

CONSTRUCTION AND MAINTENANCE AGREEMENT

THIS CONSTRUCTION AND MAINTENANCE AGREEMENT (Agreement) is made this 17 day of MARCH, 2020 and is between the **WATER-USERS OF LATERAL DITCH 110, INCORPORATED**, a Colorado nonprofit corporation, whose address is 3127 D½ Road, Grand Junction, Colorado 81504, and the **CITY OF GRAND JUNCTION**, a home rule municipality City, whose address is 250 North 5th Street, Grand Junction, Colorado 81501. Collectively the Water-Users of Lateral Ditch 110, Inc. and the City shall be referred to as the "Parties."

RECITALS

- A. Water-Users of Lateral Ditch 110, Inc. is the owner and operator of *irrigation water supply* located in Mesa County, Colorado (collectively referred to as the "Ditch/Ditch Company/ Lateral Ditch 110/Irrigation Pipeline/Ditch Facilities"). The Lateral Ditch 110's Ditch Facilities include the bed, banks, access roads, pipes, culverts, embankments and related features or facilities, for the delivery and containment of irrigation water to Lateral Ditch 110's shareholders.
- B. The City proposes to construct and perpetually maintain a Sanitary Sewer Pipeline under a segment of the Ditch Facilities situated "*North of E Road, at Headgate ML #110, Grand Valley Irrigation Company's Canal, just east of 31 Road, west of 31¼ Road, and runs south to the Colorado River*", as part of the City's project known as River Bend Lift Station Elimination Plan, hereafter the "Project."
- C. All of the improvements that are reasonable or necessary to accomplish the objective of the Project according to the Plans and Specifications therefor shall be referred to herein as the "Improvements."
- D. The City desires to obtain the Lateral Ditch 110's approval of the design of the Project and secure the Lateral Ditch 110's consent to the construction of the Project and its related facilities.
- E. The City has obtained the consent of the underlying owner of the property where the Project is being built and an easement from such owner for the construction, operation, maintenance and repair of the Improvements. The City acknowledges that the easement obtained from the owner is subject to Lateral Ditch 110's claim of easement for its Ditch Facilities.
- F. The City desires to enter into an agreement with Lateral Ditch 110 regarding the perpetual maintenance and repair of the Improvements subsequent to the completion of construction.

NOW THEREFORE, in consideration of the Recitals above, and the mutual covenants and promises set forth below, Water-Users of Lateral Ditch 110, Inc. and the City agree as follows:

1. Plans and Specifications. The City has caused to be prepared certain plans and specifications for the Project known as River Bend Lift Station Elimination Plan hereafter referred to as the "Plans and Specifications." Water-Users of Lateral Ditch 110, Inc. has reviewed the Plans and Specifications, and approves of the same, subject to the following:

- a. The City warrants and represents to Lateral Ditch 110 that the Plans and Specifications have been created, developed and reviewed by Mr. Trenton Prall, City of Grand Junction Public Works Director, a licensed professional engineer, and are free from any material errors, defects or omissions, and are accurate and suitable for the construction and installation of the Project. Mr. Prall, employee of the City, and City may rely on the Colorado Governmental Immunity Act to establish and/or limit its liability under this paragraph to third parties.
- b. The City acknowledges and agrees that Lateral Ditch 110's review of the Plans and Specifications, including the review of the same by any consultant engaged by Lateral Ditch 110's for such purpose, is solely and only for the use and benefit of Lateral Ditch 110's and is not intended, nor shall it be construed to be or constitute Lateral Ditch 110's certification or acceptance thereof as accurate or sufficient, or to be or constitute a waiver, release or other limitation upon the City's warranty as set forth in paragraph 1.a. above, or a waiver, release or other limitation on Lateral Ditch 110's right to assert claims against the City or its consultants or engineers responsible for preparing the Plans and Specifications as a result of any material errors, omissions or defects therein.
- c. The City may not rely in whole or in part upon Lateral Ditch 110's or its consultant's review of the Plans and Specifications, or the approval of any portion thereof, as a basis to assert negligence or breach of contract, or comparative negligence, on the part of Lateral Ditch 110's or its engineer, or as a basis to assert any warranty, representation or other problems on the part of Lateral Ditch 110's or its consultant to the City with respect to the suitability or accuracy of the Plans and Specifications.

2. Consent. Subject to the terms and conditions of this Agreement, and conditioned on Lateral Ditch 110's approval, Lateral Ditch 110 consents to the City's design, construction and maintenance of the Project over, under and across the real property described on the Plans and Specifications, the area of which shall be hereinafter referred to as the "Project Area." The Parties acknowledge and agree that Lateral Ditch 110 is giving its consent without warranty, express or implied, as to the merchantability of Lateral Ditch 110's title to the Ditch Facilities in the Project area, or the suitability of the Ditch Facilities in the Project area for any use or purpose permitted under this Agreement.

3. Use of the Project Area. The use of the Project Area shall be solely for the construction, operation, repair and maintenance of the Improvements. The City acknowledges that Lateral Ditch 110 may need ingress and egress to the Project area both during and subsequent to construction for the purpose of inspecting construction, reviewing and inspecting the City's maintenance of the Project Improvements, and to provide for Lateral Ditch 110's administration of the delivery of irrigation to its shareholders.

4. Construction.

- a. The Work. The City shall perform, contract or engage, or obtain or otherwise provide for, all labor, materials, equipment, supplies, permits, licenses, rights-of-way or easements that are reasonable or necessary for the commencement and completion of the Project and all Improvements related thereto, including easements or rights-of-way for maintenance and repair thereof, in accordance with the Plans and Specifications, hereafter referred to as the "Work."
- b. Construction Schedule. The City shall coordinate all Work with Lateral Ditch 110, including the anticipated times, dates or points of construction requiring inspection by any governmental entity having jurisdiction over the Work, including the City.
- c. Commencement, Completion and Construction. All Work for the Project shall be completed as soon as is reasonably possible, but in no event later than March 15, 2020. The timing, sequence and staging of the Work shall be coordinated with Lateral Ditch 110 and shall be subject to Lateral Ditch 110's approval to assure that all Work does not interfere with Lateral Ditch 110's use, operation and maintenance of the Ditch/Canal facilities, and that the Project will be completed by the construction dates set forth above.
- d. Conditions of Construction.
 - i. All construction shall be strictly in conformance with the Plans and Specifications, shall be pursued with diligence and in a good and workmanlike manner, and shall comply with all laws, ordinances, rules, regulations and orders of any applicable governmental authority bearing on the performance of the Work, including any applicable building or construction codes. Any Work not conforming thereto shall be corrected by the City immediately at its sole expense.
 - ii. The City shall pay all costs, expenses, fees, or other disbursements which are reasonable or necessary for the performance of the Work in a timely manner.
 - iii. The City shall be solely responsible for all construction means, methods, techniques and sequences and procedures, subject to the City's obligation to coordinate with Lateral Ditch 110, and to complete all Work in

accordance with this Agreement. The City shall further be solely responsible for obtaining or contracting for all labor, materials, equipment, tools, machinery, utilities, transportation and other services necessary for the proper execution and completion of the Work, and shall be solely and absolutely obligated to pay any costs or expenses therefor.

- iv. The City shall ensure that all employees or subcontractors performing the Work shall at all times observe and conduct themselves in a disciplined and professional manner. The City shall not employ or engage any person, contractor or subcontractor, or suffer or permit the employment of any employee of any contractor or subcontractor that is unfit or not skilled for the task assigned to him/her. The City shall furthermore be responsible for initiating, maintaining and supervising reasonable safety precautions and programs in connection with the Work to prevent bodily injury, death or property damage to any employees, subcontractors or members of the general public, or damage to the Ditch Facilities or any property abutting the Ditch Facilities.
- v. The City shall not cause or suffer any mechanic's lien or other encumbrance to be placed upon the Project area, or any aspect of the Ditch Facilities in connection with the performance of the Work or any operation, repair and maintenance of the Improvements thereafter. In the event any mechanic's lien or other encumbrance is asserted or filed on the Project Area, the City shall as soon as is reasonably practical cause the removal thereof by bond under the Colorado Mechanic's Lien Act.
- vi. At all times during performance of the Work, the City shall keep the Project Area and the Ditch Facilities free from the accumulation of waste materials or rubbish. Upon completion of any Improvements, the City shall remove all waste material and rubbish from the Project Area and the Ditch Facilities, as well as all tools, construction equipment, machinery and surplus machinery and, to the extent that the City disturbs any Ditch Facilities or other property adjacent to the Improvements, to reasonably restore the land adjacent to the Ditch Facilities to the condition existing prior to the commencement of construction, except as is specifically provided in the Plans and Specifications.

e. Notice of Inspection; Covering of the Work. The City shall give Lateral Ditch 110 timely notice of readiness for inspection of any aspects of the Project Improvements or any features thereof that require inspection by any governmental entity having authority over the same, or on which Lateral Ditch 110 or its engineer requests inspection. For any aspect of the Work requiring inspection by the City or its engineers, the City shall furnish Lateral Ditch 110 with any required certificates of inspection, testing or approval. The conduct of any inspections, tests or approvals by Lateral Ditch 110 or its engineer shall not relieve the City from any obligation under this Agreement.

5. City's Obligation to Operate, Maintain and Repair.

- a. Agreement to Operate, Maintain and Repair. Following substantial completion of the Project, the City agrees at its sole cost and expense to perpetually maintain and repair the Improvements, including all features, facilities and structural components thereof, so that they function and perform according to their intended uses and according to the Plans and Specifications, and in such a manner that they do not unreasonably interfere with Lateral Ditch 110's use, operation, control and enjoyment of the Ditch Facilities and the delivery of irrigation to Lateral Ditch 110's shareholders, including any seasoning, testing and correctional work related thereto. All repairs, maintenance, seasoning and correctional work performed by the City shall be coordinated with Lateral Ditch 110, and shall be undertaken and completed during the non-irrigation season, and shall not interfere with Lateral Ditch 110's operation, maintenance and control or use of the Ditch/Canal Facilities.
- b. No Unreasonable Interference. The City's operation, maintenance and repair of the Improvements shall not unreasonably interfere with Lateral Ditch 110's use of the Project area or the operation, maintenance and repair of the Ditch/Canal Facilities related thereto. In further explanation of this subparagraph, the Parties agree as follows:
 - i. Irrigation Season. During the irrigation season (April 1 to November 1), the Parties agree that it shall be an unreasonable interference for the City's operation, maintenance and repair of the Improvements to be conducted below water level, or to affect the water flowing in that part of the Project Improvements affecting the flow of water to Lateral Ditch 110's shareholders, or to involve the excavation or penetration of the Improvements or the Ditch Facilities related thereto, in, under or upon the Project area, or to block or obstruct or close the passage of equipment, personnel or vehicles for any period in excess of eight (8) hours per day or for more than one (1) day per week or to cause or threaten structural failure or instability of the Ditch/Canal Facilities or the Improvements, except for emergency situations defined below.
 - ii. Non-irrigation Season. During the non-irrigation season (November 2 through March 31), Lateral Ditch 110 and the City shall coordinate their respective operations, maintenance or repairs to the Improvements and the Ditch Facilities related thereto so as to avoid any conflict in the respective activities of the City and Lateral Ditch 110 in regard to the operation, repairs or maintenance of the Improvements or the Ditch Facilities related thereto. All repair or maintenance work performed in the non-irrigation season shall be completed on or before March 15 of such year.
 - iii. Emergency Situations. An emergency situation shall be deemed to mean any event, including a break, leak or failure for any reason in the

Improvements or the Ditch Facilities related thereto that creates a danger to persons, property and/or the environment as reasonably determined by the City any governmental entity or agency having or asserting jurisdiction thereof or Lateral Ditch 110. In the event of an emergency situation, the City and/or Lateral Ditch 110 and/or other governmental entity or agency shall immediately undertake such action as is reasonable or necessary to commence repair of the Improvements or Ditch Facilities related thereto as the case may be, and to diligently pursue repair efforts so as to eliminate, minimize and reduce the actual or threat of loss or damage to persons, property and/or the environment.

- iv. Disagreements. In the event there is a disagreement as to whether or not the City's operation, maintenance or repair of the Project is or is not an unreasonable interference with Lateral Ditch 110's use, operation and maintenance of the Improvements or the Ditch Facilities related thereto, then either party may petition the Mesa County, Colorado District Court for a declarative determination of such issue.

6. Default and Remedies. Time is of the essence for the performance of the City's obligations pursuant to this Agreement. A default shall be deemed to have occurred on the part of the City in the event the City, including its agents, employees, contractors and consultants, shall fail or refuse to perform any task, duty or other obligation provided in this Agreement following ten (10) business days' written notice of such failure or refusal. In the event of a default on the part of the City, including its agents, employees or contractors, Lateral Ditch 110 may, in its sole and absolute discretion, and without limitation on any other remedies available to Lateral Ditch 110, undertake the following action:

- a. In the event of a default on the part of the City that shall cause or threaten any interruption in delivery of irrigation water to Lateral Ditch 110 shareholders, then Lateral Ditch 110 may undertake such self-help remedy as Lateral Ditch 110 deems reasonable or necessary to restore irrigation water deliveries to its shareholders, including, but not limited to, taking physical possession of the Project Area, or so much thereof as it necessary, and restore the same to a condition ready to receive and deliver irrigation water to Lateral Ditch 110 shareholders, which may entail the use of Lateral Ditch 110's personnel or equipment or the engagement of independent parties or contractor's to accomplish such purpose or objective;
- b. Undertake such actions as Lateral Ditch 110 determines reasonable and necessary to cure any nonperformance or noncompliance by the City, including but not limited to, taking physical possession of the Project Area and all material, equipment, tools and other things thereon to complete any or all portions of the Improvements, or the undertaking of seasoning, testing and corrective work to the Improvements, or the undertaking of repairs and/or maintenance thereto, which may entail the use of Lateral Ditch 110's personnel or equipment or the

engagement of independent parties or contractor's to accomplish such purpose or objective; and/or,

- c. To commence legal proceedings for the recovery of any sums due to Lateral Ditch 110, including compensatory damages and/or for injunction or specific performance as is appropriate in the circumstances. The recovery of sums due shall include, but not limited to, costs and expenses or any other fees paid or incurred by Lateral Ditch 110 in exercising its remedies hereunder, including Lateral Ditch 110's use of its own equipment and personnel, Lateral Ditch 110's internal administrative expenses and the fees and payments to any independent contractor or party engaged for the purposes and objectives described above.

7. Miscellaneous.

- a. Benefit. The terms of this Agreement shall inure to the benefit of and be binding upon the Parties and their successors, legal representatives and assigns.
- b. Legal Proceedings. In the event Lateral Ditch 110 or the City seek to enforce any term or provision of this Agreement by legal proceedings, then the prevailing party in such legal proceeding shall be entitled to recover its reasonable attorneys' fees and costs for the same.
- c. Notice. Whenever required hereunder, notice shall be deemed sufficiently given if in writing, upon mailing, United States mail, postage prepaid, certified and return receipt requested, to the Parties addresses set forth below:
- d. Integration. This Agreement is intended be the full, complete and integrated expression of the Parties' agreements in regard to the subject matter hereof, all prior agreements, negotiations and discussions being merged herein.

DATED the year and date first above written.

Lisa M. Pfaelzgraf

Arthur W. Albright
WATER USERS OF LATERAL DITCH 110

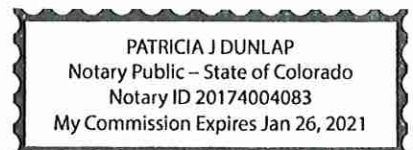
By Board Members authorized to sign for and bind the Board

STATE OF COLORADO, COUNTY OF MESA)

The foregoing Construction and Maintenance Agreement was acknowledged before me this 17 day of March, 2020 by Lisa M. Pfaelzgraf and Arthur W. Albright

Witness my hand and official seal. *Patricia J. Dunlap*
Notary Public

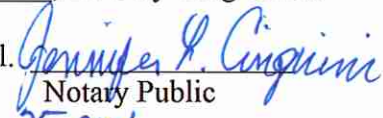
My commission expires: Jan. 26, 2021.




CITY OF GRAND JUNCTION, COLORADO
Greg Caton, City Manager

STATE OF COLORADO, COUNTY OF MESA)

The foregoing Construction and Maintenance Agreement was acknowledged before me this
23 day of March, 2020 by Greg Caton.

Witness my hand and official seal. 
Notary Public

My commission expires: May 25, 2021.

JENNIFER L. CINQUINI
NOTARY PUBLIC
STATE OF COLORADO
NOTARY ID #20084026733
My Commission Expires May 25, 2021