager interpret the nature and extent of the mineral rights held by others. The Office of General Counsel will review the field and record evidence as part of the title review inquiry, with assistance from the project manager and Real Property Services, to determine whether the rights, if exercised, could interfere with the conservation purpose of the property acquisition, adversely affect title, or cause loss to the United States. The General Counsel will also work with Pollution, Prevention, and Abatement to determine whether historic or existing exploration or mining on or near the property is an environmental factor that could pose hazardous waste liability for the agency.

If the mineral rights are not of a type or location to impact the fish and wildlife habitat values, and not likely to pose an environmental factor for liability purposes, this can be documented as part of the title review process with the Office of General Counsel (see above, "DOJ Title Review" process), and BPA can in some instances still fund the

acquisition with the mineral right encumbering the property.

If, however, the project manager, in consultation with the General Counsel and Real Property Services, determines that the rights, if exercised, could adversely impact the purposes for which the property is proposed for acquisition, the next step is to evaluate the likelihood that the site would actually be mined.

Where there is inadequate information to draw a reasonable conclusion as to risk, the project manager or Real Property Services, working with General Counsel, should consult BPA's staff geologist, whose services can be obtained through the task order to help undertake additional investigations and evaluate the risks. A sponsor may be required to obtain a mineral remoteness report from an outside contractor.



3. Addressing risks from outstanding mineral interests. If it is determined that an outstanding mineral interest, whether or not the right is actively being exercised, has the potential to interfere with the fish and wildlife purposes of the acquisition, BPA considers a variety of options, including:

- Asking the mineral rights holder to voluntarily relinquish its rights.
- Purchasing the mineral rights and prohibiting mining as a condition of BPA funding for the property.
- Entering into a non-disturbance agreement or similar easement with the mineral rights holder.
- Having the sponsor agree to compensate BPA with additional habitat at no cost should the mineral rights be exercised and permanently impair the fish and wildlife values that were intended for acquisition.
- Engaging state agency processes to have the mineral rights extinguished (e.g., this is practiced in Washington State).

- Declining to fund sites where high acquisition costs create a high risk that the value of the ratepayer investment could significantly diminish.

These options and others will be considered on a case-by-case basis and in consultation with the project manager, Real Property Services, and the Office of General Counsel. Depending on the circumstances, General Counsel may need to secure a waiver from DOJ before BPA can close the acquisition.

X. Obtain Mitigation Credit. Obtain an estimate of any applicable **mitigation credit** from the project sponsor. This applies whether the crediting currency used is acres, habitat units, stream kilometers, survival benefit units, or other metrics.

Ecosystem Service Credit

Mitigation and recovery actions can create or increase ecosystem services. These services can include things like sequestering carbon dioxide, purifying air or water, and reducing water temperature. An ecosystem services market provides a structure for buying and selling units of environmental benefit, known as credits.

BPA will support other entities cost-sharing on projects and taking an appropriate share of ecosystem service credits. For its investment, BPA will take fish and wildlife credit against its statutory obligations. Other entities may claim, and then trade or sell, other remaining credits.

Projects where ecosystem service credits may come into play should incorporate the cost-share and contribution plans as early in the project development phase as possible but no later than the land management and restoration planning stage. Prospective cost-share partners who seek credit for ecosystem services must provide the necessary maps, photographs, inventories, crediting formulas, and calculations for BPA to make an informed decision on the proposal. BPA will work with prospective cost-share partners to document and certify the credits sought. However, the project sponsor and partner remains solely responsible for securing their credit. BPA assumes no liability for any entity's credit except its own.

In developing proposals for ecosystem service credit projects, project managers should alert cost-share partners to plan on the following:

- Written approval from BPA and any other easement holder on the project.
- Strict compliance with applicable easement and mitigation agreement terms.
- That the cost-share partner will bear the cost, responsibility, and liability related to establishing, documenting, and maintaining its ecosystem service credits.
- No credit may be double counted or in any way jeopardize BPA's credit.

Y. Escrow instructions are sent to the Escrow agent approximately a week prior to the closing date agreed to by BPA. BPA will provide escrow instructions to the sponsor and to the escrow company. BPA will provide its own instructions to the escrow company.

Realtor Commissions and Fees. Sales commissions and agent fees are often part of real property transactions and are a seller paid cost that BPA does not cover. Employees of sponsors should not receive sales commissions or other compensation besides ordinary salary from BPA-funded acquisitions.

Z. Payment: Market Value. BPA uses appraisals to help establish the market value (MV) of properties proposed for acquisition. Sellers often seek more than MV. But BPA does not pay more. Instead, out of consideration to the ratepayers and other buyers in the area whose prices may be affected by overinflated comparable properties, the fish and wildlife program does not pay more than MV for an acquisition. Moreover, even when BPA contributes less than the full purchase price, the total of all contributions should not exceed 100% of the MV.

BPA recognizes that extraordinary circumstances may occasionally necessitate or compel a purchase at a price in excess of MV. These extraordinary circumstances are rare, and BPA will consider each individual project on a case-by-case basis. The decision to pay more than MV is at BPA's sole discretion. All justifications for funding more than MV must be supported by a written justification prepared by a Real Property Services specialist and be approved by BPA's Realty Officer. Generally, such exceptions should be justified by some compelling ecological or biological function of a mitigation strategy that can only be effectively satisfied by the purchase.

Condemnation of Property for Mitigation. To foster community support for its mitigation effort, BPA has funded only voluntary acquisitions when purchasing property for fish and wildlife program purposes. To comply with the Uniform Act provisions covering voluntary transactions, BPA or its contractor informs the seller in writing of what it believes to be the property's market value and that BPA will not use its power of condemnation to acquire the property if negotiations fail to result in a voluntary agreement. If a seller and project sponsor believe that condemnation will benefit the project, they should work with the project manager, Real Property Services, and General Counsel to explore whether a friendly condemnation could be appropriate.

Miscellany at Closing. By closing, BPA will need to document that the following steps have all been completed.

- 1. Complete Certificate of Inspection and Possession.** As part of its obligations to comply with U.S. DOJ title standards, a BPA representative, typically from Real Property Services, will conduct a site visit to inspect a property, where the results of inspection are documented in a "Certificate of Inspection and Possession." This site visit and documentation of it should occur within six months before closing to inform the DOJ Title Review. If the inspection and report haven't been completed before closing, they should be done at closing.
- 2. Signature Authority.** Project managers must ensure that sponsors provide proof of authority to sign a deed and purchase a real property interest as part of BPA's mitigation program. The mitigation partner should identify any applicable statute, constitution, bylaws, or articles of incorporation that authorize the partner to make the legal commitments necessary to consummate the deal. Then BPA needs the partner to show how it will comply with the applicable law when signing the land acquisition documents. For example, a tribe could provide a web link and citation to its constitution and the chairman's authority to commit the tribe, and then provide a signed council resolution approving the chairman to sign the agreement securing a particular acquisition.
- 3. Complete Acquisition Deliverables** (after funding has been wired to escrow and escrow closes); e.g., **record easement and deliver copy to BPA.** BPA will make a final inspection of the property and

will close and scan the file after all final documentation is obtained; i.e. final closing statement, final title policy, recorded deeds, etc.

- 4. Signatures.** The seller needs to sign the deed exactly as his or her name appears as the grantee in the prior conveyance to him or her; and account for any unavoidable difference by a recital identifying the seller from the previous conveyance. In a community property state, if the seller is married, the spouse needs to sign the deed as well thereby conveying his or her contingent interest to the buyer – even when the spouse is not named on the title – and acknowledge he or she is doing so for the consideration paid.

SAMPLE LANGUAGE for a purchase and sale agreement where the spouse is not a party to the agreement:

Spouse of Jane Buck: For good and valuable consideration, and intending to be legally bound, the undersigned, husband of the seller Jane Buck, approves and supports the sale and agrees to join his wife in executing and acknowledging this warranty deed.

Signed: John Doe, spouse of Jane Buck

II. Acquiring Water Rights

BPA funds water rights acquisitions, both surface and ground water, to protect instream flows, provide water for hatcheries and acclimation sites, aid in habitat restoration, and create and protect vegetation and wetlands for wildlife.

BPA typically funds water acquisitions and transfers to apply the rights instream to improve fish habitat. Sometimes BPA purchases and holds water rights in the name of the United States, but more often it funds project sponsors to secure these water rights through contracts with water right holders. For some projects water rights are transferred instream through state agency processes and held in a state trust water system. In other projects the water rights may be held by the owner of the water right or an irrigation district, but may be contractually and legally dedicated to mitigation purposes. In most cases where BPA does not own the water rights, it secures the ability to control the rights through contracts, leases, or easements.

As discussed above in section I, for land acquisitions, sponsors will typically complete a Water Survey form¹⁵ (Appendix IX) and submit appropriate supportive documentation describing any water rights appurtenant to the lands to be acquired and how they plan to use the water rights, particularly if the project sponsor



does not plan to transfer the water rights instream for fish and wildlife purposes. Water rights appurtenant to lands acquired for fish purposes will generally be transferred instream into trust through the applicable state water agency.¹⁶

Acquiring Instream Flows

BPA usually secures water rights for instream purposes using Work Element 164¹⁷ for Acquire Water Instream as part of the **Columbia Basin Water Transactions Program (CBWTP)**. It involves the purchase or transfer of water rights for instream purposes, such that the water rights remain in the stream to benefit fish and wildlife. Sponsors seeking to secure water rights instream will coordinate with the CBWTP process which will partner them with an entity qualified through the water transaction program. The project will proceed through the water transaction program review process using criteria approved by the Council through its Independent Scientific Review Panel.¹⁸ There are some exceptions in which the CBWTP might not be used. For example, when water will be donated for instream water rights or when a project transfers water conserved in an irrigation efficiency project into an instream right. Sponsors

¹⁵ The water survey form is available at: <http://www.efw.bpa.gov/IntegratedFWP/WaterSurveyForm.doc>.

¹⁶ Water is transferred instream through the Oregon Water Resources Department in Oregon, the Washington Department of Ecology in Washington, the Idaho Water Resource Board in Idaho, and the Montana Department of Natural Resources in Montana. BPA utilizes the Columbia Basin Water Transactions Program (CBWTP) qualified entities to enable project implementers to put water instream from BPA funded fish and wildlife projects.

¹⁷ <http://www.cbfish.org/WorkElement.mvc/Summary/164> or http://efw.bpa.gov/contractors/work_categories/work_elements/we164.aspx; see also, Work Element 154 for Develop and Negotiate Water Right Transactions.

¹⁸ See Work Element 164 and www.cbwtp.org for additional information on water transactions and the Columbia Basin Water Transactions Program.

should coordinate with BPA project managers beginning with the initial intake call to determine the most appropriate means to secure instream water rights for their projects. If the project involves transferring water rights instream, the CBWTP will usually prepare the transaction program checklist and associated documentation.

Acquiring Land with Water Rights

For land acquisitions that also include water rights, as identified in the Water Survey form (Attachment X), the BPA Office of General Counsel will work with the BPA project manager and project sponsor beginning with the initial intake call to describe and quantify the water rights and their planned use in any applicable interagency agreement, conservation easement, and purchase and sale agreement. Typically, these transactions proceed as a part of the land transaction.

If the land transaction includes water rights destined for instream protection and use, BPA will generally require that a qualified entity¹⁹ working under the Columbia Basin Water Transfer Program help assist the project sponsor in completing the transaction checklist²⁰ and the state agency process to transfer water rights. When a sponsor uses a qualified entity to assist with the water component of an acquisition, BPA funds the qualified entity from the water program project budget or the acquisition project budget, depending on the scope and scale of the work involved. In most land transactions with significant water rights, BPA will expect the appraisal to reflect separate values for the land and the water. In a two part closing, BPA typically funds the land component at closing, and then a subsequent payment is made through escrow when the state completes an extent and validity determination or otherwise recognizes the instream transfer.

For All Land Acquisition Projects Including Water Rights:

- Because the sponsor seeks funds for its project from United States through BPA, the land acquisition project involving water rights must follow all the steps for acquiring a real property interest with Federal funds. In addition, project managers must be sure sponsors complete the following additional steps for water right acquisitions prior to closing.
- Sponsors need to document that the water right and point of diversion exist in the capacity needed to fulfill the underlying purpose of the project. BPA will not make an unconditional, binding funding

¹⁹ A qualified entity is one pre-certified under the Columbia Basin Water Transaction Project to develop and implement water projects in the fish and wildlife program.

²⁰ http://www.cbwtp.org/jsp/cbwtp/partners/FinalChecklist_04_06_09.doc - Link to CBWTP water transaction checklist form

commitment on a project until it receives satisfactory documentation of the water right and agrees on the planned uses of the water rights. This may include information on the extent of use of the water right.²¹

- If the project needs a change in the time, place, or character of use of the water right, then the sponsor should secure approval for those changes from the applicable state agency prior to closing. These processes usually take several months to complete, so sponsors should incorporate this in their project timelines.
- The sponsor or underlying owner must secure BPA approval before transferring, changing a point of diversion, changing the purpose of use, or otherwise significantly changing any protected property water right.
- The deed for the water rights should include the seller's warranty that he or she has not forfeited, abandoned, or diminished the water rights.
- Sponsors must show that the acquisition will secure all the buildings and equipment needed to exercise the water right and fulfill the purpose of the project. For example, if water needs to be pumped for a habitat restoration project, the sponsor must ensure that the acquisition covers the seller's pump and distribution system.

WARNING: Even properly completed appraisals may not provide a firm or verifiable value of the water right. Depending on the nature and complexity of a project, BPA may require more due diligence; e.g., having the seller obtain a finding from a state water agency regarding the validity and extent of a water right. In such circumstances a multi-part process, and carefully drafted purchase and sales agreement, may be necessary to ensure BPA funds remain in escrow until the state agency renders its findings.

²¹ Previous use of the water right, particularly during the previous five years, is an important component in the quantification of the extent of a water right. Evidence of water use, such as gauge records, aerial photos, crop records, etc. for the acreage covered under the water right is important for these determinations.

State Law Governs Water Rights. Each Northwest state has different laws determining the acquisition, use, and disposition of water rights. The water related steps in this deskbook build on the states' requirements for water rights and add elements tailored to inform Fish and Wildlife Program project sponsors and better achieve its goals in a transparent, accountable, and cost-effective manner. Nevertheless, sponsors may need to work with Real Property Services and General Counsel to adequately describe the water rights obtained or excluded from the purchase, for purposes of legally describing the water in the deed conveying the land, and in any purchase and sale agreement language.

III. Acquiring Property In Relation to BPA-Funded Fish Facilities

As a general rule, fish or wildlife mitigation projects involving the transfer or acquisition of a real property interest need to follow this guidance. Some fish projects in particular do, however, present different issues or include different requirements when compared to wildlife projects. For example, permanent hatchery facilities often do not need extensive deed restrictions to protect the habitat in the portions of the property not used for hatchery purposes because the hatchery uses are prescriptively determined by the physical built structures. This section describes several commonly funded facilities and ways to approach their acquisition.

Projects securing real property interests for fish facilities – particularly smaller tracts with little fish or wildlife habitat value – can often forgo the following steps in the acquisition process.

- **Baseline documentation:** If habitat protection is not part of the project, a baseline documentation report isn't necessary. If habitat protection is part of the project, the baseline report may exclude the area occupied by the hatchery facilities.
- **Land Management Plan:** If BPA owns the facility, it will grant use rights to the sponsor or operator through a Land Use Agreement (see a sample at Appendix XXI) or possibly a memorandum of agreement. Where the sponsor or other entity owns the site, BPA will establish or formalize its expectations for management in a MOA or statements of work for the operation and maintenance of the facility. Thus, a separate land management plan is generally unnecessary.

- **Conservation Easement:** For larger permanent facilities, BPA may use a conservation easement focused on hatchery actions. The hatchery easements are usually less detailed than those for habitat protection projects. For other, smaller permanent facilities, a covenant may be adequate.

Congressional Approval. Under the Northwest Power Act, fish and wildlife projects involving construction that costs \$2.5 million or more and with an expected life of 15 years or more must receive congressional approval prior to construction. Construction commences when ground is broken. BPA requires these capital construction projects go through the Council's Three-Step Process which may take several years to complete before construction may begin.

Water Rights

Perhaps the most important real property interest related to fish projects, water rights must be secured in the type and amount necessary to operate the facility. BPA General Counsel, Real Property, and Fish and Wildlife staffs work with project sponsors to ensure that any transaction involving water rights will secure all the water necessary to fulfill the project's objectives. Section II above discusses water rights acquisition in detail. By the end of Step 2 in the Council's Three-Step process, the project sponsor needs to show that the water and associated water rights necessary to ensure a project's success are available and can be secured.



Fish Hatcheries

Given the cost to build a hatchery and its expected useful life, BPA usually acquires the site in fee or through long-term renewable leases (e.g. 50 years). The decision depends on many factors. BPA proceeds on a case-by-case basis in coordination with the project sponsor and resource managers to determine the length of the lease.

Fish Acclimation Sites

Fish acclimation facilities may be permanent or temporary and involve extensive construction and infrastructure – or very little. Acclimation sites may be leased, secured by easement, or purchased in fee depending on the size, location, intended use, and landowner willingness to sell or lease. Despite the range of possible site configurations for acclimation, all share similar processes insofar as land acquisition and management are concerned.

Generally, the acquisition process for acclimation sites is the same as for any other project. The real property interests acquired need to be adequate to fulfill the project purposes. For example, a short-term lease may suffice for a site needed for a two-year experiment, but fee title or a long-term easement might be

necessary for permanent facilities associated with a long-term project. Project sponsors and managers should coordinate with Real Property Services to determine the appropriate real property interest necessary for each acclimation site within a project.

Fish Screens

Screening projects, unlike other projects, may require a fairly complex set of interrelated agreements and real property interests, depending on factors such as who owns the point of diversion, who uses the water, and who owns the land. These projects might require permission to enter a site to study the potential for a screen facility; temporary construction staging easements; and permanent easements to access, operate, maintain, repair, and replace the facility.

Culvert Replacements

BPA usually does not secure permanent property rights for culvert replacement projects. Instead, the project sponsor and manager work with any cost-share partners to secure access, staging, and construction rights. As needed, BPA Real Property Services and General Counsel can assist in securing the necessary permissions to enter a property, temporary easements, or leases necessary to implement a project. Once the culvert has been installed operation and maintenance of the structure becomes the obligation of underlying land owner or perhaps the project sponsor, depending on the agreement.

Culverts under State-Maintained Roads. In *U.S. v. Washington*,²² Phase III, also known as the “Culverts Case,” Judge Ricardo Martinez found “that the right of taking fish, secured to the Tribes in the Stevens Treaties, imposes a duty upon the State to refrain from building or operating culverts under State-maintained roads that hinder fish passage and thereby diminish the number of fish that would otherwise be available for Tribal harvest.” The court went on to declare “that the State of Washington currently owns and operates culverts that violate this duty.” The court has not issued its remedy. Consequently, BPA uses caution when considering culvert replacement projects in western Washington, the case area, to avoid violating the in lieu funding prohibition found in the Northwest Power Act. Funding culvert projects found to be the state’s responsibility would violate the prohibition.

²² *United States v. Washington*, No. 70-9213, 2013 U.S. Dist. WL 1334391 (W.D. Wash. Mar. 29, 2013).

Riparian Planting and Fencing

BPA implements many kinds of riparian planting and fencing projects. BPA uses its contracts with project sponsors and partners to set the milestones and associated work elements, but the fencing or planting programs usually have their own rules for participation and compliance. Most rely on contracts and do not involve the acquisition or transfer of real property interests. Instead, they rely on contractual commitments by landowners to follow the program rules for a certain number of years.



BPA employees enjoy helping wildlife at Cherry Creek.

IV. Post-acquisition Responsibilities or Steps and Duties

BPA's fish and wildlife program includes over 800 real property interests, with more being acquired every year. Asset protection monitoring ensures that project sponsors and others follow any conditions BPA placed on them as a condition of bringing the real property interest into the program.

A. Asset Monitoring and Protection. In 2009, BPA began a concerted effort to create an inventory of all real property interests counted as fish and wildlife program assets. The inventory and other information about the fish and wildlife real property interests reside in the Land Information System (LIS) administered by Real Property Services and in PISCES.

With LIS and PISCES populated with the appropriate data, BPA developed a three-step protocol for monitoring real property interests. The steps are self-reporting, supplemental observation, and adaptive management.

Self-reporting. Many projects already include a requirement for annual reporting. Self-reporting will largely incorporate the information many managers gather for annual reports. Contracts currently without an annual or self-reporting work element may be amended in the future to include one. BPA will work with project

sponsors to tailor the template reporting form found in Appendix XX for each project or site.

For projects with water rights being the only real property interest acquired, BPA will continue to work with the Columbia Basin Water Transaction Program to survey active water transactions, including monitoring by other regional partners and non-BPA funded monitoring work.

Remote Monitoring. Currently, BPA uses free satellite and aerial imagery available in the public domain to observe program properties and changes that occur on them over time. In-house technical experts in the Geospatial Services group use ArcGIS tools to analyze changes on program properties. BPA's current goals and practices include remotely monitoring each property at least once every 5 years.



The number of sites visited, and the reasons for selection may vary depending on the nature of the property, its location, and whether problems have arisen there before. BPA tries to remotely monitor 50 properties annually. BPA staff from various offices – including Environmental Compliance, Fish and Wildlife, Real Property Services, and General Counsel – will visit the sites. Depending on the nature of issues discovered in the remote sensing analysis and site visits, projects will continue to be visited annually to follow-up on compliance issues, ownership changes, or large or unusual restoration efforts.

During each visit, the field team will:

- Review easement, management plan, and contract requirements for site management.
- Compare current conditions to those established in baseline documentation. See sample site review form, Appendix XX.
- Ground truth annual reports.
- Reaffirm or establish project manager and stakeholder communication about site purposes and goals.

Adaptive Management. As this monitoring effort matures it will be updated and revised. BPA expects to learn from this experience and

improve its practices for site management and effective monitoring. In addition, enforcement actions, if they need to be taken, will likely inform the nature, extent, and frequency of the monitoring needed to assure that fish and wildlife program assets continue to provide the value that ratepayers expected when BPA agreed to fund the acquisition.

B. Revenue

1. Revenue generated from management or use of a property should be used to defray the costs associated with owning the property and implementing the site Management Plan (e.g., weed control, property taxes).
2. All revenue generated from the property shall be separately identified and accurately accounted.
3. Revenue generated from the property may include income from contracts, leases, payments from conservation reserve programs, and other payments derived from management of the property; revenue also includes interest, as well as grants, donations, or other forms of financial assistance.
4. Project managers should expect sponsors to provide annual accounting to BPA for the revenue generated from mitigation properties and expenditure of that revenue. Sponsors must make their accounts available for BPA review upon request.

Payments in lieu of Taxes. BPA does not provide funds to pay property taxes or make payments in lieu of taxes for fish and wildlife mitigation properties. Project sponsors must ensure that they can cover tax payments with funds coming from a source other than BPA. Sponsors may use revenue generated from a mitigation site for taxes, payments in lieu of taxes, or other incidents of ownership, provided the revenue generating activity is not prohibited by easement or agreement and has been approved through the land management plan process, if applicable.

C. Stewardship Funding. Where it intends to provide funds for a sponsor to operate and maintain an acquisition, BPA increasingly entertains a one-time, permanent stewardship agreement approach to funding. For new projects, stewardship agreements and funding can often be established at closing. For existing projects, sponsors should discuss the possibility of converting from annual operation and maintenance contracts to a one-time, permanent stewardship agreement. Initial indications are that sponsors like

the certainty and control of funds upfront, and BPA appreciates the ability to address obligations permanently and at a known, fixed cost. Appendix XXIII is the stewardship agreement template that BPA currently works from.

D. Land Management Plans. Management plans will usually guide management of BPA funded fee title acquisitions and some conservation easements to ensure compliance with underlying mitigation agreements and any conservation easement granted over that property. BPA typically requires management plans for real property interests secured with ratepayer funds, but will acknowledge exceptions expressly on a case-by-case basis. Where BPA funds an easement-only project, the terms of the easement are often sufficient to govern site management so such projects may not need an additional plan.

Why Prepare Management Plans?

Management plans serve several purposes insofar as they become a blueprint for how, when, and where a new property will be used. Project proposals, MOAs, and easements provide broad parameters for how a sponsor manages a site. In most instances these agreements provide less detail than that which is incorporated into the management plan.

Management plans should reference wildlife, fish, or plant species or habitats of interest on the property, known cultural resources (with protections for actual locations – which do not need to be disclosed), prohibitions to the use or conversion of these under the easement, reserved rights and allowable actions, and any restrictions or reservations from applicable MOAs. The management plan should discuss each of those elements and explain how the sponsor will manage for that element. For sensitive species, the plan should state where and when the manager will take specific actions to protect and enhance that species.

Based on the planned actions identified in the management plan, BPA will determine the extent to which additional environmental compliance may be necessary. Once the sponsor identifies what resources may be changed, and how, then BPA can determine if additional NEPA, ESA consultation, or historic preservation compliance is necessary.



BPA allows sponsors to acquire property without public involvement because a change in ownership does not affect the environment. But management actions can alter the access and use of a property. Where sponsors contemplate changing the access and use of a property, BPA believes the public should have an opportunity to review and comment on the plans for the parcel. Project managers should lead the effort to ensure sponsors make draft management plans available to the public for review and comment, unless BPA has already agreed otherwise. In addition, during the early planning stages sponsors should seek the advice of state, federal, and tribal resource managers to take advantage of their expertise, and coordinate their plans. This assures that BPA fulfills its commitment to public participation and that the sponsor can take advantage of local knowledge to improve site planning and management.

The land management planning process should examine a project from an ecosystem-based perspective, if that hasn't occurred already. Thus, a "fish project" of necessity examines potential for also providing benefits to wildlife, and vice versa. This maximizes the mitigation value of each project to fish and wildlife and its cost-effectiveness for ratepayers.

Finally, management plans serve a purpose in compliance monitoring and conservation easement enforcement:

- Monitoring examines whether the sponsor performed any
- mitigation required to fulfill environmental compliance commitments.
- Monitoring ensures that the actions that the sponsor takes on the property were included in the management plan. Monitoring can

show whether the sponsor complied with the limits granted in exceptions to specific prohibitions.

- Monitoring ensures that the sponsor complied with any easement prohibitions and did not violate them.
- When necessary, compliance monitoring can verify that the sponsor has taken corrective action as agreed upon to address easement or agreement violations.

BPA does not fund action effectiveness monitoring on acquired land generally, but will do so when the agency has taken action to fulfill specific needs such as in implementing the 2014 NOAA Fisheries Supplemental Biological Opinion for the operation of the FCRPS.

NEPA, Environmental Compliance, and Public Involvement Requirements for Management Plans and Post-Acquisition Actions

After acquisition, BPA may take one of three approaches to ensure environmental coverage for future actions proposed for a site.

1. If the sponsor proposes no changes in land use and will maintain existing conditions, BPA will use a validation process that relies on the Fish and Wildlife Implementation Plan EIS²³ and will document the results of the validation process in PISCES. ESA and cultural resources will be covered as necessary to comply with applicable laws.
2. If the sponsor proposes habitat restoration or other ground disturbing activities that may adversely affect the environment, and those actions are covered in an existing programmatic EIS, then BPA will proceed as in the preceding scenario.

In addition, BPA will ensure the sponsor includes the public and other interested entities – particularly resource management agencies and tribes, county commissioners, and adjoining landowners – in the development of the management plan for the project. The sponsor must provide public notice of the availability of the draft plan, and hold at least one public meeting on the draft

²³ See, Supplement Analysis for the Fish and Wildlife Implementation Plan EIS at pages 9-11 (Oct. 5, 2009).

http://efw.bpa.gov/environmental_services/Document_Library/Implementation_Plan/2009_FishWildlifeProgramSA.pdf

The validation process may in turn rely on the impact analysis for mitigation actions covered in the Wildlife Program Final EIS (1997) and Watershed Management Program Final EIS (1997). *Id.* at 10.

plan in order to receive public comment. The final plan should reflect how the sponsor addressed any comments received.

3. If the sponsor proposes a significant change in use that is not covered by BPA's existing programmatic NEPA coverage and BPA plans to fund the change – e.g. building a hatchery – then BPA will comply with NEPA using one of the following approaches:
 - A Supplement Analysis to an existing EIS²⁴
 - A Record of Decision (ROD) tiered to BPA's Fish and Wildlife Program EIS
 - A project-specific Environmental Assessment (EA)
 - A project-specific Environmental Impact Statement (EIS)

In all circumstances, BPA needs for the accompanying public involvement to be appropriate to support the NEPA process and federal decision.

Endangered Species Act Compliance

While BPA considers effects to ESA-listed species during all phases of a project, generally the acquisition phase alone does not trigger specific actions that necessitate consultation pursuant to the ESA. Instead, when proposing to fund actions included in a land management plan or statement of work, BPA evaluates the effects on listed species, and if there are effects proceeds to consult under Section 7 of the ESA. Appendix XVI depicts the flow of decision making and action taking needed to comply with Section 7.

National Historic Preservation Act Section 106 Compliance

While BPA considers effects to cultural resources during all phases of a project, generally the acquisition phase alone does not trigger specific actions that necessitate consultation under Section 106 of the NHPA. Instead, when proposing to fund actions included in a land management plan or statement of work, BPA evaluates the potential to cause effects on cultural resources, and if there are effects proceeds to consult under Section 106.

Planning Overview

Project managers whose sponsors are acquiring fee title or easements with

²⁴ For a description of a supplement analysis, see the Department of Energy NEPA regulations, 10 C.F.R. 1021, subpart C § 1021.314.

an active restoration phase should typically complete a draft management plan for BPA and public review within 18 months after closing. To ensure compliance with the ESA, NEPA, NHPA, and other laws, sponsors should not take or authorize ground disturbing activities until the alternatives and potential effects have been analyzed. The plan should follow and comply with BPA's applicable NEPA documents, particularly BPA's Wildlife Mitigation Program, Watershed Management Program, and Fish and Wildlife Implementation Plan Final EISs and Records of Decision.²⁵ Plans should address management methods and, if necessary, mitigation for all resources addressed in the pertinent NEPA document. The management plan should identify activities the project manager believes are necessary to restore, rehabilitate, or enhance the property, and the activities necessary to maintain the habitat values of the property.

Stewardship and Routine O&M. BPA generally considers routine operation and maintenance the same as stewardship, which includes the following:

- Maintain boundaries;
- Monitor and address surrounding land uses;
- Maintain roads, gates, fences, locks and signage;
- Control public access or use;
- Prevent encroachment and mitigate risk of catastrophic wildfire;
- Outreach to neighbors, stakeholders, local governments and volunteers;
- Mowing and other vegetation management; and
- Reporting.

Restoration differs from stewardship in that restoration is typically larger scale, often includes earthmoving activities or construction, and occurs only once or at most infrequently.

Plans will often have three distinct phases. In the initial phase, the plans should describe any immediate stewardship actions, sometimes called **stabilization**, needed after acquisition to prevent damage to the conservation values and to keep long-term restoration costs down. For instance, the project manager may need to fence boundaries early on to prevent trespass grazing or treat noxious weed infestations. This initial

²⁵Wildlife Program EIS:

http://www.efw.bpa.gov/environmental_services/Document_Library/Wildlife_Mitigation/

Two other EIS incorporated into the Fish and Wildlife Implementation Plan EIS may provide additional guidance.

Watershed Program EIS:

http://www.efw.bpa.gov/environmental_services/Document_Library/Watershed_Management/

F&W Plan EIS:

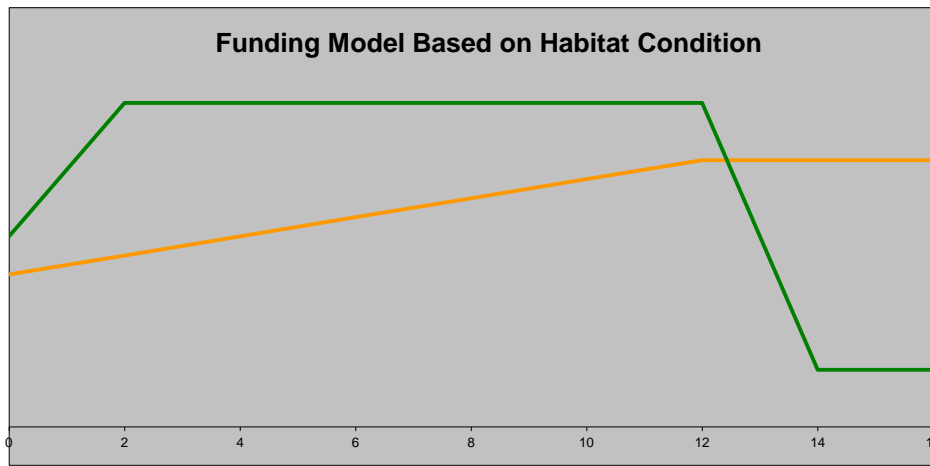
http://www.efw.bpa.gov/environmental_services/Document_Library/Implementation_Plan/

phase lasts until BPA approves the management plan.

The second phase typically spans the next 10 to 20 years and captures the main restoration and habitat enhancement efforts needed to attain the agreed upon desired future conditions on a site.

Don't Buy an Invasive Species Problem. The flora and fauna composition of the Columbia River Basin has changed dramatically with the advent of human habitation and accelerated with the Euro-American settlement in the last two hundred years. Many of today's landscapes include primarily non-native plant and animal species. Feral animals such as horses and pigs, noxious invasive weeds such as cheatgrass and yellow star thistle, and other invasive species like bull frogs and Himalayan blackberries are ubiquitous and permanent residents in the basin. Project managers should urge sponsors to consider how they will manage and pay for managing habitats with these non-native species present. BPA's duty is to mitigate fish and wildlife affected by FCRPS dams, but it cannot be expected to undo the ten thousand years of anthropogenically introduced changes to the West.

The final phase captures long-term operation and maintenance to ensure protection of the conservation values on a property. With restoration actions complete, project managers should prepare sponsors who received restoration funding from BPA to plan on reduced funding from that covers only basic management for activities such as road and fence maintenance. The accompanying graph summarize this approach—essentially, funding in the early years of a project covers active habitat restoration and management but drops in later years as restoration work takes hold and management becomes more passive.



Time (Years)

In the chart above, management costs, as represented by the dark line, decrease over time, as habitat value, represented by the light line, remains relatively stable.

Each plan should generally include the information included in Appendix XV, Template for Land Management Plan.

Management Plans Do Not Create Budget Commitments. Management plans will inform but not drive BPA’s contract budgets for operating, maintaining, and enhancing an acquired parcel. While the plans must include all the actions the sponsor proposes, BPA is not obligated or able to fund all of them. BPA uses separate processes coordinated with the Council to address project management budgets.

If the sponsor has more than one similarly situated BPA mitigation site, then project managers may support the sponsor’s efforts to prepare a **programmatic management plan** for all the related sites. The programmatic plan should cover routine management for sites with similar characteristics. Site specific plans may then tier from the programmatic plan to address any unique characteristics, needs, and prohibitions for individual projects. Because this programmatic management plan concept is similar to the programmatic ESA and NEPA documents that BPA uses, BPA’s environmental compliance staff may, upon request, be available to assist sponsors in designing a programmatic management plan.

Amended Management Plans

Over the life of a project, sponsors will usually need to prepare at least two management plans and maybe no more. The initial plan will organize and schedule the desired restoration and transitional actions necessary to establish more self-sustaining native habitats – while recognizing invasive

weed colonies and other non-native influences may make it impossible to cost-effectively establish and maintain native habitats. In most cases it may take up to 20 years to complete the initial active maintenance and restoration work. With the initial plan complete, the project manager should have the sponsor develop a second plan targeting passive long-term management focused on maintaining established habitat features and values. Depending on site dynamics, plan usefulness, available budgets, and compliance monitoring results, BPA expects to review long-term plans with sponsors every five to ten years.

BPA’s Right to Approve All Management Plans and Amendments

BPA established its right to review and approve draft management plan and subsequent amendments to ensure conformance with applicable MOAs, pertinent procurement contracts, environmental requirements, and any conservation easement or other deed restrictions either held by the sponsor or the United States (BPA). This applies to plans for sites managed directly by a state agency or tribe as well as for sites where the project sponsor holds an easement and BPA holds a third party right of enforcement.

BPA will consult with the sponsor regarding concerns about the draft or proposed amendments to a plan prior to making a decision about whether to approve the amended plan, and will provide its decision in writing if requested. BPA will base its decision on whether the plan fulfills the purposes stated in the conservation easement and any applicable MOAs. If BPA does not approve a management plan or proposed amendment, it will work with the sponsor and other entities to resolve any specific issues.

As BPA continues to gain experience in funding acquisitions and their management, new issues arise. These can often be addressed as needed in management plans and their updates.

Wild Horses

The Wild and Free-Roaming Horses and Burros Act of 1971 (“Act”)²⁶ charges the Department of the Interior (Bureau of Land Management) and Department of Agriculture (Forest Service) to manage and protect wild horses and burros on public lands, as well as those that wander off of public lands. The Act does not distinguish between “feral,” “non-native,” or “native” animals—all wild horses

²⁶ 16 U.S.C. § 1331.



and burros receive the same federal protections. Additionally, only Interior and Agriculture have express authority under the Act to determine which animals are “excess” and thus can be removed. In the Pacific Northwest, these departments also assist in managing wild horses and burros on tribal lands. For example, the Northwest Tribal Horse Coalition—comprised

of the Yakama, Umatilla, Warm Springs, Colville, and Shoshone Bannock tribes—works with Interior and Agriculture to manage the problem of excess wild horses and burros on tribal lands.²⁷ Because removal of excess wild horses and burros is a problem throughout the West and Congress has authorized Interior and Agriculture to address it, BPA does not fund sponsors to remove excess wild horses and burros from mitigation lands.



Firearms Use on Mitigation Properties

Using firearms on mitigation properties may be the continuation of a tradition that enjoys the support of many Fish and Wildlife Program sponsors and constituents. When considering any activity, including firearms use on

²⁷ CONFEDERATED TRIBES AND BANDS OF THE YAKAMA NATION, WILDLIFE, RANGE & VEGETATION RESOURCES MANAGEMENT PROGRAM, *Northwest Tribal Horse Coalition: Managing Excess Feral Horses in the Inland Northwest*, <http://www.ynwildlife.org/Wildhorsecoalition.php>.

mitigation properties, BPA looks at three issues:

- Protection and enhancement of fish and wildlife populations and their habitats
- Public health and safety
- Liability and the costs associated with the activity

BPA funds habitat acquisition and enhancement projects to mitigate for fish and wildlife adversely affected by the FCRPS dams. Sponsors should therefore manage those projects first and foremost for fish and wildlife. Other uses, such as hunting, gathering, and recreational shooting, can be allowed—but only to the extent they do not decrease, or threaten to decrease, the primary value of the project to fish and wildlife and their habitats.

Lawful hunting in compliance with all applicable federal, state, and tribal regulations may be compatible with the fish and wildlife purposes of properties acquired under the program. But some practices related to recreational access and firearms use can pose unnecessary threats to the conservation values a project is meant to protect. Fires can start unexpectedly from shooting bullets, driving vehicles in dry conditions, a cigarette butt, or an inadequately extinguished warming fire. Recreational shooting—target shooting, plinking, non-game shooting, or clay pigeon shooting—can deposit high levels of lead on sensitive habitats, increase risk of injury to other users of the project area, and increase fire risk and liability.

Project managers should consider the following when discussing how a proposed property would be managed, reviewing draft management plans, or inspecting projects for easement and agreement compliance:

- Ensure firearms use on the property does not decrease or threaten to decrease the conservation values on the property.
- Ensure firearms use guidelines for the property that at a minimum require all recreational shooting be done with non-toxic ammunition in well-defined designated areas only.
- Ensure all hunting follows applicable federal, state, and tribal regulations including seasons, bag limits, appropriate weapons, and appropriate ammunition.
- Ensure non-game animals and their habitat are protected and that the sponsor adequately describes appropriate conditions for shooting them, if there are any, in an applicable land management plan.

- Ensure that access plans consider fire danger posed by vehicles and bullets in areas subject to fire.
- Prohibit target or recreational shooting in the vicinity of wetlands, water ways, roads, trails, structures and other areas that would put other site users or fish and wildlife at risk.
- Clearly post signs at all applicable access points to ensure adequate public information as to firearms and other use restrictions and policies that apply to the property.

BPA project managers should also be aware that the sponsors and landowners have liability for the incidences of ownership. That means if someone gets hurt or if there's a fire, or if firearms use degrades the conservation values, then the land owner—usually the sponsor—is financially responsible for the damages, including restoring the property to the baseline condition under the easement.

Although BPA has, from time to time, provided such financial support, BPA generally has no legal obligation to assist sponsors in meeting the costs of such liabilities.

Management Plan Approval. BPA's review considers whether the plan or amendment is consistent with the agreements, easements, and law applicable to the project. BPA's approval or acceptance simply means that the plan is consistent with the sponsor's commitments governing the project. Review and acceptance does not indicate BPA's support or responsibility for any particular action. The plan may cover actions the sponsor wishes to take but are not related to BPA's mitigation responsibilities; e.g., developing recreational or educational opportunities, experimental management techniques, or public outreach. Consequently, BPA's acceptance does not in any way imply or create a federal responsibility for the costs or liabilities of the actions discussed in the plan. Responsibility and liability may only arise for BPA when it funds activities—i.e., enters into or amends a contract or statement of work for specific activities.

BPA's Process for Reviewing Draft Land Management Plans

1. The sponsor submits its draft plan to the BPA project manager.
2. BPA's project manager reviews the draft plan for consistency with terms and conditions of the easement.

3. If necessary, the project manager coordinates with the sponsor to clarify the draft plan.
4. The project manager summarizes the draft plan – highlighting questions and concerns – and presents it at an internal monthly Land’s Team meeting.
5. Legal and Realty provide comments and edits to the project manager.
6. The project manager works with the sponsor to address Legal and Realty issues.
7. Once all comments are resolved, Legal and Realty provide email acceptance email to the project manager.
8. The project manager prepares an acceptance letter and sends it to his or her implementation manager for signoff.
9. Project manager sends BPA’s acceptance letter to sponsor.
10. Project manager uploads the plan into PISCES/TARUS.



Prior to BPA’s acceptance of the initial management plan, sponsors should not undertake any ground-disturbing activities, unless reviewed and approved by BPA in advance or expressly allowed by an easement or

other agreement. However, sponsors may undertake ground-disturbing activities (without prior BPA review or approval) if they determine that prompt action is necessary to deal with an emergency; for instance, response to a hazardous waste release. See also the section on Land Use Agreements below.

Transmission Facilities and Habitat. Transmission facility maintenance and maintenance of habitat values are not mutually exclusive. This is evidenced by the numerous mitigation sites purchased with pre-existing high voltage distribution lines. Management plans should include provisions accommodating these facilities. Where BPA has transmission facilities on a mitigation property, it will seek to promote both transmission system reliability and habitat protection. The North American Electric Reliability Corporation sets standards that BPA must follow regarding vegetation height and distance from transmission lines. To meet these standards and fulfill its responsibilities to fish and wildlife, BPA will work with site managers to include provisions for both sets of attributes in management plans. With a focus on shared interests, such as improved safety and reduced costs, BPA will strive to work with site managers to avoid conflicts between two very important missions.

Agreement and Easement Control if the Plan Conflicts

Inevitably, somewhere, sometime, a conflict will arise between a management plan and an underlying MOA or easement. Typically, MOAs and easements expressly establish the legal parameters that the management plans must work within. Management plans must follow MOAs and easements in both time and priority. Plans do not expressly or impliedly amend or terminate underlying MOAs or easements. Take for example an easement that prohibits grazing “except as provided in the management plan.” In this case, if the sponsor and BPA determine that limited grazing to control weeds would benefit the protected values of the site, then the sponsor can graze the site and not violate or contradict the easement. Any grazing beyond that approved for the site would violate the easement and be prohibited.

Land Use Agreements

At times, it may be necessary for a sponsor, seller, or others to obtain BPA’s permission to take an action that would otherwise violate the rights of the United States under the easement. In these situations, BPA can approve and authorize the action through a **land use agreement** customized to address the specific site and circumstances.

The need for a land use agreement typically arises in two circumstances. Sometimes a seller needs additional time to vacate her property after closing, and her continued presence violates the easement. For example, a rancher sells her ranch. At closing, the buyer records the conservation easement which prohibits grazing. But in the purchase and sale agreement, the seller retained the right to graze her cattle on the property for another three months after closing. The sale agreement conveyed the right to graze from the buyer, but the sale agreement wouldn't bind BPA or exempt the grazing from the easement restrictions. To fix this, the seller needs to obtain a land use agreement from BPA authorizing the grazing. Otherwise, the grazing violates the easement and the seller could be liable for damage to the conservation values.

The need for a land use agreement may also arise on projects with no land management plan or in the time between when a plan is being drafted but hasn't been completed or approved. There the easement prohibitions apply without the clarifications that a plan can add. If an entity wants to use the site in a manner that might violate the easement, it needs to secure a land use agreement from BPA or face the legal risks inherent in violating an easement held by the United States. See Attachment XIX, Sample Land Use Agreement (for Non-Conforming Uses).

Asset Monitoring Checklist

Land management plans also provide the basis for developing a compliance monitoring checklist. Developing the plan provides sponsors and BPA project managers the opportunity to identify what should and should not happen on a mitigation site. The list serves as the starting point for periodic compliance reviews and monitoring site management and use. Appendix XIX provides a sample compliance monitoring checklist that project managers should develop prior to site visits.

Future conveyance of real property interests

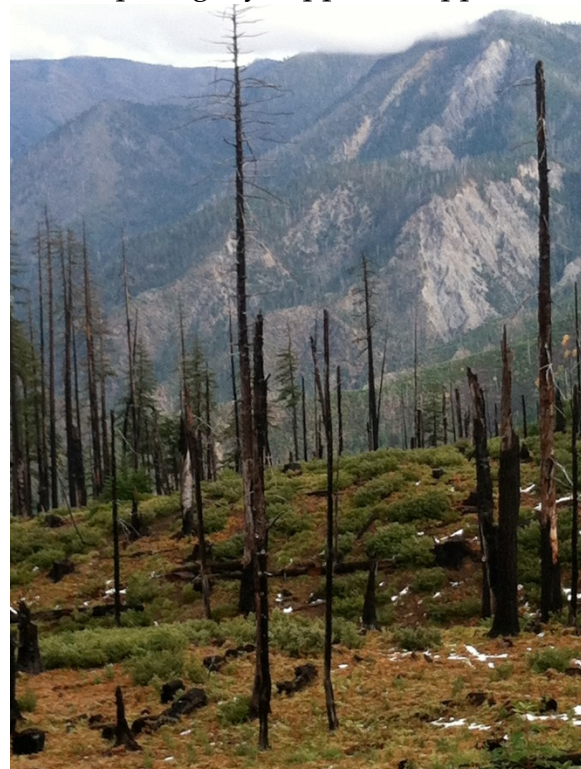
Most properties acquired with BPA fish and wildlife program funds are owned by states, tribes, and other entities. Occasionally these program property owners need to transfer, sell, or exchange the property; for example, exchanging property with an adjoining landowner to consolidate holdings or resolve a boundary dispute.

A transfer or sale typically involves the United States' property interests in one of three ways. In the first, an entity either wants to sell or trade a property over which the United States, through BPA, holds a conservation easement. In such cases, BPA can probably agree to extinguish the United States' conservation easement. If the sponsor is securing another mitigation property, it needs to work with BPA to execute a new conservation easement to protect the new acquisition.

In other instances an entity wants BPA to convey the fee title held by the United States. BPA can transfer the property to another Federal agency – such as to the Bureau of Indian Affairs to be held in trust for a tribe as discussed in section V – with relative ease, although the process is often time consuming. In such cases, BPA will seek to ensure the priority of any rights it needs to the property, whether for mitigation protection or transmission services. Each transaction will be different, but often they include executing both conservation easement and transmission right of way documents that bind the agency and sponsor assuming title to the land.

Proposals that include conveyance of fee title from BPA to a non-federal entity can raise costly, time-consuming, legally challenging issues that are best avoided. If a sponsor hopes to have BPA dispose of the United States' fee interest in a property, the sponsor and BPA will need considerable time and extensive coordination to try and develop a legally supported approach to the disposal.

What if a sponsor does not want to take fee title to a mitigation property at the outset of a project but wishes to in the future? In those cases BPA will work with the sponsor and the seller to carefully structure the transaction. In particular, BPA will need to assure the rights of the United States are not affected by the doctrine of **merger**. Merger occurs automatically when an entity with a partial interest in property becomes the fee owner – then the lesser the interest automatically “merges” and all that’s left is the fee interest. So if a sponsor starts a



project by holding an easement on a property with third party rights of enforcement in the United States, then later the sponsor obtains the property in fee, the easement merges with the fee and BPA's enforcement rights disappear. When a sponsor proposes to acquire an easement, it should contact the Office of General Counsel and Real Property Services early in the acquisition process to structure the project so the United States' interests are protected regardless of who owns the property.

Land Purchased with Project Revenue. BPA can permit sponsors to use revenue generated from a mitigation property to buy additional properties. However, if the United States will receive a conservation easement or other real property interest as a consequence of the purchase, the sponsor needs to adhere to processes in this deskbook to guide that acquisition.

Changed Circumstances and Selling Assets

If an easement holder or grantee wants to amend the conservation easement, the parties to the easement should carefully review the easement language—particularly that regarding amendment and termination—and the law of the state governing the property. The parties should document a careful and transparent process to determine that the objectives of the original easement are either impossible or that changed circumstances will make it highly impractical or unwise to continue to uphold the terms of the easement.

Assets secured with BPA fish and wildlife funding that will be sold or conveyed through the amendment or termination process need to be accounted for and, unless otherwise committed by contract or other operation of law, be returned to BPA's custody or control upon BPA acceptance of them. So, for example, if BPA provided funding for a fee acquisition that included land and structures, but later the project sponsor wishes to sell or otherwise divest itself of the structures, then BPA must still receive the benefit from the structures. That benefit could be using the income or sales proceeds to displace restoration or operations and management funding BPA might otherwise have provided. Each circumstance will likely be unique, so project sponsors should begin discussions well in advance of when they desire to actually divest themselves of fish and wildlife program assets.

V. Special Issues Related to Tribes

BPA leaves to each tribe the task of obtaining Bureau of Indian Affairs approval under 25 U.S.C. § 81, if applicable, for agreements or real property interests being bought or conveyed into trust. BPA will assist as needed, largely by providing information.

When a project involves **Indian allotments**, BPA requires that the interests of all allottees be extinguished prior to providing ratepayer funds for the acquisition. That is, for individual Indian lands (allotments) proposed for acquisition, the Tribe must acquire 100 percent of the allotment shares.

Bureau of Indian Affairs regulations govern the transfer of fee lands into trust on behalf of a tribe.²⁸ BPA will usually not oppose a tribe's application to transfer title of a mitigation property into trust for the benefit of the tribe provided the terms of the easement or applicable agreement doesn't prohibit it and the tribe fulfills and agrees to the provisions below.

If BPA knows there could be a problem in supporting future fee to trust requests by a tribe, BPA will try to ensure its position is clear well before closing and expressly stated in any deed recorded with the property. To date this issue has arisen only in the Willamette Basin under the Willamette Wildlife Program, and the resolution is that the tribes involved understand that acquisitions in the Willamette are not appropriate for fee to trust transfer. BPA will examine the transfer to trust question on a case-by-case basis and to ensure the transfer complies with all BPA's agreements and policies.

²⁸ See 25 CFR Part 151.

Taking Mitigation Land into Trust. BPA and the Department of the Interior's Regional Solicitor's Office have concluded that a conservation easement protecting fish and wildlife habitat in perpetuity does not create a restraint on alienation or otherwise restrict tribal use of the property in a manner that's inconsistent with the tribe's interests. Therefore, mitigation properties with conservation easements on them may be taken into trust. Where a property has an executory interest or covenant, the tribe may need to grant BPA a conservation easement and have BPA relinquish the other restrictive interest before the property can be taken into trust.

Issues BPA will cover in fee to trust process include:

- Ensure the fish and wildlife purposes of the acquisition in perpetuity.²⁹
- Clarify BPA's existing rights, if any, and establish their priority in the future.
- Ability to pursue future transmission facility development.



²⁹ Or other appropriate duration agreed to during contracting.

Notes: