

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

)	Project No. 2058
)	(Cabinet Gorge)
Avista Corporation)	
)	Project No. 2075
)	(Noxon Rapids)

CLARK FORK SETTLEMENT AGREEMENT

INTRODUCTION AND PURPOSE

A. This Settlement Agreement, dated as of January 1, 1999, ("Agreement") is made and entered into pursuant to Rule 602 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission ("FERC" or "Commission") (18 CFR §385.602) by and between the following entities who shall hereinafter be referred to as a "Party" and collectively as "Parties": Avista Corporation ("Avista"); the United States Fish and Wildlife Service ("USFWS"); the United States Department of Agriculture, Forest Service ("USFS"); the Confederated Salish and Kootenai Tribes; the Kalispel Tribe; the Kootenai Tribe of Idaho; the Coeur d'Alene Tribe; Trout

No. 2075) (hereinafter "Cabinet Gorge," "Noxon Rapids," and, collectively, "Clark Fork Projects" or "Projects"). This Agreement also establishes the obligations of the Parties to support this Agreement before FERC and to support the issuance of a new license for the Clark Fork Projects which is consistent with the terms of this Agreement.

AGREEMENT

EFFECTIVE DATE AND TERM

1. This Agreement shall become effective and binding on March 1, 1999, and shall continue for the term of the new license to be issued by FERC for the Clark Fork Projects plus the term of any annual license which may be issued upon expiration of the new license and shall be binding upon the successors and assigns of the Parties.

GENERAL AGREEMENTS AND UNDERSTANDINGS OF THE PARTIES

New License Should Conform to Settlement

2. The Parties agree that FERC should issue a new license to Avista which is consistent with this Agreement and which contains conditions that properly reflect the PM&Es described in and made a part of this Agreement which Avista has agreed to

Rehearing and Judicial Review

4. The provisions of this Agreement are not severable and this Agreement is made with the understanding that each term is in consideration and support of every other term and is a necessary part of the entire Agreement. In the event that FERC issues a new license with modifications or issues a new license with terms or conditions that are materially inconsistent with the Agreement, the Agreement shall, except as provided in Paragraph 5, be considered modified to conform to the terms of the new license unless any of the Parties advises the other Parties in writing, within 30 days after the issuance of such license, of its objection to the modification, change or condition. The Parties shall then immediately commence negotiations for a period not to exceed 90 days to resolve the issue(s) and modify the Agreement as needed. If agreement cannot be reached within the 90 day period or any extended period to which the negotiating Parties may agree, an objecting Party other than Avista may, by notice to all the other Parties, either withdraw from the Agreement or elect not to be bound by the modification, change or condition except to the extent the Party is otherwise subject to the jurisdiction of the FERC with respect to that modification,

exercises the withdrawal rights provided by this Agreement and withdraws from this Agreement, unless Avista reasonably determines that the withdrawal of that Party could adversely affect the likelihood of the acceptance of this Agreement by FERC as part of the order issuing a new license.

Reopeners

7. The Parties agree that they will not invoke or rely upon any reopener clause contained in the new license for the purpose of seeking changes to or otherwise seek to modify this Agreement or the new license with respect to any matter covered by this Agreement unless that Party determines that new information reasonably demonstrates that applicable provisions of this Agreement are inconsistent with the public interest and affords the Management Committee, to be established under Paragraph 26 of this Agreement, at least 90 days to consider the new information and that Party's position. Said Party shall not be required to comply with this 90 day notice provision if it believes an emergency situation exists, or as necessary to comply with the Endangered Species Act ("ESA"). Notwithstanding the provisions of this paragraph, the Parties agree that USFWS may seek reopening of the new license as

any principles or precedents except with respect to the matters to which the Parties have herein agreed. The Parties further understand and agree that no Party to this Agreement shall be deemed to have approved, accepted, agreed to or otherwise consented to any operation, management, valuation or other principle underlying any of the matters herein, except as expressly provided herein.

Agency Environmental Statements

10. Nothing in this Agreement shall be construed to predetermine the outcome of any analysis under environmental assessments or statements or decisions based on those assessments or statements which must be undertaken by any of the state or federal agencies which are Parties to this Agreement. In addition, nothing in this Agreement shall preclude the IDFG from exercising its full prerogatives under the NEPA process, including scoping, alternative development, the effects of alternatives, and records of decisions.

Successors and Assigns

11. This Agreement shall be binding upon the Parties and their successors and assigns and any successor licensee shall assume and be responsible for the same

Party has not expressly waived the exercise of its authorities and rights in this Agreement, it fully retains such authorities and rights with respect to this and other proceedings.

Responsibilities Under Existing Laws

14. Nothing in this Agreement shall be construed to relieve the parties of their responsibilities under any applicable law or to diminish the authority of any government or governmental agency over the Clark Fork Projects, including but not limited to authority under any provisions of the FPA.

SEPARATE AGENCY STATUTORY RESPONSIBILITIES

Section 10(j)

15. The state and federal fish and wildlife agency Parties represent that the measures which Avista would be required to implement under this Agreement would adequately and equitably protect, mitigate damages to, and enhance fish and wildlife, including related spawning grounds and habitat, within the meaning of § 10(j) of the FPA. Such agencies represent that they are not aware of any reason at this time which would require that they submit any recommended § 10(j) condition(s) to FERC which

17. USFWS represents that, because of this Agreement and the measures Avista would be required to implement thereunder, neither the Secretary of the Department of the Interior, the USFWS nor any delegate thereof will prescribe the construction of any fishway(s) for the Clark Fork Projects pursuant to § 18 of the FPA, 16 U.S.C. § 811, as a condition of a new license, provided that the FERC includes in the new license a full reservation of the Secretary's authority, pursuant to § 18 of the FPA, to prescribe upstream and downstream fishways after the new license for the Clark Fork Projects is issued, said authority to be used at the Secretary's discretion. The USFWS hereby reserves the Secretary's authority pursuant to § 18 of the FPA to prescribe upstream and downstream fishways after the issuance of new licenses. The USFWS further agrees, however, that no such use of that reserved authority shall be made as long as the fishery related PM&Es set forth in this Agreement are implemented by Avista with diligence and good faith and continue to show a reasonable likelihood of adequately increasing the target populations, as determined by the Secretary following consideration of any relevant information provided by Avista or other Parties. The Parties agree that any fishways ordered by FERC shall be paid

submit mandatory Section 4(e) conditions to FERC which are materially inconsistent with this Agreement, any Party may withdraw from this Agreement. USFS agrees that should it determine that any of the Section 4(e) conditions it intends to submit may be materially inconsistent with this Agreement, it will so advise the Management Committee (to be established under Paragraph 26 of this Agreement) and attempt to afford the Committee 90 days to discuss and consider such conditions.

Endangered Species Act

19. USFWS and the other Parties recognize that it will be necessary for FERC, pursuant to § 7(a) of the ESA, to engage in formal consultation with the USFWS regarding certain listed species and the habitat of such species before it may issue a new license for the Clark Fork Projects. The Parties further recognize that in the course of such consultation USFWS has an obligation under that statute to determine whether the relicensing of the Clark Fork Projects is likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of designated critical habitat and, if so, to propose to FERC those

issuance of any such certification(s) or, in the event any Party seeks judicial review, 30 days from the date of any final court decision. If either IDEQ or MDEQ issues water quality certification(s) that is consistent with the provisions of this Agreement, the Parties agree not to contest these certifications in any forum. Avista will distribute to the Parties copies of any 401 certifications which are issued, including copies of any draft or tentative certifications that may be issued by the agencies for comment. If either IDEQ or MDEQ determines that any provisions of a 401 certification that it proposes to issue will be materially inconsistent with the terms of this Agreement, it will make reasonable efforts to provide the Management Committee an opportunity to discuss and consider those provisions.

Montana Tributary Habitat Acquisition and Recreational Fishery Enhancement Program PM&E which is attached hereto as Appendix B.

(c) For the purpose of meeting the goal of increasing the viability of native salmonid populations by providing fish passage between tributaries upstream of Cabinet Gorge, Noxon Rapids and Lake Pend Oreille, Avista shall fund and implement a fish passage program in accordance with the terms of the Fish Passage/Native Salmonid Restoration Plan PM&E which is attached hereto as Appendix C.

(d) For the purpose of meeting the goal of increasing the viability of bull trout populations by reducing poaching, accidental harvest, and habitat loss, Avista shall fund and implement an education and enforcement program in accordance with the terms of the Bull Trout Protection and Public Education Project PM&E which is attached hereto as Appendix D.

(e) For the purpose of assisting local landowner groups to protect and improve lower Clark Fork River and Lake Pend Oreille tributary watersheds with the expectation that native salmonid and recreational fisheries, water quality and wildlife habitats will be benefited, Avista will fund watershed councils in accordance with the

and implement the Land Use Management Plan PM&E which is attached hereto as Appendix G.

(h) For the purpose of maintaining and managing appropriate recreational facilities at the Projects and developing new recreational facilities in the vicinity of the Projects to effectively meet recreation demand during the term of the new licenses, Avista shall fund and implement a public recreation plan in accordance with the terms of the Recreation Resource Management Plan PM&E attached hereto as Appendix H.

(i) For the purpose of protecting important aesthetic resources on Project lands, Avista shall fund and implement the Aesthetic Management Plan PM&E which is attached hereto as Appendix I.

(j) For the purpose of providing organization and presentation of the various wildlife, botanical, and wetland PM&E measures within a single, comprehensive management plan, Avista shall fund and implement the Wildlife, Botanical and Wetland Management Plan PM&E which is attached hereto as Appendix J.

erosion, Avista shall fund and implement the Clark Fork Delta Habitat and Erosion Control Program PM&E which is attached hereto as Appendix O.

(p) For the purpose of protecting and managing certain forest wildlife habitats on Project lands, Avista shall fund and implement the Forest Habitat Program PM&E which is attached hereto as Appendix P.

(q) For the purpose of protecting and enhancing certain island wildlife habitats within the Project reservoirs, Avista shall fund and implement the Reservoir Island Habitat Program PM&E attached hereto as Appendix Q.

(r) For the purpose of protecting and enhancing eligible historic and prehistoric resources on Project lands, Avista shall fund and implement the Clark Fork Heritage Resource Program and the Clark Fork Heritage Resources Management Program as agreed to in the Programmatic Agreement. The Programmatic Agreement and the Clark Fork Heritage Resource Program are attached hereto as Appendix R.

(s) For the purpose of designing and implementing effective erosion-control measures to protect important resource values on lands affected by Project induced erosion, Avista shall fund and implement the Erosion Fund and Shoreline

available during the second Avista fiscal year (January 1 through December 31) year after this Agreement becomes effective, or on such other anniversary date as the Management Committee may establish for administrative convenience, and each year thereafter, be adjusted by calculating the percentage change of the Gross Domestic Product-Implicit Price Deflator ("GDP-IPD") as reported by the Bureau of Economic Analysis, Department of Commerce, over the most recent four quarters for which the Department has reported the GDP-IPD, and adjusting the funding for that year by this percentage change. In the event that applicable funds, as described in the Funding Summary Table (Appendix U) to be made available on an annual basis by Avista are not spent or used in that year, the amount of any unexpended funds carried forward shall, at the end of the year in question and each year thereafter, be increased by the yield in percent per year, compounded daily, on U.S. Treasury securities at a constant maturity of one year, as reported in the Federal Reserve Statistical Release H-15 (Daily Update on Selected Interest Rates for January 1) or the most recent reporting date prior to January 1, of the given year.

Accounting

Management Committee approval for the disposition of those lands. It is understood that in most cases FERC policies will require Avista to include such PM&E lands in the Project boundary and it is further understood that nothing in this Agreement shall be construed either to modify that FERC license obligation of Avista or to prevent the Management Committee in appropriate cases from deferring or not requiring perpetual protection of any PM&E lands which the Committee determines may have a greater value consistent with the purposes of the relevant PM&E, in subsequent land conveyances. In the event Avista should sell or convey the Projects to another entity, it shall also convey to that entity its interest in any PM&E lands located outside the Project boundary and take appropriate measures to insure that such entity will assume the same obligations with respect to those lands as Avista has under this Agreement. The Parties agree that the Management Committee should consider and to the extent practicable implement the land acquisition and protection guidelines reflected in the Land Acquisition Policies Statement attached as Appendix V.

entities as Parties on terms different from those of the original signatories to this Agreement; (7) resolve all disputes regarding implementation of approved PM&Es and all disputes brought to it for resolution by any of the Parties or committees; and (8) following the issuance of the new license and subject to the approval of the FERC, amend this Agreement and any of the PM&Es, in accordance with the voting provisions set forth in this Agreement.

Avista License Responsibilities

27. Notwithstanding any of the provisions of the foregoing Paragraph, the Parties intend and agree that Avista will be responsible for license compliance and for the implementation of the PM&Es, including the costs of permits or applicable environmental analyses within the respective PM&E implementation budgets, pursuant to the terms of this Agreement and the terms of its new license and shall be and remain responsible regardless of the Management Committee's inability to resolve any implementation plan issue in a timely manner. In seeking FERC approval of an

unanimity of (i) the USFS, (ii) USFWS, (iii) the State of Idaho, (iv) the State of Montana, and (v) Avista. The aforementioned Parties shall make reasonable efforts to participate in the discussions held by the Management Committee on any issue upon which there may be the need for a vote. When an issue before the Management Committee involves a decision to spend funds which are within the funding amounts Avista is committed to spend under the terms of the applicable PM&Es (as distinguished from decisions involving PM&Es which contain funding estimates), consensus by Avista is not required. A quorum for meetings of the Management Committee shall be seven Parties and must include at least two of the federal agency Parties, at least one agency Party from each of the States of Idaho and Montana and Avista. The state agency Parties will be responsible for determining the representative or agency Party that will represent the state in any determination of the Management Committee under item (2) of this Paragraph. As used in this Paragraph the term "present" shall also include any Party or Parties participating in a meeting by teleconference.

dispute to the FERC within the thirty day time period, the Management Committee resolution will become binding on all parties.

Administrative and Clerical Support

30. Avista will provide reasonable administrative, clerical and support facilities for the Management Committee and TACs. Avista will be responsible for preparing proposed agendas, minutes of all committee meetings, for distributing minutes from prior meetings to the members in advance of upcoming meetings, and for the management and preservation of data and studies including the provision of reasonable public access to such data and studies. Avista will keep the Management Committee reasonably informed of the status of its license compliance filings and, in the event that any such filing is disputed by any Party, Avista shall notify all Parties of the dispute and make copies of its filing available to the Parties.

Annual Report

31. Within one year of the issuance of a Commission order approving this Agreement and issuing a new license, and annually each year thereafter during the term

aesthetics. Avista shall consult with the TACs in developing appropriate implementation plans for the PM&Es and related funding recommendations.

Membership

33. The WRTAC and the TRTAC shall unless later modified by the Management Committee, consist of one representative from each of the Parties. Within sixty (60) days of the effective date of this Agreement and annually each year thereafter during the terms of the new licenses for the Clark Fork Projects, each of the Parties shall provide written notice to the Management Committee of the identity of its representatives on the WRTAC and TRTAC. Notwithstanding the above, any Party may choose not to participate in the WRTAC and/or the TRTAC during any year, in which case it should so indicate in the written notice(s) referenced above. In order to ensure continuity and stability in the membership of the TACs, the Parties will attempt to designate representatives for three (3) year terms.

CULTURAL RESOURCES MANAGEMENT GROUP

Programmatic Agreement

36. The Parties recognize and acknowledge the special role of the Cultural Resources Management Group ("CRMG") in overseeing the protection, enhancement and mitigation of cultural resources. The composition, procedures, and protocols for the CRMG are described in the Programmatic Agreement and Clark Fork Heritage Resource Program ("CFHRP") attached hereto as Appendix R. The Parties agree that they will comply with the provisions of the CFHRP and that the TACs and other committees will consult with the CRMG on any PM&Es that are likely to directly or indirectly affect cultural properties and will advise the Management Committee of the comments of the CRMG related to cultural properties when submitting recommendations for PM&Es to that Committee. The CRMG may submit written comments to the Management Committee on PM&Es recommended to that Committee by the TACs at the time those recommendations are submitted to the Management Committee. Within one year of the effective date of this Agreement, the Management Committee shall adopt protocols for determining those PM&Es and related activities

Estimating Decommissioning Costs

38. Avista agrees that in the event FERC makes any material changes to its current policy regarding decommissioning costs during the first 35 years of its new license, Avista will consult with the Management Committee and thereafter undertake such steps as may be reasonable and consistent with those policy changes to estimate the remaining useful life of the Projects and the cost of decommissioning the Projects or a portion of the Projects.

Aboriginal and/or Federally Reserved Water Rights

41. Nothing in this Agreement is intended in any way to affect, diminish, impair, or predetermine any aboriginal and/or federally reserved or state law based water rights, if any, the signatory tribes or federal agencies may have in the Clark Fork River and its tributaries.

EXPENDITURE OF AGENCY FUNDS

Federal Agencies

42. Nothing in this Agreement shall be construed as binding the USFWS or the USFS to expend in any one fiscal year any sum in excess of appropriations made by Congress or administratively allocated for the purpose of this Agreement for the fiscal year, or to involve the USFWS or USFS in any contract or other obligation for the future expenditure of money in excess of such appropriations or allocations.

State Agencies

43. Nothing in this Agreement shall be construed as binding any state agency that is a Party to this Agreement to expend in any one fiscal year any sum in excess of appropriations made by its state legislature or administratively allocated for the

IN WITNESS WHEREOF, the Parties have executed this Agreement on the
dates indicated below.*

**CONFEDERATED SALISH AND
KOOTENAI TRIBES**

By _____

KALISPEL TRIBE

By _____

KOOTENAI TRIBE OF IDAHO

By _____

THE COEUR d'ALENE TRIBE

By _____

AVISTA CORPORATION

By _____

*Original signatures are on file at Avista Corporation's Hydro Licensing and Safety Department.

**MONTANA DEPARTMENT OF
ENVIRONMENTAL QUALITY**

By _____

**MONTANA DEPARTMENT OF FISH,
WILDLIFE AND PARKS**

By _____

**MONTANA DEPARTMENT OF
NATURAL RESOURCES AND
CONSERVATION**

By _____

**MONTANA STATE HISTORIC
PRESERVATION OFFICER**

By _____

**IDAHO STATE HISTORIC
PRESERVATION OFFICER**

By _____

IDAHO RIVERS UNITED

By _____

ROCK CREEK ALLIANCE

By _____

ELK CREEK WATERSHED COUNCIL

By _____

LAKE PEND OREILLE IDAHO CLUB

By _____

**TRI-STATE IMPLEMENTATION
COUNCIL**

By _____

ALLIANCE FOR THE WILD ROCKIES

By _____

Attachments