



**UNIVERSITY OF MONTANA ATHLETIC INDOOR PRACTICE FACILITY  
DRAFT 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 2500 Broadway, Helena, Montana 59620, and University of Montana Foundation (FOUNDATION), a non-profit corporation organized and existing under the laws of the State of Montana, having its principal office at Gilkey Center, 950 Arthur Avenue, University of Montana, Missoula, Montana 59812.

**RECITALS**

**WHEREAS**, in 2007, the Legislature, through adoption by the 60<sup>th</sup> Legislature of Senate Bill No. 419, now codified as Section 20-25-309 MCA, authorized 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**, Consistent with Section 20-25-309 MCA, the FOUNDATION and the University of Montana guarantee that all agreements relating to this facility will be negotiated in the best interests of the state and that a commitment of state appropriations for design, construction, operations, or maintenance is not expressed or implied.

**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, (UNIVERSITY); and

**WHEREAS**, on [REDACTED], 2022, the BOR authorized the UNIVERSITY to construct a new Athletic Indoor Practice Facility (PROJECT) at a project cost estimated not to exceed \$7,250,000, to be funded with private funds and bridge loan; and

**WHEREAS**, the FOUNDATION is willing and, acting with the assistance of the UNIVERSITY as further detailed in the Memorandum of Understanding of equal date herewith between the UNIVERSITY and the FOUNDATION, is able to assist the UNIVERSITY with the planned construction by undertaking the responsibility for managing contributions and non-state appropriations available from the private sector and other sources, as well as services and property provided for the project; contracting for the

design and construction and other services, materials and work required; and thereafter conveying, transferring and contributing the PROJECT and related improvements to the UNIVERSITY; and

**WHEREAS**, the BOR desires that the FOUNDATION undertake this construction project in accordance with the UNIVERSITY's goals and other requirements identified herein and wishes to allow for completion of the project and to accept the assistance of the FOUNDATION as proposed, and by this document identify the conditions acceptable to all parties enabling the FOUNDATION to undertake and complete the PROJECT 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 desires to authorize the FOUNDATION to accept contributions and manage private funds for the PROJECT construction at the Missoula Campus. The BOR further desires to authorize the FOUNDATION to enter the premises of the UNIVERSITY to coordinate all planning, design and construction work necessary to complete the proposed PROJECT. The purposes of this AGREEMENT are therefore to authorize the FOUNDATION to undertake activities for planning, designing and coordinating the construction of the PROJECT on the Missoula Campus; to identify the responsibilities of each Party in this undertaking; and to provide for the transfer and contribution of the PROJECT-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 PROJECT.

**1.2.2** The FOUNDATION will enter into all contracts required for the design and construction of the PROJECT. All proposed contracts shall be submitted to the UNIVERSITY for review and approval. The UNIVERSITY will provide qualified UNIVERSITY personnel to assist the FOUNDATION in supervising and directly participating in project construction management and design activities.

**1.2.3** All contractual financial obligations to those performing work on the project shall be borne by the FOUNDATION, and except as specifically set forth in this AGREEMENT, 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 PROJECT construction.

**1.2.4** The FOUNDATION will function as the lessee of the PROJECT commencing on the date this AGREEMENT is executed and continuing until the conveyance, transfer and contribution of the constructed PROJECT 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, or during times where the UNIVERSITY is completing its own construction work within the project site, for the purpose of allowing the UNIVERSITY to maintain PROJECT 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 PROJECT property, and shall not apply to or affect other FOUNDATION duties and obligations with regard to the PROJECT.

**1.2.5** Upon Project Completion, as provided herein, the FOUNDATION shall be obligated to convey, transfer and contribute the PROJECT 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 will provide to the FOUNDATION all available information regarding existing conditions at the proposed PROJECT site, including drawings of existing structures, topography, utilities and subsurface conditions.

**1.3.3** 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 PROJECT on Missoula Campus in accordance with the plans and specifications approved by the UNIVERSITY and State Architecture and Engineering Office 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 on or before January 2023.

**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 PROJECT. 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 accepting and managing PROJECT funds and contributions. The UNIVERSITY has agreed to cooperate

fully with these FOUNDATION efforts. It is estimated that the PROJECT design and construction costs will be approximately \$7,250,000.

The FOUNDATION has developed a financial plan outlining the estimated costs of the project by principal segments of the work as normally accepted in the construction industry, and the total cash and contributions necessary to fund the total project. Moreover, the FOUNDATION may receive, but has no obligation to solicit, additional donations for this project. Except as otherwise provided by Paragraph 6.6 herein, the BOR and the UNIVERSITY have no financial obligation to the FOUNDATION other than the cost of the project less contributions, and it is expressly acknowledged that there is no commitment of any other BOR or UNIVERSITY funds to any portion of this project except to the extent the BOR may lawfully pledge revenues of the UNIVERSITY for this project, pursuant to MCA Section 20-25-309 or otherwise; or unless the BOR authorizes such a commitment by a future lawful action.

All monies transferred and made available to the FOUNDATION pursuant to this AGREEMENT may be used only in connection with the PROJECT construction project. Sufficient accounts and records will be maintained by the FOUNDATION to enable the UNIVERSITY to ascertain that funds expended from the FOUNDATION were in fact expended for this project.

#### **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 approval, and shall make those corrections required by the UNIVERSITY. 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 PROJECT is on or before January 2023. 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 financial plan submitted by the FOUNDATION and the project completion schedule, but prior to the start of construction, the UNIVERSITY and the FOUNDATION 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 PROJECT construction. The FOUNDATION, through the FOUNDATION’s architect, will outline the responsibilities of these various entities during the progress of the PROJECT for the UNIVERSITY’S approval.

**4.4 Equipment Samples, Materials Lists.** The FOUNDATION shall submit to the UNIVERSITY, in a timely sequence and before orders are placed for equipment and materials, a list of items of materials and equipment, and any contributions, including the name of the manufacturer, to be incorporated into the project for review and approval by the UNIVERSITY.

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.**

With UNIVERSITY assistance, 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 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 PROJECT’S construction. As provided in MCA Section 20-25-309, the PROJECT Construction 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 PROJECT Construction and shall protect the UNIVERSITY's property (including adjacent property) from injury or loss arising in connection the project. The entire work of the PROJECT 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 for all risk insurance to cover the work during the course of the project naming the UNIVERSITY as an additional insured. The FOUNDATION will provide certificates of such insurance to the UNIVERSITY.

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. Insurance coverage required is \$1 million per occurrence, \$2 million aggregate. The FOUNDATION will provide the UNIVERSITY with such certificates of insurance.

**5.4 Inspection.** The UNIVERSITY will have full rights to inspect the PROJECT 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 PROJECT at the earlier of (i) when completed according to approved construction documents, or (ii) on or before January 2023 ("Project Completion"). Prior to final acceptance of the PROJECT construction by the UNIVERSITY, the FOUNDATION shall deliver to the UNIVERSITY electronic drawing files in AutoCad format 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 digital (PDF) copies of material submittals and 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 PROJECT.



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 PROJECT, subject to the limitations and damages and immunities of the University as provided by law

## **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 or repeatedly 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 President for Finance and Operations  
University of Montana  
Missoula, MT 59812

TO THE FOUNDATION:

University of Montana Foundation

Gilkey Executive Building  
Missoula, MT 59812

**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 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 PROJECT construction covered by the terms of this AGREEMENT, or other contracts to which FOUNDATION is a party in connection with the PROJECT construction under Section 1.2.2 or otherwise. The indemnification obligations of the UNIVERSITY under this section specifically and expressly apply to 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), that are the result of the UNIVERSITY, its agents and contractors, construction work within the Project Site to upgrade the primary electrical source, as detailed above in Section 5.5. The University's liability under this section is subject to the limitations and damages and immunities of the University as provided by law.

**6.6.2 Negligence and Tort Liability.** During the entire term of this AGREEMENT and thereafter following conveyance to the UNIVERSITY of the PROJECT, 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 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. The University's liability under this is subject to the limitations and damages and immunities of the University as provided by law.

**UNIVERSITY OF MONTANA FOUNDATION**

By: \_\_\_\_\_  
Cindy Williams, President & CEO

Date: \_\_\_\_\_

**MONTANA UNIVERSITY SYSTEM  
BOARD OF REGENTS OF HIGHER EDUCATION**

By: \_\_\_\_\_  
Clayton Christian, Commissioner of Higher Education

Date: \_\_\_\_\_

**UNIVERSITY OF MONTANA**

By: \_\_\_\_\_  
Seth Bodnar, President

Date: \_\_\_\_\_