

## **WATER RIGHTS LEASE AGREEMENT**

THIS AGREEMENT is made and entered into between MONTANA FISH, WILDLIFE & PARKS (FWP) and JOHN L. LAKE, JR. and YELLOWSTONE STAGE STOP ESTATES WATER USER'S AND HOMEOWNER'S ASSOCIATION (collectively "Lessors"), hereinafter collectively referred to as "the Parties."

WHEREAS, FWP desires to continue to lease water through this Water Rights Lease Agreement (Agreement) to maintain a continuous instream flow in the lower 1.4 miles of Big Creek, from a point 1.4 river-miles upstream from the mouth of Big Creek, to Big Creek's confluence with the Yellowstone River; 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, Lessors' portion of the current Temporary Authorization to Change 43B 19526599 is 2.80 cubic feet per second (cfs), or 28% of the original 10 cfs changed to instream flow; and

WHEREAS, FWP previously assisted the Lessors' in obtaining Provisional Permit 43B 30045005 to irrigate from the Yellowstone River instead of Big Creek; and

WHEREAS, the purpose of this Agreement is to provide a flow of up to 4.38 cfs necessary to help prevent fry losses of Yellowstone Cutthroat Trout caused by redd dewatering in Big Creek; and

WHEREAS, the Lessors own the water rights reflected in Statements of Claim 43B 30110714 and 43B 30110715 for irrigation from Big Creek and desire to lease these rights to FWP for instream flow purposes; 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 the existing temporary change to instream flow and to temporarily change to instream flow the Lessors' the previously unchanged portions of Statements of Claim 43B 30110714 and 43B 30110715 to instream flow.

THEREFORE, the Parties agree as follows:

1. Lease of Water Rights: Under the terms of this Agreement, the Lessors lease to FWP for instream flow purposes 4.38 cfs, being the full amount of the following water rights for the period of use claimed, and agrees not to divert water from Big Creek for irrigation under these water rights during the term of the Agreement:

| <u>Water Right No.</u> | <u>Priority Date</u> | <u>Flow Rate</u> |
|------------------------|----------------------|------------------|
| 43B 30110715           | 6-30-1873            | 3.5 cfs          |
| 43B 30110714           | 6-30-1882            | 0.88 cfs         |

2. Term of Agreement. The term of this Agreement is from the date of execution through April 30, 2029 or the date on which temporary authorization to change the rights to instream flow expires, whichever is later, unless renewed upon expiration or terminated under the provisions of Paragraph 12, 14 or 15.

3. Lease Payment for Renewed Change Authorization. In consideration for the lease of the portion Statement of Claim 43B 30110715 for 2.80 cfs currently authorized under Temporary Authorization to Change 43B 19526599 FWP shall pay a sum of \$7,500 annually to the Jackson L. Lake, Jr. The first payment shall be made by May 31, 2019 or within 30 days of approval by the Department of Natural Resources and Conservation (DNRC) of the temporary authorization to change, whichever is later. Subsequent payments shall be made by May 1<sup>st</sup> of every year this Agreement is in effect for the entire irrigation season.

4. Lease Payment for Additional Change Authorization. In consideration for the lease of the Lessors' remaining portions of Statements of Claim 43B 30110714 and 43B 30110715 not presently temporarily changed to instream flow, FWP shall pay Jackson L. Lake, Jr. \$2,679 per cfs for the approved flow rate. The approved flow rate for the purpose of calculating the payment is the volume of water approved for instream flow by DNRC divided by the number of days of use approved. The first payment shall be made by May 31, 2019 or within 30 days of approval by DNRC of the temporary authorization to change, whichever is later. Subsequent payments shall be made by May 1<sup>st</sup> of every year this Agreement is in effect for the entire irrigation season.

5. Monitoring Plan. FWP will continue to implement the measuring and monitoring plan as required by §85-2-436, MCA and FWP shall pay all costs associated with the measuring and monitoring plan.

6. Administration of Leased Instream Flows. The Parties agree that upon execution of this Agreement FWP will rely on the informal water allocation system currently in effect among the Big Creek water users to deliver the leased water for instream use. However, if working within the existing system is not effective in insuring the delivery of the instream water and if a water commissioner is the only feasible way of insuring the delivery of the instream water, the parties agree to jointly petition the District Court for Appointment of a water commissioner for Big Creek. For this purpose, the Lessors and FWP agree to file a joint petition to the District Court for the appointment of a water commissioner when necessary to meet the terms of this Agreement. Upon appointment by the District Court, the water commissioner shall admeasure and distribute the water to water users on Big Creek in accordance with Title 85, Chapter 5, MCA. The Parties agree that the petition shall specifically request the Court to order the Water Commissioner to measure and distribute water leased by FWP under this Agreement. The expense of the water commissioner shall be paid in accordance with Title 85, Chapter 5, MCA.

7. Renewal of Temporary Authorization to Change. The Parties recognize that if another appropriator submits evidence of adverse effects that were not considered in the initial lease authorization, a new application for change of purpose and place of use must be filed with and approved by DNRC in order for the lease to be renewed. If required by DNRC, and upon agreement of both parties, a new application to change the purpose and place of use shall be submitted to DNRC by FWP, in consultation with the Lessors, pursuant to §85-2-436, MCA. The Parties agree to cooperate fully in the processing of this application. Any DNRC application fees shall be paid by FWP. If DNRC imposes conditions of approval unacceptable to the Lessors or FWP, this Agreement shall terminate, unless other provisions are mutually agreed to by both parties in writing to correct the unacceptable conditions. If a new application to change the purpose and place of use is required and either party does not agree to submit such an application, this Agreement shall terminate.

8. Additional Temporary Authorization to Change. The Parties recognize that changes in the purpose and place of use of the remaining portions of Statements of Claim 43B 30110714 and 43B 30110715 not presently temporarily changed to instream flow must be approved by the DNRC. The application for such changes shall be submitted by FWP pursuant to §85-2-436 MCA, and the Lessors appoint FWP as its agent for the purpose of submitting such application. The Parties agree to cooperate fully in preparing and submitting this application. Any

application fees and other expenses related to the temporary change to instream flow application submitted to DNRC shall be paid by FWP. The term of the temporary authorization change will be requested to coincide with the termination of the temporary authorization to change in Paragraph 7. If DNRC does not approve the application or imposes conditions of approval unacceptable to the Lessors or FWP, this Agreement shall terminate upon notice by the Party finding the conditions unacceptable unless other provisions are mutually agreed to by the Parties in writing to correct the unacceptable conditions or the Parties agree to continue only with the renewal of the existing temporary authorization to change for 2.8 cfs.

9. Return of Rights to Previous Use. Upon termination of this Agreement, FWP agrees to execute any and all documents required to change the place of use and purpose of use of the water rights leased to FWP and changed to instream flow to that which existed prior to being changed to instream flow.

10. Provisional Permit Extension of Time. Upon the request of the Lessors, FWP agrees to prepare and submit an application for extension of time for Provisional Permit 43B 30045005 if the permit has not been perfected by the December 31, 2022 deadline. FWP shall pay the application fee. FWP shall file the application no later than December 31, 2022. The Lessors agree to cooperate in preparing the application in a timely manner. FWP agrees not to place call on Provisional Permit 43B 30045005 at any time this Agreement is in force.

11. Contingencies.

a. The renewal of the water right lease is expressly conditioned upon satisfaction of the following conditions and contingencies, in addition to the other terms of this Agreement:

- i. The Montana Fish and Wildlife Commission must approve the Agreement.
- ii. FWP must secure funding for the Agreement through the Future Fisheries Improvement Program and/or other sources.

b. If the contingencies in Paragraphs 10(a)(i) and 10(a)(ii) are not satisfied by April 30, 2019, FWP or the Lessors may withdraw from this Agreement by sending written notice to the other party to that effect. Upon such withdrawal, FWP shall have no obligation or right to continue to lease the water rights, the Lessors shall have no obligation to continue to lease the water rights to FWP, this Agreement shall be of no further force and effect, and the Parties shall have any liability to the other Party under this Agreement. Alternatively, the time for satisfaction of the contingencies may be extended by written agreement of all Parties.

12. Termination Before April 30, 2019. The Lessors may terminate this Agreement in writing prior to April 30, 2019 upon which this Agreement shall be of no further force and effect; and neither party shall have any liability to the other party under this Agreement.

13. Renegotiation of Annual Payment. Upon written request, the Lessors may elect to renegotiate the annual payment after no less than 3 years. The request shall be made prior to October 15<sup>th</sup> of the year preceding the year in which the renegotiated payment would be in effect. If the parties cannot reach an agreement with regard to the amount of the annual payment or the funding for the additional payment cannot be secured by FWP, the water right lease shall terminate.

14. Early Termination. Upon written notice either Party may terminate the water right lease after no less than 3 years. The notice shall be made prior to April 1<sup>st</sup>. If an annual payment has already been made for that year, it shall be returned to FWP.

15. Renewal. This Agreement may be renewed by mutual agreement of the Parties in ten-year increments. If renewed, annual lease consideration may change, and other minor amendments to this Agreement may be incorporated by and through a lease renewal agreement.

16. Default. If either party fails to perform any obligations required by this Agreement, the other party may serve a written notice upon the failing party specifying the default. The defaulting party shall have thirty (30) days from the date on which 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 default cannot be remedied within the thirty (30) day period and the defaulting party has not initiated a remedy of the default within thirty (30) days and thereafter diligently and continuously pursued the remedy to completion then a non-defaulting party may terminate this Agreement and retake or return possession, if applicable, without additional notice.

17. 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 its designated address shall do so by written notice to the other party. Notice served by mail shall be deemed complete when deposited in the United States mail. Rejection or other refusal to accept 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, and phone is:

Andy Brummond, Water Conservationist  
Montana Fish, Wildlife & Parks  
205 W Aztec Drive  
PO Box 938  
Lewistown MT 59457  
Telephone: (406) 538-2445 ext. 224

Lessors' liaison, address, and phone is:

John L. Lake, Jr.  
PO Box 5375 #19  
Salton City, CA 92275  
Telephone: (251) 861-3160

18. Pending Adjudication. FWP leases the water rights subject to the Montana Water Court adjudication process.

19. No Abandonment of Leased Water Rights. Pursuant to §85-2-404(4), MCA, nothing in this Agreement shall be interpreted to work abandonment or to evidence intent to abandon the water rights leased in this Agreement.

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

21. Binding Effect. The provisions of this lease Agreement shall be binding upon the heirs, assigns, personal representatives, administrators and successors of the parties in like manner as upon the original parties, except as provided by mutual written agreement.

22. Cooperation of the Parties. The Parties hereto agree to cooperate fully and to provide such assistance and information as may be necessary to implement this Agreement.

23. Venue, Interpretation and Attorney Fees. The venue for any court action arising under this agreement with the exception of petitioning for a water commissioner must be in the First Judicial District in and for Lewis and Clark County, Montana. This Agreement must be interpreted according to the laws of Montana. In the event an action is filed to enforce, interpret

or dispute this agreement, the prevailing party shall be entitled to recover reasonable attorneys fees from the other party in the suit.

IN WITNESS WHEREOF, the parties hereto execute this Agreement:

JOHN L. LAKE, JR.

MONTANA FISH, WILDLIFE & PARKS

\_\_\_\_\_  
Date

\_\_\_\_\_  
Martha Williams  
Director  
Date

YELLOWSTONE STAGE STOP ESTATES  
WATER USERS' AND HOMEOWNERS'  
ASSOCIATION

Approved for Legal Content

\_\_\_\_\_  
Bill Schenk  
FWP Legal Counsel  
Date

\_\_\_\_\_  
John L. Lake, Jr.  
Date

Title: \_\_\_\_\_