APPENDIX A.

AGREEMENTS

Appendix A-1. "Mitigation Agreement Between the USDI Bureau of Reclamation and Washington Department of Fish and Wildlife Regarding Keechelus Dam Construction Issues Including Fish Passage," Washington Department of Fish and Wildlife Region 3 Office, Yakima, WA (4 April 2002).

Appendix A-2. "Fish Passage at Keechelus Dam or Alternative, Conditions number 56 through 58, Hydraulic Project Approval"; Log Number 00-E1998-01, Washington Department of Fish and Wildlife Region 3 Office, Yakima, WA (17 April 2002)

Received In Mailroom
APR 08 2002
Yakima, Washington

MITIGATION AGREEMENT BETWEEN THE USDI BUREAU OF RECLAMATION AND WASHINGTON DEPARTMENT OF FISH AND WILDLIFE REGARDING KEECHELUS DAM CONSTRUCTION ISSUES INCLUDING FISH PASSAGE.

This Mitigation Agreement ("Agreement") is made between the Washington State Department of Fish and Wildlife, hereinafter referred to as WDFW, and the USDOI Bureau of Reclamation, hereinafter referred to as Reclamation. For purposes of this Agreement, the above entities are referred to collectively as "the Parties." The terms of this Agreement shall be binding upon the respective successors or assigns of each Party.

WHEREAS the U.S. Department of Interior Bureau of Reclamation ("Reclamation") and the Washington Department of Fish and Wildlife ("WDFW") share a common objective to protect, maintain and enhance water, fish and wildlife resources, and they recognize their mutual desire to continue a long-standing working relationship;

WHEREAS Congress established that the purposes of the Federal Yakima Project include fish, wildlife and recreation and that the existing storage rights of the project include storage for the purposes of fish, wildlife and recreation (Public Law 103-434, Title XII Yakima River Basin Water Enhancement Project - Sec 1205(e) Operation of Yakima Project);

WHEREAS Congress established that said storage for the purposes of fish, wildlife and recreation shall not impair the operation of the Yakima Project to provide water for irrigation purposes nor impact existing contracts (Public Law 103-434, Title XII Yakima River Basin Water Enhancement Project - Sec 1205(e) Operation of Yakima Project);

WHEREAS The Washington State law requires that a dam or other obstruction shall be provided with a durable and efficient fishway approved by the director of WDFW and that the fishway shall be maintained in an effective condition and continuously supplied with sufficient water to freely pass fish (RCW 77.55.060);

WHEREAS Reclamation and WDFW agree that Reclamation's authorities in the Yakima Basin provide for a broad range of fish enhancement activities including such things as barrier removal, screening of diversions and restoration of instream flows on both the mainstem river and tributaries, within proscribed limits;

WHEREAS Reclamation and WDFW agree that restoring fish passage at man-made barriers is, in nearly all cases, biologically preferable for conserving, restoring and enhancing indigenous fish species; and

WHEREAS the parties agree that moving forward expeditiously with repairs to Keechelus Dam is in the public interest to protect public safety and provide necessary

water for project purposes.

THEREFORE the parties agree to work collaboratively to carry out their respective responsibilities and agree as follows:

I. Commitments of WDFW:

WDFW Agrees:

1) To issue a Hydraulic Project Approval (HPA) for the proposed Safety of Dams reconstruction of Keechelus Dam as soon as possible. The HPA shall incorporate the provisions of this agreement.

2) To provide technical support to Reclamation so that the fisheries objectives of this agreement may be met.

II. Commitments by the United States of America

Reclamation Agrees:

1) To abide by the provisions of the HPA.

2) To immediately conduct an assessment of fish passage at all Yakima Project storage reservoirs in the Yakima River Basin as outlined in the HPA for the Keechelus Safety of Dams Modification Project. The assessment shall include consideration of the potential fish production and likelihood of sustainability above each dam using a mutually acceptable assessment tool. Where fish passage is determined to be desirable and practicable, based upon the results of this assessment, Reclamation shall examine engineering feasibility. Where fish passage is determined to be impracticable or infeasible, Reclamation shall negotiate with WDFW to provide an alternative to fish passage, consistent with state law.

3) To seek appropriate funding to ensure timely implementation of: a) fish passage facilities, where passage is determined to be desirable and practicable by the project-wide passage assessment (item 2 above), and b) alternative fish restoration measures for locations where fish passage is determined by the project-wide assessment to be biologically beneficial but impractical or infeasible.

4) Until construction of fish passage facilities at each of the Yakima Project storage reservoirs where fish passage has been determined as necessary as per item 2 above, and such fish passage facilities are in operation, to provide interim fish passage (e.g. trap and haul program) in collaboration with WDFW at each of those reservoirs.

5) To restore fish passage for salmonids from Lake Keechelus into Cold Creek, in collaboration with WDFW, as an interim measure to address fish passage concerns at Keechelus Dam and construction-related impacts of the Safety of Dams project. Reclamation shall do this in concert with the reconstruction of Keechelus Dam and ensure that conditions suitable for adult passage into Cold Creek from the reservoir are restored.

6) To develop a formal process involving regularly scheduled meetings to occur no less than biannually to ensure that there is ample opportunity for input by the fish management agencies (WDFW, National Marine Fisheries Service, US Fish and Wildlife Service and the Yakama Nation) into decisions concerning fish enhancement measures implemented by Reclamation under its various authorities in the Yakima River basin.

7) To ensure that construction materials for major Reclamation projects (including Safety of Dams projects) are sourced from sites not in the geomorphic flood plain of the Yakima River, or tributaries, whenever practicable.

8) To ensure that the proposed Safety of Dams reconstruction-related actions at Keechelus Dam will not result in significant additional costs for retrofitting fish passage facilities at Keechelus Dam nor require future significant modification of the portions of the dam being reconstructed as part of the SOD work.

9) To ensure that the functions of the large (approximately 300 acres) wetland complex below the toe of Keechelus Dam are not impaired. This wetland is the source of water for three different water courses, at least two of which are fish-bearing streams, which flow into a river side channel complex below Keechelus Dam. Reclamation shall mitigate for unavoidable impacts to this wetland as outlined in the Final Environmental Impact Statement (FEIS) for the Keechelus Dam Safety of Dams Modification (September 2001). If for some reason the land acquisition outlined in the FEIS cannot be accomplished, alternative mitigation strategies shall be developed in cooperation with the WDFW and others.

III. DISPUTE RESOLUTION

1) In the event that a dispute between the parties should arise, the parties shall make every effort to informally resolve the matter. Should a dispute arise, the aggrieved party shall send the other parties written notice of the issue in dispute, which shall state the aggrieved party's preferred resolution to the matter. Nothing shall prevent the parties from using any other remedy otherwise available to them if informal dispute resolution does not work; provided, however, that no party shall engage in self-help without first notifying the other parties of its intended act(s) and providing reasonable time for the other parties to respond.

2) Each Party shall have all remedies otherwise available in equity or at law to enforce the terms of this agreement, including specific performance and injunctive relief. No party shall be liable in damages to any other Party or other person for any breach of this agreement, any performance or failure to perform a mandatory or discretionary obligation imposed by this agreement, or any other cause of action arising from this agreement.

IV. MODIFICATION OF AGREEMENT

This agreement may only be modified upon written agreement of the parties.

V. SAVINGS CLAUSE

Nothing herein shall prevent, waive or diminish the right or authority of WDFW to use any statutory or other remedy available to enforce the provisions of this agreement. Nothing herein shall prevent, waive or diminish the right or authority of WDFW to protect populations of fish, or any other aquatic life in Lake Keechelus, theYakima River or tributaries to the fullest extent allowed by law, nor shall this preclude the WDFW from using any statutory or other remedy available concerning or relating to these fish. Nothing contained in this agreement is intended to unlawfully limit the authority or responsibility of the Department of Fish and Wildlife to invoke penalties or otherwise fulfill its responsibilities as a public agency.

VI. GENERAL PROVISIONS

1) Nothing herein shall or shall be construed to obligate Reclamation to expend or involve the United States of America in any contract or other obligation for the future payment of money in excess of appropriations authorized by law and administratively allocated for the purposes and projects contemplated hereunder.

2) No member of, or delegate to Congress or resident Commissioner, shall be admitted to any share or part of this Agreement or to any benefit that may arise out of it.

3) The parties agree to comply with all federal statues relating to nondiscrimination, including but not limited to: Title VII of the Civil Rights Act of 1964, as amended which prohibits discrimination on the basis of race, color, religion, sex or national origin; Title IX of the Education amendments of 1972, as amended, which prohibits discrimination on the basis of sex; the Rehabilitation Act of 1973, as amended, and the Americans with Disabilities Act of 1990, as amended, which prohibit discrimination on the basis of disability: the Age Discrimination in Employment Act of 1976, as amended, which prohibits discrimination based on age against those who are at least 40 years of age; and the Equal Pay Act of 1963.

4) The Agreement shall become effective on the date of last signature hereto and

extended until terminated. Either party may formally request modification of the agreement.

5) Nothing in this Agreement shall, or shall be construed to alter or affect the authorities, rights or obligations of the parties under existing law or regulations.

THE UNITED STATES OF AMERICA

By: Eric Glover
Dated: 4/8, 2002

Eric Glover
Area Manager
Bureau of Reclamation

WASHINGTON DEPARTMENT OF FISH AND WILDLIFE

By: Jeff Tayer
Dated: 11/4-08-, 2002

Jeff Tayer, Regional Director
Department of Fish and Wildlife

FISH PASSAGE AT KEECHELUS DAM OR ALTERNATIVE

56. Permittee shall immediately conduct a project-wide assessment of fish passage at all Yakima Project reservoirs. This assessment shall be done in collaboration with WDFW and the first phase of the assessment shall be completed and distributed by January 31, 2003. The first facility to be considered in this project-wide assessment shall be Keechelus Dam. The assessment shall include investigations as to the engineering, constructability and biological considerations of fish passage at each facility. The assessment shall include consideration of the potential fish production and likelihood of sustainability above each dam using a mutually acceptable assessment tool. Phase II of the assessment shall prioritize where fish passage is determined to be desirable and practicable, based upon the results of the phase I assessment. Phase II shall focus on engineering feasibility, cost, water management implications, and biological parameters for restoring specific stocks. Phase II of the assessment shall be completed by January, 2004. Where fish passage is determined to be both desirable and feasible, the permittee shall seek funding and complete design and construction of fish passage facilities in a timely manner. A separate HPA or HPA amendment is required for construction of these facilities. Where fish passage is determined to be undesirable or impractical, based upon the results of this assessment, Reclamation shall negotiate with WDFW an alternative to providing fish passage consistent with state law. The net benefit of this alternative shall provide equal or greater productivity and ecological function than that predicted for fish passage facilities if constructed at the dam(s).

57. The Permittee shall immediately begin the assessment of Keechelus Dam as per provision #56 above, and determine whether the proposed design and construction of the Safety of Dams Project will adversely affect the feasibility, cost or efficacy of fish passage facilities at this dam. Reclamation shall modify the Safety of Dams work as necessary to ensure that the proposed Safety of Dams reconstruction-related actions at Keechelus Dam will not result in significant additional costs for retrofitting fish passage facilities at Keechelus Dam nor require future modification of the portions of the dam being reconstructed as part of the SOD work.

58. The Permittee shall provide interim fish passage (e.g. trap and haul program) in collaboration with WDFW at facilities where fish passage is desirable based upon the results of the project-wide passage assessment. Interim passage shall be provided at locations agreed upon by the fish management entities as soon as possible but not later than one year from completion of Phase II of the passage study.