

**2008 Columbia Basin Fish Accords
Memorandum of Agreement between the
State of Montana and FCRPS Action Agencies**

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**MEMORANDUM OF AGREEMENT BETWEEN THE STATE OF MONTANA,
THE BONNEVILLE POWER ADMINISTRATION, THE U.S. ARMY CORPS OF
ENGINEERS, AND THE U.S. BUREAU OF RECLAMATION**

I. INTRODUCTION

The Bonneville Power Administration ("BPA"), the U.S. Army Corps of Engineers ("Corps") and the U.S. Bureau of Reclamation ("Reclamation") (collectively, "Action Agencies") and the State of Montana ("Montana" or "State") have developed this Memorandum of Agreement ("Agreement" or "MOA") through good faith negotiations to address for the term of the Agreement issues associated with the direct and indirect effects of construction, inundation, operation and maintenance of the Federal Columbia River Power System ("FCRPS")¹ and Reclamation's Upper Snake River ("Upper Snake") Projects,² on the fish and wildlife resources of the Columbia River Basin. The Action Agencies and Montana intend to provide for a long-term agreement that provides benefits to the above referenced Parties. Specific reasons for this Agreement include the following:

- To address legal mandates for the FCRPS and Upper Snake Projects under the Endangered Species Act ("ESA"), the Northwest Power Act ("NPA"), and the Clean Water Act ("CWA").
- To address the Parties' mutual concerns for certainty and stability in the funding and implementation of projects for the benefit of fish and wildlife affected by the FCRPS and Upper Snake Projects, affirming and adding to the actions proposed in the draft FCRPS and Upper Snake Biological Opinions ("BiOps"); and
- To foster a cooperative and partnership-like relationship in implementation of the mutual commitments in this Agreement.

II. HYDRO COMMITMENTS

A. Hydro Performance

A.1. Performance Standards, Targets, and Metrics:

Montana concurs in use of the hydro performance standards, targets, and metrics as described in the Main Report, Section 2.1.2.2 of the Action Agencies' August 2007 FCRPS Biological Assessment (FCRPS BA)(pages 2-3 through 2-6) and the draft FCRPS

¹ For purposes of this Agreement, the FCRPS comprises 14 Federal multipurpose hydropower projects. The 12 projects operated and maintained by the Corps are: Bonneville, the Dalles, John Day, McNary, Chief Joseph, Albeni Falls, Libby, Ice Harbor, Lower Monumental, Little Goose, Lower Granite, and Dworshak dams. Reclamation operates and maintains the following FCRPS projects: Hungry Horse Project and Columbia Basin Project, which includes Grand Coulee Dam.

² For purposes of this Agreement, the Upper Snake River Projects (Upper Snake) are Minidoka, Palisades, Michaud Flats, Ririe, Little Wood River, Boise, Lucky Peak, Mann Creek, Owyhee, Vale, Burnt River and Baker.

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BiOp at RPA 51 (pages 63-64 of 85). Montana and its representatives may recommend to the Action Agencies actions that may provide more benefit to Montana's resident fish than the performance standards, which will be considered and may be implemented at the discretion of the Action Agencies.

A.2. Performance and Adaptive Management:

The Parties agree that the BiOps will employ an adaptive management approach, including reporting and diagnosis, as described in Section 2.1 of the Action Agencies' FCRPS BA. The Parties agree that if biological or project performance expectations as described in the FCRPS BA are not being met over time as anticipated, diagnoses will be done to identify causes, and remedies will be developed to meet the established performance standard. The performance standard for species or the federal projects will not be lowered during the terms of the BiOps (although as provided in the FCRPS BA, tradeoffs among Snake River and lower Columbia River federal dams are allowed).

The Parties recognize that new biological information will be available during the term of the MOA that will inform the methods and assumptions used to analyze the effects of hydro operations on fish species covered by this agreement. The Parties will work together to seek agreement on methods and assumptions for such analyses building on analyses performed in development of the FCRPS BiOp as warranted.

As described in the draft FCRPS BiOp, a comprehensive review will be completed in June 2012 and June 2015 that includes a review of the state of implementation of all actions planned or anticipated in the FCRPS and Upper Snake BiOps and a review of the status and performance of each ESU addressed by those BiOps. The Parties agree that they will jointly discuss the development, analyses and recommendations related to these comprehensive evaluations and, in the event performance is not on track, to discuss options for corrective action.

A.3. Research, Monitoring, and Evaluation.

Maintaining and improving research, monitoring, and evaluation programs is critical to informed decision making on population status assessments and improving management action effectiveness. The Parties agree that the program of research, monitoring, and evaluation provided in the draft FCRPS and Upper Snake BiOps and this Agreement provide a comprehensive RM&E program that addresses critical uncertainties. The Action Agencies will implement status and effectiveness research, monitoring and evaluation sufficient to robustly track survival improvements and facilitate rebuilding actions accomplished, in part, through projects and programs identified in the FCRPS BA and the draft BiOp. The Parties further agree that the Action Agency effort should be coordinated with implementation partners including other fishery managers.

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B. Spill/Transport

The Parties agree that the spill and fish transportation measures proposed in the draft BiOps, subject to adaptive management as provided in the FCRPS BA, satisfy ESA and NPA requirements with respect to salmon and steelhead affected by the FCRPS and Upper Snake Projects.

C. Dam Breaching

Montana supports the adequacy of the combined package of the BiOps and this Agreement, and therefore agrees that breaching some or all of the Snake River FCRPS dams is not necessary to satisfy the ESA, NPA or CWA.

D. Flow Actions

D.1. The Parties agree to the flow and water management actions in the draft FCRPS and Upper Snake BiOps, including in particular, the relationship between the FCRPS BiOp and the Northwest Power & Conservation Council's Fish and Wildlife Program and Mainstem Amendments. The Parties support implementing the Libby and Hungry Horse Water Management strategies for summer reservoir operations contained in the Council's 2003 Mainstem Amendments to the Columbia River Basin Fish and Wildlife Program ("Montana operations"). The Action Agencies commit to instituting the Montana operations as described in the FCRPS BiOp, in 2009 and beyond, following the 2008 operations ordered by the federal district court of Oregon in *NWF v. NMFS* on February 25, 2008, or in any 2008 "in season" management decision emerging from the regional forum (TMT).

D.2. In addition, the Action Agencies agree to operate the FCRPS/Upper Snake projects based on the following principles:

- Mitigation for the effects of the FCRPS/Upper Snake Projects should be based first on biologically and economically sound operations of the hydroelectric system which will protect and enhance fish resources, including survival and recovery of ESA listed anadromous and resident fish, based on the best available scientific information.
- The Action Agencies will make operational decisions giving consideration to the interests of each affected sovereign state and tribe through agreed-upon forums.
- The Action Agencies will seek to ensure that operational measures aimed at the survival and recovery of ESA-listed salmon and steelhead do not adversely impact listed or non-listed resident species, or where such impacts are unavoidable, that the impacts are minimized where reasonable to do so, giving consideration to the interests of each affected sovereigns as described in the preceding principle.

E. Emergency Operations for Unlisted Fish

The Action Agencies agree to take reasonable actions to aid non-listed fish during brief periods of time due to unexpected equipment failures or other conditions and when significant detrimental biological effects are demonstrated. Where there is a conflict in such operations, operations for ESA-listed fish will take priority.

III. HABITAT COMMITMENTS

A. BPA Funding for Habitat

A.1. General Principles:

- Habitat projects funded under this Agreement are linked to biological benefits based on limiting factors for ESA-listed fish, including bull trout.
- Projects funded under this Agreement are consistent with recovery plans and subbasin plans now included in the Council's Program. More specific linkages will be documented as a function of the BPA contracting process.
- Projects may be modified by mutual agreement over time based on biological priorities, feasibility, science review comments, or accountability for results.

A.2 Commitment

BPA will provide up to \$15.5 million to Montana on October 1, 2009 for the permanent protection of resident fish habitat in the Columbia River Basin within Montana through the purchase of fee title or conservation easements (choice of method at the discretion of Montana). BPA will also provide \$50,000 in funding for associated preacquisition costs. Montana and BPA agree to negotiate an implementation MOA to be in place before October 1, 2009 providing BPA with no less than 1:1 credit to BPA per kilometer of stream habitat protected, and addressing how fee title or conservation easements will be acquired and managed. The projects or actions supported by this funding are designed to address resident fish species affected by Hungry Horse Dam in support of the Council program implementation in Montana. Montana and BPA acknowledge that rising real estate values require alternative, cost-effective approaches to resident fish mitigation. Montana commits to pursue and integrate alternatives to the acquisition of real property interests as part of any future habitat funding request to BPA pursuant to Section III.C.3. In implementing these actions, Montana and BPA will consult as appropriate with the Confederated Salish and Kootenai Tribes (CSKT) of the Flathead Reservation. Nothing in this agreement is intended to alter, disrupt, or otherwise re-arrange existing mitigation programs or funding for the fisheries protection property acquisition program already established between CSKT, BPA and the State of Montana.

B. General Provisions For All Projects

B.1. All projects funded pursuant to this Agreement shall:

- Be consistent with the Council's Program (including sub-basin plans), as amended, otherwise compliant with the NPA's science and other review processes; applicable ESA recovery plans; and applicable data management protocols adopted by the Action Agencies.
- For BPA funded commitments, be consistent with BPA's then applicable policies, including but not limited to BPA's *in lieu* policy and BPA's capital policy.
- For BPA funded commitments, report results annually (including ongoing agreed upon monitoring and evaluation) via PISCES and/or other appropriate databases.
- Remain in substantive compliance with any applicable project contract terms.

B.2. In addition, for habitat projects identified as providing benefits to resident fish, Montana shall:

- provide estimated habitat quality improvement and survival benefits from the project to a population or populations of resident fish based on key limiting factors;
- identify these benefits based on expert determination; and
- support and defend these estimates of habitat improvement and survival benefits with scientific, policy, and legal arguments

B.3. The Parties will coordinate any RM&E activities with each other and with regional RM&E processes (particularly those needed to ensure consistency with the FCRPS BiOp RM&E framework), as appropriate and agreed to among the Parties.

B.5. For actions on federal lands, Montana will consult with the federal land managers and obtain necessary permits and approvals.

C. Council and ISRP Review

C.1. As described in Section III.B.1, all projects funded by BPA pursuant to this Agreement must be consistent with the Council's Program and follow the NPA's science and other review processes. The Parties agree that, subject to Section III.B.1, BPA funding commitments in this Agreement and the associated projects to be implemented by Montana are consistent with the Council's Program.

C.2. The Parties recognize that the Council's Program is a maturing program, which through several decades of implementation has established a continuing framework for mitigating the impacts of hydroelectric development in the Columbia River Basin. The Parties acknowledge that nothing in this Agreement precludes any Party from making recommendations to the Council about modifications to the Council or ISRP review processes to facilitate project implementation under this Agreement or generally.

C.3. The Parties further acknowledge Montana's desire to not include ongoing projects in this Agreement. "Ongoing projects" refers to projects proposed by Montana,

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recommended by the Council, and funded by BPA during the FY 07-09 period pursuant to BPA's FY 07-09 programmatic fish and wildlife decisions.³ The Action Agencies agree that this Agreement does not preclude Montana or the Confederated Salish & Kootenai Tribes from seeking funds to continue such ongoing projects or for new projects through the Council's Program and that all requests for such funds will be considered by BPA in accordance with the NPA. Except as otherwise provided in this section, requests for such funds shall not be predicated, or otherwise justified, in whole or part on grounds inconsistent with the forbearance and adequacy commitments in Section IVA and B. As a result, the Parties acknowledge that Montana may continue to seek funding for ongoing or new projects from BPA pursuant to the NPA for habitat, hatchery, and research, monitoring and evaluation (RM&E) activities to protect, mitigate, and enhance resident fish in Montana. As to habitat acquisition, Montana may seek additional funding for habitation acquisition in Montana through fiscal year FY 2009 as agreed in the existing BPA, Montana and CSKT MOA; and provided further that Montana may seek additional funding for habitat acquisition in year 5 of this Agreement (i.e., 2013) for implementation beginning in year 7 of this Agreement (i.e., 2015). BPA shall comply with applicable NPA requirements in determining whether to fund such requests; provided that, as provided in the forbearance and adequacy provisions of Section IV.A and B, any such funding determinations shall not be subject to judicial or other challenge.

D. Replacement Projects and Adaptive Management

D.1. General Principles:

- The Parties agree that a project identified in this Agreement may not ultimately be implemented or completed due to a variety of possible factors, including but not limited to:
 - Problems arising during regulatory compliance (e.g., ESA consultation, NEPA, NHPA review, CWA permit compliance, etc);
 - The project does not meet BPA's in lieu policy or does not meet BPA's capital policy;
 - New information regarding the biological benefits of the project (e.g., new information indicating a different implementation action is of higher priority, or monitoring or evaluation indicates the project is not producing its anticipated benefits);
 - Changed circumstances (e.g., completion of the original project or inability to implement the project due to environmental conditions); or
 - Substantive non-compliance with the implementing contract.

- Should a project not be implemented due to one or more of the above factors, the Action Agency and Montana will promptly negotiate a replacement project.

³ The ongoing projects are: BPA Project Nos. 200200300, 199101903, 199101901, 199500400 and 200600800.

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D.2. Replacement Projects:

- A replacement project should be the same or similar to the one it replaces in terms of target species, limiting factor, mitigation approach, geographic area and/or subbasin and biological benefits.
- A replacement project will not require additional Council or ISRP review if the original project has been authorized.
- A replacement project should have the same or similar planning budget as the one it replaces (less any expenditures made for the original project). Such budget must address carry-forward funding whose amount and calculation will be subject to the Parties' mutual agreement.

D.3. Adaptive Management

In addition to project-specific adaptation described above, the Parties may mutually agree to adaptively manage this shared implementation portfolio on a more programmatic scale based on new information or changed circumstances.

E. Inflation, Ramp Up, Planning v. Actuals, Carry-over:

E.1. Inflation.

Beginning in fiscal year (FY) 2010, BPA will provide an annual inflation adjustment of 2.5 percent.

E.2. Treatment of Ramp-up of new/expanded work:

In recognition of the need to “ramp up” work (timing of Agreement execution, contracting, permitting, etc), the Parties agree that generally, average BPA spending for the new/expanded projects in fiscal year 2008 is expected to be approximately one-third of the average planning level; and for fiscal year 2009, it is expected to be up to 75 percent of the average planning level, with full planning levels expected for projects in starting in fiscal year 2010. The Parties agree, however, that given the focused habitat project commitment in this Agreement, this “ramp up” provision is not applicable unless a replacement project is necessary.

E.3. Assumptions regarding Planning versus Actuals

Historically, the long-term average difference between BPA’s planned expenditures for implementing the expense component of the Power Council’s Fish and Wildlife Program, and actual spending (what BPA is invoiced and pays under the individual contracts), has been about seven percent, with the actual spending averaging 93 percent of planned spending. While BPA will plan for spending up to 100 percent of the funding commitments described in this Agreement, nevertheless, due to a variety of factors, BPA’s actual expenditures may be less. As a result, the Parties agree that provided BPA’s actual spending for the totality of project commitments in this Agreement

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averages 93 percent of the planning amount annually, BPA is in compliance with its funding commitments. If BPA is not meeting the 93 percent average annually due to circumstances beyond the Parties' control, BPA will not be in violation of this Agreement, but the Parties will meet to discuss possible actions to remove the impediments to achieving 93 percent. The Parties also agree that, for the reasons given above regarding ramp up, new projects and projects expansions during their FY08 and FY09 ramp up phase will be excluded from this calculation.

E.4. Unspent funds, and pre-scheduling/rescheduling.

Annual project budgets may fluctuate plus or minus 20 percent in relation to the planning budgets for each project, to allow for shifts in work between years (within the scope of the project overall), if work will take longer to perform for reasons beyond the sponsors' control (reschedule), or can potentially be moved to an earlier time (preschedule). Fluctuations within an overall project's scope of work, but outside of the 20 percent band, can also occur if mutually agreeable for reasons such as, but not limited to, floods, fires, or other *force majeure* events.

Generally speaking, unspent project funds that are carried over per the reschedule/preschedule provisions above (i.e., within +/- 20 percent of the annual project budget and within the project's scope of work) may be carried forward from one contract year (i.e., Year 1), to as far as two contract years (i.e., Year 3) into the future before such funds are no longer available. There are two exceptions to this reschedule/preschedule criteria and the limitation on carry-forward.

First, as an additional limitation on carry-forward, for the project expansions and new projects (which describes all the projects in Attachment A), if actual total FY08 and FY09 spending is less than the sum of 33 percent of the FY08 budget and up to 75 percent of the FY09 budgets reflected in Attachment A for the project due to circumstances within Montana's control, then the difference between what is actually spent in FY08 and FY09, and the sum of 33 percent of the FY08 budget and up to 75 percent of the FY09 budgets reflected in the spreadsheet, cannot be carried over into FY10.

Second, to the extent that the projects committed to in this Agreement involve the acquisition of interests in land or water from willing sellers, BPA and Montana may, by mutual agreement, adjust the 20 percent fluctuation band for the budgets for such projects to accommodate the uncertainties of negotiations with sellers. In addition, BPA may extend the two year carry-forward limit for such projects, provided that Montana provides at least six months notice of the potential need for such an extension, and provided further that BPA may decline to extend the carry-forward limit to avoid a "bow wave" of requests in any given year or towards the end of this Agreement's term, or on any other reasonable ground.

IV. FORBEARANCE, WITHDRAWAL, AND DISPUTE RESOLUTION

A. Effects on Litigation

A.1. The Parties will discuss the appropriate means of alerting the district court in *NWF v. NMFS* of this Agreement (if needed) and will undertake any agreed-upon approach within 14 calendar days of the effective date of this Agreement.

A.2. Montana covenants that during the term of this Agreement:

a. Provided that the Montana operations as described in Section II.D.1 are implemented in 2009 and beyond, Montana will not initiate, intervene in, or support in any manner ESA, NPA, CWA, or Administrative Procedure Act ("APA") suits against the Action Agencies or NOAA regarding the legal sufficiency of the FCRPS proposed action, FCRPS BiOp, Upper Snake BiOp and/or conforming implementing Records of Decision (RODs) absent consent of all federal defendants.

b. Except with respect to Montana's continuing participation in the U.S. District Court in Montana in *Center for Biological Diversity, et al. v U.S. Fish and Wildlife Service, et al.*, Case CV 03-29-M-DWM, Montana will not initiate, intervene in, or support in any manner ESA, NPA, CWA or APA suits against the Action Agencies or NOAA regarding the effects on fish resources or water quality resulting from the operations or existence of the FCRPS and Upper Snake Projects that are specifically addressed in the FCRPS PA, FCRPS BiOp, Upper Snake BiOp and/or conforming implementing RODs absent consent of all federal defendants. Water quality for purposes of this provision includes only water temperature and total dissolved gas requirements and therefore excludes all other matters, such as (by way of illustration and not limitation) the Corps' program under 33 U.S.C. § 1344 and toxics clean up regulation. Nothing in this Agreement shall preclude Montana from enforcing, to the extent permitted by federal law, the provisions of state water quality statutes, or rules promulgated under such statutes, with respect to any effect from the operation the FCRPS and Upper Snake Projects, except effects on total dissolved gas or water temperature when an FCRPS Project is operated consistently with the draft FCRPS BiOp.

c. Montana's participation in ongoing and future BPA rate proceedings (ratemaking, approval, or review) will be consistent with the terms of this Agreement.

d. Montana shall not advocate against, either directly or through parties not subject to the Agreement, the adequacy of the FCRPS and Upper Snake BiOps as long as the Montana Operations as described in Section II.D.1 are implemented in 2009 and beyond.

e. These commitments apply to state agencies, boards, commissions or other Executive Branch entities, and any person that acts as an agent or representative of same. Subject to Section IV.C.3, the Parties agree that Montana's appointees to the Council are excluded from the obligations under this Agreement, except to the extent that such exclusion is

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necessary to enable Montana's appointees to perform their responsibilities under the NPA.

B. Affirmation of Adequacy

B.1. The Parties support the package of federal and Agreement actions in the FCRPS and Upper Snake BiOps and this Agreement as an adequate combined response of these entities to address the government's duties to mitigate for the FCRPS effects under applicable environmental laws and regulations during the ten year duration of the BiOps. This includes requirements for:

- conserving listed salmon and steelhead, including avoiding jeopardy and adverse modification of critical habitat under the ESA;
- protection, mitigation, enhancement and equitable treatment of fish and wildlife under the NPA; and
- CWA provisions related to water temperature and total dissolved gas requirements for FCRPS dams to the extent compliant with the draft FCRPS BiOp and subject to the exception and enforcement authority provided for pursuant to Section IV.A.2.b.

B.2. Montana's determination of adequacy under applicable law is premised on several important assumptions and understandings with which the federal parties to this Agreement concur:

- The specific actions identified in this Agreement are carried out and/or funding for such actions is provided by the federal parties in a timely manner;
- Other actions not specifically identified in this Agreement, but committed to in the FCRPS BiOp are carried out in a timely manner;
- The biological performance and status of the species affected by the development and operation of the FCRPS and Upper Snake hydroprojects are diligently and comprehensively monitored and analyzed, and reported to Montana and others as provided the BiOps; and
- Adaptive management will be used as described in the section 2.1 of the Action Agencies' FCRPS BA to ensure achievement of performance objectives for the FCRPS.

C. Council Program Amendment Process and Other Provisions

C.1. During the term of the Agreement, the Parties will submit comments or recommendations for Council Program amendments that are consistent with and are intended to effectuate this Agreement, however this provision shall not prevent Montana from supporting those program amendments which it has submitted to the Council's Fish and Wildlife program to date which are not inconsistent with this MOA.

C.2. If third parties recommend an amendment to the Program that any Party believes is contrary to this Agreement, the Party is not precluded by the terms of this Agreement from asserting any arguments it may have as to whether such an amendment is lawful or

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unlawful under the NPA, or any other law, provided in so doing they act consistent with the terms of this Agreement.

C.3. Montana's Council representatives participated in the development of this Agreement. Nothing in the Agreement, however, is intended to affect, or shall be construed as affecting, consideration by such representatives of recommendations from parties other than Montana when discharging their duties under the NPA. Similarly, nothing in this Agreement is intended to affect, or shall be construed as affecting, the Action Agencies' rights under Section IV.E with respect to withdrawal or Section IV.F with respect to dispute resolution in the event that the Council takes action inconsistent with Montana's commitments under this Agreement.

D. Good Faith Implementation and Support

Best effort good-faith implementation and support of this Agreement is the general duty to which all Parties agree to be bound. Nonetheless, the Parties understand that from time to time questions or concerns may arise regarding a Party's compliance with the terms of this Agreement. In furtherance of the continuing duty of good faith, each Party agrees that the following specific actions or efforts will be carried out:

D.1. On a continuing basis, it will take steps to ensure that all levels of their government/institution is made aware of the existence of this Agreement and the specific commitments and obligations herein, and emphasize the importance of meeting them;

D.2. Each Party will designate a person to be initially and chiefly responsible for coordinating internal questions regarding compliance with the Agreement;

D.3. Each Party will make best efforts to consult with other Parties prior to taking any action that could reasonably be interpreted as inconsistent with any part of this Agreement. To assist in this, the Parties will designate initial contact points. The formality and nature of the consultation will likely vary depending circumstances. The initial contact points are initially charged with attempting to agree on what form of consultation is required. In some instances, the contact between initial contact points may suffice for the consultation, while in others, they may need to recommend additional steps. The Parties agree that consultations should be as informal and with the least amount of process necessary to ensure that the Parties are fulfilling the good-faith obligation to implement and support the Agreement.

D.4. If a Party believes that another Party has taken action that is contrary to the terms of the Agreement, or may take such action, it has the option of a raising a point of concern with other Parties asking for a consultation to clarify or redress the matter. The Parties will endeavor to agree upon any actions that may be required to redress the point of concern. If after raising a point of concern and having a consultation the Parties are unable to agree that the matter has been satisfactorily resolved, any Party may take remedial actions as it deems appropriate, so long as those remedial actions do not violate the terms of the Agreement.

E. Changed Circumstances, Renegotiation/Modification, Withdrawal

E.1. The Parties assume that NOAA will issue final BiOps for the FCRPS and Upper Snake whose provisions, including any reasonable and prudent alternative, will be consistent with the draft BiOps insofar as material to this Agreement. If a Party believes that a material difference exists between the draft and final BiOps for either the FCRPS or Upper Snake, the provisions of Section IV.E.3 apply.

E.2 If any court, regardless of appeal, finds that the BiOp or agency action is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, and subsequently remands the BiOp to NOAA Fisheries this Agreement shall remain in force, subject to the provisions of this Section IV.E.2. If any court, regardless of appeal, enters injunctive or other relief or remand directions that compel FCRPS actions in direct conflict with this Agreement (i.e., the FCRPS actions are additional or different than required by the 2008 BiOp and/or this Agreement), then the Parties will meet promptly pursuant to Section IV.E.3 and determine the appropriate response. The Parties will seek to preserve this Agreement.

(a) In the event that a portion(s) of this Agreement is in direct conflict with the court order or resulting amended BiOp, the Parties shall meet and agree on an appropriate amendment to that section, or, if such amendment is not possible under the terms of the court order or resulting amended BiOp, then a substitute provision shall be negotiated by the Parties.

(b) If the court-ordered FCRPS operations or resulting amended BiOp present a direct conflict with this Agreement (as defined above) that are either financially material to an Action Agency or that materially constrain the Corps or Reclamation from meeting FCRPS purposes, Section IV.E.3 below shall apply.

(c) The Parties will participate in any court-ordered process or remand consultation in concert with Sections IV.D and IV.E.

(d) The Parties intend that determinations of materiality will only be made in cases of direct conflict that are significant.

E.3. In the event of the occurrence of any of the material effects in Section IV.E.2, or in the event of material non-compliance with the Agreement not resolved by dispute resolution, the affected Party or Parties shall notify the other Parties immediately and identify why the event is considered material. The Parties shall utilize dispute resolution if there is a disagreement as to whether the event is material. In addition, prior to any withdrawal, the Parties shall first make a good faith effort to renegotiate mutually agreeable modifications to the Agreement. If renegotiation is not successful, the affected Party may notify the other Parties in writing of its intent to withdraw by a date certain. If renegotiation is not successful, at the time the withdrawal is effective, all funding commitments and/or other covenants made by the withdrawing Party cease, and the withdrawing Party shall have no further rights or obligations pursuant to the Agreement. A withdrawing Party reserves any existing legal rights under applicable statutes, including all arguments and defenses, and this Agreement cannot be used as an admission or evidence in support of or against any such argument or defense.

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E.4. The provisions of this Agreement authorizing renegotiation, dispute resolution and withdrawal provide the sole remedies available to the Parties for remedying changed circumstances or disputes arising out of or relating to implementation of this Agreement.

E.5. Any Party may request renegotiation or withdrawal for reasons other than those enumerated above subject, however, to the provisions in Section IV.E.3.

E.6. If one Party withdraws from the Agreement, any other Party has the option to withdraw as well, with prior notice.

E.7. Savings. Notwithstanding Section IV.E.3, above, in the event of withdrawal, BPA will continue providing funding for projects necessary for support of BiOp commitments (as determined by the Action Agencies), and may provide funding for other on-going projects or programs that the Parties mutually agree are important to continue.

F. Dispute Resolution

F.1. Negotiation

I.a. The Parties shall attempt in good faith to resolve any dispute arising out of or relating to implementation of this Agreement in accordance with this section and without resort to administrative, judicial or other formal dispute resolution procedures. The purpose of this Section IV.F.1 is to provide the Parties an opportunity to fully and candidly discuss and resolve disputes without the expense, risk and delay of a formal dispute resolution.

I.b. If the Parties are unable to resolve the dispute through informal dispute resolution, then the dispute shall be elevated to negotiating between executives and/or officials who have authority to settle the controversy and who are at a higher level of management than the person with direct responsibility for administration of this Agreement. All reasonable requests for information made by one Party to the other will be honored, with the Action Agencies treating “reasonable” within the context of what would be released under the Freedom of Information Act.

I.c. In the event a dispute over material non-compliance with the Agreement has not been resolved by negotiation, the affected Party may seek to withdraw, without further renegotiation, in accordance with Section IV.E.3.

F.2. Mediation

In the event the dispute has not been resolved by negotiation as provided herein, the disputing Parties may agree to participate in mediation, using a mutually agreed upon mediator. To the extent that the disputing Parties seeking mediation do not already include all Parties to this Agreement, the disputing Parties shall notify the other Parties to this Agreement of the mediation. The mediator will not render a decision, but will assist

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the disputing Parties in reaching a mutually satisfactory agreement. The disputing Parties agree to share equally the costs of the mediation.

G. Modification

The Parties by mutual agreement may modify the terms of this Agreement. Any such modification shall be in writing signed by all Parties.

V. MISCELLANEOUS PROVISIONS

A. Term of Agreement

The term of this Agreement will extend from its effective date through the end of fiscal year 2018 which is midnight on September 30, 2018.

B. Applicable Law

All activities undertaken pursuant to this Agreement must be in compliance with all applicable laws and regulations. No provision of this Agreement will be interpreted or constitute a commitment or requirement that the Action Agencies take action in contravention of law, including the APA, ESA, CWA, National Environmental Policy Act, Federal Advisory Committee Act, Information Quality Act, or any other procedural or substantive law or regulation. Federal law shall govern the implementation of this Agreement and any action, whether mediated or not.

C. Authority

Each Party to this Agreement represents and acknowledges that it has full legal authority to execute this Agreement.

D. Effective Date & Counterparts

The effective date of this Agreement shall be the date of execution by the last Party to provide an authorized signature to this Agreement. This Agreement may be executed in counterparts, each of which is deemed to be an executed original even if all signatures do not appear on the same counterpart. Facsimile and photo copies of this Agreement will have the same force and effect as an original.

E. Binding Effect

This Agreement shall be binding on the Parties and their assigns and successors. Each Party may seek dispute resolution in accordance with Section IV.F, or to withdraw in accordance with Section IV.E.3 if the dispute is not resolved.

F. No third party beneficiaries are intended by this Agreement.

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G. All previous communications between the Parties, either verbal or written, with reference to the subject matter of this Agreement are superseded, and this Agreement duly accepted and approved constitutes the entire Agreement between the Parties.

H. Waiver, *Force Majeure*, Availability of Funds

H.1. The failure of any Party to require strict performance of any provision of this Agreement or a Party's waiver of performance shall not be a waiver of any future performance of or a Party's right to require strict performance in the future.

H.2. No Party shall be required to perform due to any cause beyond its control. This may include, but is not limited to fire, flood, terrorism, strike or other labor disruption, act of God or riot. The Party whose performance is affected by a *force majeure* will notify the other Parties as soon as practicable of its inability to perform, and will make all reasonable efforts to promptly resume performance once the *force majeure* is eliminated. If the *force majeure* cannot be eliminated or addressed, the Party may consider withdrawal pursuant to Section IV.E.3.

H.3. The actions of the Corps and Reclamation set forth in this Agreement are subject to the availability of appropriated funds. Nothing in this Agreement shall be construed to require the obligation or disbursement of funds in violation of the Anti-Deficiency Act.

I. Notice.

1. Any notice permitted or required by the Good Faith provisions of this Agreement, Section IV.D, may be transmitted by e-mail or telephone to a Party's initial contact points, as that person is defined pursuant to the Good Faith provisions.
2. All other notices permitted or required by this Agreement shall be in writing, delivered personally to the persons listed below, or shall be deemed given five (5) days after deposit in the United States mail, addressed as follows, or at such other address as any Party may from time to time specify to the other Parties in writing. Notices may be delivered by facsimile or other electronic means, provided that they are also delivered personally or by mail. The addresses listed below can be modified at any time through written notification to the other Parties.

Notices to BPA should be sent to:

Vice President, Environment Fish & Wildlife
Mail Stop KE-4
Bonneville Power Administration
P.O. Box 3621
Portland, OR 97208-3621

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Notices to the U.S. Army Corps of Engineers should be sent to:

U.S. Army Corps of Engineers, Northwestern Division
Chief, Planning, Environmental Resources and Fish Policy Support Division
1125 NW Couch Street
Suite 500
P.O. Box 2870
Portland, OR 97208-2870

Notices to the U.S. Bureau of Reclamation should be sent to:

Deputy Regional Director
Bureau of Reclamation
Pacific Northwest Region
1150 N. Curtis Rd., Suite 100
Boise, ID 83706

Notices to the State of Montana should be sent to:

Montana Office
Northwest Power and Conservation Council
Attn: Montana Council Members
Capitol Station
1301 Lockett
Helena, MT 59620-0805

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SIGNATURES

/s/ Stephen J. Wright

May 2, 2008

Stephen J. Wright
Administrator and Chief Executive Officer
Bonneville Power Administration

Date

/s/ Steven R. Miles, P.E.

May 2, 2008

Steven R. Miles, P.E.
Colonel, U.S. Army Corps of Engineers
Division Commander

Date

/s/ Tim Personius

May 2, 2008

(for) J. William MacDonald
Regional Director
U.S. Bureau of Reclamation
Pacific Northwest Region

Date

/s/ Brian Schweitzer

May 8, 2008

Brian Schweitzer
Governor
State of Montana

Date