

MEMORANDUM OF AGREEMENT
FOR THE STUDY FLOWS IN THE EKLUTNA RIVER
AMONG
UNITED STATES FISH AND WILDLIFE SERVICE &
NATIONAL MARINE FISHERIES SERVICE
AND
CHUGACH ELECTRIC ASSOCIATION, INC.,
MATANUSKA ELECTRIC ASSOCIATION, INC. &
MUNICIPALITY OF ANCHORAGE

This Memorandum of Agreement (“Agreement”), dated effective as of August 9, 2021, is made by and among the United States Fish and Wildlife Service (“USFWS”), the National Marine Fisheries Service (“NMFS”), Chugach Electric Association, Inc. (“CEA”), Matanuska Electric Association, Inc. (“MEA”), and the Municipality of Anchorage, formerly d/b/a Anchorage Municipal Light & Power (“MOA”) (CEA, MEA, and MOA, collectively, the “Eklutna Purchasers”, and the Eklutna Purchasers collectively with USFWS and NMFS, each a “Party” and together, the “Parties”).

RECITALS:

- a) The Eklutna Hydroelectric Project (the “Eklutna Project”) was constructed by the United States Bureau of Reclamation in 1955 to deliver electric power to the Municipality of Anchorage and surrounding areas;
- b) On August 2, 1989, the Eklutna Purchasers entered into an Eklutna Purchase Agreement with the U.S. Department of Energy, beginning a process to facilitate the sale of the Eklutna Project from the United States government to the Eklutna Purchasers;
- c) In connection with the purchase of the Eklutna Project by the Eklutna Purchasers, the Eklutna Purchasers entered into an Agreement Between the Purchasers, USFWS, NMFS, the State of Alaska, and the Alaska Energy Authority Relative to the Eklutna and Snettisham Hydroelectric Projects, dated August 7, 1991 (the “1991 Agreement”). Pursuant to the 1991 Agreement, the Eklutna Purchasers agreed that:
 - (i) no later than 25 years after their acquisition of the Eklutna Project, the Eklutna Purchasers would (in consultation with federal and state agencies including USFWS, NMFS, the Alaska Department of Fish and Game, the Alaska Department of Environmental Conservation, and the Alaska Department of Natural Resources) study the impacts of the Eklutna Project on fish and wildlife, examine and develop proposals for the protection, mitigation, and enhancement of fish and wildlife affected

- by such hydroelectric development, and prepare a “Fish and Wildlife Program” for the Governor of Alaska’s approval (the “Consultation and Study Process”), and
- (ii) no later than 35 years after their acquisition of the Eklutna Project, they would complete implementation of such Fish and Wildlife Program;
- d) Pursuant to Section 7 of the 1991 Agreement, “prior to undertaking any major structural or operational modification substantially affecting water usage or fish and wildlife at the projects,” the Eklutna Purchasers shall follow the Consultation and Study Process;
 - e) The Eklutna Purchasers initiated the Consultation and Study Process in 2019 and as part of this process, technical representatives of the Eklutna Purchasers have developed study plans in consultation with representatives from the Native Village of Eklutna; Alaska Department of Fish & Game; NMFS; UFSWS; Alaska Pacific University; Trout Unlimited; the Alaska Institute for Climate and Energy; Anchorage Water and Wastewater Utility; Chugach State Park (Alaska Department of Natural Resources Division of Parks & Outdoor Recreation), Alaska Department of Environmental Conservation, Alaska Department of Natural Resources, Alaska Department of Transportation & Public Facilities, and Alaska Energy Authority as the representative of the Governor of the State of Alaska (collectively, the “Consulted Entities”);
 - f) The study plans developed in consultation with the Consulted Entities include plans to release controlled instream flows of water into the Eklutna River in 2021, which may require modifications to reservoir operations, for the purpose of collecting data and constructing models to study the effects of providing instream flows on sediment transport and fish and wildlife habitats in the Eklutna River, in three separate water flow releases at approximately 25, 75 and 150 cubic feet per second (cfs) respectively, for up to seven days each, with the 150 cfs flow release potentially continuing up to 14 days (the “2021 Study Flows”);
 - g) Approximately seven miles downstream from the Eklutna Project, which is a dam located at the outlet of Eklutna Lake, is the site of a former hydroelectric project constructed in 1929 (the “Lower Eklutna Dam”), which stopped operating in 1956 due to the construction of the Eklutna Project, and which included a dam that was removed from the Eklutna River in 2018 by Eklutna, Inc., a Native Village Corporation, and the Conservation Fund;
 - h) After the termination of operations at the Lower Eklutna Dam and prior to the removal of the Lower Eklutna Dam, approximately 230,000 cubic yards of sediment (along with accumulated natural and man-made debris) existed in the canyon above the former Lower Eklutna Dam location, which may be moved or otherwise affected by the 2021 Study Flows;
 - i) Sediment from natural sources has accumulated in the Eklutna River in several large debris fans below the dam located at the outlet of Eklutna Lake that may also be moved or otherwise affected by the 2021 Study Flows;

- j) Time is of the essence in beginning and completing the 2021 Study Flows to advance the Consultation and Study Process outlined in 1991 Agreement and there is a general desire to reduce inefficiencies and cooperate effectively to such effect; and
- k) Given the obligations under the 1991 Agreement and the scope of the 2021 Study Flows, the Eklutna Purchasers request this Agreement to conduct the 2021 Study Flows.

AGREEMENT

SECTION 1: GENERAL

1.1 Purpose of the Agreement

The Parties have entered into this Agreement to enable the Eklutna Purchasers to move forward with the 2021 Study Flows as part of the Consultation and Study Process, pursuant to and as part of the 1991 Agreement. USFWS and NMFS acknowledge that the Eklutna Purchasers are entering into a similar agreement with the State of Alaska, which is the other party to the 1991 Agreement.

1.2 Limitations; Reservation of Rights

By entering into this Agreement, the Parties have not made any other commitments relating to the 1991 Agreement, Consultation and Study Process, or development and implementation of the Fish and Wildlife Program. Nothing in this Agreement is intended or shall be construed to affect or limit USFWS or NMFS from complying with its obligations under applicable laws and regulations, from complying with any applicable judicial decision or order, or from considering and responding to comments received in any environmental review or regulatory process related to the scope of this Agreement. This Agreement shall not predetermine the outcome of any environmental or administrative review or appeal process related to this Agreement.

1.3 Extent of Agency Authority

Nothing in this Agreement expands or diminishes any existing authority or regulatory jurisdiction under applicable federal or state law or regulation.

SECTION 2: STUDY PLANS AND FLOWS

2.1 Study Plans

As part of the ongoing Consultation and Study Process, the Eklutna Purchasers are in the process of finalizing two types of flow related studies: an Instream Flow Study and Geomorphology/Sediment Transport Study. The execution of these studies will rely on data collection in the Eklutna River under two instream flow releases: (i) the 2021 Study Flows; and (ii) based on the results of the 2021 Study Flows, subsequent higher volume study flows in a succeeding study season, likely in 2022. As part of the Consultation and Study Process and in consultation with the Consulted Entities, the Eklutna Purchasers will (a) develop models in 2021

and 2022 based on data collected during the 2021 Study Flows to determine the appropriate magnitude, duration and timing of a subsequent higher volume study flow, and then, if feasible, (b) conduct such higher volume study flows in 2022, provided that it can be done safely for the Eklutna Project, its operators, downstream landowners, their property, and the environment, and that all necessary approvals, consents and waivers are obtained in advance.

This Agreement is limited to the 2021 Study Flows. A separate agreement will be required to cover the proposed higher volume study flow in 2022.

2.2 Study Flows and Potential Impacts

The potential water levels and sediment loads associated with 2021 Study Flows at 25, 75 and 150 cfs in the Eklutna River will have impact on: (i) the Eklutna Lake and adjacent recreational facilities; (ii) the Eklutna Project; and (iii) the Eklutna River and its fish and wildlife, geomorphology, and surrounding lands and properties. A description of 2021 Study Flows and potential impacts is described in the Final Study Plans (as defined below), but the full extent of impacts, intended and unintended, is not known at this time.

The Parties agree that the benefits to fish and wildlife resources of conducting such 2021 Study Flows in order to conduct the Consultation and Study Process and develop the Fish and Wildlife Program outweigh the potential short-term impacts, damages, and losses that may occur to fish and wildlife resources as a result of the 2021 Study Flows. The Parties agree that the 2021 Study Flows are in the public interest and that conducting such studies will not be a violation of the 1991 Agreement. USFWS and NMFS believe that the 2021 Study Flows are unlikely to have any substantial or major impacts to fish and wildlife resources.

SECTION 3: CONCURRENCE AND DISPUTE RESOLUTION

3.1 Concurrence

USFWS and NMFS were consulted, per the Consultation and Study Process, on study plans detailing two flow related studies that were described in that certain Proposed Final Eklutna Study Plan dated February 2021 and posted on <https://www.eklutnahydro.com/> (the “Final Study Plans”), which include the release of 2021 Study Flows from the Eklutna Project into the Eklutna River. The purpose, methodologies, and considerations for the studies necessitating 2021 Study Flows are set forth in Section 3.1 (Instream Flow Study) and Section 3.2 (Geomorphology/Sediment Transport Study) of the Final Study Plans. NMFS sent a letter of concurrence to the Eklutna Purchasers concurring with the Final Study Plans on April 27, 2021. USFWS sent a letter of concurrence to the Eklutna Purchasers concurring with the Final Study Plans on April 30, 2021. As such, USFWS and NMFS concur with the Final Study Plans and 2021 Study Flows described in Section 2 of this Agreement.

3.2 Dispute Resolution

The Parties intend that any disputes resulting from purported claims of violation of the 1991 Agreement or other claims resulting from the 2021 Study Flows under this Agreement be resolved as expeditiously and informally as possible. Each Party shall cooperate in good faith to promptly schedule, attend, and participate in the dispute resolution procedures. The Parties agree to devote such time, resources, and attention to the dispute resolution procedures as are needed to attempt to resolve the dispute at the earliest possible time. Each Party shall implement promptly all final agreements reached through the dispute resolution procedures, consistent with the Party's applicable statutory and regulatory responsibilities.

SECTION 4: TERM AND TERMINATION

4.1 Effective Date and Term of Agreement

This Agreement shall take effect upon the execution of this Agreement by all Parties ("Effective Date") and shall remain in effect until December 31, 2022 ("Termination Date").

4.2 Termination

Prior to the Termination Date, this Agreement may be terminated by unanimous written agreement among the Parties, or by the Eklutna Purchasers if (i) after reasonable efforts, they determine that they will not be able to obtain the required permits, landowner consents, and agreement by all parties to the 1991 Agreement necessary or advisable to conduct the 2021 Study Flows, or (ii) if during the engineering review or after further study, examination or analysis, new information becomes available which leads the Eklutna Purchasers to reasonably determine that the 2021 Study Flows will cause the loss of life, damage to persons or property, significantly damage fish and wildlife habitat, or significantly impair the Eklutna Purchasers from their ability to perform under any of their contractual obligations.

Nothing in this Agreement is intended or shall be construed as requiring the Eklutna Purchasers to conduct the 2021 Study Flows. To the extent such flows have not been conducted as of the Termination Date, this Agreement shall automatically terminate with regard to any flows described in Section 2 herein and not conducted, and the Eklutna Purchasers shall not be in breach of this Agreement for failure to conduct such 2021 Study Flows.

SECTION 5: GENERAL PROVISIONS

5.1 New Information

Each Party agrees to provide written notice to all other Parties as soon as practicable regarding any new information related to or affecting, or potentially related to or affecting, the impacts of the 2021 Study Flows on natural resources or fish and wildlife habitat, which was not readily available to the Parties during the development of this Agreement.

5.2 Signatory Authority

Each signatory to this Agreement certifies that he or she is authorized to execute this Agreement.

5.3 No Third-Party Beneficiaries

Without limiting the applicability of rights granted to the public pursuant to applicable law, this Agreement shall not create any right or interest in the public, or any member of the public, as a third-party beneficiary of this Agreement, and shall not authorize any non-Party to maintain a suit at law or equity pursuant to this Agreement. The duties, obligations, and responsibilities of the Parties with respect to third parties shall remain as imposed under applicable law.

5.4 Counterparts.

This Agreement may be executed in any number of counterparts, and each executed counterpart shall have the same force and effect as an original instrument as if all the signatory Parties to all of the counterparts had signed the same instrument. Any signature page of this Agreement may be detached from any counterpart of this Agreement without impairing the legal effect of any signatures, and may be attached to another counterpart of this Agreement identical in form having attached to it one or more signature pages.

5.5 Waiver

The failure of any Party to insist, on any occasion, upon strict performance of any provision of this Agreement, shall not be considered a waiver of any obligation, right or duty of, or imposed upon, such Party.

5.6 Severability

If any section, paragraph, clause, or provision of this Agreement or any agreement agreed to in this Agreement shall be finally adjudicated by a court of competent jurisdiction or administrative agency to be invalid or unenforceable, the Agreement shall nonetheless remain in full force and effect as to the other sections, paragraphs, clauses and provisions.

5.7 Governing Law

This Agreement shall be governed by and construed in accordance with applicable law as required under the 1991 Agreement.

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IN WITNESS WHEREOF the Parties have entered into this Agreement as of the date first above written.

U.S. DEPARTMENT OF INTERIOR, FISH AND WILDLIFE SERVICE

By: **BRIAN GLASPELL** Digitally signed by BRIAN GLASPELL
Date: 2021.08.13 11:11:11 -0500
Title: Acting Regional Director - Alaska Region

U.S. DEPARTMENT OF COMMERCE, NATIONAL MARINE FISHERIES SERVICE

By: _____
Title: _____

CHUGACH ELECTRIC ASSOCIATION, INC.

By: _____
Title: _____

MATANUSKA ELECTRIC ASSOCIATION, INC.

By: _____
Title: _____

MUNICIPALITY OF ANCHORAGE

By: _____
Title: _____


IN WITNESS WHEREOF the Parties have entered into this Agreement as of the date first above written.

U.S. DEPARTMENT OF INTERIOR, FISH AND WILDLIFE SERVICE

By: _____

Title: _____

U.S. DEPARTMENT OF COMMERCE, NATIONAL MARINE FISHERIES SERVICE

By:  _____

Title: Administrator, Alaska Region

CHUGACH ELECTRIC ASSOCIATION, INC.

By: _____

Title: _____

MATANUSKA ELECTRIC ASSOCIATION, INC.

By: _____

Title: _____

MUNICIPALITY OF ANCHORAGE

By: _____

Title: _____

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U.S. DEPARTMENT OF INTERIOR, FISH AND WILDLIFE SERVICE

U.S. DEPARTMENT OF COMMERCE, NATIONAL MARINE FISHERIES SERVICE

By: _____

By: _____

Title: _____

Title: _____

CHUGACH ELECTRIC ASSOCIATION, INC.

MATANUSKA ELECTRIC ASSOCIATION, INC.

By: LEE D. THIBERT

By: 

Title: CEO

Title: Chief Executive Officer

MUNICIPALITY OF ANCHORAGE

By: 

Title: Municipal Manager