

COOPERATIVE AGREEMENT

BETWEEN THE

UNITED STATES DEPARTMENT OF THE INTERIOR

FISH AND WILDLIFE SERVICE (USF&WS),

FEDERAL HIGHWAY ADMINISTRATION (FHWA)

AND THE

MONTANA DEPARTMENT OF TRANSPORTATION

RELATIVE TO

PRIORITY HIGHWAY CONSTRUCTION

PROJECT REVIEW

June 1999

This Cooperative Agreement (Agreement) between the Montana Department of Transportation (MDT), the Federal Highway Administration (FHWA), and the United States Department of the Interior Fish and Wildlife Service (USF&WS) sets forth responsibilities of the signatory agencies (Parties) relative to priority review of highway construction projects with the goal of achieving timely design and implementation of adequate, safe and economical highway improvements while also assuring such design and implementation is sensitive to the protection of natural resources for which the USF&WS is responsible under federal statute and regulation.

WHEREAS, because of federal-aid highway funding increases under the Transportation Equity Act for the 21st Century (TEA-21), MDT has substantially increased the number of highway construction projects the USF&WS has to review pursuant to the Endangered Species Act of 1973, as amended and the Fish and Wildlife Coordination Act of 1958, as amended; and

WHEREAS, many of these projects fall within the known habitat of recently listed threatened and endangered species; and

WHEREAS, USF&WS has indicated that due to staff resource constraints, it is currently unable to provide MDT with priority review, consultation and permitting decisions for the increased number of highway construction projects pursuant to its responsibilities; and

WHEREAS, the Parties have determined that it would be mutually beneficial to supplement USF&WS staffing above normal levels which were established at pre-TEA-21 highway program levels and at levels that don't reflect additional resources needed to address recent and emerging threatened and endangered species listings; and

WHEREAS, the Parties have determined that any supplemental staffing above normal levels would provide priority review and consultation on federal-aid highway construction projects contemplated or under design by MDT; and

WHEREAS, MDT is willing to reimburse USF&WS for supplemental staffing to provide these functions; and

WHEREAS, FHWA has indicated and agrees that Montana's apportioned federal-aid highway funds can be used to support this agreement and would be eligible for reimbursement at applicable federal-aid match rates.

NOW, THEREFORE, in consideration of the mutual promises and agreements contained herein, the signatory parties to this Agreement concur with the following responsibilities and terms.

I. AGENCY RESPONSIBILITIES

A. MDT Shall:

1. Program a federal-aid project to track costs and support an advance state payment to USF&WS for the costs contemplated by this Agreement, including:
 - Salary and benefits for one (1) full-time employee (meeting the professional standard described in Attachment A) adjusted annually to cover appropriate step-increases and cost of living allowance (COLA) costs awarded Federal government employees at a rate equivalent to a federal white-collar Pay Schedule General Schedule 9/11 (GS-9/11). Attachment A is attached by reference to this Agreement.

- Travel and per-diem at federal government rates as needed to support the priority review and consultation contemplated by this Agreement.
 - Indirect costs at 22% charged by the Denver Finance Center, Denver, CO.
 - It is anticipated that total annual funds needed for these services will not initially exceed \$74,000. Actual costs may be more or less than this amount, depending on the amount of travel needed to support the priority review and consultation contemplated by this Agreement. MDT shall advance additional state payment as necessary.
2. Upon receipt of a signed Agreement/modification, transmit an advance state payment equal to either the annual total of funds needed to support the services contemplated by this Agreement or additional funds needed to fund any modifications.
 3. Review for approval, quarterly USF&WS submittals of actual account of expenditures for salaries, benefits, travel and indirect costs as drawn against advance state payment in support of work contemplated in paragraph 1.B.1.
 4. If the MDT Project Manager agrees with the USF&WS quarterly account of expenditure as submitted, an approval will be transmitted to the USF&WS Project Manager within ten (10) working days. If the MDT Project Manager disagrees with this submittal, a meeting to clarify the account of expenditures will be requested within ten (10) working

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days. In the event of a disagreement over the account of expenditures, MDT pledges to negotiate in good faith towards a reconciliation of the disputed amount.

5. Reconcile and adjust federal-aid project funding and/or advance state payment to USF&WS at the point of Agreement extension, modification, or termination and upon completion of this cooperative agreement make any adjustments needed in Federal share payable as consistent with 23 USC Section 132.

B. USF&WS Shall:

1. USF&WS shall supplement its existing staff, which currently processes MDT projects on a routine basis, with qualified staff as detailed in Attachment A, and use the funds provided under this Agreement to pay the costs of salaries and associated benefits and indirect costs as prescribed in the USF&WS' cost recovery policy (FWS Manual Part 264), and to reimburse reasonable travel expenses in accordance with the Federal Travel Regulations, 41 C.F.R. Chapter 301, which is incorporated into this agreement by reference.
2. USF&WS shall ensure that 100% of the supplemental staff contemplated by this Agreement is detailed to work on the priority projects identified by MDT in accordance with the coordination procedures defined in I.D. unless detailing to other projects is agreed to by the MDT Project Manager.

3. **USF&WS shall ensure that the supplemental staff identified in Attachment A shall keep daily time records identifying the number of hours spent working on each specific MDT project and any other work tasks such as those listed under I.D. relative to coordination. These records shall account for 100% of the time worked by supplemental staff, including any time spent on non-MDT work. In addition, USF&WS shall keep accurate and separate accounting records of all receipts and disbursements of all funds received pursuant to this Agreement and produce such records for examination as required by MDT or FHWA and shall permit extracts and copies to be made by these other signatory agencies or their duly authorized representatives. USF&WS shall keep records substantiating hours and costs billed pursuant to this Agreement for a period of at least three (3) years after the final billing is submitted. These records shall be subject to audit by MDT, as appropriate.**
4. **Submit quarterly accounts of expenditure based on 1.B.3. to MDT project manager for crediting against current advance state payment.**
5. **Upon receipt of initial advance state payment supplement existing staff as expeditiously as possible to support work contemplated by this agreement.**
6. **In the event of disagreement over statements of expenditure, negotiate in good faith towards reconciliation of the disputed amount, continue the priority review of highway construction projects throughout negotiations as long as current advance state payment is sufficient to cover costs, and credit the**

MDT for any amount determined to be a USF&WS overcharge.

C. FHWA Shall:

1. Approve programming a federal-aid project to accomplish the work contemplated by this Agreement at the applicable federal-aid reimbursement rate.
2. Under the authority of 23 USC Section 132, reimburse MDT the total amount of federal share payable for any project programmed (including advance payments) to support this Agreement upon obtaining notification of its execution.

D. Coordination:

1. On a quarterly basis, MDT will establish and submit a priority listing of projects to USF&WS which will guide USF&WS supplemental staff efforts in the priority review process.
2. Initially, MDT and USF&WS will hold monthly meetings to discuss coordination of the priority review process. After a reasonable start-up period, the scheduling of these meetings may be changed at the discretion of the project managers.
3. Both MDT and USF&WS agree that ready and reasonable access will be provided to working level staff of the other agency in an effort to minimize the need for formal meetings.

4. While the focus will be on review permitting decisions for priority MDT projects, USF&WS supplemental staff may also be involved in other tasks which support agency coordination and which serve to expedite the implementation of the MDT's highway construction program and compliance with the statutes and regulations for which USF&WS bears responsibility. Examples of other tasks which may be assigned at the request of MDT and with concurrence of USF&WS include, but are not limited to:

- early review of projects contemplated for programming,
- participation in agency scoping activities,
- compilation of wildlife resource inventories relative to the state's highway system,
- provide detailed input on alternatives under discussion, or
- review and provide comments on systems-level planning documents.

II. GENERAL TERMS

- A. Length of Agreement. The length of this Agreement is four (4) years from the date of signature of the last signing party unless extended or terminated as provided in II.B. and II.C.

- B. Modification and Extension. This Agreement may be modified, amended or extended in two-year increments by the mutual Agreement of the signatory parties.
- C. Termination. This Agreement may be terminated by either the MDT or USF&WS upon sixty (60) days written notice to the point of contact/project manager in the other agency if the party requesting termination has demonstrated that other agency has not substantially fulfilled the responsibilities and terms of the Agreement after being provided with notice and thirty (30) days to remedy the situation.
- D. Point of Contact/Project Managers.

1. The Point of Contact/Project Manager in each signatory agency is as listed below unless such responsibilities delegated by this individual.

a. MDT:

Name: Joel Marshik, Manager
Address: Environmental Services Unit
Montana Department of Transportation
P.O. Box 201001
Helena, MT 59620-1001
Tel: (406) 444-7632
Fax: (406) 444-7245
E-mail: jmarshik@state.mt.us

b. USF&WS:

Name: Kemper M. McMaster
Address: Montana Field Office
U.S. Department of the Interior
U.S. Fish and Wildlife Service
100 North Park
Helena, MT 59601
Tel: (406) 449-5225
Fax: (406) 449-5339
Email: kemper_mcmaster@fws.gov

c. FHWA:

Name: Dale Paulson, Program Development
Engineer
Address: Federal Highway Administration
2880 Skyway Drive
Helena, MT 59602
Tel: (406) 449-5303, ext.239
Fax: (406) 449-5314
E-mail: dale.paulson@fhwa.dot.gov

E. Required Clauses.

1. During the performance of this Agreement, the parties agree to abide by the terms of Executive Order 11246 on non-discrimination and will not discriminate against any person because of race, color, religion, sex or national origin. The participants will take affirmative action to ensure that applicants are employed without regard to their race, color, religion, sex or national origin.

2. No member of or delegate to Congress, or appointed transportation official or Commissioner, shall be admitted to any share or part of this Agreement or any benefit that may arise therefrom; but this provision shall not be construed to extend to this Agreement if made with a corporation for its general benefit.
3. The parties agree that in any contracts to be developed and awarded pursuant to this Agreement all design, plans, specifications, estimates of costs, construction, utility relocation work, right-of-way acquisition procedures, acceptance of the work and procedures in general shall, at all times, conform to the applicable federal and state laws, rules, regulations, orders and approvals, including, specifically, procedures and requirements relating to labor standards, equal employment opportunity, non-discrimination, compliance with the Americans with Disabilities Act, anti-solicitation, information, auditing and reporting provisions.

F. Continuation of Existing Responsibilities.

1. The parties to this Agreement are acting in an independent capacity in the performance of their respective functions under this Agreement, and regardless of the funding source for any supplemental staff to be hired by USF&WS to support priority review and consultation on highway construction projects, such staff shall not be construed as an officer, agent or employee of either the MDT or FHWA.

2. In no way do the USF&WS, MDT or FHWA intend to abrogate through this Agreement any obligations or duties to comply with the regulations promulgated under the 1973 (federal) Endangered Species Act as amended, the 1958 (federal) Fish and Wildlife Coordination Act as amended, the National Environmental Policy Act of 1969, or the Clean Water Act of 1977 (as amended).

G. Other Agreements.

1. This Agreement does not preclude the signatory agencies from entering other inter-agency agreements relative to their respective roles and responsibilities; however, any other agreements should be consistent with this Agreement.

APPROVED FOR LEGAL SUFFICIENCY

Date: 6-17-99

By: Mick A. Bohring
Montana Department of Transportation

Date: 6-17-99

By: Marz Dye
Marz Dye, Director
Montana Department of Transportation

Date: 6/18/99

By: William Stall
Regional Director - Department of
Interior - Fish & Wildlife Service, Region
6, Denver, CO.

Date: 6-17-99

By: Janice Brown
Janice Brown, Montana Division
Administrator
Federal Highway Administration

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ATTACHMENT A

Professional Standards for Supplemental Staff

One (1) specialist with experience and/or education in Fisheries and/or Wildlife Biology, Land Management or other related Environmental Science. Working knowledge of the 1973 Endangered Species Act and the Fish and Wildlife Coordination Act, 1958 (as amended), Habitat Evaluation Procedures (HEP), Section 404 of the Federal Clean Water Act, the Joint Federal Manual for the Identification and Delineation of Wetlands, and the National Environmental Policy Act is essential. In addition, an ability to travel, occasionally overnight is mandatory. Federal White Collar Pay Schedule General Schedule 9/11.