

WATER RIGHTS LEASE RENEWAL AGREEMENT

PARTIES

The Parties to this Agreement are The Montana Land Reliance (hereinafter referred to as “MLR”) and the Montana Department of Fish, Wildlife and Parks (hereinafter referred to as “FWP”).

WITNESSETH

WHEREAS, FWP desires to continue to lease water through this Water Rights Lease Renewal Agreement (Agreement) to maintain a continuous instream flow in the lower 1.4 miles of Big Creek; and

WHEREAS, without the Agreement stream dewatering in this section of Big Creek limits the capacity of the creek to produce Yellowstone cutthroat trout recruits for the fishery of the mainstem Yellowstone River; and

WHEREAS, Yellowstone cutthroat trout are recognized as a species of special concern in Montana; and

WHEREAS, the purpose of this Agreement is to provide instream flow necessary to help prevent fry losses of Yellowstone cutthroat trout caused by redd dewatering in Big Creek; and

WHEREAS, on April 5, 1999 the Department of Natural Resources and Conservation (“DNRC”) issued Temporary Authorization to Change 43B 19862800 for a flow rate of up to 16.0 cubic feet per second (cfs) for the purpose of maintaining or enhancing streamflow for the benefit of the fisheries from April 15 through October 15 each year for a period of 20 years; and 

WHEREAS, the parties intend that this Agreement provides a mechanism to utilize the provisions of §85-2-436, MCA, to accomplish the renewal of this water right lease and the corresponding Temporary Authorization to Change 43B 19862800.

THEREFORE, the parties agree as follows:

1. Lease of Water Rights and Minimum Instream Flow. MLR agrees to continue to lease its portion of the following water rights to FWP under the terms and conditions of this agreement:

<u>CLAIM NUMBER</u>	<u>PRIORITY DATE</u>	<u>FLOW RATE</u>
43B 190628-00	5-15-1910	5.00 cfs
43B 193683-00	3-12-1883	1.00 cfs
43B 193689-00	6-30-1901	2.50 cfs
43B 193684-00	5-31-1909	2.50 cfs
43B 193682-00	5-15-1910	<u>5.00 cfs</u>
Total:		16.00 cfs

2. Warranty. MLR warrants that the water rights leased under this Agreement will provide at least 1.0 cfs of water for instream flow purposes at the historic point of diversion, provided this amount of water is physically available at the point of diversion. If this amount of water is not available for instream flow purposes at the point of diversion when water is physically available, FWP must either accept the amount of water that is available as meeting the terms of this Agreement or terminate the Agreement upon thirty (30) days notice to MLR.

3. Term of Agreement. The term of this Agreement is from the date of execution through the term of the renewed temporary change to instream flow of MLR's water rights leased to FWP. The term of the lease of water rights under this Agreement shall be ten (10) years, unless renewed upon expiration, commencing on April 15, 2020 unless there are objections to the lease renewal under §85-2-436, MCA. If there are objections, then the ten (10) year lease will commence on the date DNRC authorizes the temporary change to instream flow.



4. Payment. In consideration of the lease of the portion of the water rights owned by MLR pursuant to this Agreement, FWP shall pay a sum of \$100.00 annually to MLR. The first payment shall be made by May 1, 2020 or within 30 days of approval of the renewal of the temporary authorization to change the water rights to instream flow by DNRC, whichever is later. Subsequent payments shall be made by May 1st of every year the Agreement is in effect for the entire irrigation season.

5. Contingency. The renewal of the water right lease is expressly conditioned upon approval of the lease renewal by the Montana Fish and Wildlife Commission. If not approved, FWP shall notify MLR in writing. At such time this Agreement shall be of no further force and effect and neither party shall have any liability to the other party under this Agreement.

6. Application to Renew Temporary Change to Instream Flow. The Parties recognize that an application to renew Temporary Authorization to Change 43B 19862800 must be filed with and approved by DNRC. The application shall be submitted by FWP and any application fees and other expenses related to the application to renew the temporary change to instream flow shall be paid by FWP. If DNRC does not approve the application for renewal or imposes conditions of approval unacceptable to MLR or FWP, this Agreement shall terminate upon notice by the Party finding the conditions unacceptable.

7. Measuring Devices. In accordance with §85-2-436(3)(j), MCA, FWP shall be responsible for all costs of installing measuring devices and providing personnel to measure streamflow in accordance with the requirements of Temporary Authorization to Change 43B 19862800. FWP

shall submit all measuring reports required to DNRC. All measuring reports shall be provided to MLR annually or on request more frequently. Measurements to determine compliance with the 1.0 cfs flow requirement found in Paragraph 2 shall be taken at or near the bridge located approximately ¼ mile downstream of the historic diversion.

8. Water Commissioner. FWP may request MLR to jointly petition the District Court under the provisions of Title 85, Chapter 5, MCA for the appointment of a water commissioner for Big Creek if the instream flow as measured at the measurement point defined in Paragraph 7 is below the 1.0 cfs instream flow specified under Paragraph 2. If a request to sign such a petition is made, MLR shall cooperate in petitioning the District Court. If a water commissioner is appointed at the request of FWP, MLR's share of the water commissioner fees shall be paid by FWP. If a water commissioner is appointed under the general provisions of Title 85, Chapter 5, MCA based on a petition filed by MLR or another water user other than FWP, FWP shall only be obligated to pay its proportional share of the expenses of the water commissioner for the measurement and  distribution of that portion of the water rights leased under this Agreement. Nothing in this Paragraph restricts or affects MLR's right to unilaterally enforce its water rights in any lawful manner or seek appointment of a water commissioner for reasons related to or unrelated to this Agreement.

9. Restoration of Water Rights. §85-2-436(3)(h), MCA 2017 provides, "Neither a change in appropriation right nor any other authorization is required for the reversion of a leased appropriation right to the lessor's previous use." Upon termination of this Agreement for whatever cause, unless renewed, FWP agrees to execute and file with DNRC, at its expense, any documents necessary to revert the water rights listed in Paragraph 1 and subject to Temporary Authorization to Change 43B 19862800 to the use and conditions which existed prior to April 5, 1999.

10. Default. If either Party fails to carry out any duty or obligation resulting from this Agreement, the other Party may notify the defaulting Party specifying the default. Except for a default by MLR in failing to provide the 1.0 cfs instream as provided in Paragraph 2, herein, the defaulting Party shall have thirty (30) days from the date written notice of default is given to correct the default if the default is correctable. If the default is not correctable, or if the default is not corrected within thirty (30) days of notice, or if the defaulting party has not initiated a remedy of the default within thirty days and, thereafter, diligently and continuously prosecuted the remedy to completion when the default cannot be remedied within the thirty-day period, then the non-defaulting party may terminate this Agreement and retake possession, if applicable, without notice.

If the default consists of MLR failing to allow for the 1.0 cfs as provided in Paragraph 2, then the time period described above for remedying such default shall be reduced from thirty to five (5) days.

11. Notice. Any notice to be given under this Agreement shall be in writing and shall either be served upon the Party personally or served by registered or certified mail, return receipt requested, directed to the Party to be served at the address of the Party set forth in this paragraph. A Party wishing to change their designated address shall do so by notifying the other Party in writing. Notice served by mail shall be deemed complete when deposited in the United States mail. Rejection or other refusal to accept notice, or the inability to deliver because of changed address for which no notice was given, shall be deemed to be receipt of the notice.

FWP's liaison, mailing address, telephone and email is:

Andy Brummond, Water Conservationist
Montana Fish, Wildlife & Parks
PO Box 938
Lewistown, MT 59457-0938

Telephone: (406) 538-4658
Email: abrummond@mt.gov

MLR's liaison, address, telephone and email is:

Will Trimbath
Montana Land Reliance
PO Box 355
324 Fuller Avenue
Helena, MT 59624

Telephone: (406) 443 7024
Email: will@mtlandreliance.org

12. Pending Adjudication. FWP leases MLR's water rights subject to Montana's General Water Right Adjudication. Nothing in this Agreement shall be used as evidence by FWP to diminish or adversely affect MLR's water right claims in the General Water Right Adjudication.

13. Abandonment of Water Rights. Nothing in this Agreement or any action taken by MLR to comply with this Agreement may be used as evidence of intent to abandon the water rights leased in this Agreement. The Parties agree that this Agreement and any actions taken by MLR under this Agreement do not constitute an abandonment of MLR's water rights or serve as evidence that could be used to establish abandonment of any part of the water rights under §85-2-404(4), MCA. FWP

agrees to defend MLR and its water rights against any legal action alleging that the water rights leased under this Agreement have been abandoned because of this Agreement.

14. Indemnification. FWP shall indemnify and hold MLR harmless against any claim or action by third parties challenging the use of the water leased under this Agreement by FWP for instream purposes, challenging the validity of the statutes allowing the lease of water for instream purposes by FWP, or challenging the validity of this lease Agreement on any grounds. FWP shall not indemnify MLR against any claim by third parties that arises out of or as a result of MLR's negligent or willful misconduct or conduct not authorized under this Agreement.

15. Binding Effect. This Agreement shall be binding upon the heirs, personal representatives, administrators and successors of the Parties.

16. Cooperation of Parties. The Parties agree to cooperate fully and to provide such assistance and information as may be necessary to implement this Agreement. If requested by either Party, MLR and FWP agree to meet and annually review the lease agreement on or before March 1 of each calendar year. The annual review will address measuring and monitoring information collected from the previous calendar year and discuss any problems that should be corrected before the next irrigation season. MLR or FWP may also request a meeting at any other time to discuss issues of concern.

17. Montana Law and Venue. It is agreed that any legal action or judicial proceeding concerning this Agreement must be filed either in the Sixth or the First Judicial Districts in the Counties of Park or Lewis and Clark, Montana, respectively. It is further agreed that litigation concerning this Agreement shall be governed by the laws of the State of Montana.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement this ____ day of _____, 2018.

THE MONTANA LAND RELIANCE

MONTANA DEPT. OF FISH, WILDLIFE
AND PARKS:

By: _____
Its: _____

Martha Williams, Director

Legal Counsel