

# MEMORANDUM OF AGREEMENT

## AMONG THE

State of Montana  
Confederated Salish and Kootenai Tribes  
United States Department of the Interior

## REGARDING RESTORATION, REPLACEMENT, OR ACQUISITION OF NATURAL RESOURCES IN THE CLARK FORK RIVER BASIN

### I. INTRODUCTION AND PURPOSE

1. This Memorandum of Agreement ("Agreement") by and among the State of Montana ("the State"), the Confederated Salish and Kootenai Tribes ("the Tribes"), and the United States Department of the Interior ("DOI") (collectively "the Parties"), addresses the restoration, replacement, and acquisition of the equivalent of natural resources in the Clark Fork River Basin ("CFRB"). The Parties recognize that working together cooperatively towards common restoration goals can provide an efficient and effective approach to the protection of the natural resources in the CFRB. The main purpose of this Agreement is to provide a framework for coordination and cooperation among the Parties, and for the implementation of the activities of the Parties in the furtherance of their goals of restoring, replacing, and acquiring the equivalent of injured natural resources in the CFRB.

### II. AUTHORITY

2. The Parties enter into this Agreement in accordance with the provisions of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), as amended, 42 U.S.C. §§ 9601, *et seq.*, and other applicable federal, state, and tribal law and authority.

### III. THE AFFECTED ENVIRONMENT

3. This Agreement is intended to cover the natural resources, as defined under the authorities cited above or under other applicable law in the CFRB belonging to, managed by, regulated by, or appertaining to one or more of the Parties that have been or may have been injured as a result of the release of hazardous substances, as defined under CERCLA and other applicable law, from or within the Silver Bow Creek/Butte Area, Montana Pole and Treating Plant, Milltown Reservoir Sediments, and Anaconda Smelter NPL Sites.

### IV. COORDINATION, CONSULTATION, AND DECISION-MAKING

4. The Parties recognize the benefit of restoring, replacing, and/or acquiring the equivalent of the injured natural resources of the CFRB. The Parties agree to coordinate and consult with each other on such restoration activities in the CFRB, whether undertaken by the

Party or by someone on the Party's behalf. This coordination and consultation shall include, at a minimum:

- (a) An opportunity to participate in restoration planning meetings. This will require the Party hosting the planning meeting to provide adequate notice of the time and place of meetings, and to schedule the meetings to accommodate the schedules of the other Parties;
- (b) An opportunity to review and comment on restoration plans of any one Party at least 30 days before that plan is finally approved and at least 30 days before any such plans are provided for formal review by the general public, as well as an opportunity to discuss comments by phone or in person;
- (c) Paying particular attention to natural resources of special interest to each of the Parties, including attention to natural resources of special environmental, recreational, commercial, cultural, historic, or religious significance to a Party; and
- (d) Consultation by the State with DOI on settlement decisions involving the State's natural resource damage restoration claim for the Clark Fork River brought in *Montana v. ARCO*, and consultation by DOI with the State and the Tribes involving DOI's natural resource damage claims involving lands along the Clark Fork River, on settlement decisions before those decisions become final, with an opportunity to discuss comments by telephone or in person.

5. The term "final authority" as used in this Agreement shall mean that the Party shall make the final decision regarding the restoration decision, regardless of whether any other Party disagrees.

- (a) Except as expressly provided in the Streamside Tailings Operable Unit Consent Decree, the State will have final authority for the planning and implementation of restoration activities using funds recovered by the State through a settlement or judgment of its natural resource damages claims against ARCO in the CFRB. The State shall not implement any restoration activities on land owned or managed by the United States or owned by the Tribes without the prior consent and approval of the United States or the Tribes, as appropriate.
- (b) Except as expressly provided in the Streamside Tailings Operable Unit Consent Decree, the Tribes will have final authority for the planning and implementation of any restoration activities using any funds recovered by the Tribes in settlement or judgment of their natural resource damage claims against ARCO in the CFRB. The Tribes shall not implement any restoration activities on land owned by the State or owned or managed by the United States (with the exception of lands held in trust by the United States for the Tribes) without the prior consent and approval of the State or the United States, as appropriate.

- (c) DOI will have final authority for the planning and implementation of any restoration activities using any funds recovered by DOI, or any actions owed to DOI from ARCO, a potentially responsible party, obtained in settlement or judgment of its natural resource damage claims in the CFRB. DOI shall not implement any restoration activities on land owned by the State or the Tribes without the prior consent and approval of the State or the Tribes, as appropriate. Except on lands owned by the United States (other than lands held in trust for the Tribes), DOI shall not implement any restoration activities on land managed by the State or the Tribes without the prior consent and approval of the State or the Tribes, as appropriate.

6. Notwithstanding any other provision of the Streamside Tailings Operable Unit Consent Decree or this Agreement, if DOI performs or approves the performance of restoration actions by ARCO within All Sites at any site which contains Tribal Cultural Resources or Tribal Religious Sites, as defined in paragraph 7 of this Agreement, DOI shall comply with applicable law, including the requirements of the National Historic Preservation Act, the Antiquities Act, the Archeological Resources Protection Act, and the Native American Grave Protection and Repatriation Act and the implementing regulations for those statutes.

7. For purposes of this Paragraph, the term "Tribal" is in reference to the Confederated Salish and Kootenai Tribes of the Flathead Reservation. For purposes of this Paragraph, the term "Tribal Cultural Resources" means (1) any "structure" or "object" as each of those terms are defined at 36 C.F.R. § 60.3 (1998), that possesses quality of significance in Tribal archeology and culture equivalent to a structure or object that would be deemed eligible for inclusion in the National Register of Historic Places as determined by criteria for evaluation established at 36 C.F.R. § 60.4 (1998) and clarified at the National Register Bulletin 38, "Guidelines for Evaluating and Documenting Traditional Cultural Properties," and/or (2) any Tribal human remains or associated funerary objects. For purposes of this Paragraph, the term "Tribal Religious Sites," means any location that by virtue of its established religious significance to, or ceremonial use by, the Tribes is identified as sacred by the Tribal Preservation Officer ("TPO"), after consulting with knowledgeable elders.

- (a) When conducting restoration planning, the State shall pay particular attention to Tribal Cultural Resources and Tribal Religious Sites ("TCRRS") which the State has knowledge of or which the Tribes bring to the attention of the State, and shall integrate to the extent it deems reasonable, measures to protect TCRRS in final restoration plans. Consultation with the TPO will be initiated by the State during the planning process, and the State and the TPO will attempt to reach a consensus on the integration of TCRRS protection measures into the State's restoration plans. However, if within fifteen (15) days of receipt of a final restoration plan, the TPO objects to the manner in which the plan treats the protection of TCRRS, then the State must comply with the consultation process set forth in subparagraph 7(d).

- (b) If changes in a final restoration plan are later made by the State at the time of construction due to technical or engineering constraints, and such changes will significantly affect the protections, if any, provided in the restoration plan for TCRRS, then the State shall attempt to reach a consensus with the TPO on how to protect TCRRS in light of the changes. If a consensus is not reached and the State proceeds in a manner that substantially deviates from the final restoration plan and, as a consequence, TCRRS are harmed, the State shall consult with the TPO to determine what corrective actions may be appropriate. In such event, if a consensus is reached between the State and the TPO, the State shall ensure that the corrective actions agreed upon are completed. If a consensus is not reached, then the State must comply with subparagraph 7(d).
- (c) If any undiscovered, undocumented Tribal Cultural Resources ("TCR") are encountered during construction work being performed to implement State restoration actions covered by this Agreement, the State shall implement the following consultation process:
- (1) The State shall order the cessation of construction in the immediate area of the TCR find to the extent such stoppage will not create an undue risk of harm to human health or the environment and shall notify the TPO of the TCR find. Within two business days of such notification, the TPO shall examine the find, verify its significance, if any, and complete a preliminary recordation of the find.
  - (2) Within one business day thereafter, the TPO shall advise the State of her or his findings and shall, at the same time, recommend how the TCR should be protected and/or otherwise treated.
  - (3) Thereafter, the State shall consider the findings and recommendations of the TPO, make a preliminary determination of any actions to be taken, and consult with the TPO prior to making a final decision. The State shall then make a final decision and provide its decision, in writing, to the TPO no less than 48 hours prior to the reinitiation of the construction work. If the TPO objects to the State's final decision, the TPO shall give notice of such objection to the State within one business day of receiving the final decision. If such an objection is made, the State must comply with the procedure set forth in subparagraph 7(d) before reinitiating the construction work.
  - (4) If any undiscovered, undocumented TCR are encountered and the State and TPO agree on how the TCR should be protected, and/or otherwise treated then construction work may proceed at the site without further delay or consultation. In such event, the State and TPO, in their discretion, may enter into a written memorandum of their agreement on the matter.

- (d) If the TPO should object, after the consultations provided for above, to any final restoration plans or other decisions affecting TCRRS or TCR made by the State pursuant to this Paragraph, the State and the TPO shall, within five business days after such objection is received by the State, forward all documentation relevant to the dispute to the State Historical Preservation Officer ("SHPO"). Within ten (10) days after receipt of such documentation, the SHPO will provide the state with a recommendation regarding such objection. In making his or her recommendation to the State, the SHPO shall, to the extent practicable, apply the criteria and methods for protection of historic and cultural properties established at 36 C.F.R. part 800. Subsequently, the State shall consider any recommendations made by the SHPO in determining whether changes should be made in the final restoration plan or other decision to which the TPO objected. Any determination by the State in this regard, however, after giving the matter such consideration, shall be final.
- (e) The State and DOI shall cooperate with the TPO by providing reasonable access to property that the State or DOI, respectively, have the right to provide such access to so that the TPO may perform any of the actions provided for the TPO in this Agreement and to facilitate performance of an archaeological and historical survey being performed by the Tribes in accordance with the separately executed letter agreement between the Tribes and the U.S. Environmental Protection Agency regarding compliance with applicable or relevant and appropriate requirements at the Clark Fork NPL Sites. In determining whether the Tribes' request for access is reasonable, the State or DOI will consider, among other factors, the reason for the Tribes' requested access, the urgency with which the access must be obtained to achieve the Tribes' purposes, the additional costs, if any, that would be caused by such requested access, and the extent to which the Tribes have sought to minimize any such additional costs. Any disputes regarding access for the Tribes pursuant to this Paragraph shall be subject to the provisions of Paragraph 9.

8. Nothing in this Agreement is intended to alter any of the requirements or provisions of the Streamside Tailings Operable Unit Consent Decree, including, in particular, Paragraphs 22-26 or 60-61 of that Decree.

9. Disputes among the Parties concerning restoration issues, including decision making authority under Paragraph 5, but excluding disputes arising under Paragraph 7(a)-(d) of this Agreement, above, may, except as expressly provided in the Streamside Tailings Operable Unit Consent Decree, upon written notice by any party, be raised for consideration by a dispute resolution group consisting of a duly authorized representative of each Party. Such group shall meet and attempt to resolve disputes as soon as practical, and at least within 30 days of receipt of written notice of the dispute. This dispute resolution process shall not be deemed to divest any Party of final authority as specified in Paragraph 5. Except as specifically provided in the Streamside Tailings Operable Unit Consent Decree, all final decisions regarding natural resource restoration plans to utilize funds recovered from ARCO shall be made by the Party who recovered

the funds and all final decisions regarding access as described in Paragraph 7(e) shall be made by the Party from whom access is requested.

## V. PARTIES' REPRESENTATIVES

10. The following representatives and alternates shall be the primary contacts for each Party for the purpose of notifying other Parties of major meetings described herein, for exchange of documents for review and comment, and for coordination and presentation of that Party's position on restoration and response activities:

- (a) For the State of Montana: Robert Collins and Mark Kerr, Natural Resource Damage Litigation Program, P.O. Box 201425, Old Livestock Building, 1310 East Lockey Avenue, Helena, MT 59620-1425.
- (b) For the Confederated Salish and Kootenai Tribes: Joe Hovenkotter, Staff Attorney, Tribal Legal Department, Confederated Salish and Kootenai Tribes, P.O. Box 278, Pablo, Montana 59855.
- (c) For the Department of the Interior: John E. Cook, Regional Director, Intermountain Region, National Park Service, PO Box 25287 Denver, CO 80225-0287 or, if by Federal Express, 12795 W. Alameda Parkway Lakewood, CO 80228.

Any Party may change its representative at any time by providing written notice to the other Parties.

## VI. SETTLEMENT NEGOTIATIONS

11. Nothing contained herein is intended to abridge the rights of any Party to negotiate independently and confidentially, subject to the consultation provisions of subparagraph 4.d., with ARCO or any other potentially responsible party regarding specific issues or a settlement of such Party's claims, if any. The State, the Tribes, and DOI each reserves its right, if any, to assert separate claims for recovery of damages for injuries to natural resources that they allege have not been adequately addressed by current restoration plans, or that have not been adequately restored, or for which adequate compensation has not yet been recovered by the other Parties, provided that, in agreeing to this reservation, no Party waives any legal or factual arguments or defenses with respect to any such claims. Each Party agrees that it will not assert any claim against funds recovered from ARCO by another Party.

## VII. CONFIDENTIALITY

12. The purpose of this confidentiality provision is to promote open communication among the Parties regarding their natural resource damages claims and restoration activities at the CFRB while preserving the confidentiality necessary for litigation and settlement negotiations.

13. The formal natural resource damage assessment and restoration process provides for public involvement and the release of pertinent information to the public. Given the pending and potential future litigation and the sensitivity of any settlement process, however, the Parties agree to the following conditions to preserve the privileges and confidentiality of information collected during preparation for, or in contemplation, of litigation or settlement.

- (a) All documents and other communications properly designated as confidential, whether written or oral, which are provided by one Party to another Party pertaining to litigation and settlement negotiations shall be treated by the recipient Party as privileged and confidential to the extent permitted by law. Among the documents and communications which may be privileged and confidential and subject to the terms and conditions of this confidentiality agreement provision are: (i) legal opinions; (ii) legal strategies; (iii) expressions of expert opinions connected with the above-described litigation or settlement process; and (iv) proposed settlement offers and responses. Such documents and communications shall, to the extent permitted by applicable law, not be released, disclosed, or discussed by the recipient Party in any manner whatsoever other than with persons employed or under contract with the recipient Party who have need for such documents or communications as part of their official government or consultant responsibilities and who agree to be bound by the terms of this confidentiality provision.
- (b) Any consultant or third-party contractor who is retained by a Party to work on such litigation shall be allowed access to necessary documents or communications described in Paragraph 13.a., above, only if the consultant agrees to be bound by, and signs, a confidentiality agreement consistent with the provisions of this Agreement.

14. This confidentiality provision does not create any right or claim by one Party to the documents of another Party. All documents are provided at the discretion of the disclosing Party.

15. Any Party who receives a request from a non-party for access to any privileged and confidential documents and communications received from or shared with another Party pursuant to this Agreement shall notify the other Parties in writing of receipt of such request, whether or not the intended response is to release documents or other communications subject to this confidentiality agreement or a portion thereof. The Party who receives a request shall also provide a copy of the request and a draft of the Party's intended response thereto not less than ten (10) days prior to the date that the Party intends to issue its response, unless otherwise required by applicable law.

16. Where otherwise permitted by law, the Parties may collectively agree to release documents or other communications subject to nondisclosure under this confidentiality agreement.

17. This confidentiality agreement does not apply to documents or communications previously released to ARCO or other members of the public in accordance with applicable law.

18. The transmission of information or documents between or among the Parties or their agents or contractors by whatever means shall not constitute waiver of any discovery privilege, immunity, or exemption from disclosure.

#### VIII. EFFECTIVE DATE

19. This Agreement may be executed in three counterparts. The Agreement shall take effect for any two or more Parties upon execution by those Parties.

#### IX. GENERAL PROVISIONS

20. The State, the Tribes, and DOI have each asserted that they are trustees for certain natural resources within the CFRB, that they have the authority to act on behalf of the public to recover damages from potentially responsible parties for injury to natural resources resulting from the release of hazardous substances, and that they have the authority to take appropriate actions necessary to restore, replace, or acquire the equivalent of injured natural resources.

21. Each Party to this Agreement has and reserves all of its rights, privileges, presumptions, powers, and remedies now or hereafter existing at law or equity, or by statute, treaty, or otherwise, and nothing in this Agreement waives or forecloses the exercise of the same. No Party to this Agreement, by signature or other participation in this Agreement, is acknowledging the trusteeship of any other Party to this Agreement. Nothing in this Agreement is intended to imply that any natural resource trustee with an interest in the CFRB is in any way abrogating or ceding any natural resource trustee responsibility or authority over the natural resources of the CFRB.

22. Nothing in this Agreement shall be construed to authorize a Party to enter into settlements on behalf of the other Parties or to represent another Party in any litigation, provided however, that this provision shall not limit or affect any Party's claim that it is a lead trustee for certain natural resources in the CFRB or the rights, if any, of a Party as a lead trustee. Nothing in this Agreement shall be construed as obligating any of the Parties to expend any funds in excess of appropriations or other amounts authorized by law.

23. The Parties agree that it is desirable and they have an obligation to keep the public informed of their activities under this Agreement. Accordingly, consistent with the Parties' obligations to maintain the confidentiality of certain information as set forth in Section IX of this Agreement, any Party, or Parties acting jointly, may make statements to the public, or individual members of the public and/or conduct public meetings regarding natural resource restoration.

24. This Agreement is not intended to, nor shall it, vest rights in persons who do not represent the Parties to this Agreement or who are not Parties to this Agreement.



25. This Agreement may be amended upon written agreement by all Parties.

26. Each of the undersigned signatories to this Agreement certifies that he or she is fully authorized to enter into this Agreement on behalf of the Party that he or she represents.


#### XI. WITHDRAWAL FROM OR TERMINATION OF AGREEMENT

27. The withdrawal of any Party to this Agreement for whatever reason, shall not affect the continuing validity of this Agreement among the remaining Parties. The confidentiality provisions of this Agreement shall continue in effect following termination by any Party. Upon termination of this Agreement or withdrawal by any Party, any Party may request the return of any or all of the confidential documents which that Party may have provided under this Agreement. All such documents or information must be returned within 15 working days of a written request for such return. Thereafter, any remaining Parties shall have a continuing obligation to maintain the confidentiality of all other materials in their possession which reflect any information provided in the confidential documents that have been returned.

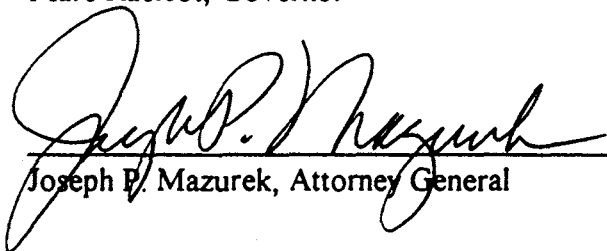
IN WITNESS WHEREOF the Parties have executed this Agreement on the dates attested to below.

The undersigned party hereby enters into the Memorandum of Agreement Among the State of Montana, Confederated Salish and Kootenai Tribes, and the United States Department of the Interior Regarding Restoration, Replacement, and Acquisition of Natural Resources in The Clark Fork River Basin:

STATE OF MONTANA:

  
\_\_\_\_\_  
Marc Racicot, Governor

November 5, 1998  
Date

  
\_\_\_\_\_  
Joseph P. Mazurek, Attorney General

Nov. 5, 1998  
Date

  
\_\_\_\_\_  
Robert Collins, Assistant Attorney General

Nov. 5, 1995  
Date

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Among the State of Montana, Confederated Salish and Kootenai Tribes, and the United States  
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Resources in The Clark Fork River Basin:

UNITED STATES DEPARTMENT OF THE INTERIOR

BY:

\_\_\_\_\_  
Name & Title

\_\_\_\_\_  
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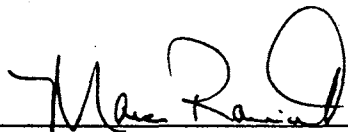
CONFEDERATED SALISH AND KOOTENAI TRIBES

BY: \_\_\_\_\_  
Name & Title Date

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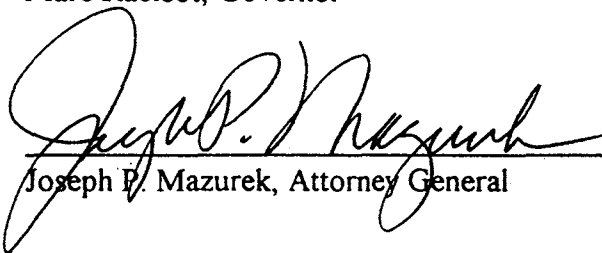
STATE OF MONTANA:



Marc Racicot, Governor

November 5, 1998

Date



Joseph P. Mazurek, Attorney General

Nov. 5, 1998

Date



Robert Collins, Assistant Attorney General

Nov. 5, 1995

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Resources in The Clark Fork River Basin:


CONFEDERATED SALISH AND KOOTENAI TRIBES

BY: Michael D. Dahl Tribal Council chairman 11/13/98  
Name & Title Date

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Department of the Interior Regarding Restoration, Replacement, and Acquisition of Natural  
Resources in The Clark Fork River Basin:

UNITED STATES DEPARTMENT OF THE INTERIOR

BY:

  
Name & Title

11/13/98  
Date