

Appendix



Implementing Agreement

IMPLEMENTING AGREEMENT

by and between the

**Montana Department of Natural Resources and Conservation
(DNRC)**

and the

U.S. Fish and Wildlife Service (USFWS)

(Draft 05-1-09)

TABLE OF CONTENTS

1.0	PARTIES	F-1
2.0	RECITALS AND PURPOSES.....	F-1
3.0	DEFINITIONS	F-2
4.0	OBLIGATIONS OF THE PARTIES.....	F-3
5.0	INCORPORATION OF THE HCP	F-5
6.0	TERM.....	F-5
7.0	FUNDING.....	F-6
8.0	MONITORING AND REPORTING	F-6
9.0	ADAPTIVE MANAGEMENT AND CHANGED CIRCUMSTANCES.....	F-7
10.0	UNFORESEEN CIRCUMSTANCES AND “NO SURPRISES.”	F-7
11.0	MODIFICATIONS AND AMENDMENTS	F-8
12.0	REMEDIES, ENFORCEMENT AND DISPUTE RESOLUTION	F-9
13.0	MISCELLANEOUS PROVISIONS.....	F-9

1.0 PARTIES

This Implementing Agreement (“IA”) made and entered into as of the ___ day of _____ 20___, by and between the Montana Department of Natural Resources and Conservation (DNRC) and the United States Fish and Wildlife (USFWS), hereinafter referred to as the “Parties,” defines the Parties’ roles and responsibilities and provides a common understanding of the actions that will be undertaken to minimize and mitigate the effects on the subject listed and unlisted species and their habitats of the proposed DNRC Forest Management Program.

2.0 RECITALS AND PURPOSES

2.1 Recitals. The parties have entered into this IA in consideration of the following facts:

- a. The DNRC manages approximately 548,530 acres of land (HCP Project Area as defined in Section 3.4 of this IA) in Montana that has been determined to be habitat for the Covered Species named in Section 1.4.1 of the HCP; and
- b. The DNRC’s Covered Activities, as defined in Section 3.3 of this IA, may affect habitat of the Covered Species; and
- c. The DNRC, with assistance from the USFWS, has developed a series of measures, described in the (*include DATE*) habitat conservation plan (HCP), to minimize and mitigate to the maximum extent practicable the effects of any Take which may occur incidental to its Covered Activities; and
- d. The USFWS has fully reviewed the DNRC’s HCP and this IA, and found them to meet all requirements under the Endangered Species Act (ESA), for issuance of an Incidental Take Permit (Permit), as defined below in Section 3.11.

2.2 Purposes. The purposes of this IA are:

- a. To ensure implementation of each of the terms of the HCP.
- b. To establish the roles, responsibilities, and other obligations of the parties and establish contingencies.
- c. To describe remedies and recourse should any party fail to perform its obligations as set forth in this IA.
- d. To provide assurances to DNRC that as long as the terms of the HCP and the Permit issued to it are fully performed, no additional mitigation will be required except as provided for in this IA, the HCP, or required by law.

3.0 DEFINITIONS

The following terms as used in this IA will have the meanings set forth below:

- 3.1 Terms Defined in Endangered Species Act.** Terms used in this IA and specifically defined in the ESA or in regulations adopted by the USFWS under the ESA have the same meaning as in the ESA and its implementing regulation unless this IA expressly provides otherwise
- 3.2 “Changed Circumstances”** means a change or changes in the circumstances affecting a Covered Species or the Covered Lands that can reasonably be anticipated by DNRC and the USFWS and that therefore can reasonably be, and has been, planned for in the HCP. Changed Circumstances are not Unforeseen Circumstances. All Changed Circumstances that can exist in connection with the HCP (together with the planned DNRC responses under the HCP to those circumstances) are contained in Chapter 6 of the HCP.
- 3.3 “Covered Activities”** means those identified activities carried out by DNRC and its contractors on Covered Lands that may result in Incidental Take of Covered Species provided that such activities are otherwise lawful. All Covered Activities are identified in Chapter 1 of the HCP.
- 3.4 “Covered Lands”** means the lands (including lands added to the HCP pursuant to Chapter 3 of the HCP) where the Covered Activities occur and the lands to which the HCP’s minimization and mitigation measures apply and where the Permit authorizes Incidental Take to DNRC and its contractors. The Covered Lands are referred to in the HCP and EIS as the “HCP Project Area” and are further described in detail in the Chapter 1 of the HCP.
- 3.5 “Covered Species”** means the Listed and Unlisted Species identified in and discussed in detail in Chapter 2 of the HCP, each of which the USFWS has determined the HCP addresses in a manner sufficient to meet all of the criteria for issuing a Permit under the ESA §10(a)(1)(B), pursuant to findings made by the USFWS with respect to issuance of the Permit. The permit will provide coverage for the follow three species listed under the ESA:
- a. Grizzly bear (*Ursus arctos horribilis*)
 - b. Canada lynx (*Lynx canadensis*)
 - c. Bull trout (*Salvelinus confluentus*)

The Permit will also provide coverage for two additional species should these species become listed during the 50-year permit period:

- a. Westslope cutthroat trout (*Oncorhynchus clarki lewisi*)
- b. Redband trout (*Oncorhynchus mykiss gairdneri*)

- 3.6** “**ESA**” means the Endangered Species Act of 1973, as amended, 16 U.S.C. §§ 1531 *et seq.*, and as may be further amended from time to time.
- 3.7** “**HCP**” means the DNRC Habitat Conservation Plan *insert date* and that was prepared by DNRC for Covered Lands.
- 3.8** “**HCP/EIS**” means the combined document containing both the HCP and the EIS prepared by the Parties pursuant to the Montana Environmental Policy Act (“MEPA”) and the National Environmental Policy Act (“NEPA”).
- 3.9** “**Incidental Take**” means Take that results from, but is not the purpose of, carrying out an otherwise lawful activity.
- 3.10** “**Listed Species**” means a Species that is listed as endangered or threatened under the ESA.
- 3.11** “**Permit**” means the Incidental Take Permit issued by the USFWS to the DNRC pursuant to § 10(a)(1)(B) of ESA for Take incidental to Covered Activities, as it may be amended from time to time.
- 3.12** “**Permittee**” means the DNRC.
- 3.13** “**Species**” means and includes any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature.
- 3.14** “**Take**” means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct and has the same meaning as the term is used in the ESA, 16 U.S.C. § 1532(19) and implementing regulations, as they may be amended in the future from time to time.
- 3.15** “**Unforeseen Circumstances**” means changes in circumstances affecting a species or geographic area covered by a conservation plan that could not reasonably have been anticipated by plan developers and the USFWS at the time of the conservation plan's negotiation and development, and that result in a substantial and adverse change in the status of the covered species.
- 3.16** “**Unlisted Species**” means a Species that is not listed as endangered or threatened under the ESA.

4.0 OBLIGATIONS OF THE PARTIES

- 4.1 Obligations of Permittee.** The DNRC shall perform the following duties:
- a. Fully and faithfully perform all obligations required of it under this IA, the HCP, and the Permit.

- b. Notify the USFWS within 30 days if, for any reason (including lack of sufficient appropriated funds or court decisions), the DNRC has become or is likely to become unable to fulfill any obligation undertaken by it in the HCP, the Permit, or the IA.
- c. Promptly respond to all notices and inquiries received from the USFWS under the HCP, the Permit, or this IA consistent with applicable laws and the terms of the HCP. If the HCP does not provide for a timeline for a response, promptly will mean within 30 days.
- d. Use its best efforts to help resolve any disputes that may arise among the USFWS, any agency, local government entity, state or local officials, or private parties with respect to the application and interpretation of the HCP, the Permit, or this IA using the dispute-resolution processes specified in this IA or other dispute-resolution processes that may be agreed to with respect to a particular dispute consistent with applicable laws.
- e. Immediately notify the USFWS of any lawsuits filed against the DNRC, or any formal written notices of intent to file such suits, to challenge the validity of the Permit or any decisions made by the DNRC in connection with the HCP, the Permit, or this IA.

4.2 Obligations of the USFWS. The USFWS shall perform the following duties to the extent permitted by the ESA and other applicable federal law.

- a. Upon execution of this IA by both Parties and satisfaction of all other applicable legal requirements, the USFWS will issue the DNRC a Permit under § 10(a)(1)(B) of the ESA. The Permit will authorize Incidental Take of Covered Species on Covered Lands that may occur in connection with Covered Activities during the times the HCP, the Permit, and this IA are in effect.
- b. Within 60 days of publication of any proposed or final rule, notify the DNRC whenever the USFWS proposes to list as threatened or endangered, change the listing status, or designate critical habitat for any Covered Species, and again notify the DNRC when any listing, change in listing status, or designation is made final.
- c. Notify the DNRC within 30 days if, for any reason (including lack of sufficient appropriated funds or court decisions), the USFWS has or is likely to become unable to fulfill any obligation undertaken in connection with the HCP, the Permit, or this IA.
- d. Promptly respond to all notices and inquiries received from the DNRC under the HCP, the Permit, or this IA consistent with applicable laws and the terms of the HCP. If the HCP does not provide for a time frame for a response, promptly will mean within 30 days.

- e. If requested by the DNRC, the USFWS shall use its best effort to help resolve any disputes that may arise among the USFWS, the DNRC, any state or local agency or officials, or private parties with respect to the application and interpretation of the HCP, the Permit, or this IA using the dispute-resolution processes specified in this IA or other dispute-resolution processes that may be agreed to with respect to a particular dispute consistent with applicable laws.
- f. Immediately notify the DNRC of any lawsuits filed against the USFWS, or any formal written notices of intent to file such suits, to challenge the validity of the Permit or any decisions made by the USFWS in connection with the HCP, the Permit, or this IA.
- g. Provided that DNRC has complied with its obligations under the HCP, this IA, and the Permit, the Service may only require DNRC to provide mitigation beyond that provided for in the HCP under unforeseen circumstances and only in accordance with the “No Surprises” regulations at 50 CFR 17.22 (b)(5) and 17.32(b)(5). If the USFWS makes a finding of unforeseen circumstances, during the period necessary to determine the nature and location of additional or modified mitigation, DNRC will avoid contributing to appreciably reducing the likelihood of survival and recovery of the affected species.

5.0 INCORPORATION OF THE HCP

The HCP and each of its provisions are intended to be, and by this reference are, incorporated herein. In the event of any direct contradiction between the terms of this IA and the HCP, the terms of this IA shall control. In all other cases, the terms of this IA and the terms of the HCP shall be interpreted to be supplementary to each other.

6.0 TERM

- 6.1 Effective Date and Permit Term.** This IA will become effective on the date the USFWS issues the Permit. This IA, the HCP, and the Permit will remain in effect for (50) years from issuance of the original permit, except as provided below.
- 6.2 Permit Suspension or Revocation.** The USFWS may suspend or revoke the Permit only for cause, and only in accordance with regulations in force at the time of such suspension or revocation. (These regulations are currently codified at 50 C.F.R. §§ 13.27 through 13.29) except that the USFWS may suspend or revoke the permit only based on a determination that the continuation of the permitted activity would be likely to jeopardize the continued existence of the Covered Species only if the Service has not been successful in remedying the situation in a timely fashion through other means as provided in the No Surprises regulations. Such suspension or revocation may apply to the entire permit, or may apply only to specified Covered Species, Covered Lands or Covered Activities.
- 6.3 Relinquishment of the Permit.** The DNRC may voluntarily relinquish the Permit and discontinue HCP implementation. If DNRC wishes to relinquish the

Permit before expiration of the term, DNRC will provide notice of its intent to do so to the USFWS at least 60 days prior to the planned relinquishment. The USFWS will review all relevant data to determine whether Take of Covered Species, occurring prior to the date of Permit relinquishment, has been fully minimized and mitigated in accordance with the Permit and HCP. If Take has been fully minimized and mitigated and DNRC is in compliance with the terms of the HCP and Permit upon relinquishment, DNRC shall have no further obligation(s) under the Permit. If the USFWS demonstrates that Take of such Species that occurred during the term of the Permit has not been minimized and mitigated, the USFWS may require continuation of specified HCP activities until such time as mitigation is substantially completed. Minimization and mitigation will have occurred if the minimization and mitigation that has been provided under the HCP compensates for the Take that has occurred under the Permit as of that date. This process will also be utilized in the instance DNRC wishes to relinquish the permit as to any, but less than all of the specified Covered Species, Covered Lands, or Covered Activities.

6.4 Extension of the Permit. Upon agreement of the parties and compliance with all applicable laws, the Permit may be extended beyond its initial term under regulations of the USFWS in force on the date of such extension. If DNRC desires to extend the Permit, it will so notify the USFWS at least 180 days before the then-current term is scheduled to expire. Extension of the permit constitutes extension of the HCP and this IA for the same amount of time, subject to any modification that the USFWS and DNRC may agree to at the time of extension, consistent with regulations then in force pertaining to extensions.

6.5 Treatment of Unlisted Species. For purposes of Sections 6.2 and 6.3 of this IA, Unlisted Covered Species will be treated as though they were Listed Species in determining the amount of Take and the minimization and mitigation required.

7.0 FUNDING

DNRC will expend its appropriated funds as may be necessary to fulfill its obligations under the HCP. The DNRC will promptly notify the USFWS of any material change in its funding resources, and will cooperate with the USFWS to minimize the adverse effects of any such change on the conservation goals of the HCP.

8.0 MONITORING AND REPORTING

8.1 Monitoring. As described in the HCP, DNRC will conduct monitoring and will submit monitoring reports describing its activities and results of the monitoring program provided for in the HCP.

- 8.2 Other Reporting.** DNRC will provide, within 30 days of being requested by the USFWS, any additional information in its possession or control related to implementation of the HCP that is requested by the USFWS for the purpose of assessing whether the terms and conditions of the Permit and the HCP, including the HCP's adaptive management plan, are being fully implemented.
- 8.3 Monitoring by the USFWS.** The USFWS may conduct inspections and monitoring in connection with the permit in accordance with its regulations (See 50 CFR 13.47)

9.0 ADAPTIVE MANAGEMENT AND CHANGED CIRCUMSTANCES

- 9.1 Adaptive Management.** DNRC and the USFWS will implement the adaptive management provisions in Chapter 4 of the HCP. Such changes are provided for in the HCP, and hence do not constitute unforeseen circumstances or require amendment to the Permit or HCP, except as provided for in this section.
- 9.2 Reduction in Mitigation.** DNRC will not implement adaptive management changes that may result in less mitigation than provided for Covered Species under the original terms of the HCP, unless the USFWS first provides written approval. DNRC may propose any such adaptive management changes by notice to the USFWS, specifying the adaptive management modifications proposed, the basis for them, including supporting data, and the anticipated effects on Covered Species, and other environmental impacts. Within 120 days of receiving such a notice, the USFWS will either approve the proposed adaptive management changes, approve them as modified by the USFWS, or notify DNRC that the proposed changes constitute permit amendments that must be reviewed under Section 11.2 of this IA.
- 9.3 No Increase in Take.** This section does not authorize any modification that would result in an increase in the amount and nature of Take, or increase the impacts of the Take, of Covered Species beyond that analyzed under the original HCP, section 7 biological Opinion conducted by USFWS on issuance of the permit and any amendments thereto. Any such modification must be reviewed as a permit amendment under Section 11.2 of the IA.

10.0 UNFORESEEN CIRCUMSTANCES AND “NO SURPRISES.”

- 10.1** Provided that the DNRC has complied with its obligations under the HCP, the IA, and the Permit, the USFWS may only require DNRC to provide mitigation beyond that provided for in the HCP in accordance with the “No Surprises” regulations at 50 C.F.R. §§ 17.22(b)(5) and 17.32(b)(5).
- 10.2 Rights and Authorities Preserved.** Except as otherwise specifically provided in the HCP, nothing herein contained shall be deemed to restrict the rights, privileges, and powers of the DNRC to manage the use of, or exercise all rights incident to land ownership associated with, Covered Lands. Nothing herein

contained shall be interpreted to restrict the authority of the USFWS to administer the Permit with respect to permit lands in accordance with this IA and the ESA.

11.0 MODIFICATIONS AND AMENDMENTS

11.1 Minor Modifications.

(a) DNRC or the USFWS may propose minor modifications to the HCP or this IA. Such notice shall include a statement of the reason for the proposed modification and an analysis of its environmental effects on operations under the HCP and on Covered Species. The DNRC and USFWS will use best efforts to respond to proposed modifications within 60 days of receipt of such notice. Proposed modifications will become effective upon DNRC and USFWS written approval. If, for any reason, USFWS or DNRC objects to a proposed modification, it must be processed as an amendment of the permit in accordance with subsection 11.2 of this section. USFWS will not propose or approve minor modifications to the HCP or this IA if the USFWS determines that such modifications would result in operations under the HCP that are significantly different from those analyzed in connection with original HCP, or additional take not analyzed in connection with the original HCP.

(b) Minor modifications to the HCP and IA processed pursuant to this subsection may include but are not limited to the following:

(1) Corrections of typographic and grammatical errors and similar editing errors that do not change the intended meaning.

(2) Corrections to any maps, or exhibits to correct errors in mapping or to reflect previously changes in the permit or HCP;

(3) Minor changes to survey, monitoring or reporting protocols; and

(4) Adding and removing lands from Covered Lands, as described in Chapter 3 of the HCP.

(c) Any other modification to the HCP or IA will be processed as amendments of the permit in accordance with subsection 11.2 of this section

11.2 Amendment of the Permit.

The Permit may be amended in accordance with all applicable legal requirements, including but not limited to the ESA, the National Environmental Policy Act, and the USFWS section 10(a)(1)(B) permit regulations. The Party proposing the amendment shall provide a statement of the reason for the amendment and an analysis of its environmental effects, including its effects on operations under the HCP and on Covered Species.

12.0 REMEDIES, ENFORCEMENT AND DISPUTE RESOLUTION

12.1 In General. Except as set forth below, each Party shall have all remedies otherwise available to enforce the terms of this IA, the Permit, and the HCP.

12.2 No Monetary Damages. No Party shall be liable in damages to any other Party or other person for any breach of this IA, any performance or failure to perform a mandatory or discretionary obligation imposed by this IA or any other cause of action arising from this IA.

12.3 Dispute Resolution. The Parties recognize that disputes concerning implementation of or compliance with this IA, the HCP, and the Permit may arise from time to time. In particular, the adaptive management and changed circumstances provisions of the HCP in Chapters 4 and 6 establish procedures that call for collaboration and agreement by the parties through a structured process; the Parties recognize that good faith disputes may arise from time to time during that process. The Parties agree to work together in good faith to resolve such disputes, using the informal dispute resolution procedures set forth in this Section, or such other procedures upon which the Parties may later agree. However, if at any time any Party determines that circumstances so warrant, it may seek any available remedy without waiting to complete informal dispute resolutions. Unless the Parties agree upon another dispute resolution process, or unless a Party has initiated administrative proceedings or suit in federal court, the parties may use the following process to attempt to resolve disputes:

1. Party with concern notifies other party of concern and proposed remedy.
2. Notified party has 30 days to respond.
3. Parties can then decide how to discuss and may consider non-binding mediation or some other alternate dispute-resolution process.
4. Parties can seek their individually available remedies. The Parties acknowledged that the Covered Species are unique and that their loss as a species would result in irreparable damage to the environment, and that therefore injunctive and temporary relief may be appropriate to ensure compliance with the terms of this IA.

12.4 Responsibility of the United States. Nothing contained in this IA is intended to limit the authority of the United States government to seek civil or criminal penalties or otherwise fulfill its enforcement responsibilities under the ESA.

13.0 MISCELLANEOUS PROVISIONS

13.1 No Partnership. Except as otherwise expressly set forth herein, neither this IA nor the HCP shall make or be deemed to make any Party to this IA the agent for or the partner of any other Party.

- 13.2 Notices.** Any notice shall be delivered personally to the persons set forth below or shall be deemed given five (5) days after deposit in the United States mail, certified and postage prepaid, return receipt requested and addressed as follows or at such any other address a Party may from time to time specify to the other Parties in writing:

Assistant Regional Director
United States Fish and Wildlife USFWS
134 Union Boulevard
Lakewood, Colorado 80228-1807.
Telephone: 303 236-8155
Telefax: 303 236-8101

Director
Montana Department of Natural Resources and Conservation
1625 - 11th Ave.
Helena, MT 59620
Telephone: 406 444-2074
Telefax: 406 444-2684

- 13.3 Integration.** This IA, together with the HCP and the Permit, constitutes the entire agreement between the Parties. It supersedes any and all other agreements outside those listed, either oral or in writing, among the Parties with respect to the subject matter hereof and contains all of the covenants and agreements among them with respect to said matters, and each Party acknowledges that no representation, inducement, promise or agreement, oral or otherwise, has been made by any other Party or anyone acting on behalf of any other Party that is not embodied herein.
- 13.4 Severability.** If a portion of the IA, HCP, or Permit is found to be invalid or unenforceable, or this IA is terminated in part, all other commitments shall remain in effect to the extent they can still be reasonably applied.
- 13.5 Elected Officials Not To Benefit.** No member of, or delegate to, Congress shall be entitled to any share or part of this IA, or to any benefit that may arise from it.
- 13.6 Availability of Funds.** Implementation of this IA and the HCP by the USFWS is subject to the requirements of the Anti-Deficiency Act and the availability of appropriated funds. Nothing in this IA will be construed by the Parties to require the obligation, appropriation, or expenditure of any money from the U.S. Treasury. The Parties acknowledge that the USFWS will not be required under this IA to expend any Federal agency's appropriated funds unless and until an authorized official of that agency affirmatively acts to commit to such expenditures as evidenced in writing.
- 13.7 Duplicate Originals.** This IA may be executed in any number of duplicate originals. A complete original of this IA shall be maintained in the official records of each of the Parties hereto.

- 13.8 No Third-Party Beneficiaries.** Without limiting the applicability of the rights granted to the public pursuant to the ESA or other federal law, this IA shall not create any right or interest in the public, or any member thereof, as a third party beneficiary hereof, nor shall it authorize anyone not a Party to this IA to maintain a suit for personal injuries or property damages pursuant to the provisions of this IA. The duties, obligations, and responsibilities of the Parties to this IA with respect to third parties shall remain as imposed under existing Federal or State law.
- 13.9 Applicable Laws.** All activities undertaken pursuant to this IA, the HCP, or the Permit must be in compliance with all applicable State and Federal laws and regulations.
- 13.10 Reference to Regulations.** Any reference in this IA, the HCP, or the permit to any regulation or rule of the Service shall be deemed to be a reference to such regulation or rule in existence at the time an action is taken. Actions occurring in the future will comply with all regulations existing at the time an action is taken, subject to paragraph 4.2g of this IA.
- 13.11 Successors and Assigns.** This IA and each of its covenants and conditions shall be binding on and shall inure to the benefit of the parties and their respective successors and assigns. Assignments or other transfer of the Permit shall be governed by the USFWS's regulations in force at the time.
- 13.12 Relationship to the ESA and other Authorities.** The terms of this IA shall be governed by and construed in accordance with the ESA and applicable federal law. In particular, nothing in this IA is intended to limit the authority of the USFWS to seek penalties or otherwise fulfill its responsibilities under the ESA. Moreover, nothing in this IA is intended to limit or diminish the legal obligations and responsibilities of the USFWS as an agency of the federal government. Nothing in this IA will limit the right or obligation of any federal agency to engage in consultation required under section 7 of the ESA or other federal law; however, it is intended that the rights and obligations of DNRC under this HCP and this IA will be considered in any consultation affecting Permittee's use of the Covered Lands.

IN WITNESS WHEREOF, THE PARTIES HERETO have executed this Implementing Agreement to be in effect as of the date last signed below.

BY _____ Date _____
Regional Director
United States Fish and Wildlife USFWS
Denver, Colorado

BY _____ Date _____
Director
Montana Department of Natural Resources and Conservation
Helena, Montana