

**AGREEMENT  
BETWEEN  
THE UNITED STATES OF AMERICA  
AND  
THE NEZ PERCE TRIBE  
FOR  
WATER USE IN THE DWORSHAK RESERVOIR**

**THIS AGREEMENT** is entered into by and between the **UNITED STATES OF AMERICA** (the “United States”) represented by the **Division Commander, Northwestern Division, U.S. Army Corps of Engineers** (the “Corps”), and the **NEZ PERCE TRIBE** (the “Tribe”), collectively referred to as the “Parties;”

**WITNESSETH THAT:**

**WHEREAS**, the Tribe is a Federally-recognized Indian Tribe, with its own sovereign government, unique culture, and history;

**WHEREAS**, in 1855, the Tribe entered into a Treaty with the United States (the “Treaty of 1855”) in which the Tribe, among other things, ceded some of its aboriginal territory to the United States, but reserved to itself the exclusive use and benefit of the area located within the boundaries of the Nez Perce Reservation as they existed in 1855;

**WHEREAS**, in the Treaty of 1855, the Tribe further reserved the exclusive right of taking fish in all the streams running through or bordering the Nez Perce Reservation, including the Clearwater River;

**WHEREAS**, in 1863, the Tribe entered into another Treaty with the United States (the “Treaty of 1863”) which, among other things, reaffirmed the Tribe’s fishing, hunting, gathering and pasturing rights, and established the current boundaries of the Nez Perce Reservation for the exclusive use and benefit of the Tribe;

**WHEREAS**, over the objections of the Tribe, which objections were publicly recorded from 1954 onward, the Dworshak Project (the “Project”), consisting of a Dam, Reservoir and appurtenant structures, was authorized in 1962 pursuant to Public Law 87-874 and Public Law 85-500 for the express purpose of flood control; Public Law 87-874 for hydroelectric power generation and navigation; Public Law 87-874 and Public Law 85-624 for fish and wildlife; and Public Law 78-534 for recreation;

**WHEREAS**, the Project became operational for flood control purposes in 1972 and for power generation in 1973;

**WHEREAS**, the Dworshak Dam and a portion of the Reservoir are located within the exterior boundaries of the Nez Perce Reservation, as described in the Treaty of 1863;

**WHEREAS**, the land and water in and around the Project has been historically important to the Tribe for hunting, fishing, and gathering, and is currently used for those purposes by the Tribe to the extent possible, given the effects of the Project;

**WHEREAS**, the Tribe actively manages fish, wildlife and cultural resources associated with the Dworshak Dam and Reservoir:

**WHEREAS**, this Agreement is an element of, and partial consideration for, settlement of the Tribe's claim to water rights in the Snake River Basin Adjudication, Case No. 39576, in the District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Twin Falls;

**WHEREAS**, the United States Congress enacted the Snake River Water Rights Act of 2004 in Title X of Division J, Public Law 108-447 (the "2004 Act"), which authorizes and directs the heads of Federal Agencies to execute and perform actions necessary to carry out the document titled "Mediator's Term Sheet," dated April 20, 2004;

**WHEREAS**, the settlement of the Tribe's claim to water rights in the Snake River Basin Adjudication, as specified in the Mediator's Term Sheet, dated April 20, 2004, includes the provision that the United States will enter into an agreement with the Tribe for the use of 200,000 acre-feet of water in Dworshak Reservoir, which will include an operational Memorandum of Agreement (MOA) between the Tribe, the Corps, the National Marine Fisheries Service (NMFS), the Bonneville Power Administration (BPA), and the State of Idaho for implementing a flow augmentation plan beneficial to fish;

**WHEREAS**, the above-referenced Mediator's Term Sheet also provides that the Tribe and the United States will mutually agree that the power revenue effect of implementing this term will be either neutral or positive;

**WHEREAS**, the Corps was authorized by the United States Congress to construct, operate and maintain the Project for authorized uses, and the Mediator's Term Sheet does not alter the Corps' authority or discretion to operate the Dworshak Dam for these uses;

**WHEREAS**, the Project has a normal operating range between the elevations of 1,600 feet and 1,445 feet above National Geodetic Vertical Datum (NGVD), a gross storage capacity of 3,468,000 acre-feet, and a usable active storage capacity of 2,015,800 acre-feet;

**WHEREAS**, the United States and all of its departments and agencies have a trust responsibility to the Tribe consistent with treaties, decisions of the United States Supreme Court and other Federal courts, Federal statutes and regulations, and Executive Orders of the President of the United States.

**NOW, THEREFORE**, the United States and the Tribe agree as follows:

## ARTICLE 1 – WATER USE

- a. The United States, subject to the direction of the 2004 Act and applicable Federal laws, shall provide for the use of 200,000 acre-feet (200 KAF) of water within the Project for the Tribe in accordance with the terms and conditions of this Agreement.
- b. The Tribe shall have the right to annually use 200 KAF of water in the Project. This water is to be used for implementing flow augmentation plans, developed in accordance with the operational Memorandum of Agreement (MOA) attached as Appendix A to this Agreement, which are beneficial to fish and consistent with the authorized Project purposes.
- c. Consistent with Corps' current responsibilities under the Endangered Species Act (ESA) concerning the operation of the Federal Columbia River Power System, the Project is operated from elevation 1,600 feet to 1,520 feet above NGVD (approximately 1.2 million acre-feet) from July into September to benefit listed salmonid species.
- d. The use of water stored between elevations 1,535 feet and 1,520 feet above NGVD will be made available for the Tribe for the purpose stated in paragraph b. of this Article. These elevations will be adjusted by the mutual agreement of the Parties, as necessary, to ensure the Tribe's right under paragraph b. of this Article. In the event the Project does not fill to elevation 1,535 feet by June 30th of any year, the Tribe shall have the right to use 200 KAF of water from the active usable storage in the Project, consistent with the Corps' responsibilities under the ESA and the authorized Project purposes.
- e. In the event an operational change at the Project, other than described in paragraph i. of this Article, interferes with the Tribe's right under paragraph b. of this Article, the Tribe shall be entitled to use 200 KAF of water, consistent with the Project purposes, from the active usable storage at elevations that will best serve the Tribe's purposes to benefit fish under this Agreement.

- f. The Tribe shall have the right to call upon the Corps to release water from the Project up to 200 KAF of water per year through the powerhouse, spillway or regulating outlet, or a combination of the three. The schedule, rate and temperature of the water releases shall be determined in accordance with the operational plans prepared pursuant to the MOA attached as Appendix A, or future amendment of said MOA. The 200 KAF of water will be measured as releases through the powerhouse, spillway or regulating outlet in addition to the Established Minimum Project Releases.
- g. In the event of changes to the Corps' responsibilities under the ESA that no longer require the Project to be operated from elevation 1,600 feet to 1,520 feet above NGVD, use of 200 KAF of water will be reserved for the Tribe for the purpose stated in paragraph b. of this Article from anywhere within the active usable storage of the Project.
- h. In the event that the Corps' responsibilities under the ESA are eliminated for flow augmentation for anadromous fish, use of 200 KAF of water will be reserved for the Tribe for the purpose stated in paragraph b. of this Article from anywhere within the active usable storage of the Project.
- i. The Corps reserves the right to take such measures as may be necessary in the operation of the Project for authorized Project purposes, to respond to Power Emergencies, Flood Control Emergencies, Other Emergencies, and to preserve life and/or property, including the right not to make downstream releases during such periods of time where life and/or property are at risk and/or to inspect, maintain, or repair the Project.
- j. The Tribe recognizes that the water releases required by this Agreement are subject to applicable Total Dissolved Gas water quality standards. Further, the Corps makes no representation with respect to the quality of the water and assumes no responsibility therefor, or for treatment of the water.

## ARTICLE 2 – AUTHORITY

- a. **Nez Perce Tribal Executive Committee.** The Nez Perce Tribal Executive Committee (“NPTEC”) has the authority to enter into this Agreement with the United States pursuant to Article VIII of the Tribal Constitution. The Chairman and Secretary of NPTEC have the authority to execute this Agreement on behalf of the Tribe pursuant to NPTEC Resolution No. NP- \_\_\_\_\_ attached hereto as Exhibit \_\_\_\_\_
- b. **U.S. Army Corps of Engineers.** The Division Engineer, Northwestern Division, U.S. Army Corps of Engineers, has the authority to enter into this Agreement pursuant to 33 CFR § 222.5(g).

## ARTICLE 3 – DEFINITIONS

For purposes of this Agreement, the following definitions apply:

- (1) **“Acre foot”** means that amount of water necessary to cover one acre of land to a depth of one foot.
- (2) **“Agreement”** means this Agreement between the Nez Perce Tribe and the U.S. Army Corps of Engineers regarding the use of 200 KAF of water in the Dworshak Project.
- (3) **“Dworshak Project” or “Project”** means the Dworshak Dam, Dworshak Reservoir and related lands, powerhouse and recreational facilities, PWI Number 05090.
- (4) **“Established Minimum Project Releases”** means the minimum flow needed to meet downstream ecological requirements under applicable statutory, regulatory or other legal obligations.
- (5) **“Flood Control Emergencies”** means reservoir operations that are needed to respond to flood warnings and flood watches issued by the Northwest River Forecast Center.

- (6) **“KAF”** means a thousand acre-feet of water.
- (7) **“Life of the Project”** means the physical life of the Project.
- (8) **“Memorandum of Agreement” or “MOA”** means the Memorandum of Agreement between the Tribe, the U.S. Army Corps of Engineers, the Bonneville Power Administration, the State of Idaho, and National Marine Fisheries Service as to operational considerations for the use of 200 KAF of water from the Dworshak Project, and attached to the Agreement as Appendix A.
- (9) **“National Geodetic Vertical Datum” or “NGVD”** means the National Geodetic Vertical Datum of 1929 (NGVD of 1929) – a geodetic datum derived from a general adjustment of the first-order level nets of both the United States and Canada, formerly called Sea Level Datum of 1929.
- (10) **“Other Emergencies”** means the existence or result of extenuating circumstances which fall outside of the range of normal operations, are unanticipated, and may result or have resulted in catastrophic impact, physical damage or failure to part of the physical power system.
- (11) **“Parties”** means the Nez Perce Tribe and the U.S. Army Corps of Engineers.
- (12) **“Power Emergencies”** means generation or transmission emergencies involving either the potential for or actual insufficiency of electrical generation to satisfy electrical demand or load within the BPA transmission system; or the potential or actual loss or limitation in the ability to move electricity from the site of generation to the actual consumer or end-user.

- (13) **“SRBA”** means the Snake River Basin Adjudication, a general stream adjudication in the District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Twin Falls, Case No. 39576.
- (14) **“Treaty of 1855”** means the Treaty between the United States and the Nez Perce Indians, dated June 11, 1855 (12 Stat. 957, 2 Kappler 702)
- (15) **“Treaty of 1863”** means the Treaty between the United States and the Nez Perce Tribe, dated June 9, 1863 (14 Stat. 647, 2 Kappler 843).
- (16) **“Tribal Constitution”** means the Constitution and Bylaws of the Nez Perce Tribe, originally approved by the Assistant Commissioner of Indian Affairs on April 2, 1948, and ratified by the Tribal General Council on April 30, 1948, as amended.
- (17) **“Tribe”** means the Nez Perce Tribe, a Federally recognized Indian tribe, and all officers, agents, departments and business enterprises and subordinate organizations thereof.
- (18) **“Usable Active Storage”** means the water in the Dworshak Project between the elevations 1,600 feet and 1,445 feet above National Geodetic Vertical Datum, which equals approximately 2,015,800 acre-feet of usable active storage used for the authorized purposes of the Project.

#### **ARTICLE 4 –COOPERATION, ADMINISTRATION AND NOTICE**

- a. To the maximum extent practicable, the Parties agree to work cooperatively to fairly resolve disputes arising under this Agreement without resorting to litigation. As required, each Party shall appoint a representative to meet and resolve any such disputes, with recourse to any available dispute resolution process, including mediation. This Agreement will be implemented, in part, through the operational MOA, attached to this Agreement as Appendix A, which shall be consistent with the terms of this Agreement.

- b. For purposes of this Agreement, any notices to the Parties shall be sent to the persons designated below by certified mail, return receipt requested, or such other person as may later be designated in writing by any party:

NEZ PERCE TRIBE: Chairman  
Nez Perce Tribal Executive Committee  
P.O. Box 305  
Lapwai, ID 83540

Managing Attorney  
Office of Legal Counsel  
Nez Perce Tribe  
P.O. Box 305  
Lapwai, ID 83540

UNITED STATES: Division Engineer, Northwestern Division  
U.S. Army Corps of Engineers  
Suite 500  
1125 NW Couch Street  
P.O. Box 2870  
Portland, OR 97209-2870

#### **ARTICLE 5 – HOLD AND SAVE**

The Tribe shall hold and save the United States harmless from all damages which may be filed or asserted as a result of the use of water from the Project as called for by the Tribe pursuant to this Agreement, except for damages due to the fault or negligence of the United States or its contractors.

#### **ARTICLE 6 – COMPLIANCE WITH LAW**

In acting pursuant to this Agreement, the Tribe agrees to comply with all applicable Federal laws and regulations.

## **ARTICLE 7 – TRANSFERS AND ASSIGNMENTS**

The Tribe shall not transfer or assign this Agreement nor any rights acquired thereunder, nor grant any interest, privilege or license whatsoever in connection with this Agreement, without the approval of the United States.

## **ARTICLE 8 – EFFECTIVE DATE AND DURATION**

- a. After signature by the authorized representatives of the Parties, the effective date of this Agreement will be the date on which the Secretary of the Interior causes to be published the statement of findings required by Section 10(a)(5) of the 2004 Act.
- b. This Agreement shall continue in full force and effect for the life of the Project. In the event the Corps no longer operates the Project, the rights of the Tribe under this Agreement shall continue in full force and effect under any other operator or operation of the Project.
- c. This Agreement may not be modified in any manner except with the joint written consent of the duly authorized representatives of the Corps and the Tribe.
- d. The Parties recognize that various issues of Indian law are and will be the subject of litigation, and the Parties agree that any subsequent changes, developments, or interpretations in such law shall not change the enforceability of this Agreement.
- e. By executing this Agreement, each signer for the Corps and the Tribe represents that the signer has actual authority to do so.
- f. The parties may sign this Agreement in counterpart

The Parties have executed this Agreement on the date following their respective signatures.

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NEZ PERCE TRIBE

BY: \_\_\_\_\_

\_\_\_\_\_  
Date

BY: \_\_\_\_\_

\_\_\_\_\_  
Date

UNITED STATES

BY:  \_\_\_\_\_

31 MAR 05  
Date

## APPENDIX A

**MEMORANDUM OF AGREEMENT  
BETWEEN  
THE NEZ PERCE TRIBE  
THE UNITED STATES ARMY CORPS OF ENGINEERS  
THE NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION – NATIONAL  
MARINE FISHERIES SERVICE  
THE BONNEVILLE POWER ADMINISTRATION  
AND THE STATE OF IDAHO**

**This Memorandum of Agreement (MOA)** is executed in counterpart by the Nez Perce Tribe (Tribe), the United States Army Corps of Engineers (Corps), the National Oceanic and Atmospheric Administration National Marine Fisheries Service (NMFS), the Bonneville Power Administration (BPA) and the State of Idaho (State) on the dates set out below. These entities are hereinafter referred to collectively as the “Parties.”

The Snake River Basin Adjudication (SRBA) Agreement, settling the Tribe’s water right claims (the “SRBA Agreement”), provides that the United States and the Tribe will enter into an agreement as to the use of 200,000 acre-feet of water in Dworshak Reservoir (the “Reservoir”), which will include an operational MOA between the Parties implementing a flow augmentation plan beneficial to fish.

The Corps and the Tribe have entered into an agreement as to the use of 200,000 acre-feet of water in the Dworshak Project (Agreement). This MOA is an appendix to the Agreement and is subject to and consistent with the Agreement.

The Parties have a mutual interest in supporting and protecting anadromous and resident fish species, wildlife and cultural resources affected by the Dworshak Project.

The Dworshak Project, authorized by Congress for multiple purposes, currently provides an estimated 1.2 million acre-feet of water (water elevation 1,600 feet to 1,520 feet above National Geodetic Vertical Datum) for flow augmentation and management of temperature in the lower Snake River for the benefit of migrating anadromous fish species, consistent with responsibilities pursuant to the Endangered Species Act (ESA) biological opinions on the Federal Columbia River Power System, and the Clean Water Act.

The Parties acknowledge that using 200,000 acre-feet of water from the Dworshak Project for flow augmentation and management of temperatures, including extending the use into September, benefits juvenile fall Chinook rearing in the Clearwater and Snake rivers, and adult Chinook and steelhead returning to the Clearwater and Snake rivers, and provides incidental benefits to summer recreational use of the Reservoir.

**THEREFORE**, the Parties agree as follows:

1. There is hereby created an intergovernmental board (the “Board”), composed of policy-level representatives appointed by each Party, of which the Nez Perce Tribe’s representative shall serve as permanent Chairperson. The Board shall exercise the respective authorities of the Parties in a cooperative manner in order to fulfill the mutual interests of the Parties in providing benefits to fish species affected by the Dworshak Project.
2. By June 10<sup>th</sup> of each year, the Board will prepare an operational plan (the Plan) for releasing up to 200,000 acre-feet of water from the Dworshak Project, which will include the planned dates of release, the rate of release, and the temperature of the water released.
3. In developing the Plan, the Board will consider factors benefiting fish species affected by the Dworshak Project, including but not limited to:
  - a. Projected water temperature and flow conditions in the Lower Snake River at Lower Granite Dam.
  - b. Growth rate of rearing juvenile fall Chinook in the Clearwater River.
  - c. Migration status of juvenile fall Chinook in the Clearwater and Snake rivers.
  - d. Migration status of adult steelhead and fall Chinook.
  - e. Other anadromous and resident fish needs.
4. In developing the Plan, the Board will also consider other factors affected by the Dworshak Project, including but not limited to:
  - a. Cultural resources, including but not limited to archaeological resources and burial sites, located in and around the Dworshak Project.
  - b. Summer recreational uses of the Reservoir.
5. The Plan, and its implementation, will comply with applicable Federal laws, regulations, and treaties. Issues surrounding such compliance will be identified and resolved during the Board’s development of the Plan. Any issues of compliance that arise after completion of the Plan will be addressed through the process described in paragraph 9 of this MOA.
6. If, in any year, the Board is unable to reach consensus on the Plan, then by June 20<sup>th</sup> of that year the Tribe will complete the Plan at its discretion and provide the Plan to the Parties. In doing so, the Tribe will make best efforts to fulfill the purposes of this MOA and will ensure compliance with applicable Federal laws, regulations and treaties. This MOA does not delegate the authority of any Party established by law; therefore, each party remains ultimately responsible for ensuring its compliance with applicable Federal laws, regulations, and treaties.
7. As a courtesy, the Tribe, on behalf of the Board, will inform other Columbia River Basin salmon managers of the Plan by June 30<sup>th</sup> of each year or at least ten days prior to the anticipated implementation of the Plan, whichever is earlier.

8. In any year, any Party may call for the Board to convene for the preparation of the Plan at a date other than specified in paragraph 2 of this MOA. In such an event, the Plan will be prepared in accordance with all other provisions of this MOA, but will be completed by a date mutually agreed to by the Parties, subject to the provision of paragraph 6 of this MOA.
9. In any year, a Party may call for the Board to reconvene after the adoption of the Plan for the purpose of amending the Plan due to substantially changed conditions. The Board may only amend the Plan by the unanimous written consent of the Parties.
10. The Plan will be deemed revenue neutral or positive if the 200,000 acre-feet is released in August and/or September with no spill in September. If this operation is maintained through at least 2020, the Plan thereafter could move the water to other times of the year and would still be deemed revenue neutral or positive. In making this determination, the parties assumed that flows would go through the powerhouse up to full powerhouse capacity; any additional flows would be through the spillway or regulating outlet.
11. Each Party reserves all rights, powers, and remedies now or hereafter existing in law or in equity, by statute, treaty or otherwise, in participating in this MOA. Nothing in this MOA is or shall be construed to be a waiver of the sovereign immunity of the Nez Perce Tribe, the State of Idaho, or the United States.
12. This MOA is entered into subject to the Agreement and nothing in it shall alter or be inconsistent with the Agreement. In the event of a conflict between this MOA and the Agreement, the Agreement will govern.
13. This MOA may be modified or supplemented with the unanimous written consent of the authorized representatives of the Parties.
14. After signature by the authorized representatives of the Parties, the effective date of this MOA and Agreement, will be the date on which the Secretary of the Interior causes to be published the statement of findings required by Section 10(a)(5) of the Snake River Water Rights Act of 2004, Title X, Division J, Public Law 108-447. The Parties may sign this MOA in counterparts, which shall not affect its validity.

NEZ PERCE TRIBE

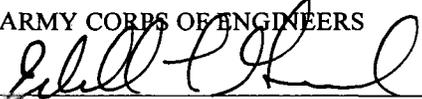
BY: \_\_\_\_\_

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BY: \_\_\_\_\_

Date: \_\_\_\_\_

U.S. ARMY CORPS OF ENGINEERS

BY: 

Date: 31 MAR 05

NATIONAL MARINE FISHERIES SERVICE

BY: \_\_\_\_\_

Date: \_\_\_\_\_

BONNEVILLE POWER ADMINISTRATION

BY: \_\_\_\_\_

Date: \_\_\_\_\_

STATE OF IDAHO

BY: \_\_\_\_\_ Date: \_\_\_\_\_