

Accord Extension Amendment – MONTANA / ACTION AGENCIES

Amendment to 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 Amendment, “**the Accord**”), and the 2018 Accord Extension includes fish and wildlife mitigation project budgets spanning four federal fiscal years – 2019 through 2022;

Whereas, the 2018 Accord Extension term provision states: “[T]his Extension will be in force until the earlier of when the Action Agencies issue their final decisions on the [Columbia River System Operations (CRSO) Environmental Impact Statement (EIS)] and any associated consultation under the Endangered Species Act (“ESA”) for the Columbia River System, or September 30, 2022”;

Whereas, in response to an October 19, 2018, presidential memorandum, the federal Action Agencies revised the schedule for the CRSO EIS and associated biological opinions to complete them by September 2020, one year earlier than originally planned;

Whereas, the parties share an interest in pursuing prompt negotiation of a potential new long-term agreement (“**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, the parties acknowledge that pending matters relating to Columbia River System operation, maintenance, configuration, and mitigation (including non-operational conservation measures), and the substance of final agency decisions for the CRSO EIS and associated ESA consultations in particular, are material to the parties’ consideration of and willingness to enter into a potential 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 successor agreement on a timeframe that would allow the parties to complete negotiation and execution of such agreement prior to Sep. 30, 2020;

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

Now, therefore, the parties agree as follows:

Except as expressly stated in this Amendment, 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.

A. AMENDMENTS

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 ~~when the Action Agencies issue their final decisions on the CRSO EIS and any associated consultation under the ESA for the Columbia River System, or~~ September 30, 2022, *or such time that the parties enter into a successor agreement replacing this Accord Extension.*

2. The Parties understand that upon issuance of the Action Agencies' Record of Decision (CRSO ROD), operation of the Columbia River System will be as provided in the CRSO ROD and in accordance with the associated biological opinions. Therefore, Attachment C of the 2018 Accord Extension, that covered Columbia River System Operations, is superseded and stricken.
3. For the past 13 years, 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 Amendment, 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.
4. The Parties desire to negotiate and execute a 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 Parties' good-faith negotiation of such successor agreement, 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

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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.

5. Notwithstanding Section A.4, above, the Parties agree to the addition of the following off-ramp to the Accord:

In the event that Montana finds it necessary to take a position in litigation contrary to the forbearance commitment set forth in Amendment Section A.4, 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.

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

6. By agreeing to this Amendment, no party waives its right to assert any claims, arguments, or defenses in the future.
7. Each party reserves the right to pursue legislation 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 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.

The Action Agencies acknowledge that Montana’s willingness to enter into a successor agreement, including affirmation of adequacy and forbearance provisions, is predicated on numerous considerations, such as review of the CRSO Final EIS, associated biological opinions, and the record of decision (“ROD”), as well as agreement with the Action Agencies on successor

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agreement 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 Amendment, but the Parties agree to engage in good-faith discussion of these matters in their pursuit and negotiation of a potential successor agreement.

C. EFFECTIVE DATE of AMENDMENT

This Amendment will take effect once all parties have signed below.

D. SIGNATURES

/s/ John L. Hairston

September 24, 2020

John L. Hairston
Acting Administrator and Chief Executive Officer
Bonneville Power Administration

Date

/s/ D. Peter Helmlinger

September 24, 2020

D. Peter Helmlinger, P.E.
Brigadier General, US Army
Division Commander

Date

/s/ Lorri J. Gray

September 24, 2020

Lorri J. Gray
Regional Director
Bureau of Reclamation
Columbia-Pacific Northwest Region

Date

/s/ Steve Bullock

September 29, 2020

Steve Bullock
Governor
State of Montana

Date