



## **UNIVERSITY OF MONTANA WESTERN SPORTS AND ACTIVITIES COMPLEX AGREEMENT AND LEASE**

This AGREEMENT AND LEASE (AGREEMENT) is entered into between the Montana University System Board of Regents of Higher Education, (BOR), a state agency having its principal office at 560 N Park 4<sup>th</sup> Floor, Helena, Montana 59620, and University of Montana Western Foundation (FOUNDATION), a non-profit corporation organized and existing under the laws of the State of Montana, having its principal office at UMW Campus.

### **RECITALS**

**WHEREAS**, Section 20-25-309 MCA, authorizes the BOR to lease land to a private, non-profit foundation for the purpose of constructing or renovating athletic facilities under certain conditions, with the express purpose of excluding such construction and renovation projects from Montana public facilities construction bid requirements in order to take advantage of significant contributions; and

**WHEREAS** the FOUNDATION is a non-profit corporation organized under the laws of the State of Montana to raise and provide funds in part to assist the athletic program of the University of Montana Western, (UNIVERSITY); and

**WHEREAS**, on March \_\_\_\_, 2023 the BOR authorized the UNIVERSITY to construct a new UNIVERSITY Sports and Activities Complex (COMPLEX) at a project cost estimated not to exceed \$5,500,000, to be funded with donor funds and other donor contributions collected by the FOUNDATION; and

**WHEREAS** the FOUNDATION is willing and able to undertake the project management responsibilities associated with designing and building the planned COMPLEX by using the donor funds made available and promised to the Foundation; and thereafter conveying, transferring and contributing the COMPLEX and related improvements to the UNIVERSITY; and

**WHEREAS**, the BOR authorizes the FOUNDATION to undertake this construction project in accordance with the UNIVERSITY's goals and other requirements identified herein. This document identifies the conditions acceptable to all parties enabling the FOUNDATION to undertake and complete the COMPLEX construction for the use and benefit of the UNIVERSITY, and to specifically authorize the UNIVERSITY to act for and on behalf of the BOR in all matters subject to this AGREEMENT.

**NOW THEREFORE**, the Parties agree as follows:

## **SECTION I**

### **Purpose and General Responsibilities**

**1.1 Purpose.** The BOR authorizes the FOUNDATION to accept contributions for the COMPLEX construction on the UNIVERSITY campus. The BOR authorizes the FOUNDATION to enter the premises of the UNIVERSITY to coordinate all planning, design and construction work necessary to complete the proposed COMPLEX. The purposes of this AGREEMENT are therefore to authorize the FOUNDATION to undertake activities for planning, designing and coordinating the construction of the COMPLEX; to identify the responsibilities of each Party in this undertaking; and to provide for the transfer and contribution of the COMPLEX-related improvements to the UNIVERSITY upon Project Completion (as hereinafter defined).

#### **1.2 Foundation Responsibilities.**

**1.2.1** The FOUNDATION will have responsibility for all work, including the coordination and direction of the planning, design and construction of the COMPLEX. The FOUNDATION will work closely with the Montana State Division of Architecture and Engineering (“A&E”) regarding the planning, design, and construction of the COMPLEX.

**1.2.2** The FOUNDATION will enter into all contracts required for the design and construction of the COMPLEX. All proposed contracts shall be submitted to the UNIVERSITY for review and approval.

**1.2.3** All contractual financial obligations to those performing work on the project shall be borne by the FOUNDATION, the State of Montana, BOR, the Montana University System and the UNIVERSITY shall have no obligation, financial or otherwise, to those architects, engineers, contract managers, contractors, workers, suppliers or any person or firm involved with the FOUNDATION’s efforts relative to the COMPLEX construction.

**1.2.4** The FOUNDATION will function as the lessee of the COMPLEX commencing on the date this AGREEMENT is executed and continuing until the conveyance, transfer and contribution of the constructed COMPLEX to the BOR for the use and benefit of the UNIVERSITY upon Project Completion; except that the FOUNDATION lessee status shall be suspended during all UNIVERSITY activities and events requiring the use of the premises, for the purpose of allowing the UNIVERSITY to maintain COMPLEX ownership, control and management during such activities and events. Any FOUNDATION lessee status suspension pursuant to this Section shall apply solely to the lease and occupancy of the COMPLEX property, and shall not apply to or affect other FOUNDATION duties and obligations with regard to the COMPLEX.

**1.2.5** Upon Project Completion, as provided herein, the FOUNDATION shall be obligated to convey, transfer and contribute the COMPLEX to the BOR for the use and benefit of the

UNIVERSITY free of any encumbrances; and the BOR shall thereafter have all right and title thereto for the use and benefit of the UNIVERSITY.

### **1.3 University Responsibilities.**

**1.3.1** It shall be the responsibility of the UNIVERSITY as project manager to make recommendations, and give approvals or disapprovals as provided in this AGREEMENT in a timely and professional manner to facilitate the activities of the FOUNDATION in completing the project, utilizing UNIVERSITY personnel for this project pursuant to Paragraph 1.2.2. The UNIVERSITY and the FOUNDATION have memorialized the obligations of the UNIVERSITY in assisting the FOUNDATION as project manager in the Memorandum of Understanding of equal date herewith between the UNIVERSITY and the FOUNDATION.

**1.3.2** The UNIVERSITY specifically agrees to provide to the FOUNDATION, so that the FOUNDATION may provide to the Contractor, the following:

- a. The information, drawings and specifications, describing the physical characteristics, legal limitations and utility locations for the site of the project, and a legal description of the site.
- b. General security for the site.
- c. Any other information, data or documentation in possession of, or available to, the UNIVERSITY that may reasonably be needed by the contractor to complete the project.

## **SECTION II**

### **Lease**

#### **2.1 Lease.**

**2.1.1** The BOR leases to the FOUNDATION, subject to the suspension provisions set forth in Section 1.2.4 above, in addition to all easements, both apparent and of record, the property described in the plat attached as Exhibit 1 hereto and incorporated herein as a part of this AGREEMENT for the purpose of completing the necessary planning, design and construction of the COMPLEX in accordance with the plans and specifications approved by the UNIVERSITY and the requirements identified herein. The FOUNDATION shall not use or permit to be used the demised premises or any part thereof for any purpose or purposes other than the purpose or purposes for which the demised premises are hereby leased.

**2.1.2** This AGREEMENT shall continue until Project Completion, which is anticipated to be September 2024.

**2.1.3** The FOUNDATION shall permit the UNIVERSITY and its authorized agents and employees to enter upon the demised premises at any and all times to inspect the premises or for any other purpose incidental to the UNIVERSITY's business.

**2.1.4** The FOUNDATION shall maintain emergency access to the site.

**2.2 Covenant Not to Sue – Assignment of Rights to the UNIVERSITY.** The UNIVERSITY and the BOR hereby covenant not to initiate any legal action or legal proceeding against the FOUNDATION, its officers, directors, agents and employees, because of faulty materials, equipment, installation or workmanship relating to the COMPLEX. The FOUNDATION shall assign to the UNIVERSITY all rights and claims it may have against all contractors, suppliers or any persons or firms involved with the project. The UNIVERSITY shall have the right to initiate any required legal action directly against construction contractors, suppliers or any person or firm by virtue of the assignment of such rights to the UNIVERSITY by the FOUNDATION. The assignment of rights shall be accomplished by the FOUNDATION in writing at the time of the acceptance of the completed project by the UNIVERSITY.

## **SECTION III**

### **Funding**

**3.1 Funding and Financial Plan.** The FOUNDATION has the primary responsibility for soliciting, accepting, managing and ensuring all COMPLEX project funds and contributions. It is estimated that the COMPLEX construction project cost will be approximately \$5,500,000.

The BOR and the UNIVERSITY have no financial obligation to the FOUNDATION for commitment of any BOR or UNIVERSITY funds to any portion of this project. Provided, however, that

the BOR may lawfully pledge revenues at the UNIVERSITY for this project, pursuant to MCA Section 20-25-309 or otherwise in its discretion and the BOR authorizes such a commitment by a future lawful action.

## **SECTION IV**

### **Pre-Construction Phase and Scheduling**

**4.1 Plans and Specifications.** The FOUNDATION shall employ architects to develop plans, specifications and drawings for the project. The FOUNDATION will submit copies of the plans, specifications and all other construction contract documents to the UNIVERSITY for review and input. No construction shall commence without final approval of all plans, specifications and drawings by the UNIVERSITY. Copies of the final plans, specifications and drawings shall be filed with the UNIVERSITY prior to the commencement of any construction.

**4.2 Construction and Completion Schedules.** The FOUNDATION will submit to the UNIVERSITY an overall completion schedule for the project. Such schedule will reflect necessary approvals by the UNIVERSITY, including but not limited to approval of all architect and construction contracts and related documents. The following specific items must be presented to the UNIVERSITY for approval:

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

It is acknowledged that the goal for completion of the COMPLEX project is September 2024. The FOUNDATION will attempt to meet this goal, but failure to do so shall not cause the FOUNDATION to incur any penalty or to be in default of this AGREEMENT.

**4.3 Pre-construction Conference.** After the UNIVERSITY has accepted the project completion schedule, but prior to the start of construction, the UNIVERSITY, the FOUNDATION and A&E, shall arrange a pre-construction conference to include representatives of design and coordination firms or individuals designated in the previous paragraph and representative(s) of the principal construction firm(s) to be involved in the design, coordination and construction phases of the COMPLEX construction project. The FOUNDATION, through the FOUNDATION's architect, will outline the responsibilities of these various entities during the progress of the COMPLEX project for the UNIVERSITY'S approval.

**4.4 Equipment Samples, Materials Lists.** 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 V**  
**Construction Phase**

**5.1 Permits and Compliance with Applicable Laws and UNIVERSITY Regulations.**

The FOUNDATION shall be responsible for the securing of and payment for all required permits and inspections; the giving of all required notices; and payment of all applicable taxes and fees. The FOUNDATION further agrees that the FOUNDATION and all employees, contractors, subcontractors, vendors, suppliers and their employees shall 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 the UNIVERSITY; all federal and Montana anti-discrimination laws; and all federal, state and local occupational safety and health standards bearing on the COMPLEX project and related improvements on the demised premises. The FOUNDATION's obligations shall be satisfied by requiring compliance with each of the foregoing in its contract with each party performing services or providing materials in the COMPLEX project and construction. As provided in MCA Section 20-25-309, the COMPLEX Construction 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.

**5.2 Protection of Work and Property and Builders Risk Insurance.** The FOUNDATION shall continuously maintain or cause to be maintained adequate protection of all work on the COMPLEX Construction Project and shall protect the UNIVERSITY's property (including adjacent property) from injury or loss arising in connection the project. The entire work of the COMPLEX construction shall be at the sole risk of the FOUNDATION until Project Completion. Any loss or damage covered by insurance shall be promptly repaired, replaced or rebuilt by the FOUNDATION at its sole cost using insurance proceeds. The FOUNDATION shall secure fire, extended coverage and vandalism insurance or all risk insurance to cover the work during the course of the project naming the UNIVERSITY as an additional insured.

The FOUNDATION shall require its architect and contractors to comply with all applicable provisions of federal, state and municipal safety laws and building codes to prevent accidents or injury to persons on, about or adjacent to the premises where the work is being performed. The FOUNDATION shall further require its architect and 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 of vehicular traffic or inconvenience to pedestrians. All arrangements to care for such traffic shall be the

FOUNDATION's responsibility, with UNIVERSITY assistance. All work shall be carried on with due regard for the safety of the public generally. Open trenches shall be provided with barricades of a type that can be seen at a reasonable distance, and at night and which otherwise comply with applicable safety standards, regulations and ordinances.

In an emergency affecting the safety of life, of the work, or of adjoining property, the FOUNDATION, without special instruction or authorization from the UNIVERSITY, is hereby permitted to act, at its discretion, to prevent such threatened loss or injury, and it shall so act without approval.

**5.3 Liability Insurance and Indemnification.** The FOUNDATION shall obtain or 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 the UNIVERSITY naming the UNIVERSITY as an additional insured.

**5.4 Inspection.** The UNIVERSITY will have full rights to inspect the COMPLEX construction site during the project for compliance with approved construction documents and the requirements of this AGREEMENT.

**5.5 Utilities During Construction.** The UNIVERSITY will provide access to its electrical power source. The Contractor will make the necessary connections. Except as herein above provided and as set forth in Section 1.3.3 above, the FOUNDATION will furnish all other utilities required for completion of the project as part of the project cost.

The FOUNDATION shall make reasonable efforts to minimize disruption of the utility services of the UNIVERSITY and shall coordinate with the UNIVERSITY 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 the UNIVERSITY to minimize the effect of any such disruptions on the remainder of the campus. The FOUNDATION shall allow the UNIVERSITY maintenance access to utility service lines as required.

**5.6 Salvaged Material.** The FOUNDATION shall legally dispose of all unusable material.

**5.7 Change Orders.** The FOUNDATION shall have the right to incorporate necessary and desirable changes during the project subject to the review and approval of the UNIVERSITY. Such review and approval shall be undertaken in accordance with the same procedure utilized for review and approval of the original plans and specifications, and shop and setting drawings. Requested changes will not be approved unless they are in accordance with the financial plan and adequate funds are available to pay any increase in costs.

**5.8 Project Completion.** The UNIVERSITY, on behalf of the BOR, shall inspect and accept the COMPLEX at the earlier of (i) when completed according to approved construction documents, or (ii)

[add date] (“Project Completion”). Prior to final acceptance of the COMPLEX construction by the UNIVERSITY, the FOUNDATION shall deliver to the UNIVERSITY a set of reproducible mylar record prints and electronic drawing files in the AutoCad 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 the FOUNDATION. The FOUNDATION shall also deliver two complete, bound sets of any operating manuals or instructions for any equipment installed as a part of the project where such manuals and instructions are required or normally provided, upon completion of the project and prior to the termination of this AGREEMENT.

It is further agreed that the FOUNDATION will not be required to provide any independent warranty for materials, equipment, installation, workmanship or other services undertaken as a part of the construction of the COMPLEX.

On behalf of the BOR, the UNIVERSITY agrees to indemnify and hold harmless the FOUNDATION from any and all claims whatsoever, to the extent any such claims are not covered by insurance, arising out of or connected in any way with the COMPLEX project.

## **SECTION VI** **Miscellaneous**

**6.1 Owner’s Right to Terminate AGREEMENT.** If the FOUNDATION 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 materials or labor, or persistently disregard laws, ordinances of the UNIVERSITY or otherwise be guilty of a substantial violation of any provision of this AGREEMENT, the UNIVERSITY may, without prejudice to any other right or remedy, and after giving the FOUNDATION and its surety, if any, seven (7) days written notice to cure the violation, terminate this AGREEMENT, and take possession of the premises and of all materials, tools and appliances thereon, and finish the work by whatever method the UNIVERSITY may deem expedient.

In the event of termination, the FOUNDATION shall transfer any remaining funds, fund pledges, pledges for materials, services, equipment and other “gifts-in-kind,” and any other financial assurances to the UNIVERSITY in order that such resources are available to proceed with the project.

**6.2 Audit Access.** The FOUNDATION agrees to abide by the audit access provisions in Section 18-1-118, MCA.

**6.3 Amendments.** This AGREEMENT may be amended by mutual agreement in writing executed by the officials executing this AGREEMENT, or their successors, and appended hereto.

**6.4 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 THE UNIVERSITY:



Vice Chancellor for Administration & Finance  
710 S. Atlantic Street, Dillon MT

TO THE FOUNDATION:

University of Montana Western Foundation

**6.5 Termination.** This AGREEMENT shall terminate upon Project Completion unless earlier terminated pursuant to Paragraph 6.1.

**6.6 Indemnification.**

**6.6.1 Contractual Liability.** During the entire term of this AGREEMENT and thereafter following conveyance to the UNIVERSITY of the COMPLEX project, the UNIVERSITY for itself and on behalf of the BOR shall, except to the extent any such claims or causes of action are attributable to a willful material breach of this AGREEMENT by the FOUNDATION, fully indemnify, pay, protect, defend and hold harmless (with counsel reasonably approved by the FOUNDATION) the FOUNDATION (and its successors, assigns, employees, officers, directors and agents), from and against any claims, demands, damages, injuries, costs, expenses, losses, liabilities, causes of action, judgments, executions, interest, fines, charges or penalties (including reasonable legal fees and expenses in enforcing this indemnity and hold harmless or defending any claims hereunder), to the extent any such claims, demands, causes of action, etc. are not covered by insurance, arise directly or indirectly out of, or are, attributable to or connected in any way with the FOUNDATION's participation in or its duties and obligations with respect to the COMPLEX construction project covered by the terms of this AGREEMENT, or other contracts to which FOUNDATION is a party in connection with the COMPLEX construction project under Section 1.2.2 or otherwise.

**6.6.2 Negligence and Tort Liability.** During the entire term of this AGREEMENT and thereafter following conveyance to the UNIVERSITY of the COMPLEX, the Parties agree to fully indemnify, pay, protect, defend and hold harmless each other and each other's employees, officers, directors and agents, from and against any claims, demands, damages, injuries, costs, expenses, losses, liabilities, causes of action, judgments, executions, interest, fines, charges or penalties (including reasonable attorney fees and expenses in enforcing this indemnity and hold harmless or defending any claims hereunder), to the extent any such claims, demands, causes of action, etc. are not covered by insurance and arise from the indemnifying Party's own negligent or other tortious acts or omissions, and which directly or indirectly arise out of, or are attributable to or connected in any way with the COMPLEX project covered by the terms of this AGREEMENT. Nothing in this Section 6.6.2 shall constitute a waiver of either party's insurer's rights to seek indemnity, contribution or a tender of legal defense from the other Party or the other Party's insurer to the extent permissible by law.

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IN WITNESS WHEREOF, the FOUNDATION has caused these \_\_\_\_\_ to be executed in several copies by its proper officers at Dillon, Montana, this \_\_\_\_ day of \_\_\_\_\_, 2023, and the UNIVERSITY has caused the same to be executed un several copies by its proper officers at Dillon, Montana, this \_\_\_\_ day of \_\_\_\_\_, 2023.

UNIVERSITY OF MONTANA WESTERN FOUNDATION

By: \_\_\_\_\_  
Executive Director

Attest:

\_\_\_\_\_  
UM FOUNDATION

MONTANA UNIVERSITY SYSTEM  
BOARD OF REGENTS OF HIGHER EDUCATION

By: \_\_\_\_\_  
CHANCELLOR, UNIVERSITY OF MONTANA WESTERN

Attest:

\_\_\_\_\_  
Vice President for Administration & Finance

