

James Yost
Chair
Idaho

W. Bill Booth
Idaho

Guy Norman
Washington

Tom Karier
Washington



Northwest Power and Conservation Council

Jennifer Anders
Vice Chair
Montana

Tim Baker
Montana

Ted Ferrioli
Oregon

Richard Devlin
Oregon

October 12, 2018

Elliot Mainzer, Administrator
Bonneville Power Administration
P.O. Box 3621
Portland, OR 97232

Dear Elliot:

The Council has carefully followed Bonneville's process for extending the Columbia Basin Fish Accords. In the Accord Extension process, Bonneville has asserted a position with regard to the Council's Columbia River Basin Fish and Wildlife Program that is inconsistent with the Northwest Power Act.

In a footnote in the draft Accord Extension with the Colville Tribes, Bonneville takes the position that a measure in the 2014 Program does not meet the requirements in Section 4(h)(5)-(7) of the Power Act for Program measures. Bonneville reiterated that position in the Record of Decision that you recently signed to approve the Accord Extensions, adding that Bonneville "deserves substantial deference" for this interpretation of the statute.

This position has no basis in the Northwest Power Act. Under the Act, Bonneville has no legal role in deciding whether something is a measure in the Program under Sections 4(h)(5)-(7). The Council has that authority. Moreover, nowhere in the Ninth Circuit's decision in *NRIC v. Council*, 35 F.3d 1371, 1389 (9th Cir. 1994) – cited by Bonneville as authority - does it say that *Bonneville* has the authority to make an independent decision on whether something is a program measure that meets the criteria in Section 4(h)(6).

Once the Council includes a measure in the program, Bonneville must decide whether and how to use its fund and otherwise act "in a manner consistent" with the program, a determination guided in large part by the Ninth Circuit's decision in the Fish Passage Center case, *Northwest Environmental Defense Center v. Bonneville Power Administration*, 477 F.3d 668 (9th Cir 2007). That determination by Bonneville does not include deciding for itself whether the Council properly included the measure under 4(h)(5)-(7). Moreover, Bonneville is not entitled to any deference for an interpretation of

the portions of the Act explicitly directed at the Council instructing the Council how to develop and amend the fish and wildlife program.

The Council and Bonneville have their appropriate roles under the Act. The Council works hard to fulfill its roles in program development, public review and comment, and project review; Bonneville was given the flexibility to fulfill its role in program implementation and to meet its other legal obligations. This relationship becomes untenable rather than harmonious if Bonneville asserts it can decide for itself what is properly assigned in the Act to the Council.

Thank you for your attention to this letter. We look forward to your response.

Sincerely,

A handwritten signature in black ink that reads "James A. Yost". The signature is written in a cursive style with a large initial "J" and a distinct "Y" at the end.

James Yost
Chair