

**BROWNFIELDS AGREEMENT BETWEEN
THE CITY OF MISSOULA
AND
MONTANA COMMUNITY DEVELOPMENT CORPORATION**

THIS AGREEMENT is entered into by the **City of Missoula** (herein referred to as the “City”) and the **Montana Community Development Corporation**, a nonprofit economic development corporation (herein referred to as “MCDC”). This agreement supersedes and obviates the Subrecipient Agreement and Memorandum of Understanding that previously governed the parties’ relationship relative to the Missoula Brownfields Cleanup Revolving Loan Fund.

WITNESSETH:

WHEREAS, the City of Missoula is the recipient of a Brownfields Cleanup Revolving Loan Fund Grant from the U.S. Environmental Protection Agency, herein referred to as “EPA,” and

WHEREAS, the purpose of the grant is to establish a revolving loan fund to facilitate the cleanup and redevelopment of brownfields properties; and

WHEREAS, the City established in 2006 and has since successfully administered the Missoula Brownfields Cleanup Revolving Loan Fund since 2006; and

WHEREAS, the City reviewed alternative financial management options and determined that MCDC’s financial services, experience, and involvement with potential brownfield loan recipients position it to best provide underwriting and servicing for the loans made to third parties from funds advanced by the City from the Missoula Brownfields Revolving Loan Fund; and

WHEREAS, the City therefore wishes to enter into a contract with MCDC to provide specified underwriting and loan management services relative to the loans made to third parties from funds advanced by the City from the Missoula Brownfields Revolving Loan Fund (MB-RLF);

NOW, THEREFORE, in consideration of the mutual covenants and conditions set out in this Agreement, the parties agree as follows:

A. RESPONSIBILITIES DELEGATED TO MCDC

1. It is contemplated that MCDC shall manage for the City a loan program for purposes of placing funds from the Missoula Brownfields Cleanup Revolving Loan Fund with qualified third parties for the purposes contemplated hereunder. In this regard, it is further contemplated that MCDC will underwrite third party borrowers; prepare credit presentations; present loans packages for approval to MCDC’s loan committee; if approved, present loan packages to the City for review and approval; present draw packages to the City to procure funds necessary to disbursements on closed loans; and provide all asset management for approved loans (hereinafter referred to as the “Third Party Loans”.) MCDC shall use prudent lending practices and standards customarily utilized in its underwriting processes for purposes of evaluating the risks associated with the borrower’s ability to repay

each loan including loan structure and terms such as collateral, repayment terms and interest rates and will present its analysis to the City. In addition, MCDC will develop and present to the City, a risk profile, underwriting analysis and proposed terms and conditions for each loan utilizing the mitigating factors provided by the MB-RLF Program Guidelines attached to this Agreement. The City shall be solely responsible for approving and funding each loan based upon its review of the underwriting information provided by MCDC. For purposes of this provision, prudent lending practices shall include the following:

- i. Application documentation;
 - ii. Credit Analysis;
 - iii. Loan package development;
 - iv. Loan package presentation for MCDC loan committee and City approval;
 - v. Collaboration with other funding sources, as necessary, to provide a complete financing package;
 - vi. Loan closing, loan disbursement, loan servicing, and recovery actions.
2. MCDC will be responsible for the servicing and management of all MB-RLF funds received from principal and interest payments on Third Party Loans (hereinafter referred to as Program Income) and of funds received from the City for loan deployment. Funds must be deposited in interest-bearing accounts, and principal and interest must be separately identifiable.
3. During the term of the Agreement, MCDC will maintain records of its performance under this Agreement in a manner consistent with generally accepted accounting principles and consistent with the provisions of 40 CFR Part 31.42 (retention and access requirements). MCDC will allow the City and its authorized representatives access to these records at any time during normal business hours. MCDC will maintain these records for a minimum of three years upon termination of this agreement. MCDC will submit to the City, within five (5) working days of the end of each calendar quarter, in the format prescribed by the City, a quarterly report of its performance under this agreement.
4. MCDC will comply with the MB-RLF Program Guidelines attached to this Agreement (Attachment A). In this regard, MCDC will establish a budget with each borrower pursuant to the underwriting process and will provide to the City for its approval a disbursement package. Any and all disbursements under each loan package shall be approved by the City. The City shall be solely responsible for ensuring that any disbursements are in compliance with its Cooperative Agreement with the EPA and shall indemnify and hold MCDC harmless from any breach of its obligations thereunder.
5. MCDC shall comply with applicable federal and state law with regard to its hiring practices.
6. MCDC acknowledges and represents that it shall be in compliance with the City of Missoula's Affirmative Action Plan, and Title 49 Montana Code Annotated entitled "Human Rights" or forfeit the right to continue such business dealings. MCDC will allow the City or its authorized representatives the opportunity upon reasonable advanced notice and without

disruption to MCDC's operations to audit MCDC as needed to document compliance with these requirements.

7. If MCDC ceases to exist or a Termination of Agreement occurs, all MB-RLF funds on hand and accounts or notes receivable, including program income, will revert to the City.

B. RESPONSIBILITIES OF THE CITY

1. The City shall have sole responsibility and final approval rights on all loans. Loans cannot be made from the MB-RLF without written approval from the City.
2. The City shall work with potential third party borrowers to determine if the proposed use of MB-RLF funding is eligible under the City's agreement with the EPA. The City shall also have the sole authority to determine if expenses incurred by a third party with an approved MB-RLF loan are eligible for brownfields funding.
3. The City shall ensure that sufficient proceeds are available either in program income, funds held at the City for the MB-RLF, or in available but undrawn from the EPA prior to giving final approval for a MB-RLF loan.
4. The City shall submit draw requests to the EPA and provide the necessary balance of funding to MCDC, when approved MB-RLF loans request funds that exceed cash available for MB-RLF lending at MCDC and the City.
5. MCDC shall receive from the City quarterly reimbursement in the amount not to exceed Two Thousand Five Hundred and 00/100 Dollars (\$2,500.00) from available brownfield funding to cover actual, reasonable, and eligible programmatic costs of managing the funds that are eligible under EPA rules and relevant cooperative agreements between the City and the EPA in accord with applicable OMB cost principles. MCDC may invoice the City for the responsibilities listed in Section A. that include (a) expenses for making, underwriting, administering and managing loans; (b) expenses, including financial management expenses, for marketing the loan program, and (c) costs for performance and financial reporting required under 40 CFR 30.51 and 30.52, and 40 CFR 31.40 and 31.41.

C. DURATION OF THE AGREEMENT

This Agreement will become effective upon authorization by the City and MCDC and shall be binding for one year. This Agreement will terminate if either party fails to meet the conditions of this Agreement or if a Termination of Agreement, as described in Section G, occurs. The contract shall be annually renewable on January 1st at the discretion of the City and upon mutual written agreement of the parties. If either party chooses not to renew the contract, the non-renewing party shall provide the other party with written notice of intent to discontinue by November 15th of the year prior to the renewal.

D. ADMINISTRATION

1. For the purpose of implementing this Agreement, the Missoula Department of Grants and

Community Programs Brownfields Coordinator will be the local government project liaison who will work with MCDC. The parties will meet as necessary to provide for the efficient and smooth implementation of this Agreement and the activities contained herein. This Agreement will follow the Program Guidelines (see Attachment A) for issues related to implementation of the MB-RLF.

2. The City will, relative to its respective responsibilities under this agreement, comply with the respective cooperative agreements between the City and EPA establishing any RLF awards, including any future amendments. The City will comply with any relevant federal cross-cutting requirements, including, but not limited to, Disadvantaged Business Enterprise (DBE) requirements found at 40 CFR. 31.36(e) or 40 CFR. 30.44(b); OSHA Worker Health & Safety Standard 29 CFR. 1910.120; the Uniform Relocation Act; Historic Preservation Act; Endangered Species Act; and Permits required by Section 404 of the Clean Water Act; Executive Order 11246, Equal Employment Opportunity, and implementing regulations at 41 CFR. 60-4; Contract Work Hours and Safety Standards Act, as amended (40 USC 327-333) the Anti-Kickback Act (40 USC 276c) and Section 504 of the Rehabilitation Act of 1973 as implemented by Executive Orders 11914 and 11250.
3. MCDC certifies and agrees to initiate searches of its employees at the time of hire to ensure that they are not debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from participation in the Contract by any governmental agency or department. In addition, at the time of the origination of a loan, MCDC will initiate a one-time search of the borrower to confirm that the borrower is not debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from participation in the Contract by any governmental agency.

F. INDEMNIFICATION

1. MCDC waives any and all claims and recourse against the City and its officers, employees and agents including the right of contribution, for loss or damage to persons or property arising from, growing out of, or in any way connected with or incidental to MCDC's failure to properly perform its duties and obligations under this Service Agreement or the failure of any subrecipient to properly perform its duties and obligation as contemplated hereunder. The City waives any and all claims and recourse against MCDC and its directors, officers, employees and agents including the right of contribution, for loss or damage to persons or property arising from, growing out of, or in any way connected with or incidental to the failure of the City to properly perform its duties and obligations under this Service Agreement.
2. MCDC agrees to indemnify, hold harmless, protect, defend and save the City, its elected and appointed officials, agents and employees, while acting within the scope of their duties as such, against any and all claims, demands, damages, costs, liability, expenses, including reasonable attorneys' fees, or causes of action of any kind or character, including the cost of defense arising out of willful misconduct or fraud in the performance or omissions of performance of the duties and obligations of MCDC and/or its agents, employees, representatives, assigns, subrecipients, and/or subcontractors under this Agreement. The

City agrees to indemnify, hold harmless, protect and defend MCDC and its directors, officers, employees and agents while acting within the scope of their duties as such, against any and all claims, demands, damages, costs, liability, expenses, including reasonable attorney's fees, or causes of any kind or character, including the cost of defense arising out of the willful misconduct or fraud in the performance or omissions of performance or in any way resulting from the acts or omissions of the City and/or its agents, employees, representatives, assigns, subrecipients, and such are subcontractors under this Agreement. No director, officer, employee or agent of MCDC shall be under any personal liability to the City for any action taken in good faith or for refraining from the taking of any action in good faith pursuant to this Service Agreement, or for errors in judgment.

G. TERMINATION OF AGREEMENT

1. If any of the following events occur, the City may, in its sole discretion, declare such event a default under this Agreement:
 - A. Any representation or warranty made by MCDC in any request or certificate or other information furnished to the City under this Agreement proves to have been incorrect in any material respect; or,
 - B. MCDC fails in any material respect to carry out its obligations to the City under this Agreement.

In the event of any uncured default by MCDC under Section G.1. above, the City may declare MCDC to be in default and thereafter give MCDC written notice setting forth the action or inaction which constitutes the default and give MCDC 45 days in which to correct the default or any additional reasonable period of time to cure the default provided that the default is capable of being cured within an additional reasonable period of time and MCDC is diligently pursuing a cure. If MCDC fails to correct the default within 45 days of receipt of this notice or such additional reasonable period of time following receipt of written notice, the City may notify MCDC in writing that this Agreement is terminated. If this Agreement is terminated, all loans, MB-RLF funds on hand and accounts and notes receivable, program income, and obligations to service outstanding loans shall revert to and be assumed by the City.

It is agreed by the parties that the provisions of this Agreement provide for reasonable and sufficient notice to be given to MCDC in case of MCDC's failure to comply with any of its covenants and that this notice is sufficient for MCDC to rectify its actions or inactions of default.

The waiver by the City of any default by MCDC does not constitute a waiver of a continuing breach or waiver of a subsequent breach. Any additional agreement or amendments to this agreement between the parties is not binding upon either party unless it is in writing and signed by both parties.

2. If any of the following events occur, MCDC may, in its sole discretion, declare such event a default under this Agreement:

- A. Any representation or warranty made by the City hereunder or in any request or certificate or other information furnished to MCDC under this Agreement proves to have been incorrect in any material respect; or,
- B. The City fails in any material respect to properly perform its duties and obligations under this Agreement or in connection with the Brownfields Cleanup Revolving Loan Fund Grant from the U.S. Environmental Protection Agency; or,
- C. Funds are no longer available from the Missoula Brownfields Cleanup Revolving Loan Fund for the purposes contemplated hereunder.

If the City fails to perform any of its duties under this Agreement or if any event of default occurs, MCDC may declare the City to be in default and thereafter provide the City with written notice setting forth the action or inaction which constitutes the default and provide the City with forty-five (45) days within which to correct the default.

If the City fails to correct the default within forty-five (45) days of receipt of the notice, MCDC may notify the City in writing that any amount that is payable from the City to MCDC and from MCDC to the City under this Agreement is due and payable in full within forty-five (45) days and this Agreement is terminated. If this Agreement is terminated, all loans, MB-RLF funds on hand and accounts and notes receivable, program income, and obligations to service outstanding loans shall revert to and be assumed by the City.

It is agreed by the parties that the provisions of this Agreement provide for reasonable and sufficient notice to be given to the City in case of the City's failure to comply with any of its covenants and that this notice is sufficient for the City to rectify its actions or inactions of default.

The waiver by MCDC of any default by the City does not constitute a waiver of a continuing breach or waiver of a subsequent breach.

MCDC may resign from the obligations and duties imposed on it pursuant to this Servicing Agreement if MCDC determines that the procedures, guidelines and policies of the City applicable to the loan arrangements contemplated hereunder have been amended or modified since the effective date to such an extent that it is impractical or impossible for MCDC to perform its obligations pursuant to this Service Agreement. Such resignation shall be effective on the date on which MCDC provides written notice of such to the City, and, in such event MCDC shall not be held in default of this Service Agreement for such failure to perform.

H. EFFECTIVE TERMINATION

1. On or after receipt by MCDC of written notice from the City pursuant to Section G(1) or on or after receipt by the City of written notice from MCDC as provided in Section G(2), the obligations of MCDC under this Service Agreement shall terminate and all loans, MB-RLF funds on hand and accounts and notes receivable, program income, and obligations to

service outstanding loans shall revert to and be assumed by the City. The parties agree to cooperate with each other in effecting the termination of MCDC's responsibilities hereunder. Upon termination, MCDC shall be entitled to the payments for services that were rendered and/or reimbursement of its program costs of managing loans pursuant to Section B(4) above.

I. NOTICES

All communications pertaining to the subject matter of this agreement shall be mailed to the parties at the following addresses:

MCDC
Montana Community Development Corporation
Heidi DeArment, Vice President
229 East Main St.
Missoula, MT 59802

City of Missoula
Nancy Harte, Senior Grants Administrator
Brownfields Coordinator
Missoula Dept. of Grants and Community Programs
435 Ryman
Missoula, MT 59802

J. CONSTRUCTION AND VENUE

This Agreement will be construed under and governed by the laws of the State of Montana. The City and MCDC agree that performance of this Agreement is in Missoula County, State of Montana and that in the event of litigation concerning it, venue is in the District Court of the 4th Judicial District in and for the City of Missoula, Montana.

K. DISPUTE RESOLUTION.

1. Should any dispute or disagreement develop between or among the parties hereto with respect to this Agreement, it shall be settled as specified in this Section K.1. If one such party believes that another such party has breached this Agreement, notice thereof shall be given to the other party in writing. The receiving party shall respond in writing within five (5) business days of receipt of such notice. If the dispute is not resolved promptly following the exchange of such initial information, the parties shall schedule a face-to-face meeting within thirty (30) days of the initial notice of breach, for the purpose of discussing and negotiating a resolution of any outstanding disputes. If the foregoing meeting fails to bring about a prompt resolution of the disagreement or dispute, then within thirty (30) days of such meeting, the involved parties shall initiate a voluntary, non-binding mediation held in Missoula County of the State of Montana in which the registered office of MCDC and the City are located, and conducted by a mutually-acceptable mediator. If the parties are unable to agree upon a mediator, they shall request a court of competent jurisdiction sitting in that

county to appoint a mediator for them. Each of the parties shall bear its own costs and expenses (including attorney's fees) and their proportionate share of any other costs, fees, or expenses associated with this mediation and endeavor in good faith to resolve their differences. If the parties are unable to resolve any dispute arising out of or in connection with this Agreement amicably, such dispute shall be finally settled by binding arbitration in accordance with Section K.2.

- 2. **Jurisdiction and Venue.** Any arbitration involving any dispute or matter arising under this Agreement may only be brought after the dispute resolution process outlined in Section K.1. has been completed. Binding arbitration shall be conducted by a single arbitrator. The decision shall be final with no appeal. MCDC and the City hereby consent to the exercise of personal jurisdiction by any such court with respect to any such proceeding.

The City of Missoula and Montana Community Development Corporation have approved this Agreement.

IN WITNESS THEREOF, the parties hereto have caused this Agreement to be executed.

CITY OF MISSOULA
435 Ryman
Missoula, MT 59802

MONTANA COMMUNITY
DEVELOPMENT CORPORATION
229 East Main
Missoula, MT 59802

John Engen, Mayor

Dave Glaser, President

Date

Date

ATTEST:

Martha L. Rehbein, CMC
City Clerk

STATE OF MONTANA)
)
County of Missoula)

On this ____ day of _____, 2016, before me _____, a Notary Public for the State of Montana, personally appeared, Dave Glaser, President, Montana Community Development Corporation, in Montana, and acknowledged to me that he executed the written instrument on behalf of said Business.

(NOTARY SEAL)

PRINTED NAME: _____
Notary Public for the State of Montana
Residing at _____
My Commission expires _____