

WILDLIFE MITIGATION AGREEMENT FOR LIBBY AND HUNGRY HORSE DAMS

between the

BONNEVILLE POWER ADMINISTRATION

and the

STATE OF MONTANA

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This WILDLIFE MITIGATION AGREEMENT FOR LIBBY AND HUNGRY HORSE DAMS (Agreement), executed this 21st day of December, 1988, is between the Bonneville Power Administration (BPA) and the State of Montana.

WITNESSETH

WHEREAS, Libby Dam was constructed on the Kootenai River in the State of Montana and for which hydroelectric production is one of the project's authorized purposes;

WHEREAS, Hungry Horse Dam was constructed on the South Fork of the Flathead River in the State of Montana and for which hydroelectric production is one of the project's authorized purposes;

WHEREAS, both Libby and Hungry Horse Dams are operated as part of the Federal Columbia River Power System and are within the Columbia River Basin;

WHEREAS, Section 4(h) of the Pacific Northwest Electric Power Planning and Conservation Act, Public Law 96-501 (Northwest Power Act) includes provisions for the protection, mitigation, and enhancement of fish and wildlife affected by the development, operation, and management of hydroelectric facilities of the Columbia River Basin;

WHEREAS, Section 4(h)(10)(A) of the Northwest Power Act authorizes the Administrator of the BPA to use the BPA fund to protect, mitigate, and enhance

fish and wildlife affected by the development and operation of hydroelectric facilities of the Columbia River Basin;

WHEREAS, Montana Department of Fish, Wildlife, and Parks (MDFWP) evaluated and defined wildlife impacts from the construction of Libby and Hungry Horse Dams;

WHEREAS, the Northwest Power Planning Council (Council) in their Columbia River Basin Fish and Wildlife Program (Program), identified the need for wildlife protection, mitigation, and enhancement at Libby and Hungry Horse Dams;

WHEREAS, the State of Montana through its Department of Fish, Wildlife, and Parks (MDFWP) has authority and responsibility for management of fish and wildlife within the State of Montana;

WHEREAS, the 50th Legislature of Montana adopted Senate Bill 320, an Act to Establish a Fish and Wildlife Mitigation Trust Fund, now codified in the Montana Code Annotated, sections 87-1-611 et seq., that authorizes MDFWP to enter into Agreements with other entities committing money to the trust and requires that expenditures of principal and interest from the trust be in accordance with such written Agreements.

NOW, THEREFORE, the BPA and the State of Montana agree as follows:

1. Purpose

The purpose of this Agreement is to establish an arrangement that provides for the protection, mitigation, and enhancement of wildlife and wildlife habitat affected by the development of Libby and Hungry Horse Dams within the State of Montana.

2. Definitions

a. Bonneville Power Administration (BPA) means the Bonneville Power Administration, a federal power marketing agency created by the Bonneville Project Act and its agents, successors, and assigns.

b. BPA Account means the trust account within the Trust Fund into which Montana places moneys paid by BPA pursuant to this Agreement.

c. Council means the Pacific Northwest Electric Power and Conservation Planning Council created by Section 4 of the Pacific Northwest Electric Power Planning and Conservation Act, P.L. No. 96-501.

d. Development means the construction of Libby and Hungry Horse Dams, reservoirs, and associated facilities.

e. Fiscal year means the fiscal year beginning October 1 and ending September 30.

f. Fish and Wildlife Program means the Program adopted and revised by the Council pursuant to the Northwest Power Act to protect, mitigate, and enhance fish and wildlife on the Columbia River and its tributaries.

g. Habitat or Wildlife Habitat means those habitats identified in Exhibits 1 and 2 as lost or affected by the development of Libby and Hungry Horse Dams and within the boundaries of the State of Montana.

h. Montana means the government of the State of Montana, including its various departments, agencies, commissions and subdivisions; and its officials, representatives, employees, appointees and contractors, whether elected or appointed. However, Montana excludes Montana's appointees to the Pacific Northwest Electric Power and Conservation Planning Council, to the extent that such exclusion is necessary to enable Montana's appointees to perform their responsibilities under the Pacific Northwest Electric Power Planning and Conservation Act.

i. Montana Department of Fish, Wildlife, and Parks (MDFWP) means the state agency responsible for the management of wildlife within the State of Montana.

j. Pacific Northwest Electric Power Planning and Conservation Act, or Northwest Power Act means the Pacific Northwest Electric Power Planning and Conservation Act, P.L. 96-501, 16 U.S.C. 839 et seq., and as it may be amended.

k. Operation and Maintenance means activity or action performed during and after the term of the Agreement to manage, operate, keep up, repair, maintain, retain, and preserve the wildlife and wildlife habitat values and benefits of the mitigation efforts, actions, or projects undertaken during the term of this Agreement.

l. Party means either of the parties to this Agreement: BPA or the State of Montana.

m. Term means the period of time the Agreement is in effect.

n. Trust Fund means the fund established by Montana pursuant to State of Montana Senate Bill 320, an Act to establish a Fish and Wildlife Mitigation Trust Fund, codified in the Montana Code Annotated, sections 87-1-611 et seq., for the purpose of wildlife mitigation.

o. Wildlife or Associated Wildlife means any and all wildlife species associated with the habitats identified in Exhibits 1 and 2 and includes wildlife either specifically or not specifically described in these Exhibits.

p. Wildlife Mitigation, Mitigation, or Protection, Mitigation, and Enhancement means actions or activities undertaken to protect, mitigate, and enhance wildlife and wildlife habitat affected by the development of Libby and Hungry Horse Dams.

3. Exhibits

Exhibit 1. Wildlife Impact Assessment and Mitigation Summary, Montana Hydroelectric Projects, Volume I - Libby Dam; MDFWP; Final Report; 1984; DOE/BP314.

Exhibit 2. Wildlife Impact Assessment and Mitigation Summary, Montana Hydroelectric Projects, Volume III - Hungry Horse Dam; MDFWP; Final Report; 1984; DOE/BP313; Second Printing July 1986.

4. Agents

The Director of MDFWP or his appointee will serve as the representative for the State of Montana for carrying out the provisions of this Agreement. The Director of the Division of Fish and Wildlife of BPA or his appointee will serve as the representative for BPA for carrying out the provisions of this Agreement and for renewing the Agreement pursuant to sections 6 and 7 of this Agreement.

5. Wildlife Impacts

MDFWP has estimated the impacts to wildlife and wildlife habitat from the development of Libby and Hungry Horse Dams and associated facilities within the boundaries of the State of Montana and sets forth these estimates in Exhibits 1 and 2, respectively. Exhibits 1 and 2 identify a loss of 32,950 acres of wildlife habitat from Libby Dam and 23,750 acres from Hungry Horse Dam. Montana and BPA acknowledge that the losses identified by MDFWP in Exhibits 1 and 2 adequately represent the area, and types and amounts of wildlife habitats and associated wildlife impacted by the development of Libby and Hungry Horse Dams. Further, Montana and BPA agree that MDFWP's use of target wildlife species to estimate impacts to wildlife in Exhibits 1 and 2 adequately address impacts to any and all wildlife species associated with these habitats.

6. Term

a. This Agreement shall be effective when the Administrator of BPA, the Director of MDFWP, and the Governor of Montana sign this Agreement.

b. The term of this Agreement shall commence when BPA pays to Montana \$2 million and shall be for a period ending 1 year after BPA makes such payment to Montana.

c. BPA, at its sole option, may extend the period of this Agreement for one or more additional terms by making additional payments to Montana in the amounts set forth in Section 7 on or before the time that this Agreement would otherwise expire without the additional payments. Prior to the time that this Agreement would otherwise expire, BPA will notify Montana in writing of its intent to exercise its option to extend the period of the Agreement.

d. Upon expiration of this Agreement, the parties shall not continue to incur liabilities and obligations pursuant to this Agreement, except for the provisions of Sections 8 and 9 pertaining to operation and maintenance of mitigation actions undertaken and those provisions of Section 12 pertaining to Hold Harmless and Indemnification.

7. Payment

a. BPA will pay to the State of Montana on or before December 31, 1989, the amount of \$2 million, and this Agreement shall remain effective for an initial term ending 1 year after BPA makes this payment.

b. If BPA exercises one or more of its options for renewal as provided under Section 6 of this Agreement, payment for such renewals and their terms shall be as follows:

- (1) \$2 million for the first renewal for an additional term of 1 year.
- (2) \$2 million for the second renewal for an additional term of 1 year.
- (3) \$2 million for the third renewal for an additional term of 1 year.
- (4) \$2 million for the fourth renewal for an additional term of 1 year.
- (5) \$2.5 million for the final renewal for an additional term of 55 years.

c. BPA at its sole discretion shall have the right to exercise one or more of its options for renewal at any time and provide payment for such additional term or terms. If BPA exercises all of its options for renewal, this Agreement will remain effective for 60 years.

d. If BPA does not exercise its options for renewal, then Montana will retain the moneys paid by BPA into the BPA account and use such moneys on activities within the Columbia River Basin of Northwest Montana that protect, mitigate, and enhance wildlife and wildlife habitat affected by the

development of Libby and Hungry Horse Dams. BPA will receive credit for wildlife mitigation undertaken with funds from BPA and the BPA Account.

8. Wildlife Mitigation Fund

a. Montana will utilize all funds provided by BPA pursuant to this Agreement to establish a BPA Account in Montana's Wildlife Mitigation Trust Fund in accordance with State of Montana Senate Bill 320, an act to establish a Fish and Wildlife Mitigation Trust Fund, now codified in the Montana Code Annotated, sections 87-1-611 et seq. Principal, interest, and other earnings of said fund will be used only for activities or actions to protect, mitigate, and enhance wildlife and wildlife habitat affected by the development of Libby and Hungry Horse Dams in accordance with the provisions of this Agreement, and for the operation and maintenance of such mitigation actions. Montana agrees to undertake such mitigation actions in a manner that is consistent with the Council's Columbia River Basin Fish and Wildlife Program and will consult with the Wildlife Mitigation Advisory Committee established pursuant to Section 10 of this Agreement for advice and guidance in designing and implementing such mitigation actions. Further, Montana agrees that such mitigation actions will be performed within the Columbia River Basin of Northwest Montana.

b. BPA will receive credit for wildlife mitigation undertaken with funds from BPA and the BPA Account, and such mitigation actions will be used to satisfy BPA's responsibilities to protect, mitigate, and enhance wildlife and wildlife habitat affected by the development of Libby and Hungry Horse Dams.

c. During the term of this Agreement and following expiration of this Agreement, Montana or its agents, successors, or assigns will retain ownership

of real property and facilities that it or its agents, successors, or assigns has acquired or constructed with funds from the BPA Account.

d. Montana also agrees, following expiration of the maximum possible period of this Agreement, to undertake the operation and maintenance of mitigation actions undertaken under and during the term of this Agreement and to retain and use funds in the BPA Account of the Trust Fund in accordance with Section 9 of this Agreement to pay for such operation and maintenance.

9. Management and Investment of the Wildlife Mitigation Fund

a. All funds provided to Montana by BPA will be deposited with the Montana Board of Investments to be invested and managed as part of the unified investment program in a separate investment fund, consistent with Sections 17-6-203 and 87-1-611 of the Montana Code Annotated. The principal, interest, earnings, and income of the investment fund will be expended or retained in accordance with the terms and conditions of this Agreement.

b. Montana will administer the BPA Account in the Trust Fund so that, if BPA exercises its options to renew this Agreement for a maximum possible period of 60 years, the unobligated amount of funds in the BPA Account of the Trust Fund will equal or exceed \$10 million upon final payment by BPA and will equal or exceed \$8 million for the period from BPA's final payment until year 30 of the Agreement. Thereafter, the unobligated amount of funds in the BPA Account of the Trust Fund shall never be less than \$4 million.

c. Following expiration of the maximum possible period of this Agreement (60 years), Montana will continue to administer the BPA Account, and will retain unobligated moneys in the BPA Account in the amount of at least \$4 million, to provide earnings sufficient to pay for the operation and

maintenance of mitigation actions undertaken under and during the term of this Agreement. If earnings from the BPA Account of the Trust Fund exceed the amount necessary to pay for the operation and maintenance of mitigation actions undertaken, then Montana may spend such excess funds on additional activities within the Columbia River Basin of Northwest Montana that further protect, mitigate, and enhance wildlife and wildlife habitat affected by the development of Libby and Hungry Horse Dams.

10. Wildlife Mitigation Advisory Committee

a. Montana will establish a mitigation advisory committee to provide advice and guidance regarding implementation of mitigation activities undertaken pursuant to this Agreement. Montana will invite each of the following entities to appoint a representative to serve as a member of the advisory committee at the appointing entity's expense: MDFWP as the chair, BPA, Council, Pacific Northwest Utilities Conference Committee, U.S. Fish and Wildlife Service, Confederated Salish and Kootenai Tribes of the Flathead Reservation, U.S. Forest Service, Western Montana Electric Generation and Transmission, Montana Electric Cooperative Association, Bureau of Reclamation, and U.S. Army Corps of Engineers. Montana may invite other entities not listed above to appoint a representative to serve as a member of the advisory committee at the appointing entity's expense.

b. Montana will develop and provide an annual report to the advisory committee at the end of each fiscal year (September 30) this Agreement is in effect. The annual report will address mitigation activities undertaken, wildlife benefits derived, and provide an accounting of revenues and expenditures in accordance with generally accepted accounting principles,

along with a listing of funds currently held in the trust account. The annual report will also outline future activities, expected wildlife benefits, and estimated costs.

c. The members of the committee will decide how to conduct meetings and how to develop and provide advice and guidance to Montana. The Committee will meet when requested by Montana and as appropriate to provide advice and guidance. However, the advisory committee shall meet at least twice each fiscal year. The chair of the advisory committee will be responsible for providing minutes of the meetings to the members of the advisory committee.

11. Relationship to the Columbia River Basin Fish and Wildlife Program

Mitigation actions implemented pursuant to this Agreement will be undertaken in a manner consistent with the Council's Fish and Wildlife Program. Mitigation measures in the Council's Fish and Wildlife Program for Libby and Hungry Horse Dams will be given consideration as priority projects to be implemented under this Agreement. Montana agrees not to submit, endorse, or support amendments to the Council's Fish and Wildlife Program that would be in conflict with the intent, purpose, or provisions of this Agreement.

12. Hold Harmless and Indemnification

a. Montana agrees that this Agreement satisfies, for the term of the Agreement, any and all of BPA's responsibilities that can be performed under the Northwest Power Act for the protection, mitigation, and enhancement of wildlife and wildlife habitat affected by the development of Libby and Hungry Horse Dams as set forth in Exhibits 1 and 2 and that are within the boundaries of the State of Montana. Montana agrees to indemnify and hold harmless BPA

for the term of this Agreement from any and all claims, orders, adjudications, rules, suits, or actions, whether by Montana, the Council, Federal and State agencies, tribes, fish and wildlife organizations, or any other entity or individual, that BPA has not satisfied any and all of its responsibilities that can be performed under the Northwest Power Act to protect, mitigate, and enhance wildlife and wildlife habitat affected by the development of Libby and Hungry Horse Dams as set forth in Exhibits 1 and 2 and that are within the boundaries of the State of Montana. This indemnification includes responsibility for the area, amounts, and types of habitats identified in Exhibits 1 and 2 and for any wildlife species associated with these habitats either specifically or not specifically described in these Exhibits. Montana assumes no responsibility to indemnify BPA for habitats lost by the development of Libby and Hungry Horse Dams that are outside of those set forth in Exhibits 1 and 2.

b. Montana further agrees that, during and after the term of this Agreement, Montana will indemnify and hold harmless BPA from any and all claims, orders, adjudications, rules, suits, or actions, whether by Montana, the Council, Federal and State agencies, tribes, fish and wildlife organizations, or any other entity or individual, that BPA should pay additional moneys for (1) mitigation actions undertaken under and during the term of this Agreement, (2) the operation and maintenance of mitigation actions undertaken under and during the term of this Agreement, and (3) damages to wildlife and wildlife habitat that were not mitigated as a result, directly or indirectly, of Montana's or other's misuse, mismanagement, or negligent use of the trust funds, or as a result of negligent or improper conduct of protection, mitigation, and enhancement efforts undertaken during the term of this Agreement.

c. If BPA exercises its options to renew this Agreement for the maximum possible period of 60 years, then, during and after termination of this Agreement, Montana agrees not directly or indirectly to recommend to the Council or any other person or entity, not directly or indirectly to endorse or support the recommendations or claims of others, and not to make any other claims that BPA should pay additional moneys for the protection, mitigation, and enhancement of wildlife and wildlife habitat affected by the development of Libby and Hungry Horse Dams as set forth in Exhibits 1 and 2 and that are within the boundaries of the State of Montana, if such protection, mitigation, and enhancement can be performed under the Northwest Power Act.

d. The parties do not intend that this Agreement create or confer rights upon third party beneficiaries of any sort whatsoever. Montana has a right to defend against any claim or suit that BPA should pay for the protection, mitigation, and enhancement of wildlife and wildlife habitat affected by the development of Libby and Hungry Horse Dams.

13. Choice of Law

To the extent that state law is applicable, this Agreement shall be interpreted under the law of the state of Montana. Otherwise, Federal law shall govern.

14. Invalidity

In the event any part, term, or provision of this Agreement is determined by a court of competent jurisdiction to be void, voidable, unenforceable, illegal, or in conflict with any law of the state of Montana or of the United States, then such determination shall not affect the remaining provisions of this Agreement. If the court's ruling includes a determination that the

principal purpose or intent is defeated, or that any of the indemnification and hold harmless provisions of the Agreement are void, voidable, unenforceable, illegal, or in conflict with Federal law or the law of the state of Montana, then each party to this Agreement shall appeal any such adverse determination at its own expense. However, both parties may by mutual agreement decide not to appeal any such adverse determination. If both parties agree not to appeal, or appeals are unsuccessful, and the adverse determination remains in effect, and if the parties do not agree to amendments to this Agreement so that the Agreement is consistent with such adverse determination, then, within 60 days after the decision not to appeal or exhaustion of opportunities for appeal, Montana will pay to BPA (1) the amount of money in the BPA Account of the Trust Fund, less obligations to the extent they are unconditional and cannot be reduced or revoked, at the time of the initial adverse determination, plus (2) earnings, if any, from the BPA Account from the time of the initial adverse determination to the time of exhaustion of opportunity for appeal or the decision not to appeal, less obligations on such earnings to the extent they are unconditional and cannot be reduced or revoked, plus (3) any payments made by BPA during the period of appeal. If the above obligation to return money to BPA causes a burden on continuing mitigation efforts during the period of appeal, then BPA and Montana may mutually agree on (1) mitigation efforts that should continue, and (2) the amount of moneys from the BPA Account of the Trust Fund that will be spent on such continuing mitigation efforts. All moneys then remaining in the BPA Account of the Trust Fund at the time of exhaustion of opportunity for appeal, less obligations to the extent they are unconditional and cannot be reduced or revoked, will be paid to BPA. In addition, BPA and Montana will agree on the

disposition or retention of real property and facilities acquired or constructed with funds from the BPA Account. After Montana makes such payment to BPA, as established above, and closes out the BPA Account of the Trust Fund, and the disposition of real property is completed, this Agreement will terminate and the parties will not continue to incur any liabilities or obligations pursuant to this Agreement.

IN WITNESS WHEREOF, the parties have executed this Agreement this 21st day of December, 1988, in Helena, Montana.



JAMES J. JURA
Administrator
Bonneville Power Administration



THEODORE SCHWINDEN
Governor
State of Montana



JAMES W. FLYNN
Director
Montana Department of Fish,
Wildlife, and Parks