

GVI09MCD

TYPE OF RECORD:	PERMANENT
CATEGORY OF RECORD:	CONTRACT
NAME OF CONTRACTOR:	GRAND VALLEY IRRIGATION COMPANY
SUBJECT/PROJECT:	CONSTRUCTION AND MAINTENANCE AGREEMENT TO MAINTAIN THE EXISTING CROSSING OVER THE MESA COUNTY DITCH SITUATED A THE INTERSECTION OF D ½ AND 29 ROAD AS PART OF THE CITY'S 29 ROAD AND 1-70B INTERSECTION PROJECT
CITY DEPARTMENT:	PUBLIC WORKS AND PLANNING
YEAR:	2009
EXPIRATION DATE:	NONE
DESTRUCTION DATE:	NONE

CONSTRUCTION AND MAINTENANCE AGREEMENT

THIS CONSTRUCTION AND MAINTENANCE AGREEMENT (Agreement) is made this 4th day of February, 2009, and is between the **GRAND VALLEY IRRIGATION COMPANY**, a Colorado nonprofit corporation (GVIC), whose address is 688 26 Road, Grand Junction, Colorado 81506, and the **CITY OF GRAND JUNCTION**, a home rule municipality (City), whose address is 250 North 5th Street, Grand Junction, Colorado 81501. Collectively GVIC and the City shall be referred to as the "Parties."

RECITALS

- A. GVIC is the owner and operator of a system of irrigation canals and related facilities located in Mesa County, Colorado (collectively referred to as the "Canal Facilities"). The Canal Facilities include the canal bed, banks, access roads, pipes, culverts, embankments and related features or facilities, for the delivery and containment of irrigation water to GVIC shareholders. The Mesa County Ditch is a part of the Canal Facilities.
- B. The City proposes to modify and perpetually maintain the existing crossing over the Mesa County Ditch situated at the intersection of D ½ Road and 29 Road as part of the City's 29 Road and I-70B Intersection Project, known as Project No. 2004-F42200, 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 GVIC's approval of the design of the Project and GVIC's consent to the construction of the Project and its related facilities.
- E. The City represents that it 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 GVIC's claim of easement for GVIC's Mesa County Ditch.
- F. The City desires to enter into an agreement with GVIC for 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, GVIC and the City agree as follows:

1. Plans and Specifications. The City has caused to be prepared certain plans and specifications for the Project identified as 29 Road and I-70B Intersection Project, known as Project No. 2004-F42200 dated December 29, 2008, hereafter referred to as the "Plans and

Specifications.” GVIC has reviewed the Plans and Specifications, and approves of the same, subject to the following:

- a. The City warrants and represents to GVIC that the Plans and Specifications have been created, developed and reviewed by its in-house licensed professional engineer(s) and are free from any material errors, defects or omissions, and are accurate and suitable for the construction and installation of the Project. The 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 GVIC’s review of the Plans and Specifications, including the review of the same by any consultant engaged by GVIC for such purpose, is solely and only for the use and benefit of GVIC and is not intended, nor shall it be construed to be or constitute GVIC’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 GVIC’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 GVIC 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 GVIC or its engineer, or as a basis to assert any warranty, representation or other problems on the part of GVIC 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 GVIC’s approval, GVIC 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 GVIC is giving its consent without warranty, express or implied, as to the merchantability of GVIC’s title to the Canal Facilities in the Project Area, or the suitability of the Canal 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 GVIC will 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 GVIC’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 GVIC, 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, 2009. The timing, sequence and staging of the Work shall be coordinated with GVIC and shall be subject to GVIC approval to assure that all Work does not interfere with GVIC’s use, operation and maintenance of the Mesa County Ditch Line Canal, 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 GVIC, 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

f. Reimbursement of GVIC's Costs and Consulting Fees. The City agrees to reimburse GVIC for reasonable out-of-pocket or internal administrative costs it incurs to review the Plans and Specifications, to develop this Agreement and for ongoing observation, inspection and consultation in connection with the construction of the Project, whether requested by the City or initiated by GVIC. Such costs shall include fees charged to GVIC by its consulting engineer and legal counsel, and, in addition, the time for GVIC administrative staff. Compensation is agreed to be at the rate of \$55.00 per hour for GVIC administrative staff, legal services at \$200.00 per hour and GVIC's engineer at the prevailing rate of \$85.00 to \$110.00 per hour. The City shall reimburse GVIC for such costs within thirty (30) days following GVIC's submittal of an invoice for the same, attaching supporting invoices and documentation. The City's obligation to reimburse GVIC hereunder shall not exceed \$7,000.00.

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 interfere with GVIC's use, operation, control and enjoyment of the Mesa County Ditch and the delivery of irrigation to GVIC's shareholders, including any seasoning, testing and correctional work related thereto and the removal of trash accumulation caused by the Improvements. All repairs, maintenance, seasoning and correctional work performed by the City shall be coordinated with GVIC, and, except for trash removal which shall be conducted during the irrigation season, shall be undertaken and completed during the non-irrigation season, and shall not interfere with GVIC's operation, maintenance and control or use of the Canal Facilities.

b. No Unreasonable Interference. The City's operation, maintenance and repair of the Improvements shall not unreasonably interfere with GVIC's use of the Project Area or the operation, maintenance and repair of the 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 October 31), 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 GVIC's shareholders, or to involve the excavation or penetration of the Improvements or the Canal Facilities related thereto, in, under or upon the Project Area, or to block or obstruct or close the passage of equipment, personnel or vehicles upon any Canal Access Road 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 Canal Facilities or the Improvements, except for emergency situations defined below.

- ii. Non-irrigation Season. During the non-irrigation season (November 1 through March 31), GVIC and the City shall coordinate their respective operations, maintenance or repairs to the Improvements and the Canal Facilities related thereto so as to avoid any conflict in the respective activities of the City and GVIC in regard to the operation, repairs or maintenance of the Improvements or the Canal Facilities related thereto or the running of GVIC's domestic water right during the non-irrigation season. 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 Canal 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 GVIC. In the event of an emergency situation, the City and/or GVIC and/or other governmental entity or agency shall immediately undertake such action as is reasonable or necessary to commence repair of the Improvements or Canal 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 GVIC's use, operation and maintenance of the Improvements or the Canal Facilities related thereto, then either party may petition the Mesa County, Colorado District Court for a declarative determination of such issue.

6. Indemnity. To the extent allowed by law the City shall indemnify and hold GVIC harmless against any and all loss, liability, claim or damage, including, but not limited to, claims for bodily injury, property damage or death and workers' compensation and unemployment compensation claims, arising out of, resulting from or caused by the construction, installation, seasoning, testing, and maintenance or repair of the Improvements, including, but not limited to, any loss or liability resulting from errors, omissions or defects in the Plans and Specifications. This indemnity shall include all claims based on the acts or omissions of the City and its agents and employees, and all persons or entities engaged by the City for any aspect of the Project, including the creation of the Plans and Specifications and any contractor, subcontractor or other person or entity engaged for the purpose of constructing the Improvements or repairing, maintaining or operating the Improvements. This indemnity

shall also include GVIC's reasonable attorney's fees paid or incurred to investigate, negotiate, mediate, litigate or settle any claim, whether pending or threatened, indemnified hereunder. This indemnity shall further include any claims brought by members of the general public or adjoining property owners arising from or out of the construction of the Improvements.

7. 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 seven (7) 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, GVIC may, in its sole and absolute discretion, and without limitation on any other remedies available to GVIC, 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 GVIC shareholders, then GVIC may undertake such self-help remedy as GVIC 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 GVIC shareholders, which may entail the use of GVIC's personnel or equipment or the engagement of independent parties or contractor's to accomplish such purpose or objective;
- b. Undertake such actions as GVIC 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 GVIC'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 GVIC, 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, any consulting costs and expenses or any other fees paid or incurred by GVIC in exercising its remedies hereunder, including GVIC's use of its own equipment and personnel, GVIC's internal administrative expenses and the fees and payments to any independent contractor or party engaged for the purposes and objectives described above.

8. 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 GVIC 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:

 GVIC : 688 26 Road, Grand Junction, Colorado 81506
 City : 250 North 5th Street, Grand Junction, Colorado 81501
- 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.

**GRAND VALLEY
IRRIGATION COMPANY,**
a Colorado nonprofit corporation

CITY OF GRAND JUNCTION,
a home rule municipality

By Robert Raymond
Robert Raymond, President

By Laurie Kadrach
Laurie Kadrach, City Manager

STATE OF COLORADO)
) ss.
CITY OF MESA)

The foregoing instrument was acknowledged before me this 4th day of February, 2009, by Robert Raymond President for Grand Valley Irrigation Company.

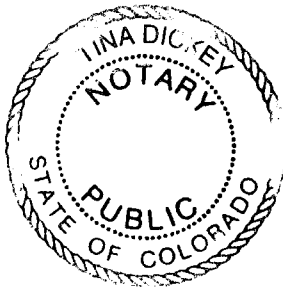
Witness my hand and official seal.
My commission expires: 04/09/2011.

Judy Lopez
Notary Public



My Commission Expires 04/09/2011

STATE OF COLORADO)
) ss.
CITY OF MESA)



The foregoing instrument was acknowledged before me this 30th day of January, 2009, by Laurie Kadrich, City Manager of the City of Grand Junction.

Witness my hand and official seal.

My commission expires: 06-27-09.

Tina Dickey
Notary Public