

2021-384  
Agreement

## 2021 SILVER LAKE FLOW-RELEASE AGREEMENT

THIS AGREEMENT is made this 4<sup>th</sup> day of August, 2021, between the City and County of Butte-Silver Bow (BSB) and the Montana Department of Justice Natural Resource Damage Program (NRDP), collectively referred to herein as the "Parties," to implement, on a trial basis, releases of certain stored water from Silver Lake that are attendant to water rights owned by BSB, for the benefit of allowing NRDP to provide additional water to the Upper Clark Fork during this time of severe drought.

**Recitals**

- BSB is the sole owner of several multiple-use water rights including storage rights in Silver Lake, and direct flow rights in Warm Spring Creek. Of those water rights, and pursuant to DNRC Change Authorization 76G 30013721, the following water rights include an instream flow for fisheries benefit purpose for use in portions of Warm Spring Creek and for the Clark Fork River to Gold Creek, not to exceed 40 cfs and 15,580 ac-ft:

<u>Claim Number</u>	<u>Flow rate</u>
76G 91528 00	4.0 cfs
76G 91530 00	9.54 cfs
76G 91531 00	3.37 cfs
76G 91557 00	6.75 cfs
76G 124864 00	n/a (1,309 af)
76G 124867 00	92 cfs
76G 124868 00	1.25 cfs
76G 124869 00	51 cfs
76G 124870 00	n/a (13,128 af)
76G 124871 00	83 cfs
76G 124872 00	n/a (200 af)
76G 126480 00	136.75 cfs

76G 126484 00	n/a (2,000 af)
76G 126508 00	44 cfs

2. The upper Clark Fork River, between Warm Springs and Deer Lodge, suffers from low stream flows, resulting in dewatering and elevated water temperatures to the detriment of the aquatic life in that reach.
3. The NRDP, in its Upper Clark Fork River Aquatic and Terrestrial Resources Restoration Plans (Plans), describes both Warm Springs Creek and the upper Clark Fork as Priority 1 stream areas for restoration. The Plans identify flow augmentation on both Warm Springs Creek and the upper Clark Fork as critical restoration components.
4. NRDP desires closely monitored, short-term flow releases to augment instream flows in Warm Springs Creek and the upper Clark Fork River.
5. NRDP desires that releases under this agreement be timed to coincide with the current period of low flow and elevated water temperatures in the upper Clark Fork River.
6. The NRDP Plans have allocated funds to implement a short-term trial release of water.
7. The Parties anticipate that this release will build upon the knowledge gained from the 2017 and 2019 short term release of Silver Lake water to Warm Springs Creek and the Clark Fork River.

**THEREFORE**, in consideration for the promises made in this agreement, the Parties agree as follows:

1. **Implementation of Flow Release.** For the consideration stated herein, BSB shall perform flow releases (Release(s)) of 32 cubic feet per second (cfs), from Silver Lake into Warm Springs Creek. Releases will occur between August 5, 2021, and September 18, 2021, and measured in 24-hour days. The agreed minimum duration for any Release is one day. NRDP acknowledges and agrees that BSB is under no duty to modify the amount or duration of a Release more than once a day. Any Release will maintain (at or above) the agreed specified minimum flow rate for the duration of that day's Release.

2. This agreement provides for forty-five (45) consecutive days of Releases, subject to water availability (legal and physical), equipment failure, water right limitations, resource need, and/or, Force Majeure.
3. **Source of Water for Release.** The source of the water for Release shall be the stored water attendant to those storage water rights that are included in the list of water rights in Recital 1 of this agreement.
4. **Purpose of Releases.** NRDP acknowledges and agrees that all Releases shall only be used for instream flow for the benefit of fisheries within Warm Springs Creek and upper Clark Fork River to Gold Creek, pursuant to the permitted usage of the above-described water rights under DNRC Change Authorization 76G 30013721, and that no Releases will be wasted.
5. **Location of Releases, and Place of Use.** The agreed location of any Releases is Silver Lake Dam's release structure(s) into Warm Springs Creek. The Parties agree that BSB's duty to Release will have been fully satisfied upon actual release of water at this location. The place of use of such water is only legally authorized to be used downstream of this location on Warm Springs Creek to the confluence of Warm Springs Creek and the Clark Fork River, and thence downstream to the confluence of Clark Fork River and Gold Creek. NRDP agrees it will only call for Releases with the intent that they be used within this place of use. NRDP acknowledges and agrees that BSB is under no duty to convey, shepherd, or protect any Release beyond the Silver Lake Dam's release structure(s), and BSB specifically disclaims any ability or guaranty to deliver water to any other location.
6. **No Warranties.** Parties agree and acknowledge that there are no representations, warranties or affirmations, regarding the quality or the amount of water available from the natural sources of water or the water rights attendant thereto and described herein, or the adequacy of any water or water supply provided for Releases.
7. **Ownership in BSB.** All right, title, and interest in and to the water, water rights and any associated property shall be and remain in BSB. NRDP shall acquire no right, title, or interest in any of BSB's water, water rights, or associated property.

NRDP shall acquire no rights or equities under this Agreement which will in any manner prejudice the right of BSB to terminate this Agreement.

- 8. Relationship of Parties.** This Agreement shall not be construed to create a partnership, joint venture, association, or agency relationship between BSB and NRDP. Nothing in this Agreement shall in any way be construed to constitute NRDP as an agent or employee of BSB, and nothing herein shall be construed to constitute BSB to be an agent or employee of NRDP. The duties of BSB as set forth in this Agreement are not in any way controlled by NRDP. NRDP shall neither have nor exercise any control, direction or supervision over the judgment, manner or methods by which BSB performs its duties under this Agreement.
- 9. Notification of and Consultation with Others Working in or Using Water from Warm Springs Creek.** NRDP shall consult with other water users or those involved in restoration or other activities on Warm Springs Creek and the upper Clark Fork River to attempt to minimize any unintended consequences that might otherwise arise from the release. Such consultations by NRDP shall have no effect on BSB's existing legal rights and/or BSB's independent ability to utilize its water rights of its own volition.
- 10. Subordination of Water Delivery Obligations.** BSB's obligations to deliver water as specified herein are subject to, and subordinate to, all other water service contracts existing at the date of execution of this agreement, and under which BSB is obligated to deliver any water attendant to the water rights included in this agreement.
- 11. Monitoring and Tracking the Release.** Flow monitoring of the Release directly below the Silver Lake Dam will be completed by BSB. BSB will provide daily notification of the flow amount during any Release to NRDP, via email or phone call. Monitoring below Meyers Dam in Warm Spring Creek and in the Clark Fork River will be done by NRDP. After all Releases pursuant to this agreement are completed NRDP will complete a flow monitoring report that compiles the flow and temperature data and will share the report with BSB.
- 12. Funding.** NRDP will fund this work from the Upper Clark Fork River Restoration Fund. It is understood that the NRDP funds are State funds, and

payments for these improvements will only be made by NRDP to BSB upon completion of the 45 days of Releases, and in no event later than 30 days after the last Release day under this agreement. Payments will be made in a single lump-sum payment. Payment will be based upon the actual number of Release days completed. NRDP agrees to pay \$75,000.00 as a one-time hook-up fee for access to the Silver Lake Water System. If the agreed-upon Release of 32 CFS/day cannot occur each day for the 45 days, the Parties agree that NRDP will instead pay \$1,666 for each day a Release actually occurs as the hook-up fee. NRDP agrees to pay \$7,600.00 for the first day of Releases per month, as well as \$3,800.00 for every day a Release occurs.

- 13. Future Credit.** The Parties agree that any sums paid as a hook-up fee under this Agreement will be credited to any similar charge or fee should the NRDP enter into a water service agreement with BSB as a water user of the Silver Lake Water system.
- 14. Term of Agreement.** As long as this agreement is signed by both Parties, it will run from August 5, 2021, until October 31, 2021.
- 15. Termination of Agreement.** Any party may terminate this Agreement for failure of the other party to perform any of the services, duties, or conditions contained in this Agreement after giving ten (10) days written notice to the other party. Termination shall not affect BSB's right to collect all payments owed by NRDP up to the date of termination under this Agreement. The remedies described above is not exclusive, and all other remedies under this Agreement, existing law, or statute shall remain available.
- 16. Abandonment.** Nothing in this agreement will be interpreted to work an abandonment or to express an intent to abandon the water right claims affected by this agreement. The Parties affirm that the terms of this agreement do not constitute an abandonment of BSB's water right claims, and cannot serve as evidence that could be used to establish an abandonment of any part of those water
- 17. Notice.** Any notice given under this agreement must be in writing and must be served on the party to receive it by registered or certified mail, return receipt

requested and sent to the party's address as set forth below. A party wishing to change its designated liaison and/or address may do so in a writing sent to the other party. Notice served under this provision will be complete when deposited in the United States mail. Refusal to accept or failure of delivery because of a changed address for which no change-in-address was given will be considered receipt of notice.

NRDP's liaison and address is:

Meranda Flugge  
Montana Natural Resource Damage Program  
1790 9th Avenue  
Helena, MT 59620

BSB's liaison and address is:

Mark Neary  
Public Works Director  
City and County of Butte-Silver Bow  
126 West Granite Street  
Butte, MT 59701

- 18. Cooperation.** The Parties to this agreement will cooperate fully and provide such assistance and information to the other as may be necessary to implement this agreement.
- 19. No Third-Party Beneficiary Rights.** This Agreement is not intended to and shall not be construed to give any third party any interest or rights (including, without limitation, any third-party beneficiary rights) with respect to or in connection with any agreement or provision contained herein or contemplated hereby.
- 20. Counterparts.** This Agreement may be executed in counterparts, which together shall constitute one agreement.
- 21. Entire Agreement.** It is mutually understood and agreed that this Agreement is the entire agreement pertaining to the matters it addresses, and that there is no other agreement or understanding or any other thing to be done except as set forth in this Agreement.

The parties sign this agreement with the expectation that they will be bound by its terms effective as of August 5, 2021.

CITY AND COUNTY OF  
BUTTE-SILVER BOW

DocuSigned by:  
*J.P. Gallagher*  
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\_\_\_\_\_  
J.P. GALLAGHER  
CHIEF EXECUTIVE

ATTEST:

DocuSigned by:  
*Linda Sajor-Joyce*  
F8653226CB92425  
\_\_\_\_\_  
Linda Sajor-Joyce  
CLERK AND RECORDER

APPROVED AS TO FORM:

DocuSigned by:  
*Eileen Joyce*  
19A411F23C3E493  
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EILEEN JOYCE  
COUNTY ATTORNEY

MONTANA DEPARTMENT OF JUSTICE  
NATURAL RESOURCE DAMAGE PROGRAM

DocuSigned by:  
*Harley Harris*  
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By: *Harley Harris*  
Harley Harris, Supervising Attorney

Date: August 5, 2021 | 9:02:14 AM MDT

Approved for Legal Content:

DocuSigned by:  
*Katherine Hausrath*  
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By: *Katherine Hausrath*  
Katherine Hausrath, NRDP Attorney

Date: August 5, 2021 | 8:50:44 AM MDT