

## DITCH CARRYING CAPACITY EASEMENT DEED AND AGREEMENT

WHEREAS, the City of Alamosa, Colorado (“Grantee”), and the Hickory-Jackson Ditch Company (“Grantor”) entered into an agreement dated May 26, 1983, to allow Grantee to use the Alamosa Ditch, otherwise known as the Hickory-Jackson Ditch (the “Ditch”), owned by Grantor, to remove storm water from the City of Alamosa; and,

WHEREAS, Grantee has grown and developed to require additional storm water removal than contemplated in the 1983 Agreement, in particular to the west of the location covered by the 1983 Agreement;

NOW THEREFORE, Grantor for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, hereby sells, conveys, and quitclaims to Grantee a perpetual, non-exclusive, easement for use of the carrying capacity (“Ditch Capacity”) of a defined segment of the Alamosa Ditch, otherwise known as the Hickory-Jackson (the “Ditch”) to convey storm water (the “Easement”) arising within the City of Alamosa upon the following terms and conditions:

1. *Location.* The Easement encompasses the Ditch Capacity in the Ditch from its intersection with County Road 107 South (western end of segment) to the intersection with the south line of the North ½ Section 14, Township 37 North, Range 10 East of the New Mexico Principal Meridian. See map attached as EXHIBIT A.
2. *Use.* Grantee shall have the right to use the Easement to carry storm water from the City of Alamosa to the eastern terminus of the Easement, from which point Grantee may further convey the storm water to the Rio Grande through other structures not the subject of this Easement, or Grantor may, at its option and if not prohibited by the division engineer or other authority having jurisdiction, further use the storm water in its system. Grantee and its agents, employees and contractors shall have full right and authority to enter the Easement at all times for the purposes set forth in this Easement Deed and Agreement, including to make the modifications listed in paragraph 3, to repair and maintain the Ditch, to restore the capacity of the Ditch, and to use the Easement for reasonable access for personnel and equipment. Non-use or a limited use of the Easement by Grantee shall not prevent Grantee from thereafter making use of the Easement to the full extent authorized. This is a non-exclusive easement, and Grantor retains the right to use the Ditch in any manner that does not unreasonably interfere with Grantee’s use of the Easement as described herein.
3. *Modifications by Grantee to Facilitate Use of Easement.* Grantee shall have either the right or the obligation to make the following modifications to the Ditch in the Easement segment to facilitate its use to convey storm water, as follows:
  - a. Grantee shall provide a rip-rap lining of the Ditch at points of discharge of storm water.
  - b. Grantee may install a total of six (including existing discharge points) discharge points on the Ditch at locations to be determined by the Grantee, between Old Airport Road and County Road 107 S; however, should Grantor determine that the proposed location of a discharge line is reasonably

expected to cause physical damage to the Ditch, then Grantee shall either modify the discharge or relocate the proposed discharge line to a different location which will not cause such damage.

- c. Grantee may remove trees and willows along the Ditch banks.
- d. Grantee shall install measuring devices to measure its discharge to the ditch, and may meter discharges from the Ditch, so as to be able to monitor capacity in the Ditch, measure storm water introduced to the Ditch and to deliver such storm water out of the Ditch to the Rio Grande, with appropriate deductions for seepage and evaporation, if necessary to satisfy requirements by the state or division engineer. If Grantee undertakes any such measurement and delivery of storm water into and out of the Ditch, Grantee shall pay the cost of any engineering work and construction of structures reasonably deemed necessary by the Grantor to ensure that no injury accrues to Grantor by virtue of such measurement and delivery.

All such required or permitted modifications in the Ditch shall be done with good quality materials and in a workmanlike manner.

- 4. *Repair and Maintenance.* Grantee shall cut weeds on the tops and outside slopes of the Ditch, and shall spray the weeds on the Ditch, throughout the course of the Easement, all such maintenance shall be at the sole expense of Grantee, except if the Grantor requires certain chemicals to be sprayed other than those Grantee typically uses for weed control, in which case such particular chemicals shall be provided at the expense of Grantor. In addition, Grantee shall keep the Ditch reasonably free from all sediment and debris accumulating in the Ditch throughout the course of the Easement; provided, however, this work shall be scheduled by agreement of the parties so that it does not interfere with the flow of the ditch and so that the work will be completed before the irrigation season commences. Grantee shall promptly repair any damage to the Ditch caused by diversion of storm water into the Ditch, damage resulting from the Ditch overflowing because of diversion of storm water into the Ditch, and any damage to pasture downstream caused by winter freeze-ups.
- 5. *Ditch Capacity.* Within six months after full execution of this Easement Deed and Agreement, Grantee shall restore the capacity of the Ditch to at least 34 cfs between County Road 107 S and U.S. Highway 285 by removing vegetation and sediment. Throughout the course of the Easement, Grantee shall monitor capacity in the Ditch, and the combined stormwater pumping rate from all of Grantee's discharge locations shall not exceed 18 cfs.
- 6. *Assurance of Water Quality.* Grantee will perform a water quality analysis of the water in the Ditch either at each discharge point or, at Grantee's option, at a point downstream of Grantee's last introduction of storm water and upstream of any of Grantor's subsequent diversions out of the Ditch once every three years after a storm water event to test the storm water introduced into the Ditch for the list of water quality standards set forth in the CDPHE Water Quality Control Commission Applicable Standards for Irrigation Water and four additional parameters: total ammonia, total nitrogen, chlorine and sulfide. In the event Grantee's storm water discharge causes the water in the ditch to exceed applicable CDPHE standards, Grantee shall propose a method to bring the storm water discharge into compliance within four months of the test showing the

exceeded parameter. Grantee shall provide engineering reasonably acceptable to Grantor assessing the proposed solution, and will implement the solution within one month of Grantor's approval of the solution, or diligently pursue such implementation until complete. In the event the storm water discharge cannot be brought within the CDPHE standards, the Easement will terminate one year from the date the determination is made that the discharge cannot be brought into compliance.

7. *Grantor's modification to Ditch location.* The location of the Ditch may be changed by Grantor in its discretion and at its expense. If any change in location of the Ditch requires Grantee to incur costs to modify its discharge points, Grantor shall pay all such costs unless the change to location of the Ditch is occasioned by requirement of any authority having jurisdiction, in which case Grantee shall bear all costs relating to relocation of its discharge points, and shall share proportionately in the cost of relocating the segment of the Ditch encompassed by the Easement proportionately. If measuring devices have been installed, the costs shall be in the same proportion as the amount of storm water discharged to the Ditch over the preceding five full calendar years bears to the total amount of water (including storm water and irrigation water) carried by the ditch over that five year period. If no or insufficient measuring devices have been installed to make the determination referenced above, then the following shall apply: 1) If the change in location is west of Highway 285, the City's share shall be the number of discharge points the City has west of Highway 285 multiplied by the ratio 3/34; 2) if the change in location is east of Highway 285, then the City's share shall be the number of all city discharge points multiplied by the ratio 3/34.
8. *Waiver of Storm Water Fees.* Grantee agrees to waive any storm water fees which would otherwise be imposed on any of the property identified in the attached Exhibit B that, if and when developed, drain into the Ditch. Grantee currently imposes no such fees, and as used herein "storm water fees" does not include Grantee's existing requirement of developers to install and maintain adequate storm water facilities as a condition of development.
9. *Indemnification.* Grantee shall defend, indemnify and hold harmless the Grantor and its officers, directors, employees, agents, successors and permitted assigns from and against all losses, damages, liabilities, deficiencies, actions, judgments, fines, costs or expenses of whatever kind, including reasonable attorneys' fees ("Losses") arising out of or resulting from any third party claim, suit, action or proceeding arising out of or resulting from: (a) bodily injury, death of any person or damage to real or tangible, personal property resulting from storm water discharge into the Company's ditch and any negligent acts or omissions of the City; and (b) the City's material breach of any representation, warranty or other obligation of the City under this Agreement.
10. *Successors and Assigns Bound.* The Easement shall run with the land, both the Ditch and the land encompassed within the boundaries of the City of Alamosa, and shall be appurtenant to such land and the Ditch. The Easement may not be assigned by Grantee.

11. *No Waiver.* No amendment, modification or supplement of this Easement shall be binding on Grantee unless made in writing and executed by an authorized representative of Grantee. No waiver by Grantee of any provision hereof shall be deemed to have been made unless made in writing and signed by an authorized representative of Grantee. No delay or omission in the exercise of any right or remedy accruing to Grantee upon any breach shall impair such right or remedy or be construed as a waiver of any such breach or of a subsequent breach of the same or any other term, covenant or condition herein contained.

12. *Entire Agreement.* This Easement incorporates all agreements between the parties as to the subject matter of this Easement and no prior representations or statements, verbal or written, shall modify or supplement the terms of this Easement. This Easement consists of the document entitled "Ditch Carrying Capacity Easement Deed and Agreement", Exhibit A containing a map and description of the Easement, and Exhibit B described in paragraph 9 above. No other exhibit, addendum, schedule or other attachment (collectively "Addendum") is authorized by Grantee, and no Addendum shall be effective and binding upon Grantee unless executed by an authorized representative of Grantee.

IN WITNESS WHEREOF, Grantor and Grantee have executed this Easement Deed and Agreement this \_\_\_\_ day of \_\_\_\_\_, 2021.

CITY OF ALAMOSA

BY \_\_\_\_\_ (date) \_\_\_\_\_  
Heather Brooks, City Manager

ATTEST \_\_\_\_\_  
Holly C. Martinez, City Clerk

HICKORY-JACKSON DITCH COMPANY

By \_\_\_\_\_ (date) \_\_\_\_\_  
Jeff Martinez, President

ATTEST \_\_\_\_\_  
\_\_\_\_\_, Secretary