

**FWP WATER PURCHASE CONTRACT
PAINTED ROCKS**

This Contract ("Contract") is made and entered on this 12th day of July, 2004 between the Montana Department of Natural Resources and Conservation ("DNRC") and the Montana Department of Fish, Wildlife, & Parks ("FWP"), both executive branch agencies of the State of Montana.

- 1. Parties:** The DNRC owns the Painted Rocks Water Conservation Project ("Project"), which includes a dam and reservoir on the West Fork of the Bitterroot River in Ravalli County, Montana. The DNRC also owns the underlying rights to the water diverted and stored by the Project and sells the right to use the water for irrigation and fish and wildlife. FWP is responsible for the preservation and propagation of fish in Montana.
- 2. Purpose:** This Contract establishes the terms and conditions under which the DNRC shall sell Project water to FWP for enhancing stream flows for the preservation and propagation of fish in the West Fork and mainstem of the Bitterroot River.
- 3. Water Quantity:** The quantity of water purchased under this Contract shall be 10,000 acre-feet annually. Depending on availability, the DNRC shall deliver this quantity of Project water to FWP, at the reservoir outlet, beginning May 1 and ending September 30. DNRC shall honor FWP's legal calls for contract water during this period. DNRC will make its best effort to respond to requested releases within five days. If, because of physical, climatic, or operating conditions, or because of repair or maintenance considerations, the DNRC is unable to fill outstanding water purchase contracts for that year, the FWP shall be entitled to its pro rata share of the water available. FWP's pro rata share under this contract shall be two-fifths as determined by the ratio of the Contract quantity (10,000 acre-feet) to the total amount of water that DNRC currently sells from the Project annually (25,000 acre-feet).

4. Right, Title and Interest in the Project: Except as provided in Section 4(a), below, all right, title, and interest in and to the Project and the associated water rights shall be and remain with DNRC. Except for the right to use water under this Contract and except as provided in Section 4(a) below, FWP shall acquire no right, title or interest in the Painted Rocks Project or the water rights. FWP shall acquire no rights or equities under this Contract that will in any manner prejudice the right of DNRC to terminate this Contract if all reasonable efforts by the parties and others cannot generate adequate funding for rehabilitation and repairs to keep the Project operational, provided that such a decision by DNRC to terminate will not preclude the water rights transfer described in subsection (a) of this section.

(a.) End of Project Life. If the Project reaches the end of its useful life as a storage reservoir, DNRC or its successor agency, if any, shall transfer the portion of DNRC's water right associated with the Project (referred to as water right #76H-W-119795, as of the date of this signing) representing the relevant flow and volume of the 10,000 acre-feet of water under this Contract to FWP ownership.

(b.) New Project. If FWP acquires the rights to 10,000 acre feet pursuant to conditions stated in Section 4(a) above, and DNRC or its successor agency, if any, constructs any other water storage facility located upstream from the United States Geological Survey gauging station on the Bitterroot River near Darby, Montana, No. 1234400, located approximately 3 miles below the confluence of the East and West Forks of the Bitterroot River, at Latitude 45° 58' 20", Longitude 114° 08' 26" in SW1/4, SE1/4, NE ¼, sec. 36, T.3 N., R. 21 W., Ravalli County, Hydrologic Unit 17010205, at approximately river mile 77.2, DNRC or its successor agency will provide FWP with the option to transfer the 10,000 acre feet of the water right described in

Section 4(a) above to a purchase of that amount of contract water in the new facility. As with Painted Rocks, this contract water shall be available for release upon call by FWP. This option shall have priority over the marketing of water in the new facility to new potential purchasers, and FWP shall have first right of refusal of contract terms for that water.

5. Deposits and Payments: Payments under this Contract are to allow the DNRC to recoup the cost of original construction, and pay DNRC for the costs of operating the Project and keeping the Project operational. FWP will share these costs with the other users of Project water at a per-acre-foot cost not exceeding that paid by other Project water purchasers. For operations and periodic repairs, FWP's cost share shall be 50%. For rehabilitation of major components (per section 5(c) of this Contract) FWP's cost share shall be 60%. Cost shares apply only to that portion of a repair or rehabilitation that is paid for by the water users. Both Parties recognize that this Project will be facing repairs and rehabilitations that will greatly exceed the amounts provided for in this Contract and the other water purchase contracts. Upon DNRC determination that rehabilitation is necessary, DNRC and FWP will work together in partnership and with others to secure the funds beyond those committed in this Contract that will be necessary to keep the Project safe and operational.

(a) **Original Construction.** FWP shall pay its share of the cost of original construction at a rate of \$0.31 per acre-foot per year for 40 years. This payment shall be made annually, on or before April 1 of every year.

(b) **Operation, Maintenance, and Periodic Repairs.**

(i.) FWP shall pay DNRC a rate of \$1.50 per acre-foot per year to cover FWP's share of operations and maintenance for the year. This payment will be made annually on

or before April 1. If FWP's payment exceeds the proportional amount needed to cover operation and maintenance costs in any given year, DNRC shall reduce FWP's O&M obligation in the following year by the amount exceeded.

(ii.) FWP shall earmark \$100,000 within its Fish and Wildlife Mitigation Trust Fund for Periodic Repairs to cover FWP's share of Painted Rocks repairs that are in excess of routine annual operation and maintenance. DNRC shall report annually before November 1 to the water users, including FWP, of any periodic repairs anticipated for the following year and shall provide the water users with an opportunity to propose mutually acceptable alternatives before issuing a final billing. Unless the water users propose mutually acceptable alternatives by January 1 following the November report, FWP shall pay the estimated repair cost share on or before April 1.

(iii.) The payment and earmark described in subsections 5b(i) and 5b(ii) shall satisfy FWP's obligation for operations, maintenance, and repair during the first ten years of this agreement.

- (1) At the end of ten years, DNRC shall apply the Consumer Price Index as defined by the U.S. Bureau of Labor Statistics to the amount described in subsection 5b(i) to determine an adjustment in the amount of the O&M payment. The starting CPI value from which changes in the CPI shall be for the reference period 2004; the ending value shall be for the reference period 2113; DNRC shall use CPI-U for the West Region, for all items with an index base period of 1982-84=100. The change in the O&M payment shall be directly

proportional to the change in the CPI as calculated by the following formula:

$$\frac{(\text{CPI for 2113}) - (\text{CPI for 2004})}{(\text{CPI for 2004})} \times 100$$

At the end of each successive ten-year period, the parties shall revisit the O&M payment and adjust contributions according to this formula, adjusting the reference periods accordingly.

- (2) At the end of the first ten years from the date of signature of this Contract, the parties shall assess the funding needs for periodic repairs, based on engineering projections of future repair needs, and, if necessary, negotiate a different amount for the following ten years. At the end of each successive ten-year period thereafter, the parties shall revisit the periodic repair account and adjust contributions accordingly. If the need for repairs large enough to exceed the amount described in subsection b(ii) unexpectedly arises during any ten-year period, DNRC will notify FWP and the parties will meet to discuss how to finance the repairs.

(c.) Rehabilitation of Major Project Components.

(i.) Upon FWP's receipt of a single payment of \$400,000 from the Bonneville Power Administration, FWP shall deposit that payment into its Fish and Wildlife Mitigation Trust Fund and earmark \$300,000 as an interest-bearing Reserve Fund, the principal and growth of which shall be available for the rehabilitation of major project

components. For the purpose of this contract, rehabilitation of a major project component is defined as, any replacement or substantial modification that is intended to restore the component to like-new condition. Major project components include the embankment, stilling basin, outlet conduit, gate chamber and intake structure. Any amount remaining in the reserve account established in the water purchase contract that was executed in 1992 between the parties shall also be deposited in the reserve fund. This reserve fund with these deposits shall fulfill FWP's obligation to contribute to the reserve account for at least twenty years from the date of signature of this Contract.

(ii.) FWP shall pay for its share of rehabilitation of major project components out of this account. As feasibility studies are completed on proposed rehabilitation of major components, DNRC will share with FWP the results of the feasibility study, and if the feasibility study indicates that the cost of the rehabilitation will deplete the reserve account, DNRC and FWP shall negotiate in good faith with each other, with any other Project water purchasers, and with other beneficiaries of the Project, to develop a plan for fully funding the rehabilitation of major project components.

(iii.) One year before the twentieth anniversary of the signature of this Contract, the parties shall meet to review the extent to which the rehabilitation of major project components has depleted the reserve fund, and to project, to the extent it is possible, the future rehabilitation needs of the project. Based upon the projections, if the parties determine that it will be necessary to replenish the reserve fund, they shall negotiate the amount and method by which FWP will renew contributions to the reserve fund.

(d.) **Emergencies.** The Project dam is a High Hazard Dam as defined by the Montana Dam Safety Act. Consequently, any repairs that might affect the integrity of the

structure will have to be made or operations altered to protect life and property.

Although DNRC will use its best efforts to avoid emergencies through adequate investigation and planning, emergency circumstances may arise without notice. For such emergencies, the DNRC will cause the needed repairs to be made and assess FWP for its share as soon as practical after the costs are known. The DNRC's determination of the additional costs shall be final. If emergency repair costs exceed the available repair and rehabilitation funds, the parties shall meet to discuss how to finance the repairs.

6. Safety: The DNRC, as owner of the Project, shall continue to be responsible for compliance with Montana Dam Safety Act for the Project and will conduct the necessary periodic safety inspections at no cost to FWP. However, safety shall be considered integral to operation and maintenance of the Project and a necessary cost of the water.

7. Termination: When major repair or rehabilitation to the Project is required for compliance with the Montana Dam Safety Act and the proposed repairs will deplete or exceed available repair and rehabilitation funds, DNRC and FWP will negotiate in good faith and with other water users and beneficiaries of Painted Rocks water to develop a funding plan for major repair and rehabilitation. If agreement cannot be reached, either party may terminate the Contract.

Termination will not affect any past due charges or debt. Upon termination, FWP shall forward to DNRC a prorated share of the unexpended \$300,000 of rehabilitation funds committed through this contract described in section 5(c)(i). FWP shall calculate the prorated amount to be forwarded by the following equation:

$$[[A * (B/C)] - D] + E; \text{ where}$$

A = amount of reserve fund commitment

B = # of years contract in effect

C = # of years of reserve fund commitment

D = amount of rehabilitation funds expended

E = accumulated interest applicable to reserve funds as prorated above

Example:

Assuming:

- 1) the starting reserve amount in 2004 is \$300,000
- 2) this contract was in effect for 5 years,
- 3) the rehabilitation commitment is for 20 years,
- 4) \$50,000 of the reserve fund had been expended, and
- 5) $[[A * (B/C)] - D]$ generated \$2,300 in accumulated interest,

the relevant calculation would be:

$$\underline{[[\$300,000 * (5/20)] - \$50,000] + \$2,300 = \$27,300 \text{ due to DNRC}}$$

In addition, any amount remaining in the reserve account established in the water purchase contract that was executed in 1992 plus interest shall be forwarded to DNRC upon termination of this contract.

8. Priority: FWP shall have no preference or priority to receive water from the Project in advance of other water purchasers who have entered into water purchase contracts for water from the Project. All Project water purchasers shall have an equal and ratable right to water in accordance with respective amounts to which they are entitled under their water purchase contracts.

9. Billing procedures: DNRC will send FWP one annual bill with annual costs itemized per this Contract. Annual and periodic assessments will be sent to:

FWP PAINTED ROCKS WATER PURCHASE CONTRACT

Department of Fish, Wildlife & Parks

Attn: Water Resources Program

Fisheries Division

P.O. Box 200701

Helena, MT 59620-0701

FWP payments under this contract will be sent to:

Department of Natural Resources and Conservation

Attn: Central Services Division

P.O. Box 201601

Helena, MT 59620-1601

10. Term: The term of this Contract shall be for the useful life of the Project as extended by any repairs and rehabilitation.

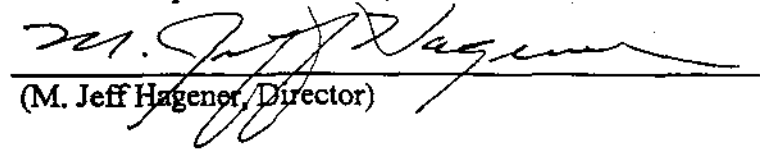
11. Successors and Assigns: The provisions of this Contract shall apply to and bind the successors and assigns of the respective parties.

12. Existing Contracts: This Contract supercedes and replaces a previous Water Purchase Contract between the DNRC and FWP entered on December 3, 1992 and is separate from another contract held by FWP for 5000 acre-feet of water dated March 5, 1958.

The Department of Fish, Wildlife, and Parks, the Water Purchaser, and the Department of Natural Resources and Conservation, the Water Seller, by their signatures below have caused this Water Purchase Contract for the Painted Rocks Water Conservation Project to be executed on this 12th day of July, 2004.

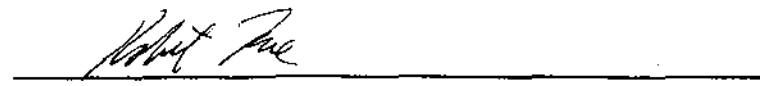
WATER PURCHASER

Montana Department of Fish, Wildlife and Parks



(M. Jeff Hagen, Director)

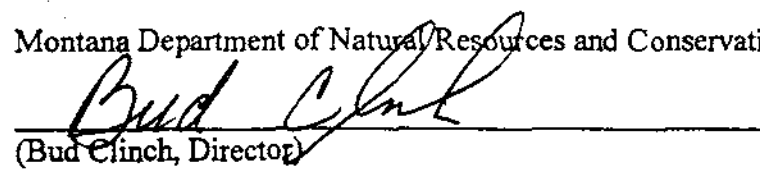
Approved for Legal Content:



Robert Lane, Chief Legal Counsel

WATER SELLER

Montana Department of Natural Resources and Conservation



(Bud Clinch, Director)