

Second Extension– MONTANA / ACTION AGENCIES Accord

Second Extension of the Columbia Basin Fish Accord Agreement

among

the State of Montana (“Montana”)

and

Bonneville Power Administration (“Bonneville”),

U.S. Army Corps of Engineers (“Corps”), and Bureau of Reclamation (“Reclamation”)

RECITALS

Whereas, Montana, Bonneville, Corps, and Reclamation are Parties to the 2008 Columbia Basin Fish Accord Memorandum of Agreement (“2008 Accord”), including the Accord Extension signed in 2018 (collectively, together with this Second Extension, “**the Accord**”);

Whereas, the 2018 Accord Extension, as amended by the Parties in 2020, is set to expire on September 30, 2022;

Whereas, the Parties share an interest in pursuing negotiation of a potential new long-term agreement (“**long-term successor agreement**”) to succeed and replace the Accord and to preserve and advance the mutual benefits of the Accord relationship that the Parties have cultivated for more than a decade;

Whereas, pending matters relating to Columbia River System operation, maintenance, configuration, and mitigation (including non-operational conservation measures), the substance of final agency decisions for the Columbia River System Operations (“**CRSO**”) Environmental Impact Statement (“**EIS**”) and associated Endangered Species Act (“**ESA**”) consultations in particular, litigation over the CRSO EIS Record of Decision (“**ROD**”) and associated biological opinions, and related settlement discussions are material to the Parties’ consideration of and willingness to enter into a potential long-term successor agreement;

Whereas, the pendency of such matters makes it impractical for the Parties to consider and discuss all information germane to the substance of a potential long-term successor agreement on a timeframe that would allow the Parties to complete negotiation and execution of such agreement prior to Sep. 30, 2022;

Whereas, the Parties believe that maintaining continuity and stability in their Accord relationship as they pursue a long-term successor agreement will promote more effective and productive negotiation;

Now, therefore, the Parties agree as follows:

Second Extension – MONTANA / ACTION AGENCIES Accord

Except as expressly stated in this Second Extension of the Accord (hereinafter, “**Second Extension**”), all terms of the 2018 Accord Extension, including but not limited to any remaining operative provisions of the 2008 Accord, fish and wildlife project portfolios, planned budgets, and off-ramps, remain in effect; however, this Second Extension supersedes the 2020 Accord Extension Amendment.

A. AMENDMENTS to the Accord

1. The term provision of the 2018 Accord Extension, Section V.C, is amended as follows:

Unless otherwise decided by a Party pursuant to this Section V, this Extension, *as amended*, will be in force until the earlier of September 30, 2025, or such time that the Parties enter into a successor agreement replacing this Accord Extension.

2. Montana and Bonneville renegotiated project descriptions and budgets for the term of this Second Extension. Bonneville’s project funding commitment for fiscal years 23-25 are as shown in Attachment A, which is incorporated into this Second Extension.
3. Montana and Bonneville agree to the following modification of Section III.B.2 of the 2018 Accord Extension:

~~The total amount of funds that can be spent in a single fiscal year—including any unspent carry forward funds from any prior fiscal years—shall not exceed 120% of the budgeted amount for that year set forth in Attachment A, unless Bonneville and Montana agree otherwise. This cap governs request for changes in the timing of implementation and distribution of Extension dollars, may be adjusted through preschedules, reschedules, or budget transfers, as defined below.~~

This modification eliminates the 120% single fiscal year spending cap of the 2018 Accord Extension, and as a result, in any given fiscal year of this 2022 Accord Extension, the full carry-forward balance will be available for allocation across the Montana’s Accord project portfolio to supplement the project portfolio base budgets identified in Attachment A.

4. Montana and the Bureau of Reclamation negotiated certain provisions regarding Accord projects for this Second Extension.
 - a. Consistent with the biological opinions on Hungry Horse operation and maintenance, Reclamation will continue to operate the Selective Withdrawal

Second Extension – MONTANA / ACTION AGENCIES Accord

- System (“SWS”) to improve temperature conditions in the South Fork Flathead River for the benefit of native resident fish from June through the end of September and, when conditions allow, into November.
- b. To improve SWS operations, Reclamation will investigate installing real-time water temperature data monitoring equipment when the SWS undergoes overhaul. If installing the equipment is technologically feasible and warranted, Reclamation will install the equipment during the SWS overhaul.
 - c. Reclamation will convene an annual SWS coordination meeting with Montana Fish Wildlife and Parks (“MFWP”) and Reclamation regional and project staff prior to commencing SWS operations.
5. The Parties understand that with the issuance of the Action Agencies’ Record of Decision (“CRSO EIS ROD”) in September 2020, operation of the Columbia River System will be as provided in the CRSO EIS ROD and in accordance with the associated biological opinions, court orders, and other agreements. Therefore, Attachment C of the 2018 Accord Extension, that covered Columbia River System Operations, is superseded and stricken.
 6. Under the Accord, the Parties have agreed on the adequacy of the Action Agencies’ compliance with relevant laws as to the Columbia River System. The Action Agencies assert that their actions continue to comply with their legal responsibilities under the ESA, Northwest Power Act (“NWPA”), Clean Water Act (“CWA”), and National Environmental Policy Act (“NEPA”). Nonetheless, for the duration of this Second Extension, the Action Agencies agree that Montana is not obligated to affirm the adequacy of the Action Agencies’ compliance with those laws under Section V.A of the 2018 Accord Extension.
 7. The Parties desire to negotiate and execute a long-term successor agreement that includes Montana’s affirmation of adequacy and ongoing forbearance, and the Parties intend to work collaboratively and expeditiously towards that shared goal. Therefore, during the term of this Second Extension, Montana will forbear from taking a position adverse to any Action Agency in litigation under the NWPA, ESA, CWA, or NEPA that directly implicates the operation, maintenance, or configuration of the Columbia River System; neither will Montana take a position adverse to National Oceanic and Atmospheric Administration Fisheries (“NOAA”) or U.S. Fish and Wildlife Service (“USFWS”) in litigation under the ESA or Administrative Procedure Act regarding their July 2020 Biological Opinions for the Columbia River System. This forbearance commitment in no way affects Montana’s ability to independently interpret, advocate for, or fulfill its regulatory responsibilities under the CWA.

Second Extension – MONTANA / ACTION AGENCIES Accord

8. Notwithstanding Section A.7, above, the Parties agree to the addition of the following off-ramps to the Accord:
 - a. In the event that Montana finds it necessary to take a position in litigation contrary to the forbearance commitment set forth in Section A.7, above, Montana shall provide written notice of its withdrawal under this provision to the other Parties. A Party withdrawing under this off-ramp need not follow the withdrawal procedures provided in the 2018 Accord Extension. Rather, the Montana Accord will terminate automatically upon provision of such written notice of its withdrawal.
 - b. In addition, any Party may withdraw from the Accord if changed circumstances arising after the Effective Date of this Second Extension (1) necessitate a material change in the operation, maintenance, configuration, or mitigation of the Columbia River System, (2) such change is actually implemented during the term of this Second Extension, and (3) such change harms the withdrawing Party's interests or expectations (including biological interests or expectations) related to the Columbia River System.

All other applicable off-ramps and withdrawal procedures under the 2018 Accord Extension remain available to the Parties.

9. By agreeing to this Second Extension, no Party waives its right to assert any claims, arguments, or defenses in the future.
10. Each Party reserves the right to pursue legislation and settlement to address concerns related to Columbia River System operation, maintenance, configuration, mitigation (including non-operational conservation measures) or infrastructure funding, and other related matters.

B. NEGOTIATION OF SUCCESSOR AGREEMENT

The Action Agencies have an interest in developing a long-term successor agreement that preserves and promotes collaborative relationships with Montana and that includes commitments sufficient to support Montana's (1) affirmation of adequacy as to the federal legal compliance with respect to Columbia River System operation, maintenance, configuration and mitigation (including non-operational conservation measures), and (2) forbearance from initiating or joining in suits or regulatory actions challenging such compliance.

Second Extension – MONTANA / ACTION AGENCIES Accord

The Action Agencies acknowledge that Montana’s willingness to enter into a long-term successor agreement, including affirmation of adequacy and forbearance provisions, is predicated on numerous considerations, such as agreement with the Action Agencies on terms that reasonably account for the priorities and objectives of the 2018 Extensions or as may be subsequently identified by Montana.

The Parties understand that such matters are beyond the limited scope of this Second Extension, but the Parties agree to engage in good-faith discussion of these matters in their pursuit and negotiation of a potential long-term successor agreement.

C. EFFECTIVE DATE of SECOND EXTENSION

This Second Extension will take effect once all Parties have signed below.

D. SIGNATURES

Second Extension – MONTANA / ACTION AGENCIES Accord

BONNEVILLE POWER ADMINISTRATION:

JOHN

HAIRSTON

Digitally signed by

JOHN HAIRSTON

Date: 2022.09.30

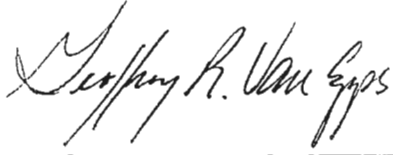
14:20:21 -07'00'

By: John L. Hairston
Title: Administrator and Chief Executive Officer

Date

Second Extension – MONTANA / ACTION AGENCIES Accord

U.S. ARMY CORPS OF ENGINEERS:



02 Oct 2022

By: Geoffrey R. Van Epps
Title: Colonel, U.S. Army
Division Commander

Date

Second Extension – MONTANA / ACTION AGENCIES Accord

BUREAU OF RECLAMATION:

JENNIFER
CARRINGTON

Digitally signed by
JENNIFER CARRINGTON
Date: 2022.10.03
21:31:32 -06'00'

By: Jennifer J. Carrington
Title: Regional Director
Columbia-Pacific Northwest Region

Date

Second Extension – MONTANA / ACTION AGENCIES Accord

STATE OF MONTANA:


By: _____
Title: Governor

10/17/2022
Date

Second Extension – MONTANA / ACTION AGENCIES Accord

Attachment A – Montana Project Portfolio

PROJECT No. *	PROJECT NAME	2022 (Base Value)	2023	2024	2025	TOTAL 2023-2025 (Base)	2023	2024	2025	TOTAL 2023-2025 (Base + Inflation)	Comments
Expense								2.5%	2.5%		
1	199101903 Hungry Horse Milligation Habitat Restoration and Research, Monitoring and Evaluation (R/M&E)	\$ 1,700,801	\$ 1,998,348	\$ 1,998,348	\$ 1,998,348	\$ 5,995,044	\$ 1,998,348	\$ 2,048,307	\$ 2,099,514	\$ 6,146,169	
2	199101903 Stewardship	\$ 130,000	\$ 130,000	\$ 130,000	\$ 130,000	\$ 390,000	\$ 130,000	\$ 133,260	\$ 136,581	\$ 399,831	BPA/Montana negotiated decrease of \$130k in 2020 in anticipation of Stewardship agreement. That Stewardship Agreement will not occur during this extension.
3	199500400 Libby Reservoir Milligation Restoration and Research, Monitoring and Evaluation (R/M&E)	\$ 1,217,332	\$ 1,267,332	\$ 1,267,332	\$ 1,267,332	\$ 3,801,994	\$ 1,267,332	\$ 1,299,015	\$ 1,331,491	\$ 3,897,838	
4	200201100 Kootenai River Operational Loss Assessment	\$ 239,887	\$ 239,887	\$ 239,887	\$ 239,887	\$ 719,661	\$ 239,887	\$ 245,884	\$ 252,031	\$ 737,802	Includes \$239,887 originating from 2019-002-00 Kootenai Wildlife Ops Milligation
5	200880000 Montana Resident Fish Habitat Acquisition	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	
6	201200800 Montana Regional Coordination	\$ 130,711	\$ 130,711	\$ 130,711	\$ 130,711	\$ 392,133	\$ 130,711	\$ 133,979	\$ 137,328	\$ 402,018	
7	201900100 Sekokini Springs Hatchery	\$ 274,419	\$ 324,419	\$ 324,419	\$ 324,419	\$ 973,257	\$ 324,419	\$ 332,529	\$ 340,843	\$ 997,791	
	Reinstatement of 2018 Extension Reduction	\$ 307,547	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	
YEARLY EXPENSE TOTAL:		\$ 4,090,697	\$ 4,090,697	\$ 4,090,697	\$ 4,090,697	\$ 12,272,091	\$ 4,090,697	\$ 4,192,944	\$ 4,297,789	\$ 12,581,450	

PROJECT No. *	PROJECT NAME	2022 (Base Value)	2023	2024	2025	TOTAL 2023-2025 (Base)	2023	2024	2025	TOTAL 2023-2025 (Base + Inflation)	Comments
Capital											
YEARLY CAPITAL TOTAL:											

Note: BPA Project numbers may change over time
 Note: Montana Resident Fish Habitat prior capital amount carried forward (for land acquisition)