

OPERATIONS AND MAINTENANCE AGREEMENT REGARDING THE LYONS DITCH COMPANY, INC.

This Operations and Maintenance Agreement (“O&M Agreement”) is made by and between the Town of Lyons, a municipal corporation of the State of Colorado, (the “Town”), and the Lyons Ditch Company, a Colorado nonprofit corporation, acting by and through its Board of Directors (the “Ditch Company”), (collectively, “the Parties”), and is effective following proper execution by the Ditch Company and on the date of execution by the Town as indicated below.

RECITALS

WHEREAS, the Ditch Company, as a mutual ditch company has rights and obligations under Colorado law to operate and maintain for the benefit of its shareholders the Lyons Ditch No. 1 (the “Ditch”) and related diversion, transportation, storage and other structures and facilities and rights of way; and

WHEREAS, the Ditch crosses certain Town-owned property, including LaVern M. Johnson (Meadow) Park, described more fully in Exhibit A attached hereto via rights of way and easements owned and maintained by the Ditch Company; and

WHEREAS, the Town and the Ditch Company desire to cooperate and to foster a positive working relationship that will enhance the health, safety and welfare of the residents of the Town and of the Ditch Company’s service area; and

WHEREAS, the Town and the Ditch Company each own, control and operate facilities that the other party may wish to utilize from time to time for the purpose of conveying water; and

WHEREAS, both parties desire to enter into this O&M Agreement in order to document the rights and responsibilities of each party with regard to the facilities owned by the other.

NOW, THEREFORE, THE PARTIES AGREE AS FOLLOWS:

1. Purpose

The purpose of this O&M Agreement is to allow for the reasonable use of and access to the Lyons Ditch for irrigation purposes by each Party of certain facilities owned and operated by the other (“Facilities”), subject to the terms and conditions contained herein, including provisions facilitating maintenance of the facilities.

2. Facilities

The Facilities that are the subject of this O&M Agreement are those identified/depicted on Exhibit A attached hereto.

3. Responsibilities of the Parties

A. Town's Responsibilities

The Town shall be responsible for:

1. Assisting the Ditch Company in operating and maintaining the Ditch and associated infrastructure through LaVern M. Johnson (Meadow) Park in compliance with the Ditch Company's bylaws, requirements, policies and procedures, and in a manner that does not jeopardize the rights of the Ditch Company and its shareholders, including but not limited to the water rights associated with the Ditch. Examples include, but are not limited to, assisting with the removal of major obstructions within buried sections of ditch, inspections, jetting all buried sections of ditch east of Lavern Johnson Park on a biennial basis (unless otherwise agreed to), and restoring all public roadways, sidewalks, and maintained landscapes damaged by ditch operations.
2. Assigning one or more members of the Town's Park Staff to operate and maintain the Ditch headgate in LaVern M. Johnson (Meadow) Park, including checking the flow at the headgate regularly and making any necessary adjustments.
3. Cleaning up of Ditch Company Facilities after any use by the Town. Such uses of the Ditch Company Facilities by the Town shall be limited strictly to irrigation of parks. The Ditch Company shall charge the Town for any direct or indirect costs it incurs for any maintenance, repair and/or clean up as a result of the Town's use of such Facilities, where such costs exceed ordinary maintenance, repair and use costs.
4. Consulting with and obtaining written approval from the Ditch Company prior to any modifications or improvements to the Ditch Company Facilities not requested or required by the Ditch Company, or use of Ditch Company Facilities, as well as prior to the Town's incurrence of any costs related to any such modifications, improvements or use. Modifications and improvements not required by the Ditch Company include the installation of buried culverts to facilitate the installation and operation of public and private infrastructure.
5. Consulting with and obtaining written approval from the Ditch Company prior to the issuance of building permits when those permits would entail modification of ditch facilities and/or the ditch right-of-way.

B. Ditch Company's Responsibilities

The Ditch Company shall be responsible for:

1. Operating and maintaining the Ditch and associated infrastructure, including but not limited to the portion of the Ditch and any associated infrastructure past the LaVern M. Johnson (Meadow) Park entrance through the Town;
2. Assigning one or more members of the Ditch Company to communicate with the Town on the flow of the ditch and maintenance regarding the ditch. The goal is to alert Town Staff of any needs or issues. No adjustments to the headgate or irrigation pump pit should be made by the ditch company.
3. Cleaning up Town Facilities after any use related to operation and maintenance of the Ditch, headgate, and associated structures. The Town shall charge the Ditch Company for any direct or indirect costs it incurs for any maintenance, repair, and/or clean up of such Facilities that exceed ordinary costs usually incurred by the Town for performing such activities.
4. Consulting with and obtaining written approval from the Town prior to any modifications or improvements to the Ditch Company Facilities that are on Town property or in Town right of way.

C. It is the shared understanding of the Parties, that Neither Party shall be responsible for maintenance of any area on private property or the laterals connecting to private property and that said maintenance is the responsibility of the respective private property owners.

4. Term and Review

This Agreement shall be effective on the date indicated above and shall remain in effect until and unless terminated in accordance with Section 5 of this Agreement. The Agreement shall be formally reviewed by the Parties three (3) years after the effective date and every three (3) years thereafter. The Agreement may be amended only in writing executed by both parties. Upon such execution by the Parties, said written documents shall act as amending items to this Agreement. Any such amendments shall effectively extend the terms and considerations of this Agreement as set forth herein. All other terms of this Agreement shall remain the same. Key Ditch Company and Town Staff involved in the implementation of this O&M Agreement shall annually, or upon the request of either party, meet to informally review this Agreement.

5. Termination

A. It is mutually understood and agreed by the Parties that if either Party sells, assigns, conveys, leases or otherwise disposes of all of the Party's facilities and/or buildings that are the subject of this Agreement, this Agreement shall become null and void except by written agreement of the Parties.

B. This Agreement may be terminated by either Party by giving the other

Party at least sixty (60) days written notice, including an explanation of the reason(s) for termination; however, the Parties agree to meet within fourteen (14) days of receipt of the notice of termination to attempt to remediate any violation of this Agreement and to discuss any other reasons given for termination.

6. Notifications

- A.** In the event the Ditch Company encounters any problem with the water level in the Ditch, including but not limited to too little flow, too much flow causing flooding in some area or clogged headgate, Ditch Company officials shall notify Lyons Town Hall at 303-823-6622 as soon as practicable after discovery of the problem, and shall take such immediate steps as are necessary to rectify such problems. In the event the Ditch Company designee encounters any problem after hours, on a weekend or any other time when Town Hall is closed, the Ditch Company designee shall be authorized to contact the non emergency dispatch number to see if Town Staff may be available to solve the problem.
- B.** All headgate diversion and Ditch flow adjustments shall ultimately be the responsibility of the Ditch Company, and should be performed in coordination with and with assistance from the Town of Lyons Headgate Designees, and should be performed in such a manner as to not cause flooding or other damage or maintenance issues to other users.

7. 2020 Designees

For the Town: **Town of Lyons Park and Public Works Staff**
303-823-6622 (Mon-Fri 7:30-4:00)
Parks and Public Works Parks Director
970-617-3335 (after hours only)
Non-Emergency Public Works/Dispatch
303-441-4444

For the Ditch Co: **Ian Brighton**
Arn Hayden

8. Start-up/Shut-down Times

Although times may vary due to weather and other circumstances beyond the Parties' control, the approximate Start-up and Shut-down of the Ditch Company shall be as follows, subject to the terms and conditions of the final decree entered by the District Court on January 2, 1877, in Case No. 443 confirming the Ditch water rights:

Start up-April 1-15 of each calendar year

Shut down-Oct. 15-30 of each calendar year

9. Resolving Conflict

In the event of a conflict or dispute between the Town and the Ditch Company, the matter shall be reviewed by and between the Lyons Parks and Public Works Director (Town Liaison) and the Ditch Company President or designated Board Member. The staff of both Parties shall act in good faith to identify options or ways to accommodate the interests of both Parties. If the Town Liaison and the Ditch Company president or designees are unable to resolve the conflict or dispute, the matter shall be reviewed by and between the Lyons Town Administrator and the Ditch Company Board.

10. Town Position on Ditch Company Board

Nothing in this Agreement shall affect the Town's status as a 26% shareholder in the Ditch Company or its corresponding seat on the Ditch Company Board.

11. Assignment

Neither Party may assign any rights or obligations under this Agreement to any other organization without the written approval of the other Party.

12. Insurance, Liability and Immunity

A. Each party shall procure and maintain in full force and effect such insurance or self-insurance that will insure its obligations and liabilities under this Agreement, including workers' compensation, automobile liability, general liability, and property insurance.

B. Each Party assumes responsibility for the actions and/or omissions of its agents and its employees in the use of the other's facilities, and further each Party, to the extent authorized by the law, agrees to hold harmless and indemnify the other for such actions or omissions of their respective employees and/or agents. Nothing in this Agreement shall be construed as a waiver by either Party of any rights, immunities, privileges, monetary limitations, judgments, and defenses available to the Parties under common law or the Colorado Governmental Immunity Act, C.R.S. § 24-10-101 *et seq.*

13. No Employee Relationship

It is mutually understood and agreed by the Parties that employees, patrons, participants and clients of the Town shall not be, for any purposes, including payroll, construed to be employees or agents of the Ditch Company and as such, are not entitled to any of the benefits of Ditch Company employment. Likewise, it is mutually understood and agreed by the Parties that employees, patrons, participants and clients of the Ditch Company shall not be, for any purposes, including payroll, construed to be employees or agents of the Town and as such, are not entitled to any of the benefits of Town employment.

14. Venue

Venue for any and all legal actions arising out of this Agreement shall lie in the District Court in and for the County of Boulder, State of Colorado, and this Agreement shall be governed by the laws of Colorado.

15. Waiver

No waiver of any breach or default under this Agreement shall be a waiver of any other or subsequent breach or default.

16. No Third-Party Beneficiaries

This Agreement is for the sole benefit of and binds the parties, their successors and assigns. This Agreement affords no claim, benefit, or right of action to any third party. Any party other than the Town or the Ditch Company receiving services or benefits under this Agreement is only an incidental beneficiary.

17. Notices

All notices and other communications under this Agreement shall be in writing. All such notices and communications shall be deemed to have been duly given on the date of service, if delivered and served personally, or served via facsimile on the person to whom notice is given; on the next business day after deposit for overnight delivery by a courier service such as Federal Express; or on the third day after mailing, if mailed to the party to whom payment and notice is to be given by first class mail, postage prepaid, and properly addressed as follows.

Lyons Ditch Company, Inc.
P.O. Box 472
Lyons, CO 80540
303-823-5519

Town of Lyons
432 5th Avenue
PO Box 49
Lyons, CO 80540
303-823-6622

19. Financial Obligations of the Parties

All of the parties' financial obligations under this Agreement are contingent upon appropriation, budgeting, and availability of specific funds to discharge those obligations. Nothing in this Agreement constitutes a debt, a direct or indirect multiple fiscal year financial obligation, a pledge of the parties' credit, or a payment guarantee by either party to the other.

20. Authority

The parties warrant that they have taken all actions necessary or required by their own procedures, bylaws, or applicable law, to authorize their respective signatories to sign this Agreement for them and to bind them to its terms.

President, Lyons Ditch Company
Ian Brighton

Lyons Town Administrator
Victoria Simonsen

Lyons Parks and Public Works Director
David Cosgrove