



OPERATING AGREEMENT
between
MONTANA STATE UNIVERSITY
and
MONTANA STATE UNIVERSITY FOUNDATION, INC.

THIS AGREEMENT (“Agreement”), entered into as of this _____ day of _____, 2017 by and between Montana State University and the Montana State University Foundation, Inc., a non-profit corporation.

RECITALS

WHEREAS, Montana State University (“the University”) is Montana’s land grant institution of higher education and a unit of the Montana University System;

WHEREAS, the Montana State University Foundation, Inc., d/b/a the Montana State University Alumni Foundation (“the Alumni Foundation”), is an independent corporation, incorporated in the state of Montana, organized under Section 501(c)(3) of the Internal Revenue Code, and governed by the Articles of Incorporation and Bylaws affected by the Board of Governors of the Alumni Foundation on September 9, 2011 for the sole purpose of providing support to advance the students, faculty and staff of Montana State University, consistent with the mission and priorities of Montana State University;

WHEREAS, the University recognizes the Alumni Foundation as its sole affiliated foundation for the purposes outlined in Section 901.9 of the Montana University System Policy and Procedures Manual: “Campus-Affiliated Foundations”; and

WHEREAS, the University desires an association with alumni and friends and the financial support of private constituencies, and the Alumni Foundation exists to cultivate lifelong relationships and secure private support to advance Montana State University, the Alumni Foundation shall, for payment:

- Conduct its fundraising operations in a manner that is consistent with the mission and priorities of the University;
- Solicit, receive, hold, prudently invest, administer and manage funds (including both restricted and unrestricted gifts) consistent with the wishes of its donors, and to make expenditures to or for the sole benefit of the University, and with University consent, manage selected University funds and other University resources to the extent permissible by law, provided that such University funds and resources remain identified in Foundation and University records as University assets;

- Employ staff, including a Foundation Chief Executive Officer (“the Alumni Foundation CEO”), who shall, as a critical part of his or her duties and responsibilities, communicate effectively and regularly with the University President to ensure clear understanding of the University President’s funding priorities, and shall work cooperatively and diligently to advance those priorities, along with periodic requests for the campus made by the University President, that can lawfully be fulfilled.
- Engage and nurture lifelong relationships with graduates, friends, parents, faculty, staff, retirees and other constituencies that seek a meaningful association with the University.

TERMS OF AGREEMENT

NOW THEREFORE, in consideration of the mutual covenants and commitments of the University and the Alumni Foundation (“Parties”) contained herein, the mutual benefits to be gained by the performance hereof, and other good and valuable consideration, receipt of which is hereby acknowledged, the Parties agree to the following terms:

1.0 University Name, Seal and Logotype

Consistent with its mission to help advance the plans, priorities, and objectives of the University, the Alumni Foundation is granted the use of the name Montana State University and is granted the use of the University’s seal, core logo, affiliated logos and marks according to the University’s Graphic Identity and Branding Policy until such time as the Alumni Foundation dissolves, the Alumni Foundation ceases to be recognized as a tax exempt organization, or the University’s President withdraws recognition of the Alumni Foundation consistent with Section 6.5.

At all times, the Alumni Foundation will operate under its own seal and logotype and shall not use the University seal in the promotion of Alumni Foundation business or activities unless separately approved.

2.0 Relationship Between the University and the Alumni Foundation

The University and the Alumni Foundation mutually agree that the relationship between the Parties is of paramount importance to the ongoing and future success of both the University and the Alumni Foundation. As such, the Parties are equally committed to developing and maintaining a close relationship through open communication, trust, and cooperation.

In furtherance of this relationship, the University President and the Alumni Foundation CEO shall meet regularly and communicate frequently to ensure the University’s priorities, along with the duties and responsibilities outlined herein, are well-coordinated and achieved.

The University President is responsible for communicating the University’s priorities and long-term plans to the Alumni Foundation on a regular basis.

The Alumni Foundation shall support the University and respective programs through the services outlined in Section 4 (Alumni Foundation Responsibilities), to the extent allowed by law, unless the Parties agree otherwise and when modified by an attachment to this Agreement.

The University recognizes that the Alumni Foundation is a private, independent corporation with the authority to keep its records confidential, conduct its affairs under the direction of the Alumni Foundation Board of Governors, and fulfill its mission to support the University according to laws applicable to private, non-profit corporations.

The Alumni Foundation CEO shall also carry the title of Vice President for Advancement, a non-compensatory title. At the University President's discretion, the Alumni Foundation CEO shall be included as a member of the University President's executive council, University council, and other appropriate teams as necessary to build, nurture, and maintain a deep and effective strategic partnership between the University and the Alumni Foundation.

Inclusion or and participation by the Alumni Foundation CEO in these councils, teams, or other groups by the University President shall be for the purposes of strategic planning, communication, and cooperation between the Alumni Foundation and the University. Said inclusion and participation, as well as the title of Vice President for Advancement, shall not create an employment relationship, whether express or implied, between the Alumni Foundation CEO and the University. The University shall have no authority, express or implied, to hire, fire, or set the compensation for the Alumni Foundation CEO.

The Alumni Foundation CEO shall be accountable for effectively communicating with the University President and campus leadership, timely and responsive reports on the University's funding priorities, including implementation plans and completion status, and alerting the University President of significant decisions, relating to personnel or otherwise, that may impact the Foundation's work under this agreement.

The University President shall serve as an ex-officio, non-voting member of the Alumni Foundation Board of Governors and shall assume a prominent role in appropriate constituent-related activities. As an ex-officio, non-voting member of the Board of Governors, the University President shall be provided an opportunity to provide input and recommendations for candidates for the Alumni Foundation Board of Governors.

The Alumni Foundation Board of Governors is solely responsible for the control and management of all assets of the Alumni Foundation, and is responsible to ensure that all gifts made to the Alumni Foundation are managed prudently, consistent with donor intent, and according to all applicable laws.

The Alumni Foundation is solely responsible for the performance and oversight of all aspects of its operations based on a comprehensive set of bylaws that clearly address its

Board of Governor's fiduciary responsibilities, including expectations of individual board members based upon legal and ethical guidelines and policies.

The Alumni Foundation is solely responsible for the employment, compensation, and evaluation of its employees, including the Alumni Foundation CEO. The University President shall be consulted as part of the normal evaluation process for the Alumni Foundation CEO.

3.0 University Responsibilities

The University shall provide all services and attendant fees to the Alumni Foundation as outlined below:

- 3.1 **Funding Priorities.** At least annually, the University President will communicate to the Alumni Foundation President and CEO the University's current private funding priorities. The University shall rely upon the Alumni Foundation, or its designee, to help assess the private funding feasibility of each. The Alumni Foundation shall diligently pursue the University's funding priorities and shall avoid activities that conflict with those priorities.
- 3.2 **Integrated Advancement.** The University will actively coordinate its communications, internal relations, and external relations activities with the Alumni Foundation to develop a culture within the University's students, faculty, alumni, and friends that encourages engagement and private support.
- 3.3 **Consideration.** In consideration for the Alumni Foundation's services including but not limited to the responsibilities listed in Section 4 (Alumni Foundation Responsibilities), the University will provide the Alumni Foundation with fair and reasonable payment for services as negotiated by the Parties. The consideration for this contract term is included as Attachment A.
- 3.4 **Donor, Alumni, and Constituent Related Activities.** The University shall support the Alumni Foundation's processes relating to philanthropic, alumni, and constituent related activities that seek and solicit private support and advocacy to benefit the University. The Parties shall coordinate to conduct these activities in compliance with each Party's applicable policies.

Additionally, the University recognizes the Alumni Foundation as having sole responsibility for the constituent related activities described in this Agreement, on behalf of the University and certain affiliated campuses. The University President, deans, directors, appropriate administrators, other University officials, and University-selected or University-sanctioned volunteers shall work in conjunction with the Alumni Foundation administration and staff to cultivate relationships, coordinate efforts, and secure private support.

- 3.5 **Provision of Data.** When and to the extent allowed by law, the University shall provide to the Alumni Foundation any constituent or other data reasonably requested by the Alumni Foundation and upon demonstration of necessity by the

Alumni Foundation for the maintenance and support of the Alumni Foundation's efforts under this Agreement.

- 3.6 **Other Services.** The University will also provide other services at a mutually agreed upon rate. If the Alumni Foundation requires additional or external services, the University and the Alumni Foundation may agree to terms relating to such services under a separate agreement. Those services include but are not limited to, information systems and technologies, property security, custodial services, facility maintenance, and special events.

4.0 Alumni Foundation Responsibilities

- 4.1 **Alumni and Volunteer Relations.** The Alumni Foundation shall be responsible for various programs, services, and initiatives to strategically enhance and expand alumni engagement with the University ("alumni relations") and to enhance and expand volunteer advocacy in support of the University ("volunteer relations").
- 4.2 **Donor Relations.** The Alumni Foundation shall be responsible for various programs, services, and initiatives to strategically enhance and expand donor engagement with and private support for the University ("donor relations").
- 4.3 **Event Services.** The Alumni Foundation shall provide event planning and management services in support of the Alumni Foundation's programs. The Alumni Foundation may coordinate events planned by and/or hosted by other University-related offices when those events are in support of alumni engagement or donor relations.
- 4.4 **Withdrawal of funding:** Any potential withdrawal of funding for an ongoing campus activity will be discussed with the University President and Alumni Foundation CEO prior to the Alumni Foundation making a final decision on any potential withdrawal of funding.
- 4.5 **Communications Services.** The Alumni Foundation shall provide constituent-related communications services to the University upon request and when related to the Alumni Foundation's efforts and activities.
- 4.6 **Gift Acceptance and Acknowledgment.** The Alumni Foundation will establish, adhere to, and periodically assess its gift acceptance and fund management policies and procedures. The Alumni Foundation will promptly acknowledge and issue receipts for all assets given to the Alumni Foundation and provide appropriate recognition and stewardship of such support.
- 4.7 **Constituent Records.** The Alumni Foundation shall establish and enforce policies and procedures to comply with all applicable laws and regulations and to protect the confidentiality of the Alumni Foundation information and the reasonable expectation of privacy attendant to constituent data.

- 4.8 **Asset Investment.** When the University deposits funds with the Alumni Foundation for investment purposes, the Alumni Foundation may comingle those funds with the Alumni Foundation's funds and other funds held by the Alumni Foundation in a pooled investment portfolio ("pooled investments"). In doing so, it is mutually understood that:
- A. the University retains ownership of University funds;
 - B. the Alumni Foundation is authorized to invest the University funds in the same manner as other Alumni Foundation funds;
 - C. University funds are subject to the Alumni Foundation's administrative fees in accordance with the Alumni Foundation's fund administration policies;
 - D. University funds may be pooled with the Alumni Foundation's institutional funds and other funds for the purpose of participating in the pooled investments;
 - E. there is no trust relationship between the University and the Alumni Foundation, express or implied;
 - F. pooled investments are invested in accordance with the Alumni Foundation's investment policy;
 - G. there is an inherent risk involved with investing that is beyond the control of the Alumni Foundation, including the potential for loss of the University's principal in the initial investment, loss of subsequent deposits, loss of interest or appreciation, and loss of other financial gains;
 - H. neither party is obligated to offer or accept investment advice to or from the other party;
 - I. the Alumni Foundation has not and does not hold itself out as an investment advisor or as a professional investment corporation; and
 - J. the University representative for all matters relating to the investment of University funds by the Alumni Foundation is the University President or his or her designee.

For all University funds invested by the Alumni Foundation, the Alumni Foundation shall provide periodic summaries and confirmations of balances of University funds as may be requested or required. The Alumni Foundation shall make its fund administration and investment policies publicly available, and provide the University an opportunity to provide feedback on any proposed policy change.

Upon written notice from an authorized University administrator requesting withdrawal of University funds from the pooled investments, the Alumni Foundation will withdraw the funds within a reasonable length of time such that removal of the funds may be completed without adversely affecting the remaining investment portfolio.

- 4.9 **Asset Management.** The Alumni Foundation will establish and, from time to time, modify asset allocation, disbursement, and spending policies and procedures that adhere to all current and future applicable federal and state laws including the Uniform Prudent Investor Act (UPIA) and the Uniform Prudent

Management of Institutional Funds Act (UPMIFA), as amended or modified from time to time.

The Alumni Foundation will receive, hold, manage, invest, and disburse contributions of cash, securities, and other forms of property, including the immediate investment of gifts and deferred gifts that are contributed in the form of planned and deferred-gift instruments.

- 4.10 **Fund Administration and Distribution.** The Alumni Foundation will administer private gifts to benefit the University and will transfer funds to the designated entity within the University in compliance with applicable laws, University policies, fund agreements, and donor restrictions.

Per the Alumni Foundation's Disbursement Policy, the Alumni Foundation's disbursements on behalf of the University must be for reasonable expenses that support the University and its programs, are consistent with donor intent, and do not conflict with any applicable laws and regulations.

When establishing a new fund, the Alumni Foundation will disclose to the University any terms, conditions, or limitations legally imposed by the donor or legal determination on the gift. The University will abide by such restrictions and provide appropriate acknowledgment of such terms, conditions, or limitations and documentation of compliance.

- 4.11 **Provision of Financial Data.** The Alumni Foundation will engage an independent accounting firm annually to conduct an audit of the Alumni Foundation's financial records and will provide the University with a copy of the annual audited financial statements no later than 01 October of each year, as required by Board of Regents' Policy 901.9. Other data shall be provided from time to time to enable the University to complete its audited financial statements and fulfill information requests by credit rating agencies. Such information includes but is not limited to the Alumni Foundation's asset allocation breakdown and investment performance, as well as an annual, detailed listing of payments made from the Alumni Foundation to the University.
- 4.12 **Funding of the Alumni Foundation Operations.** The Alumni Foundation is responsible for establishing a financial plan to pay the costs of the Alumni Foundation programs, operations, and services. In addition to the consideration for the services provided under this Agreement, the Alumni Foundation has the right to impose reasonable gift and management fees. The Alumni Foundation shall provide the University with at least six (6) months' notice of any change in gift and management fees.

Except as outlined herein or as otherwise agreed, the Alumni Foundation, at its own expense, will recruit, employ, and retain personnel and provide office space, computer and telephone systems, utilities, office supplies, and other such services that may be necessary or required to fulfill its responsibilities and obligations.

- 4.13 **Other Responsibilities.** With the explicit approval of the Alumni Foundation Board of Governors, the Alumni Foundation may from time to time serve as an instrument for entrepreneurial activities for the University including but not limited to the purchasing, developing, or managing of real estate for the University, as well as University-related improvements or expansion.

The Alumni Foundation may accept licensing agreements and other forms of intellectual property, borrow or guarantee debt issued by third parties, or engage in other activities to increase the Alumni Foundation revenue consistent with its mission.

- 4.14 **Subsidiaries and Separate Units.** The Alumni Foundation may, from time to time, establish subsidiaries and separate units for specific purposes consistent with this MOU. The Alumni Foundation will establish controls and/or management oversight to ensure the mission and goals of the Alumni Foundation are supported by all units and subsidiaries of the Alumni Foundation, including the Montana State University Innovation Campus and Advanced Technology, Inc.

5.0 **Confidentiality and Access to Information by Other than Alumni Foundation Employees**

The Alumni Foundation will provide access to all public documents of the Alumni Foundation including:

- 5.1 Policies and procedures documentation, including:
 - A. Gift Acceptance Policy,
 - B. Investment Policy,
 - C. Disbursement Policy, and
 - D. Other relevant accountability policies
- 5.2 Organizational documents, including articles of incorporation and corporate bylaws;
- 5.3 Audited financial statements; and
- 5.4 Form 990, Return of Organization Exempt from Income Tax.

The Alumni Foundation maintains that confidential information which is not available for public inspection includes, but is not limited to, the following:

- 5.5 Information relating to Alumni Foundation constituents:
 - A. Contact information including, but not limited to, addresses, phone numbers,

- and email addresses;
- B. Records and portions of records that disclose personal, financial, estate planning or gift planning matters;
 - C. Records and portions of records regarding a prospective gift or pledge;
 - D. Records and portions of records regarding the appropriateness of a solicitation and/or dollar amount of a gift or pledge;
 - E. Record and portions of records disclosing the identity of an alumnus, donor, or prospective donor or that could identify an alumnus, donor, or prospective donor, directly or indirectly, when such donor has requested anonymity in connection with a gift or pledge. This does not apply to a gift or pledge from a publicly held business corporation.
- 5.6 Information relating to fundraising plans and strategies;
- 5.7 Trade secret information and information relating to the business of any the Alumni Foundation subsidiary which, if released, could create a competitive disadvantage;
- 5.8 Alumni Foundation employee information including, but not limited to, compensation and benefits, except as required by law;
- 5.9 Individual student information not otherwise exempted;
- 5.10 Information relating to trusts and annuities administered by the Alumni Foundation, except as to actual gifts to the Alumni Foundation from such a trust or annuity; and
- 5.11 Other information protected by law

When necessary or beneficial to the efficient execution of the Alumni Foundation activities, the Alumni Foundation may provide access to the Alumni Foundation data and records to select University personnel on a limited, need-to-know basis in accordance with applicable laws and Alumni Foundation policies and guidelines. Providing such access shall not negate the confidential nature of the Alumni Foundation's information and records or the classification of such information and records as trade secrets. Additionally, providing such access does not undermine the reasonable expectation of privacy of donors, prospective donors, or any other individual or entity with respect to the information provided to and/or maintained by the Alumni Foundation. Any individual, including anyone not employed by the Alumni Foundation, with access to Alumni Foundation data, records, and information, shall be held to the highest standard of confidentiality, shall sign a confidentiality agreement specifically governing such access, and shall adhere to all relevant Alumni Foundation policies and processes regarding the acceptable use of data and information.

- 5.12 If a public records request is made of any University official or employee for any information the Alumni Foundation deems confidential, even where there is a signed

confidentiality agreement with the Alumni Foundation as outlined in 5.11, the University will give the Alumni Foundation twenty (20) business days' notice of the request so that the Alumni Foundation can seek a protective order. If a protective order is not secured and the matter not resolved by the Alumni Foundation with the requestor, the University may release any relevant requested records without any legal liability to the Alumni Foundation.

6.0 Other Matters

- 6.1 **Winding Up Upon Dissolution.** Consistent with the provisions of the Bylaws and Articles of Incorporation of the Alumni Foundation, should the entity cease to exist or cease to be an IRC § 501 (c)(3) organization, it will transfer its assets and property to the University or the assignee chosen by the University. Any transition to the University or its assignee will occur on an agreed upon reasonable timetable designed to minimize donor disruption and any potential tax issues. If a time table cannot be agreed upon within the first ninety (90) days of a termination notice as outlined in section 6.5 the matter will be resolved through mandatory mediation using a mediator from the American Arbitration Association. For purposes of this section, a corporate reorganization, merger, or consolidation or a renaming of the Alumni Foundation shall not constitute a cessation of existence provided the Alumni Foundation, or its successor, is recognized as the affiliated foundation of Montana State University for the purposes outlined in Section 901.9 of the Montana University System Policy and Procedures Manual.
- 6.2 **Regent's Approval.** This Agreement is not effective until approved by the Montana Board of Regents. The Parties agree and understand that this Agreement will be reviewed and approved by the Board of Regents every two (2) years. The Parties agree and understand that this Agreement will be in effect from January 1, 2018 through June 30, 2019.
- 6.3 **Liability Exposure.** The Parties understand and agree that the liability of the University, its officials and employees, is controlled and limited by the provisions of Title 2, Chapter 9, of the Montana Code Annotated. Any provisions of this Agreement shall be controlled, limited and otherwise modified to limit any liability of the State of Montana and the University to that set forth in the above-cited law.
- 6.4 **Indemnification**
- A. Each party agrees to be responsible and assume liability for its own wrongful or negligent acts or omissions, or those of its officers, agents or employees, to the full extent required by law.
 - B. Each party agrees to maintain reasonable coverage for such liabilities either through commercial insurance or a reasonable self-insurance mechanism, and the nature of such insurance coverage or self-insurance mechanism will be reasonably provided to the other upon request.

6.5 Termination

This Agreement may be terminated at any time by the mutual written consent of the Parties or termination may be invoked by either party upon six (6) months written notice to the other. In the event of termination, the University's financial obligation shall end six (6) months after the termination notice is received or on the last day of the fiscal year in which termination occurs, whichever is later. If necessary to insure a smooth transition of the assets, the former deadlines may be extended by the University as outlined in section 6.1 In the absence of termination notice, this Agreement shall be automatically renewed year to year under the same terms as set forth in this Agreement.

For reasonable cause, the President may withdraw recognition of the Alumni Foundation as the affiliated foundation of Montana State University after consultation with the Commissioner of Higher Education and written notice to the members of the Montana Board of Regents.

This Agreement supersedes the previous Memorandum of Understanding entered into by the Parties and approved by the Board of Regents in July 2017.

The Parties have caused this Operating Agreement to be executed by their duly authorized officers as of the date set forth below.

Signed and agreed to this _____ day of _____, 2017 by:

MONTANA STATE UNIVERSITY

**MONTANA STATE UNIVERSITY FOUNDATION,
INC.**

d/b/a Montana State University Alumni
Foundation

By: _____
President Waded Cruzado

By: _____
Chief Executive Officer

Attachment A

Compensation for Services Agreement

The University and the Alumni Foundation, hereby agree that the direct compensation to be paid by the University to the Alumni Foundation for services provided as outlined in Section 4.0 of this Operating Agreement between Montana State University and Montana State University Foundation, Inc. dated__ shall be as follows:

Total for FY 2018: \$1,500,000.00

Total for FY 2019: \$1,500,000.00

One-fourth (¼) of the annual payment due to the Alumni Foundation will be paid by the University on the first day of each calendar quarter beginning on July 1 of each year. Notwithstanding the foregoing, any remaining annual payment due to the Alumni Foundation for FY 2018 shall be paid by the University in two (2) equal installments on or before January 1, 2018 and April 1, 2018.

Signed and agreed to this _____ day of _____, 2017 by:

MONTANA STATE UNIVERSITY

**MONTANA STATE UNIVERSITY
FOUNDATION, INC.**

d/b/a Montana State University Alumni
Foundation

By: _____
President Waded Cruzado

By: _____
Chief Executive Officer

Attachment B

Compensation for Services Agreement - MontanaPBS

The University and the Alumni Foundation, hereby agree that the services provided to the University on behalf of MontanaPBS shall include the applicable services outlined in Section 4 of this Operating Agreement between Montana State University and Montana State University Foundation, Inc. dated _____ except as follows:

- MontanaPBS shall retain sole responsibility for its annual fund, membership, and underwriting programs.

Signed and agreed to this _____ day of _____, 2017 by:

MONTANA STATE UNIVERSITY

**MONTANA STATE UNIVERSITY
FOUNDATION, INC.**

d/b/a Montana State University Alumni
Foundation

By: _____
President Waded Cruzado

By: _____
Chief Executive Officer