

# Lake DeSmet Counties Coalition

Johnson and Sheridan Counties

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October 24, 2011

Sheridan County Commission  
224 South Main St.  
Sheridan, WY 82801

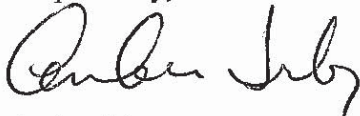
RE: WYOMING GAME & FISH 2011 LEASE

The Lake DeSmet Counties Coalition Joint Powers Board and Wyoming Game & Fish Department are proposing to enter into a long-term lease agreement for the non-consumptive recreational use of 66,024 acre-feet of storage water in Lake DeSmet Reservoir. Please find enclosed the Lease of Water Rights in Lake DeSmet Between the Lake DeSmet Counties Coalition JPB and the Wyoming Game & Fish Commission.

This document is being made available to the public via Johnson County Commission, Sheridan County Commission, Johnson County Library, Sheridan County Library, the Lake DeSmet Counties Coalition JPB website ([lakedesmet@lakedesmet.org](mailto:lakedesmet@lakedesmet.org)) and at the Lake DeSmet Counties Coalition JPB Office.

Thank you for your assistance.

Respectfully,



Amber Irby  
Administrative Assistant

# Lease of Water Rights in Lake DeSmet between the Lake DeSmet Counties Coalition Joint Power Board and the Wyoming Game and Fish Commission

## Recitals

WHEREAS, Lake DeSmet is a 235,000 acre foot reservoir with an average depth of 69 feet and a maximum depth of 120 feet located in northern Johnson County between Buffalo and Sheridan; and

WHEREAS, Lake DeSmet is the most important reservoir trout fishery in northeast Wyoming with approximately 35,000 anglers annually fishing Lake DeSmet and catching about 60,000 trout; and

WHEREAS, the value of the Lake DeSmet fishery to the local economy is about \$2.4 million annually; and

WHEREAS, the reservoir holds significant industrial water rights that if used would result in annual fluctuation of 25 to 50 vertical feet. These fluctuations would make all current boat ramps unusable at lower water elevations, and could negatively impact the recreational value of the reservoir; and

WHEREAS, the Lake DeSmet Counties Coalition Joint Powers Board owns the entire shoreline up to the high water elevation of 4,620 feet, and controls significant water rights; and

WHEREAS, the Lake DeSmet Counties Coalition Joint Powers Board's ownership interests in Lake DeSmet can provide approximately 3300 acres of surface use opportunities; so

THEREFORE, the Lake DeSmet Counties Coalition Joint Powers Board desires to lease the following reservoir rights in Lake DeSmet to the Game and Fish Commission for the purpose of maintaining the recreational fishery of Lake DeSmet at a reservoir elevation of not less than 4580' at all times.

- a. Permit number 6226R for 8,902 acre-feet of storage with a priority date of 4/26/1955.
- b. Permit number 7009R for 17,738 acre-feet of storage with priority dates of 11/13/1963 and 2/25/1955.
- c. Permit number 6227R for 1,304 acre-feet of storage with a priority date 3/8/1955.
- d. Permit number 7532R for 740 acre-feet of storage with a priority date of 4/16/1957.
- e. Permit number 7291R for 37,340 acre-feet of storage with a priority date of 11/13/1963.

## 1. Parties.

This Lease is made between the Lake DeSmet Counties Coalition Joint Power Board [Coalition], whose address is 133 West Burkitt St., Sheridan, Wyoming 82801, and the Wyoming Game and Fish Commission [Commission], whose address is 5400 Bishop Blvd., Cheyenne, Wyoming

82006. In consideration of the mutual covenants contained herein, the parties agree as follows:

2. **Property Subject to Lease**

A. Coalition leases the following reservoir rights in Lake DeSmet to the Commission for the purpose of maintaining the recreational fishery within Lake DeSmet:

- i. Permit number 6226R for 8,902 acre-feet of storage with a priority date of 4/26/1955.
- ii. Permit number 7009R for 17,738 acre-feet of storage with priority dates of 11/13/1963 and 2/25/1955.
- iii. Permit number 6227R for 1,304 acre-feet of storage with a priority date 3/8/1955.
- iv. Permit number 7532R for 740 acre-feet of storage with a priority date of 4/16/1957.
- v. Permit number 7291R for 37,340 acre-feet of storage with a priority date of 11/13/1963.

B. The parties desire to enter into a lease contract [Lease] defining their rights, duties, and liabilities relating to the reservoir rights. No diversion of the water rights outside of Lake DeSmet, or for any consumptive use, shall be permitted during the term of this lease.

C. Coalition shall call for water to be stored as needed and appropriate to refill quantified evaporative losses whenever the need exists and water is available in priority.

3. **Term of Lease.**

A. Unless terminated earlier as provided herein, this Lease shall be for a term of ninety-nine (99) years commencing as of the Effective Date as defined herein. This Lease is not valid and shall not become effective until it is signed by an authorized representative of the Coalition and an authorized representative of the Commission, approved as to form by the Office of the Wyoming Attorney General, and, if required by Wyo. Stat. § 9-2-1016(b)(iv), approved by the Governor or his designee, and the status and standing of the anticipated use identified in 2.A. has been authorized by the State Engineer's Office and Board of Control as discussed in 5.C. of this Lease.

B. The Effective Date of the Lease shall be October 1, 2011, or the date of the signature last affixed to this Agreement, whichever is later, and shall expire on September 30, 2110, or 99 years from the date of the signature last affixed to this Lease, whichever is later, unless terminated earlier as provided for in this Lease.

4. **Payment.**

A. The total amount to be paid by the Commission to the Coalition for the rights identified in Section 2. A. of this Lease shall be two million nine hundred seventy one thousand nine hundred dollars (\$2,971,900). This amount shall be paid annually over five years in an amount not less than five hundred ninety four thousand three hundred eighty dollars (\$594,380) per year. Payment shall be made on or before October 1 of each year as follows:

- i. On October 1, 2011: \$594,380
- ii. On or before October 1, 2012: \$594,380
- iii. On or before October 1, 2013: \$594,380
- iv. On or before October 1, 2014: \$594,380
- v. On or before October 1, 2015: \$594,380

B. **Grace Period.** Any installment not paid by the Commission within thirty (30) days of its due date shall be grounds for the Coalition to commence termination of this lease as provided in Section 5.J. of this Lease.

C. **Accelerated Payment.** The Commission shall have the right, without penalty, to accelerate payment of any part or all of the unpaid balance due hereunder.

D. **Shoreline Management in Lieu of Operation and Maintenance Payments.** The Commission shall enforce the Lake DeSmet Reservoir Shoreline Protection Regulations (hereafter "the Regulations"), which Regulations are currently being promulgated pursuant to a public notice and hearing procedure by the Coalition. The Regulations, and all amendments and revisions thereto, shall be approved by the Commission before the enforcement obligation begins. The Commission's fulfillment of its responsibilities under the Regulations shall be performed in lieu of payments for the annual operation and maintenance expenses associated with water rights being leased.

5. **Special Provisions**

A. **Taxes.**

The Coalition shall pay all taxes, assessments, or other governmental charges that shall or may, during the lease term, be imposed on, or arise in connection with the water rights that are the subject of this Lease.

B. **Annual Report**

The Coalition shall prepare an annual report for each water year, beginning October 1<sup>st</sup> and ending on September 30<sup>th</sup> of the following year. The annual report shall track water usage/deliveries including evaporation losses to assure the Commission that the leased rights are available in the reservoir, that they are not

being used for any unauthorized purpose, and water has been stored when it is available in priority.

- i. It is the goal of both parties to maintain the water level of Lake DeSmet at no less than 4580' elevation at all times.
- ii. Coalition warrants that the water rights in question are completely full at the date this agreement is signed for that water year, subject to any evaporation chargeable to the water rights for that year.

**C. Enlargement of Water Rights**

- i. Lease is conditioned on Coalition being able to legally provide said water rights for the entire term of this agreement for the recreational purpose identified in Section 2 above. Toward that end, the Commission and the Coalition agree to cooperate in the submission of applications, petitions, and other appropriate materials to the State Engineer's Office and the Board of Control to permit the uses of the water incident to the water rights subject to this lease.
- ii. Within forty-five (45) days after the execution of this Lease, the Coalition shall apply to the Surface Water Division of the Wyoming State Engineer's Office for a temporary use permit to allow recreation as a temporary use of the reservoir water rights. The Coalition shall continue to seek additional temporary use permits until enlargement of the water rights as described in Section C.ii. is granted.
- iii. Within forty-five (45) days after the execution of this Lease, the Coalition shall apply to the Surface Water Division of the Wyoming State Engineer's Office to enlarge the permits identified in Section 2.A. of this Lease by adding recreation as an additional use. The Commission understands and agrees that the priority date of the recreational use would be the date that the Coalition applies for the enlargement.
- iv. In the event that the Wyoming State Engineer's Office or Board of Control denies the applications for this additional use for all water rights identified in Section 2.A., then this Lease is voidable. The Commission shall exercise its option to void the lease within 60 days of the application's denial. After 60 days, the Lease is no longer voidable.
- v. If the Commission exercises its option to void the Lease due to denial of the applications described above, then the Coalition shall return a pro rata share of the Commission's payment. The pro rata share shall equal the total initial payment from the Commission of \$2,971,900 less \$30,019 per year as described in Section 5.F. from the effective date of the Lease to the date the Commission exercised its option to void the Lease.

**D. Maintenance and Operation of Dam**

The Coalition shall be responsible for the maintenance and operation of either dam at Lake DeSmet. This responsibility includes outlet works, and all other facilities associated with the dams. The Commission shall not be responsible for any maintenance or operation costs associated with Lake DeSmet, its dams, outlet works or other physical attributes.

**E. Assignment, Mortgage, or Sublease.**

Neither the Commission nor the Coalition, its successors or assigns shall, without written consent, assign, mortgage, pledge, or encumber this Lease or any of the individual water rights identified herein.

**F. Termination.**

Upon completion of no less than fifty (50) years of the Lease, the Coalition, at its option, may terminate the lease. If the Coalition chooses to exercise this right, it shall pay to the Commission the pro rata remainder of the initial two million nine hundred seventy one thousand nine hundred dollars (\$2,971,900) used to lease the reservoir rights. The pro rata annual lease payment projected over 99 years is \$30,019 per year based on the total consideration paid for the lease. If the Coalition elects to terminate the lease, then the Coalition shall pay to the Commission \$30,019 times the number of years remaining on the 99 year lease. For example, if the Coalition elected to terminate the lease at the end of 50 years, the Coalition would pay \$1,470,931 (49 years times \$30,019.)

**G. Binding Documents**

In addition to this Lease, the Parties shall be bound by all terms and conditions pertaining to the water rights, uses by the public and shoreline management in the Shoreline Management Plan that is being developed cooperatively between the Coalition and the Commission.

**H. Ordinances and Statutes.**

The Parties shall comply with all applicable health, wildlife, environmental and safety regulations administered by any public authority having lawful jurisdiction over such matters pertaining to the Reservoir and the lands covered by the Shoreline Management Plan.

**I. Hazardous Substances.**

The Parties shall comply with all applicable state and federal environmental laws, including, but not limited to the Clean Water Act.

**J. Violation**

- (i) Either party may terminate this Lease for cause, subject to the requirements of Section 5.J.ii. of this Lease. For purposes of this Lease, for cause means those situations where a party fails to perform in accordance with the terms of this Lease.

- (ii) If either party determines that a violation of the terms of this Lease has occurred or is threatened, it shall give written notice to the other party of such violation and request corrective action sufficient to resolve the violation. If the Commission notifies the Coalition and the Coalition fails to resolve the violation within thirty (30) days after receipt of notice thereof from the Commission, then the Commission may either extend the term of the lease by an additional year, or withdraw from the lease. If the Commission withdraws from the lease for a violation of its terms, the Coalition shall repay the Commission as outlined in Section 5.F.ii. of this Lease. If the Coalition notifies the Commission and the Commission fails to resolve the violation or establish a formal process leading to a likely resolution within thirty (30) days after receipt of notice thereof from the Coalition, then the Coalition may withdraw from the lease. If the Coalition withdraws from the lease for a violation of its terms, it shall not be subject to repayment as would otherwise be required by Section 5.F.ii of this Lease.

**K. Easements, Contracts, or Encumbrances.** The parties shall be bound by all existing easements, contracts, and encumbrances of record relating to the premises.

**L. Successors and Assigns.** This Lease and the terms and conditions hereof apply to and are binding on the purchasers, heirs, legal representatives, successors, assignees, agents, and employees of both parties.

**M. Time is of the Essence.** Time is of the essence in all provisions of this Lease.

6. **General Provisions**

**A. Applicable Law/Venue.** The construction, interpretation, and enforcement of this Lease shall be governed by the laws of the State of Wyoming. The Courts of the State of Wyoming shall have jurisdiction over this Lease and the parties, and the venue shall be the First Judicial District, Laramie County, Wyoming.

**B. Entirety of Lease.** This Lease, consisting of eight (8) pages, contains the entire contract between the parties and supersedes all prior negotiations, representations or contracts, either written or oral. This Lease cannot be changed except by a written instrument subsequently executed by the parties.

**C. Funding.** This Lease is subject to the available funding of the Commission. Should the governmental source of funds fail to appropriate monies or the responsible department or agency fail to provide the

necessary funding, then the Commission may terminate the Lease. Under this situation, the Commission would not be entitled to reimbursement of any payments prior to that point.

**D. Indemnification.** The Coalition shall release, indemnify, and hold harmless the State, the Agency, and their officers, agents, employees, successors, and assignees from any cause of action, claims or demands arising out of pre-existing conditions, Coalition's nondisclosure of known contamination, or Coalition's performance or failure to perform under this Lease.

**E. Notice.** All notices to be given with respect to this Lease shall be in writing. Each notice shall be sent by registered or certified mail, postage prepaid, and return receipt requested, or by facsimile, e-mail, or in person, to the party to be notified at the address set forth above.

Every notice shall, if mailed, be deemed to have been given at the time it shall be deposited in the United States mail in the manner prescribed herein. Notice sent by facsimile or e-mail shall be deemed to have been given at the time sent. Nothing contained herein shall be construed to preclude personal service of any notice.

**F. Sovereign Immunity.** The State of Wyoming and the Commission do not waive sovereign immunity by entering into this Lease and specifically retain immunity and all defenses available to them as sovereigns pursuant to Wyo. Stat. § 1-39-104(a) and all other applicable law.

**G. Third Party Beneficiary Rights.** The parties do not intend to create in any other individual or entity the status of third party beneficiary, and this Contract shall not be construed so as to create such status. The rights, duties, and obligations contained in this Contract shall operate only between the parties to this Contract and shall inure solely to the benefit of the parties to this Contract. The provisions of this Contract are intended only to assist the parties in determining and performing their obligations under this Contract.

**H. Waivers.** The failure of the Coalition to insist on a strict performance of any of the terms and conditions hereof shall be deemed a waiver of the rights or remedies that the Coalition may have regarding that specific term or condition.

**7. Signatures.**

The parties to this Lease, through their duly authorized representative, have executed this Lease on the dates set out below, and certify that they have read, understand, and agree to the terms and conditions of this Lease.

This Lease is not binding on either party until approved by A&I Procurement and the Governor of the State of Wyoming or his designee, if required by Wyo. Stat. § 9-2-1016(b)(iv). The effective date of this Lease is the date of the signature last affixed to this page.

**LESSEE [GAME AND FISH COMMISSION]**

\_\_\_\_\_  
[Name and Title] Date

**LESSOR [Lake DeSmet Counties Coalition]**

\_\_\_\_\_  
[Name and Title] Date

**ATTORNEY GENERAL'S OFFICE APPROVAL AS TO FORM**

\_\_\_\_\_  
[Name and Title] Date

**JOHNSON COUNTY COMMISSION**

By: \_\_\_\_\_

Approved by the Johnson County  
Commission at a meeting held on  
\_\_\_\_\_, 2011

**SHERIDAN COUNTY COMMISSION**

By: \_\_\_\_\_

Approved by the Sheridan County  
Commission at a meeting held on  
\_\_\_\_\_, 2011

**Approved by A&I Procurement and the  
Governor of the State of Wyoming or his  
designee**

By: \_\_\_\_\_