

**TOWN OF LYONS, COLORADO
RESOLUTION 2020-56**

**A RESOLUTION OF THE TOWN OF LYONS, COLORADO RATIFYING A LICENSE
AGREEMENT WITH THE HIGHLAND DITCH COMPANY FOR THE ST. VRAIN
STREAMBANK RESTORATION PROJECT**

WHEREAS, the Town of Lyons ("Town") is authorized to contract for performance of necessary public services; and

WHEREAS, the Town has received funding from the Federal Emergency Management Agency ("FEMA") and the U.S. Department Housing and Urban Development Community Block Grant Disaster Response ("CBDG-DR") funding to restore a portion of St. Vrain stream bank (the "Project"); and

WHEREAS, the Project will impact a portion of the Highland Ditch Company's ("Highland's") historical ditch easement; and

WHEREAS, the Highland requires a license agreement for a ditch crossing (the "Agreement") for the Town to use its easement area; and

WHEREAS, the Agreement obligates the Town to reimburse the Highland for costs incurred by the Highland due to the Project; and

WHEREAS, the expected costs to the Highland due to the project are expected to be minimal and below the Town Administrator's spending authority; and

WHEREAS, the timing of construction and the delayed drafting of the license agreement due to the Corona Virus Disease 2019 emergency required execution of the Agreement prior to the meeting of the Board; and

WHEREAS, the Town Administrator executed the First Amendment on behalf of the Town; and

WHEREAS, the Town of Lyons Board of Trustees desires ratify the execution of Agreement.

NOW, THEREFORE, BE IT RESOLVED BY THE BOARD OF TRUSTEES OF THE TOWN OF LYONS, COLORADO:

Section 1. The above recitals are hereby incorporated by reference.

Section 2. The Town Board of Trustees hereby ratifies the Mayor's decision to execute the Amendment on behalf of the Town in substantially the form attached as **Exhibit 1**.

Section 3. This Resolution shall take effect immediately upon adoption.

ADOPTED this 30th day of March 2020.

TOWN OF LYONS

By: 
Connie Sullivan, Mayor

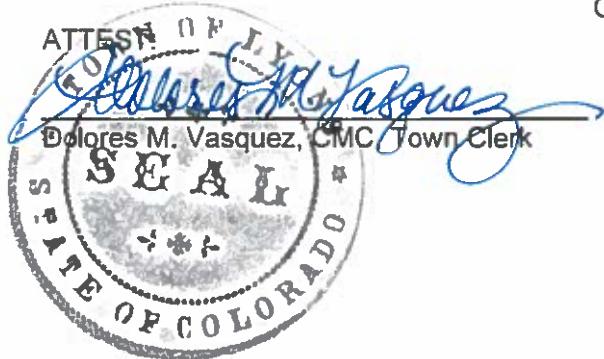


EXHIBIT 1

Highland Ditch Company License Agreement

HIGHLAND DITCH COMPANY

LICENSE AGREEMENT

1. PARTIES. The parties to this License Agreement are the Highland Ditch Company ("the Company") and the Town of Lyons, a statutory town of the State of Colorado ("the Licensee"). The Company and Licensee are jointly referred to as the **Parties**.

2. RECITALS. Licensee desires to obtain the permission of the Company to conduct bank stabilization work on the St. Vrain River ("River") immediately downstream of the Robert Schlagel Diversion Structure ("Structure"), located as described below. The Structure, associated ditch ("Ditch") and appurtenances, and associated historical prescriptive easement ("Easement") are owned by the Company. The Company's rights within the Easement include, but are not limited to, the right to divert water by operating the Structure, to convey water in the Ditch and associated canals; the right to clean, maintain, repair, modify, replace and remove the Structure, Ditch and associated canals, as well as the property within the Easement, as needed; and rights of historic ingress and egress to the Easement for these purposes. The bank stabilization work will be located in the NW ¼ of Section 20, Township 3 North, Range 70 West, Sixth Principal Meridian, in Boulder, County, Colorado, near the intersection of Highway 66 and Highway 36. The Company agrees to permit the bank stabilization work by the Licensee, subject to the terms, conditions, covenants and agreements set forth in this License Agreement. Licensee agrees to abide by all the terms, conditions, covenants and obligations set forth herein.

2.1 FEMA. The Parties agree and acknowledge that the Company previously conducted its own bank stabilization work downstream of the Structure under a grant from the Federal Emergency Management Agency ("FEMA"). Licensee agrees that it removed some of the bank stabilization materials placed by the Company under the FEMA grant as part of a subsequent, unrelated project. The Parties agree that the indemnification provisions of this Agreement, as set forth in Paragraph 6.1 below, are intended to address any adverse consequences of Licensee's activities with respect to the Company's FEMA grant, including the prior actions described in this paragraph and the bank stabilization work described herein.

3. GRANT OF RIGHT OF CONSTRUCTION. Pursuant to the terms of this License Agreement, Licensee is granted a license to conduct bank stabilization work pursuant to the plans and specifications approved by the Company and attached hereto as **EXHIBIT A** ("the Project"). The Company's review of the plans and specifications is solely for its own benefit and creates no obligation or acceptance of responsibility on or by the Company except as set forth herein.

4. CONSTRUCTION STANDARDS. The facilities constructed or installed by Licensee as described in **EXHIBIT A** shall be constructed and installed in a good and workmanlike manner in accordance with the designs, specifications, and requirements set forth in **EXHIBIT A**, the terms and conditions of this License Agreement, and the following:

4.1 Nothing herein shall obligate the Company to incur expenses as part of the Project.

4.2 Where compacting of earth materials is required around structures, the materials shall be compacted to standards required by the Company and as specified in **EXHIBIT A** and herein.

4.3 Except as modified by **EXHIBIT A**, all portions of the Easement and of the River bottom, sides, and banks which are disturbed by the process of the Licensee's construction shall be restored to their original condition and all other facilities appurtenant to the Structure and the Ditch shall be

replaced in a condition at least equal to the condition of such facilities and appurtenances prior to the commencement of work permitted by this License Agreement.

4.4 Licensee shall notify the Company at least five (5) days preceding the date of commencing any construction work pursuant to this License Agreement. Licensee will inspect all work during construction permitted by this License Agreement. The Company is permitted to inspect the installations during construction and may inspect the installations upon completion. The Company's right to inspect in no way relieves Licensee of its liability for improper construction. The Company's inspection is solely for the benefit of the Company and creates no obligation on behalf of the Company. Upon completion, Licensee shall provide the Company with "as-built drawings" completed and certified by Licensee that the construction complies with this License Agreement and the aforementioned plans and specifications. Licensee will also provide a construction completion report including daily construction reports, materials testing results as appropriate, and construction photos. The engineer of record shall stamp the report certifying that the Project was completed substantially in accordance with the approved plans and specifications set forth in Exhibit A.

4.5 Licensee agrees to obtain, comply with, and to pay for the cost of any permits required by any governmental authority or agency. To the extent allowed by law, Licensee shall indemnify the Company for any and all costs, damages, fines and fees, including reasonable attorneys' fees incurred by the Company as a result of Licensee's failure to obtain such permits or approvals or failure to comply with all applicable permits, laws and regulations.

5. LIQUIDATED DAMAGES. The Project shall be constructed, maintained, repaired and replaced in such a manner so as not to interfere with the flow of water to the Company's shareholders and other users of water delivered from the Company's system. To the extent construction of the Project impairs the Company's ability to deliver water, Licensee shall be responsible for the carriage of water while Licensee constructs, maintains, repairs or replaces the Project.

5.1 Licensee agrees that the construction permitted hereunder shall proceed with reasonable diligence from the initiation of such construction to its completion. Licensee's construction shall not impair the Company's ability to deliver water to shareholders and contract water users between April 15 and September 30, 2020. If the Company cannot deliver the full demand for water to shareholders and contract water users between April 15 and September 30, 2020 due to Licensee's construction, Licensee shall provide wet water of a quality suitable for agricultural irrigation at the Robert Schlagel Diversion Structure in an amount sufficient to fulfill the daily demand of said shareholders and contract water users.

5.2 There shall be no refund of any fees paid by the Licensee to the Company. The Parties specifically agree that the Company's shareholders are third party beneficiaries of this License Agreement.

5.3 The Parties agree that, as of the date of this License Agreement, the remedy set forth in Paragraph 5.1 above is a reasonable remedy for the presumed actual damages.

5.4 Upon completion of the Project, the Licensee agrees to pay reasonable and documented damages including loss of crops and other reasonable damages to the Company, provided the Licensee is the proximate cause of an inability to deliver water due to maintenance, repair, replacements or failure to maintain, to repair or to replace the Project.

6. REIMBURSEMENT OF EXPENSES.

6.1 Licensee understands that the Company constructed the Structure and related

appurtenances, including original bank stabilization materials, under a grant from FEMA. Licensee acknowledges that FEMA may require the Company to reimburse FEMA for some or all of the funds provided for construction of the Structure and related appurtenances as a result of Licensee's construction of the Project. To the extent that FEMA requires such reimbursement from the Company, Licensee agrees to reimburse the Company for any such FEMA demand and related costs to the extent needed to place the Company in the same financial position it occupied prior to commencement of the Project. In addition, Licensee shall provide in or with its construction completion report, as described in Paragraph 4.4, a description of the disposition of any existing bank stabilization materials, along with any receipts related to such disposition, as may be required by FEMA.

6.2 Statements for the costs chargeable to Licensee hereunder will be forwarded to Licensee and the same shall be paid to the Company within 45 days after the billing date. If payment has not been received by the Company within 45 days, Licensee shall have breached this License Agreement and Company may institute legal proceedings to collect the amount due and owing. In such proceeding, Company shall be entitled to its costs and reasonable attorneys' fees from Licensee.

7. MAINTENANCE.

7.1 Licensee specifically agrees and pledges to maintain, repair, and replace the Project as described in EXHIBIT A so as not to require the Company to maintain, repair or replace it. If Licensee fails to properly maintain, repair or replace any portion of the Project for which it is responsible after ten (10) days' notice of the need for same, Company may, at its option, conduct its own maintenance, repair or replacement, and Licensee shall reimburse Company for the cost of such work within thirty (30) days. In no way shall the Company be obligated to maintain any aspect of the Project. In the event Licensee fails to maintain, repair or replace any portion of the Project, it shall be held liable for any loss, damage or injury to Company. If the Company conducts its own maintenance, repair or replacement, it does not waive the right to hold Licensee liable for damages caused by Licensee's failure to maintain, repair or replace.

7.2 In the event of an emergency, the Company or Licensee may conduct maintenance or repair immediately, giving notice to the other party as soon as possible at the emergency contacts identified in paragraph 12. If the Company conducts emergency work, it shall be reimbursed for the reasonable and documented cost of the work. Under no circumstances shall the Company be responsible or held liable for damages to the Project resulting from non-negligent maintenance or repair of the Structure and/or Ditch.

7.3 The Company retains all rights in the Easement. Licensee hereby grants to the Company the right to access the Project during construction as needed to exercise the Company's rights in the Easement. After construction is complete and to the extent that Licensee uses gates or locks to restrict access to the Project, Licensee shall make access to the Project available to Company personnel and/or agents. If Licensee fails to provide such access, the Company shall have the right to force entry into the area of the Easement as reasonably needed.

8. WARRANTY. To the extent permitted by law, Licensee warrants that the construction of the Project will allow the Company to divert and transport water without additional seepage or transit loss than has historically occurred. If the Project increases seepage losses in the Structure, the Licensee agrees to repair the Project to prevent such additional loss.

9. LIABILITY AND INDEMNIFICATION.

9.1 By virtue of entering into this License Agreement, the Company: (1) assumes no liability for use, operation, or existence of the Project; and (2) assumes no additional responsibilities or obligations related to Licensee's future or additional activities in the area described in EXHIBIT A which are required by this License Agreement.

9.2 The Company shall not be liable for damage to the Project from reasonable operation, maintenance, repair or improvements to the Structure, Ditch or Easement, or from flooding or excess water, even if caused by, contributed to, or as a result of any of the Company's non-negligent operations.

9.3 To the extent permitted by law, Licensee agrees to indemnify and hold harmless the Company, from all claims and liability for damage or injury to property or persons arising or caused directly or indirectly by Licensee's construction, restoration, maintenance of, or failure to maintain, the Project and Licensee's occupancy and use of the area.

10. EASEMENT RIGHTS. The License granted to Licensee herein in no way restricts the Company's right to the use of its Easement to construct, operate, or maintain all existing structures and facilities in or appurtenant to the Structure and Ditch. Other than those specifically set forth herein, no rights, including water rights, are conveyed to the Licensee by this License Agreement.

11. TERM. If construction and/or the Project is not completed by December 31, 2020, this License Agreement expires and is of no force or effect.

12. NOTICES. Any notice required or permitted by this License Agreement shall be in writing and shall be deemed to have been sufficiently given for all purposes if sent by certified or registered mail, postage and fees prepaid, addressed to the party to whom such notice is intended to be given at the address set forth below, or at such other address as has been previously furnished in writing to the other party or parties. Such notice shall be deemed to have been given when deposited in the U.S. mail.

COMPANY:

Highland Ditch Company
PO Box 649
Mead, CO 80542-0649
Phone: 970-535-4531

COPY TO:

Highland Ditch Company
4309 State Hwy 66
Longmont, CO 80504

LICENSEE:

Towns of Lyons
Attn: Town Administrator
432 5th Avenue
P.O. Box 49
Lyons, CO 80540
303-823-6622

COPY TO:

Town Attorney
Kissinger & Fellman, P.C.
3773 Cherry Creek North Dr.
Suite 900
Denver, CO 80209
303-320-6100

13. GOVERNING LAW AND VENUE. This License Agreement shall be governed by and construed in accordance with the laws of the State of Colorado. Venue for any dispute arising hereunder that results in litigation shall be in the District Court in and for the County of Boulder, Colorado.

14. WAIVER OF BREACH. The waiver by any party to this License Agreement of a breach of any term or provision of this License Agreement shall not operate or be construed as a waiver of any subsequent breach by any party.

15. **RECORDATION.** This License Agreement shall be recorded by and at the total cost of Licensee and shall be binding on any successors of the Parties thereafter. All portions of **EXHIBIT A** shall also be recorded.

16. **EXHIBITS.** All exhibits referred to in this License Agreement are, by reference, incorporated in this License Agreement for all purposes.

17. **REMEDIES.** This License Agreement may be enforced by specific performance, including mandatory injunctive relief, and damages. If any party breaches this agreement, the breaching party shall pay all of the non-breaching party's reasonable attorney's fees, expenses, and costs in enforcing this License Agreement if there is a judgement in a court of law.

18. **ENTIRE AGREEMENT.** This License Agreement represents the entire agreement of the parties with respect to the subject matter covered herein. All negotiations, considerations, representations and understandings between the parties are incorporated and merged herein. This License Agreement may be modified or altered only by the parties' written agreement.

Dated: _____.

HIGHLAND DITCH COMPANY

By _____

As President

By: _____

As Superintendent

ATTEST:

Its: _____

THE TOWN OF LYONS, COLORADO

Print Name:

Connie Sullivan

Its:

