

**BOBCAT ATHLETIC COMPLEX AND ACADEMIC EXCELLENCE CENTER CAPITAL PROJECT
AGREEMENT AND LEASE – 2019
BETWEEN
MONTANA STATE UNIVERSITY ALUMNI FOUNDATION
AND
MONTANA STATE UNIVERSITY**

This AGREEMENT AND LEASE (“Capital Project Lease”) is dated for reference purposes TBD, 2019 and is made between Montana State University (“MSU”) as lessor and Montana State University Foundation, Inc., d/b/a Montana State University Alumni Foundation (“MSUAF”) as lessee.

RECITALS

- A. MCA § 20-25-309 permits the Montana University System’s Board of Regents (“Board of Regents”) to lease land or land and facilities to a non-profit foundation organized to solicit, manage and administer nonstate funds, gifts, grants, donations, in-kind contributions, and revenue on behalf of a unit of the Montana University System for the purpose of constructing or renovating athletic facilities. MCA § 20-25-309 requires that the terms, guaranties, and agreements relating to such a facility must (i) be negotiated in the best interests of the State of Montana and must include guarantees that a commitment of state appropriations for design, construction, operations, or maintenance is not expressed or implied and (ii) be subject to review and approval by Board of Regents.
- B. MSUAF is a non-profit foundation as contemplated by MCA § 20-25-309 whose mission is to cultivate lifelong relationships and secure private support to advance MSU.
- C. MSU has requested MSUAF to participate in the planning, design and construction of the Bobcat Athletic Complex and Academic Excellence Center (“Capital Project”). The Capital Project will include a new football operations building and related Bobcat Stadium improvements together with an academic excellence center within the Brick Breeden Fieldhouse, all in accordance with the approved 2017 Athletic Master Plan and a new Stadium Master Plan.
- D. MSU is willing to lease to MSUAF, and MSUAF is willing to lease from MSU, a portion of Bobcat Stadium and Brick Breeden Fieldhouse as more particularly described herein and necessary adjacent property to construct the Capital Project.
- E. Pursuant to a Memorandum of Understanding dated TBD, 2019, MSUAF will solicit and manage contributions to and/or private funds for the Capital Project. In addition, MSU will provide \$3,000,000 for the Capital Project from Revenue Bonds or from other non-state funds as MSU in its discretion determines. As part of the MOU, MSU and MSUAF mutually agreed upon a Total Project Cost (as defined below) of \$18,000,000 to complete the Capital Project and set the fundraising goal for the Capital Project on that basis.
- F. This Capital Project Lease provides for MSUAF (i) to contract for the planning, design, construction, and other services, as well as the materials and work required for the Capital Project and (ii) to transfer the Capital Project and any related improvements to MSU upon completion.

G. The Board of Regents authorized this Capital Project Lease and the Capital Project by Item No. XXXX, adopted _____, 2019 at a properly noticed [special] meeting

Therefore, MSU and MSUAF agree as follows:

SECTION 1.
Definitions

1.1 Definitions.

1.1.1 Architect is the qualified architect for the Capital Project retained by MSUAF upon the recommendation of the Owner's Representative and as approved by Project Steering Committee.

1.1.2 Bridge Financing is the advance of funds to MSUAF's operating fund from MSUAF's Short Term Pool, Long Term Pool, or an external lender, or some combination thereof, to pay a portion of the Maximum Facility Cost for the Capital Project, all as more specifically set forth in the MOU.

1.1.3 Bridge Financing Procedure is the Bridge Financing Procedure for Athletics Capital Projects Subject to MCA § 20-25-309 as adopted by MSUAF Board of Governors on April 24, 2019.

1.1.4 Capital Project is the Bobcat Athletic Complex and Academic Excellence Center capital project described herein to be undertaken by MSUAF, as requested by MSU, pursuant to MCA § 20-25-309.

1.1.5 Capital Project Lease is this Lease and Agreement made by MSU as lessor and MSUAF as lessee for the Premises described herein, within which MSUAF will cause the Capital Project to be designed and constructed.

1.1.6 Contractor is the qualified general contractor for the Capital Project retained by MSUAF upon the recommendation of the Owner's Representative and as approved by the Project Steering Committee.

1.1.7 Maximum Facility Cost is the total of all design and construction costs plus any MSU and state fees required to fully complete the Capital Project, including all costs incurred prior to the date of the MOU. The Maximum Facility Cost is more specifically set forth on the attached **Exhibit B**. Unless specifically authorized by its Board of Governors, in the Board's sole discretion, MSUAF is not responsible for funding, and will not incur, any costs in excess of the Maximum Facility Cost for design and construction of the Capital Project.

1.1.8 MOU is the Memorandum of Understanding dated _____ **TBD** _____, 2019 between MSU and MSUAF whereby MSUAF will solicit and manage contributions to and/or private funds for the Capital Project and will, to the extent provided in the MOU, make Bridge Financing available for the Capital Project.

1.1.9 MSUAF Facility Fee is the fee assessed by MSUAF for the Capital Project. It is part of the Total Project Cost and is 1.0% for capital projects with a Maximum Facility Cost greater than \$5,000,000. This fee will be assessed and payable at the time a construction bid for the Capital Project is accepted, as defined in MSUAF Capital Projects Process.

1.1.10 Notice to Proceed is the notice issued to the Contractor by MSUAF, with the approval of the Owner's Representative, to commence construction of the Capital Project which Notice shall not be issued until MSUAF and the Project Steering Committee have determined that all conditions to the commencement of construction set forth in this Lease, in the MOU and in any other applicable Capital Project documents have been satisfied.

1.1.11 Owner's Representative is MSU's AVP for University Services, Director for Campus Planning, Design and Construction (CPDC) or Senior Project Manager for CPDC, and will be the owner's representative during the course of the Capital Project.

1.1.12 Premises is a portion of Bobcat Stadium and Brick Breeden Fieldhouse as more particularly described on the attached **Exhibit A** and necessary adjacent property within which the Capital Project will be constructed.

1.1.13 Total Project Cost for this Capital Project is more specifically set forth on the attached **Exhibit B** and is defined as the total of:

- 1.1.13.1 Maximum Facility Cost;
- 1.1.13.2 Interest expected to accrue on any Bridge Financing;
- 1.1.13.3 The Provision for Uncollectible Pledges as defined in the MOU;
- 1.1.13.4 All applicable MSUAF fees which may include gift, endowment management, and service fees; and
- 1.1.13.5 The MSUAF Facility Fee.

SECTION 2. **General Responsibilities**

2.1 Project Building Committee and Steering Committee

A Project Building Committee and a Project Steering Committee shall oversee the programming, design and cost estimate/budget for the Capital Project. The Steering Committee will be responsible for approving budgets and determining high-level programming, design and cost estimates as well as be responsible for the campus-wide communication and outreach. The Project Steering Committee is composed of:

- MSU's President, or the President's designee
- MSUAF's President & CEO, or the President & CEO's designee
- MSU's Vice President for Administration and Finance
- MSU's Associate Vice President of University Services
- MSU's Director for Planning, Design and Construction
- MSU's Director of Athletics

The Project Building Committee will oversee the day-to-day portions of project programming, design and cost estimate/budgeting. The Project Building Committee will report directly to the Project Steering Committee. The Project Building Committee is composed of:

Senior Project Manager, MSU
Senior Associate Athletic Director, MSU
Sports Facilities, MSU
University Architect, MSU
Campus Planner, MSU
Project Manager, MSU
Student Athlete, MSU
Sustainability Office, MSU
Athletics Academic Coordinator, MSU
Architects, Contracted
Other representatives of MSU as needed
MSUAF's Project Consultant
Other representatives of MSUAF as needed

2.2 MSUAF Responsibilities.

2.2.1 Pursuant to MCA § 20-25-309, MSUAF as lessee of the Premises will have responsibility for the Capital Project, including the coordination and direction of the planning, design and construction of the Project as of the date of this Capital Project Lease; provided, however, that MSUAF and MSU will closely coordinate all such work through the Steering Committee and the Building Committee.

2.2.2 As of the date of this Capital Project Lease, MSUAF will enter into all contracts required for the design and construction of the Project; provided, however, that all such contracts will first be reviewed and approved by the Steering Committee; and further provided that MSUAF shall have no obligation to enter into any contract which will result in the Maximum Facility Cost being exceeded.

2.2.3 All contractual financial obligations to those performing work in the Capital Project shall be borne by MSUAF, and except as specifically set forth in this Capital Project Lease, the State of Montana, Board of Regents, the Montana University System and MSU shall have no obligation, financial or otherwise, to those architects, engineers, contract managers, contractors, workmen, suppliers or any person or firm involved with the Capital Project. Notwithstanding the foregoing, MSUAF shall not be required to assume any financial obligation that results in the Maximum Facility Cost being exceeded unless approved in writing by its Board of Governors.

2.2.4 MSUAF will lease the Premises for construction of the Capital Project from MSU in accordance with Section 3 below.

2.2.5 Upon completion of the Capital Project, MSUAF shall convey and transfer the Capital Project to MSU free of any encumbrances, except any encumbrance resulting from the actions of, or as approved by, MSU.

2.3 University Responsibilities

MSU shall provide assistance in the form of participation on the Project Building Committee and the Project Steering Committee. The AVP for University Services, Director for Campus Planning, Design and Construction ("CPDC") or Senior Project Manager for CPDC, will be the Owner's Representative for MSUAF and will be responsible for the following:

- a. Recommending appointment of the Architect by MSUAF;

- b. Overseeing the work of the Architect;
- c. Preparing contracting documents for the Architect and Contractor for review and execution by MSUAF;
- d. Managing the construction bid process;
- e. Recommending the award by MSUAF of a construction contract to the Contractor;
- f. Managing the design and construction the Capital Project;
- g. Reviewing and recommending for approval by MSUAF any change orders;
- h. Providing regular budget updates to MSUAF for the Capital Project; and
- i. Reviewing and recommending all related requests for payment.

SECTION 3.

Lease

3.1 Lease.

3.1.1 MSU leases the Premises described herein to MSUAF for the design and construction of the Capital Project. MSUAF shall not assign or sublease the Premises to anyone, nor shall MSUAF use or permit to be used the Premises or any part thereof for any purpose or purposes, except as authorized in writing by MSU.

3.1.2 The term of the Capital Project Lease shall commence as of the date the Notice to Proceed with the Capital Project is approved by the Steering Committee and issued by MSUAF, and shall continue until the conveyance and transfer of the completed Capital Project improvements to MSU.

3.1.3 MSUAF shall permit MSU and its authorized agents and employees to enter upon the Premises at any and all times to inspect the Premises or for any other purpose incidental to MSU's business.

3.1.4 So long as it will not unreasonably interfere with the construction of the Capital Project or result in any safety concerns, MSUAF will, at no charge, permit MSU to use the Premises as needed for any purpose deemed appropriate by MSU; provided, that MSU shall indemnify MSUAF from any injury or damage resulting from any such permitted use.

3.2 Covenant Not to Sue – Assignment of Rights to the University.

MSU hereby covenants not to initiate any legal action or legal proceeding against MSUAF, its officers, governors, agents and employees, because of faulty materials, equipment, installation or workmanship relating to the Capital Project. MSUAF shall assign to MSU all rights and claims it may have against all contractors, suppliers or any persons or firms involved with the Capital Project. MSU shall have the right to initiate any required legal action directly against architects, construction contractors, suppliers or any person or firm by virtue of the assignment of such rights to MSU by MSUAF. The assignment of rights shall be accomplished by MSUAF in writing at the time of conveyance and transfer of the Capital Project to MSU. MSUAF hereby covenants not to initiate any legal action or legal proceeding against MSU, its officers, directors, agents and employees, arising out of MSU'S actions taken in compliance with this Capital Project Lease.

SECTION 4. **Funding**

4.1 Funding and Financial Plan.

As set forth in the MOU, MSUAF shall have the primary responsibility for accepting and managing the funds and contributions for the Capital Project. MSU shall cooperate fully with these MSUAF efforts. The Project Steering Committee will develop and approve a budget for all costs of the Capital Project. As set forth in the MOU, the parties have agreed that MSUAF must have sufficient funds identified to fully fund the Total Project Cost, and MSU must have express Board of Regents approval to proceed, before any contract for construction will be awarded by MSUAF.

MSU has no financial obligation for the Capital Project, except to the extent MSU may lawfully pledge non-state funds for the Project, pursuant to MCA Section 20-25-309 or otherwise; or unless MSU authorizes such a commitment by a future lawful action.

MSUAF will maintain good and sufficient accounts and records of all funds expended in connection with the design and construction of the Capital Project and will provide MSU with access to or copies of any such accounts and records for its review.

SECTION 5. **Pre-Construction Phase and Scheduling**

5.1 Plans and Specifications.

Subject to MSU's recommendation pursuant to Section 2.3, MSUAF shall employ the Architect as to develop programming, plans, specifications and drawings for the Capital Project. MSUAF will require the Architect to submit copies of the programming, plans, specifications and all other construction contract documents to the Project Building and Steering Committees for review and approval, and shall make those corrections required by both Committees. No construction shall commence without final approval of all plans, specifications and drawings by the Project Steering Committee and the Owner's Representative. MSUAF shall direct the Architect to provide MSU with copies of the final plans, specifications and drawings prior to the commencement of any construction.

5.2 Construction and Completion Schedules.

MSUAF shall require the Contractor to submit to the Project Building and Steering Committees an overall completion schedule for the Capital Project. The schedule will reflect necessary approvals by the Project Steering Committee, including but not limited to approval of all architect and construction contracts and related documents. The following specific items must be presented to the Project Steering Committee for approval:

- a. completion schedule;
- b. plans and specifications;
- c. construction contract and related documents, including certificates of insurance and bonding;
- d. estimated construction schedules and revised schedules, if any;
- e. authorization to commence construction; and
- f. project acceptance.

The overall goal for completion of the Project is August 1, 2021. MSUAF will work diligently to meet this goal, but failure to do so shall not cause MSUAF to incur any penalty or to be in default of this Capital Project Lease.

5.3 Pre-construction Conference.

After the MOU has been executed by MSU signifying its approval of the financial plan for the Capital Project and the Steering Committee has approved the project completion schedule, but prior to the start of construction, the Project Steering Committee, the Owner's Representative and MSUAF shall arrange a pre-construction conference to include representatives of the Architect and the Contractor and any other individuals or firms to be involved in the design, coordination and construction phases of the Project as designated by the Project Steering Committee. MSUAF, through the Architect and the Owner's Representative, will outline the responsibilities of these various entities during the progress of the Project for the Project Steering Committee's approval.

5.4 Equipment Samples, Materials Lists.

MSUAF shall require the Contractor to submit to the Project Building and Steering Committees, in a timely sequence and before orders are placed for equipment and materials, a list of items of materials and equipment, including the name of the manufacturer, to be incorporated into the Capital Project for review and approval by the Project Steering Committee. Materials and equipment to be furnished and installed shall be manufactured, fabricated or constructed to meet all federal, state and local safety requirements and all applicable building codes of the State of Montana.

SECTION 6. **Construction Phase**

6.1 Permits and Compliance with Applicable Laws and University Regulations.

MSUAF shall be responsible for (i) causing all required permits and inspections to be obtained; (ii) giving of all required notices; and (iii) payment of all applicable taxes and fees. MSUAF shall and shall cause the Architect, the Contractor and all employees, contractors, subcontractors, materialmen, suppliers and their employees to comply with all applicable laws, ordinances, lawful orders and rules, regulations of public authorities having proper jurisdiction, including those rules and regulations duly promulgated by MSU; all federal and Montana anti-discrimination laws, including § 49-3-206, MCA and § 18-2-401- 432, MCA; and all federal, state and local occupation safety and health standards bearing on the Capital Project. MSUAF's obligations shall be satisfied by requiring compliance with each of the foregoing in its contract with each party performing services or providing material for the Capital Project. As provided in MCA Section 20-25-442 the Capital Project is not subject to the requirements of MCA Title 18, Chapter 2 except that:

- a. the Department of Administration shall execute the provisions of MCA Sections 18-2-103(1)(a) and (1)(e);
- b. the provisions of Title 18, Chapter 2, Part 4 apply to all labor except donated labor; and
- c. such other provisions of law as may be required to protect the interests of the State of Montana shall also be applicable.

6.2 Protection of Work and Property and Builders Risk Insurance.

MSUAF shall continuously maintain or cause to be maintained adequate insurance protection of all the work on the Capital Project and shall protect MSU's property (including adjacent property) from injury or loss arising in connection with the project. The entire work of the Capital Project shall be at the sole risk of MSUAF until Project completion and conveyance. Any loss or damage covered by insurance shall be promptly repaired, replaced or rebuilt by MSUAF using insurance proceeds. MSUAF shall procure or shall cause the Architect or Contractor to procure the specific insurance coverage for the Capital Project that is set forth on the attached **Exhibit C**, which insurance coverage has been reviewed and approved by MSU and MSUAF.

MSUAF shall require the Architect and the Contractor and any other contractors working on the Capital Project to comply with all applicable provisions of federal, state and municipal safety laws and building codes to prevent accidents or injury to person on, about or adjacent to the premises where the work is being performed. MSUAF shall further require the Architect, the Contractor and any other contractors to erect and properly maintain at all times, all necessary safeguards as required by the conditions and progress of the work.

The work shall be done in such a manner as will cause a minimum of interruption to surrounding persons, structures or uses. All arrangements to care for such interruptions shall be recommended by the Project Steering and Building Committee or the Owner's Representative and shall be MSUAF's responsibility to implement. All work shall be carried on with due regard for the safety of the public generally

6.3 Liability Insurance.

MSUAF shall obtain and cause its contractors and subcontractors to obtain workers' compensation, employer's liability, bodily injury liability, property damage liability and comprehensive automobile bodily injury, and property damage liability insurance in amounts satisfactory to MSU naming MSU as an additional insured. The specific insurance coverage required by MSU is set forth on the attached **Exhibit C**.

6.4 Bonding.

MSUAF shall cause its Contractor to obtain a performance bond with a surety company registered and licensed in Montana for the Capital Project. MSUAF shall cause MSU to be designated as an assignee of the performance bond after the Capital Project is turned over to MSU or in the event MSU takes over the Capital Project, provided however MSUAF is not required to cause MSU to be an assignee if such protection is not reasonably available or if the cost is significant in relation to the cost of the performance bond.

6.5 Inspection.

MSU will have full rights to inspect the Capital Project site during the term of this Capital Project Lease for compliance with approved construction documents and the requirements of this Capital Lease.

6.6 Utilities During Construction.

MSU will provide all water, gas, heat, light, power, telephone service, and other public utilities to be furnished to the Premises, and all other costs and expenses in connection with the use, operation and maintenance of the non-leased facilities on or adjacent to the Premises. The Contractor will make the necessary connections. MSUAF will cause the Contractor to obtain all other utilities required for completion of the Capital Project as part of the project cost.

MSUAF shall make reasonable efforts to minimize disruption of the utility services of MSU and shall coordinate with MSU representatives prior to the time that any connections are made, or if it is necessary to disrupt a utility service, such disruptions shall be at times designated by MSU to minimize the effect of any such disruptions on the remainder of the campus. MSUAF shall allow MSU maintenance access to utility service lines as required.

6.7 Project Completion.

MSU shall inspect and accept the Capital Project: (i) when completed according to approved construction documents, or (ii) at any other agreed upon date. Prior to final acceptance of the Capital Project by MSU, MSUAF shall cause the Architect to deliver to MSU a set of reproducible mylar record prints and electronic drawing files in the AutoCad and/or Revit format of drawings showing significant changes made during the construction process, based on marked up prints, drawings and other data furnished by the Contractor to MSUAF. MSUAF shall also cause the Contractor to deliver to MSU two complete, bound sets of any operating manuals or instructions for any equipment installed as part of the Capital Project where such manuals and instructions are required or normally provided, upon completion of the project and prior to the termination of this Capital Project Lease.

MSUAF will not be required to provide any independent warranty for materials, equipment, installation, workmanship or other services undertaken as part of the construction of the Capital Project but will assign to MSU any such warranties obtained from the Contractor or other third parties in connection with the Capital Project.

SECTION 7. **Miscellaneous**

7.1 Right to Terminate Capital Project Lease.

If MSUAF should persistently or repeatedly refuse or should fail, except in cases for which extension of time is provided, to supply enough contractors or subcontractors or material or labor, or persistently disregard laws, ordinances, or rules and regulations of MSU or otherwise be guilty of a substantial violation of any provision of this Capital Project Lease, MSU may, without prejudice to any other right or remedy, and after giving MSUAF and its surety, if any, seven (7) days written notice to cure the violation, terminate this Capital Lease, and take possession of the Premises and of all materials, tools and appliances thereon, and finish the work by whatever method MSU may deem expedient.

If this Capital Project Lease is terminated and if MSU proceeds with the Capital Project substantially as envisioned and as represented to donors, any remaining funds, fund pledges, pledges for materials, services, equipment and other "gifts-in-kind," and any other financial assurances designated for the Capital Project shall, to the extent consistent with the gift agreements entered into by MSUAF and individual donors be transferred or otherwise made available to MSU to proceed with the Capital Project.

7.2 Audit Access.

MSUAF shall abide by the audit access provisions in Section 18-1-118, MCA.

7.3 Amendments.

This Capital Project Lease may only be amended by a mutual agreement, in writing, executed by MSU and MSUAF, or their successors, and appended hereto.

7.4 Notices.

All notices given by either Party to the other hereunder shall be mailed by certified or registered mail, or personally delivered as follows:

TO MSU:

Vice President for Administration & Finance
Montana State University
Bozeman, MT 59717

TO MSUAF:

President & CEO
Montana State University Foundation
P.O. Box 172750
1501 South 11th Avenue
Bozeman, MT 59717-2750

7.5 Term.

This Capital Project Lease shall terminate as set forth in Section 3.1.2. However, this Capital Project Lease and its terms may be extended by an amendment entered into by the parties pursuant to Section 7.3.

7.6 Liability.

Each party hereto 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. The extent of liability of MSU and State of Montana, its officials and employees is controlled and limited by the provisions of Title 2, Chapter 9, MCA. Any provisions of this contract, whether or not incorporated by reference shall be controlled, limited and otherwise modified to limit any liability of the State of Montana and MSU to that set forth in the above-cited laws.

Nothing in this Section shall constitute a waiver of either Party's insurer's rights to seek contribution or a tender of legal defense from the other Party or the other Party's insurer to the extent permissible by law.

MONTANA STATE UNIVERSITY FOUNDATION, INC.

By: _____
PRESIDENT & CEO

Date: _____, 2019

MONTANA STATE UNIVERSITY

By: _____
PRESIDENT, MONTANA STATE UNIVERSITY

Date: _____, 2019

DRAFT

**EXHIBIT A
DEPICTION OF PREMISES**

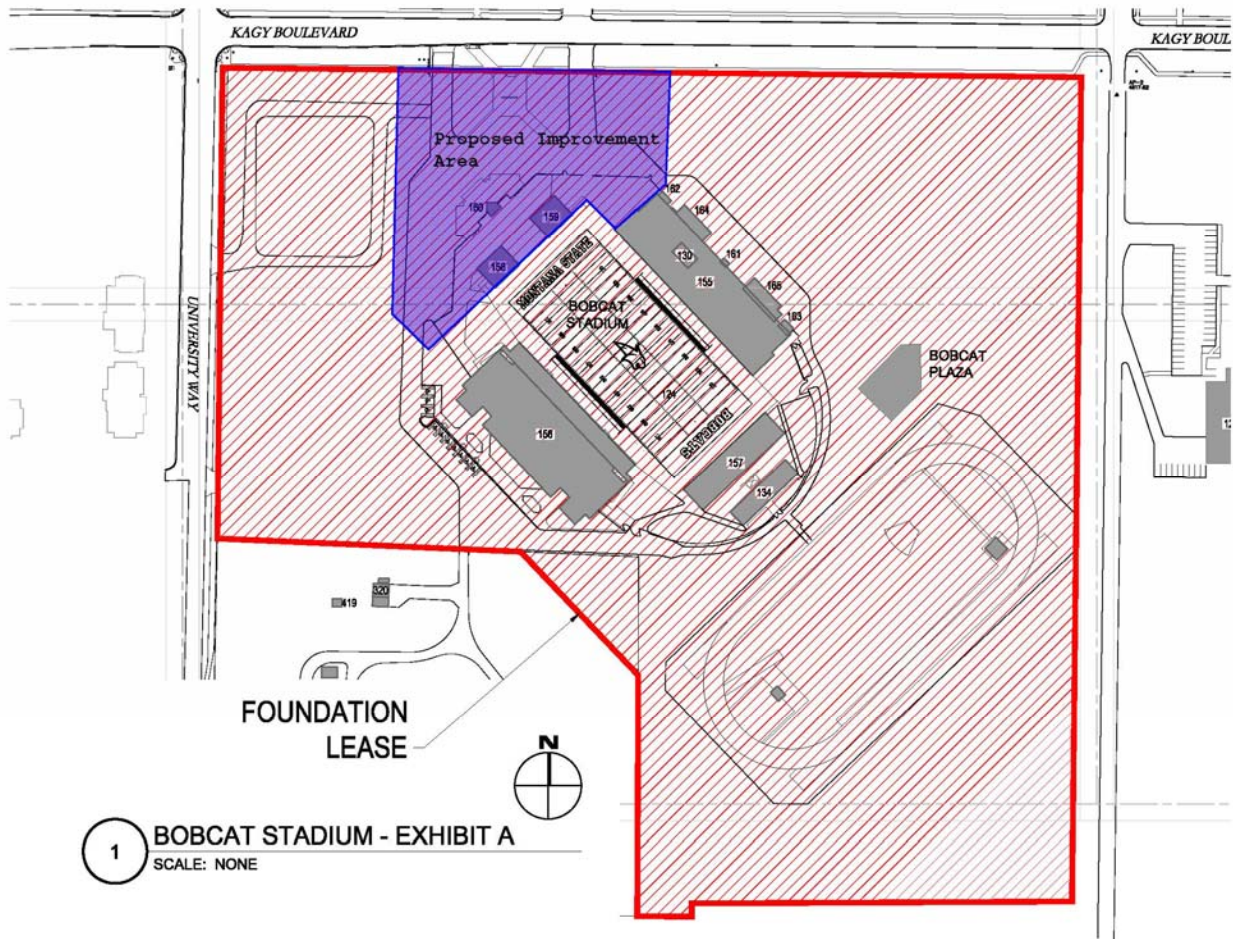


EXHIBIT B
SCHEDULE OF TOTAL PROJECT COST, INCLUDING MAXIMUM FACILITY COST

NOT FINAL

The agreed upon Total Project Cost for this Capital Project includes:

Cost	Amount
Maximum Facility Cost ⁽¹⁾	\$ 15,520,000
Estimated Interest on Bridge Financing	765,000
Provision for Uncollectible Pledges	810,000
MSUAF Gift Fees	750,000
MSUAF Facility Fee (1%)	155,000
Total Project Cost	\$ 18,000,000

⁽¹⁾ As of the date of this MOU, \$TBD has already been expended out of MSUAF fund 92748 (not including Gift Fees). These costs are included in the Maximum Facility Cost.

**EXHIBIT C
INSURANCE REQUIREMENTS**

[TBD]

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