



State of Montana
Office of the Governor
Helena, Montana 59620
406-444-3111

STAN STEPHENS
GOVERNOR

September 21, 1990

Mr. Jim Jura, Administrator
Bonneville Power Administration
P.O. Box 3621
Portland, Oregon 97208

Dear Jim:

There have been concerns expressed regarding the scope of Montana's obligation under the Wildlife Mitigation Agreement for Libby and Hungry Horse Dams. My attorney, Mr. Richard Bartos, has advised me that certain portions of the Wildlife Mitigation Agreement could be interpreted in a way which would make Montana's obligation so open-ended that the Agreement would violate Montana's Constitution and perhaps other laws. I am confident that these concerns can be easily addressed without changing the substance of the Agreement.

It may well be that the troubling interpretations are not intended under the Agreement. If so, it appears that a simple confirmation of the intent of the Agreement will remove these concerns and allow us to move forward.

There are two concerns that require clarification.

First, at the end of the 60-year term of the Agreement, Montana is obligated to continue to operate and maintain the mitigation projects. (See paragraph 9(c)) The Agreement sets aside \$4 million in the Trust Fund to fund operation and maintenance expenses at the end of the term. However, the Agreement can be read to impose a perpetual obligation on Montana to carry out operation and maintenance, regardless of whether or not the \$4 million, prudently invested, provides enough income to sustain reasonable operation and maintenance expenses.

Second, under the Agreement Montana takes responsibility for the protection, mitigation, and enhancement of wildlife and wildlife habitat affected by the development of Libby and Hungry Horse Dams. The Montana Department of Fish, Wildlife and Parks has carefully studied the wildlife losses which resulted from the loss of habitat, and intends to use the trust to replace 100 percent of the lost habitat by acquiring and setting aside

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various parcels, by improving some existing parcels, and by entering into management agreements on certain parcels.

The Department is willing to take the risk about the cost and successful outcome of these projects up to 100 percent of the lost habitat. Normally, this represents an upper limit, and is what is meant by "full mitigation". However, not all persons agree on what is adequate mitigation, and the possibility exists that, at some time in the future someone might seek to require more than a one-to-one replacement of lost habitat. Obviously, this is a risk not contemplated by the agreement and it is a risk which Montana cannot and did not intend to assume.

Under the Constitution of the State of Montana, no state debt can be created unless authorized by a two-thirds vote of the members of each house of the legislature or by a majority of the electors. (Article VIII, Section 8.) If the obligation created by this Agreement includes (1) an obligation to perpetually pay for full operation and maintenance of all mitigation projects, and (2) an obligation to replace more than 100 percent of the lost habitat, then there is no reasonable certainty that the funds provided pursuant to this Agreement will be adequate to cover the full cost of Montana's obligations. I am advised that an agreement which creates such an unfunded obligation is likely to be considered as creating a debt, and thus such an agreement would violate Montana's Constitution unless authorized by the legislature or the electors.

These constitutional problems are avoided if we have a clear understanding about the meaning of the two provisions noted above. I am, therefore, setting forth Montana's understanding regarding these provisions as follows:

Understanding with regard to paragraphs 9(c) and 12(b): At the conclusion of the 60-year term of this agreement, Montana is obligated to retain at least \$4 million in the trust fund. Montana will use the earnings from the amount remaining in the trust fund to pay for operation and maintenance of the mitigation actions taken under the Agreement. Montana will minimize, to the extent reasonably possible, the operation and maintenance requirements for each mitigation action undertaken, and Montana will prudently manage the amount remaining in the trust fund with the objective of providing adequate continuing funding for operation and maintenance of the mitigation actions.

Montana's obligation to pay for operation and maintenance of the mitigation actions after the 60-year term of this agreement is limited to the funds available from trust fund earnings, and Montana is not obligated to spend money in addition to trust fund

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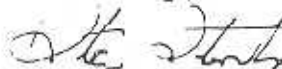
earnings to pay for operation and maintenance expenses. Neither is BPA obligated to Montana to spend money to pay for such operation and maintenance expenses. Montana's obligation under paragraph 12(b) with regard to operation and maintenance of mitigation actions undertaken after the 60-year term is also subject to this limitation.

Understanding with regard to paragraphs 12(a) and 12(b):
Montana's maximum obligation under paragraph 12(a) is to replace 100 percent of the lost habitat identified in Exhibits 1 and 2 with an amount of habitat which has an equivalent biological carrying capacity. Montana may replace the lost habitat by acquiring interests in land which give Montana control over the wildlife habitat located on the land or by entering into agreements for the long-term protection, enhancement, or management of habitat located on land owned by others or by other means. The replacement value of such replacement habitat consists of the biological carrying capacity of the habitat at the time it is acquired or an agreement for its protection is made, plus any additional carrying capacity which results from subsequent protection, enhancement, or management measures. Montana's obligation to indemnify and hold harmless under paragraphs 12(a) and 12(b) applies only to claims, etc., relating to the replacement of lost habitat which Montana has agreed to perform under the provisions of this Agreement.

I am hopeful that this is also Bonneville's interpretation of these provisions. If so, I would be most grateful if you could sign below to indicate Bonneville's concurrence with the "Understanding with regard to paragraph 9(c) and 12(b)" and with the "Understanding with regard to paragraph 12(a)" and return the signed copy so that it can be kept together with our copy of the Agreement.

Thank you for your assistance in resolving these concerns. Your concurrence will allow Montana to proceed with the Agreement without further delay.

Sincerely,



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Governor

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CONCURRENCE

The Bonneville Power Administration concurs in the "Understanding with regard to paragraph 9(c) and 12(b)" and in the "Understanding with regard to paragraph 12(a) and 12(b)" as stated above, and in the Administrator's letter accompanying this concurrence.


JIM JURA
Administrator



Department of Energy
Bonneville Power Administration
P.O. Box 3621
Portland, Oregon 97208 - 3621

5.5.92
Libby Wildlife Trust

OFFICE OF THE ADMINISTRATOR

December 11, 1990

In reply refer to: APP

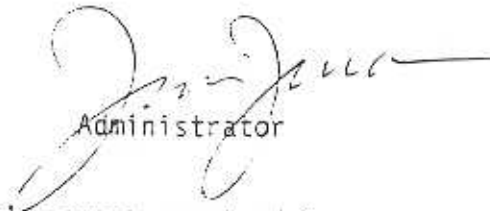
The Honorable Stan Stephens
Governor of Montana
Office of the Governor
Helena, MT 59620

Dear Governor Stephens:

Your letter of September 21, 1990, seeks a clarification regarding the scope of Montana's obligation under the Wildlife Mitigation Agreement for Libby and Hungry Horse Dams. The "Understanding with regard to paragraph 9(c) and 12(b)" recognizes that neither party is obligated under the Agreement to use moneys outside the trust fund for operation and maintenance expenses, and the "Understanding with regard to paragraph 12(a) and 12(b)" recognizes that Montana's maximum obligation is to replace 100 percent of lost habitat and defines replacement to include not only the acquisition of land but also wildlife protection, enhancement, management, and other means. Please consider this letter as my concurrence with these understandings.

We believe this is a significant and mutually beneficial Agreement, and these understandings will ensure the Agreement's success. We look forward to achieving wildlife mitigation at Libby and Hungry Horse Dams.

Sincerely,


Administrator

Enclosure:

September 21, 1990, Concurrence request received from
Governor Stephens, with additional wording