

**TOWN OF TIMNATH, COLORADO
RESOLUTION NO. 38, SERIES 2016**

**A RESOLUTION APPROVING THE CROSSING AGREEMENT WITH CACHE LA
POUDRE RESERVOIR COMPANY FOR HARMONY ROAD**

WHEREAS, the Town Council of the Town of Timnath (“Town”) pursuant to C.R.S. § 31-15-103, has the power to pass resolutions; and

WHEREAS, the Town of Timnath and Cache la Poudre Reservoir Company (the “Company”) wish to enter into an agreement for the construction and long term maintenance of the Timnath Reservoir Outlet Canal crossing of Harmony Road, more particularly described in **Exhibit A** (agreement); and

NOW, THEREFORE, BE IT RESOLVED BY THE TOWN COUNCIL OF THE TOWN OF TIMNATH, COLORADO as follows:

Section 1. Approval

The Agreement is hereby approved in substantially the form as attached hereto, subject to technical or otherwise non-substantive modifications, as deemed necessary by the Town Manager in consultation with the Town Planner, Engineer, Legal Counsel, and other applicable staff or consultants

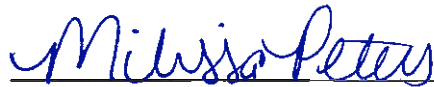
INTRODUCED, MOVED, AND ADOPTED BY THE TOWN COUNCIL OF THE TOWN OF TIMNATH, ON MAY 10, 2016.

TOWN OF TIMNATH, COLORADO



Jill Grossman-Belisle, Mayor

ATTEST:



Milissa Peters, CMC
Town Clerk



EXHIBIT A

AGREEMENT

DRAFT

**AGREEMENT
(TOWN OF TIMNATH – HARMONY ROAD)**

THIS AGREEMENT, is entered into this ____ day of _____, 2016, between the Cache la Poudre Reservoir Company, a Colorado mutual reservoir company ("Company"), and the Town of Timnath, a Colorado municipal corporation ("Town").

RECITALS

WHEREAS, the Company is the operator of a canal or ditch commonly known as the Timnath Reservoir Outlet Canal ("TROC"); and

WHEREAS, the TROC presently exists and conveys water beneath Harmony Road via a single box culvert located in the SW ¼ of the SW ¼ of Section 36, Township 7 North, Range 68 West, 6th P.M.; and

WHEREAS, the Town is constructing improvements to Harmony Road which will require the expansion of Harmony Road over the TROC, the removal of the existing box culvert, and the installation of ~~three~~ new box culverts in the TROC under the expanded Harmony Road ("Project"); and

WHEREAS, the Company is willing to allow for the construction of the Project in and around the TROC in accordance with the terms and conditions of this Agreement.

NOW, THEREFORE, in consideration of _____ (\$ _____) paid to the Company by the Town, and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties agree as follows:

AGREEMENT

1. **Recitals.** The foregoing recitals are incorporated herein as if fully set forth.
2. **Project.** Detailed plans and specifications that describe and depict the location of the Project ("Project Area") and the scope of work for the Project are attached as Exhibit A and incorporated herein by this reference as if set forth fully (the "Project"). The Project shall be constructed in accordance with the plans and specifications and the plans and specifications shall not be materially altered without the written approval of the Company, which approval shall not be unreasonably withheld or delayed.

3. Grant of Easement. The Company grants ~~a to the~~ temporary easement for the construction of the Project and a perpetual easement for access to and maintenance of the box culverts and associated structures constructed as part of the Project (“Improvements”), and ongoing use of the one box culvert planned for pedestrian access and a trail. It is understood and agreed that during construction of the Project the Company reserves the right to use the TROC for the delivery of water which deliveries shall be accommodated and delivered through the Project Area as set forth in the plans and specifications, and once the Project is completed the Company shall continue to use the Project Area and the Improvements for purposes including continued delivery of water through the TROC, as well as maintaining, cleaning, repairing and operating the TROC.
4. Approval of Construction Plans by the Company. Through the execution of this Agreement, and subject to paragraph 2 above, the Company is approving the plans and specifications described and depicted as Exhibit A. The Town agrees to reimburse the Company for the reasonable expenses incurred in preparing this Agreement and reviewing the plans and specifications, which costs shall be deemed to have been paid upon tender of the consideration set forth above. The proposed timeline of construction of the Project is from _____ to _____. In no event shall construction of the Project extend beyond _____. The Company’s review and any approval of the plans and specifications and the contemplated work and any supervision of the work by the Company shall not constitute an engineering review or supervision and does not affect, release or limit the Town from any obligation, responsibility or liability to conduct such work in accordance with all applicable governmental rules and regulations, or for any damages that may result from the design and construction of the Improvements. The Town and the Company agree to cooperate and coordinate in good faith during construction of the Project to ensure continued water deliveries and the expeditious and efficient completion of the Project. —
5. TROC and Improvement Maintenance by Company. As part of the consideration for this Agreement, the Town agrees to be solely responsible for the maintenance of the Improvements and the Project Area in perpetuity upon completion of the construction of the Project. Such maintenance shall include but is not limited to assuring the continued bank stability in the Project and assuring the continued structural integrity and performance of the Improvements including the removal of all debris and trash in and around the Improvements as necessary to assure the performance and safe operation of the Improvements. The foregoing notwithstanding, the Company shall have full power to continue to operate, maintain, alter, enlarge, clean and manage the TROC, including the Improvements as necessary due to the Town’s failure to adequately maintain the Improvements and Project Area as if this Agreement had not been made, and any expense or damages caused by the Improvements to the Town shall not be chargeable to the Company, except as to any damage as may be caused by the Company's negligence. The Company agrees that except in emergencies, it will first provide the Town with notice of the needed maintenance and a

reasonable time to respond, before undertaking the work itself. It is specifically agreed that normal maintenance and repair activities in accordance with standards of reasonable care, including the operation of machinery for such purposes upon the TROC right of way and within the TROC itself, shall not constitute negligence. In the event, however, that any such action on the part of the Company could reasonably be expected to affect the Town, the Company agrees to give prior notice to the Town, and to cooperate to avoid injuries or damages to the structures. In the event any sum is expended by the Company for repair or maintenance of the TROC within the Project Area, which repair or maintenance is necessary because of the Town's acts or omissions in constructing the Improvements or because of the existence of the Improvements or because of any malfunction of the Improvements, the Town shall reimburse the Company for such expense. Determination of whether repair or maintenance is necessary, and whether an emergency exists, shall be at the reasonable discretion of the Company. In the event that the company finds it necessary to perform emergency repairs to the TROC, either now or at any future time, the Company shall be wholly without liability for damages to the Town as the result of the performance of such repairs, except as to such damage as may be caused by the Company's negligence.

6. No Disturbance to Company Operations. Construction of the Project shall be entirely without disturbance by Town to the Company's operation of the TROC for diversion and delivery of water, unless permission in writing is first received from the Company for such disturbance. The Town shall at no time cause the delivery of water be interrupted for any reason without the Company's prior approval. Subject to appropriation and legal availability of funds, the Town expressly agrees that it shall be liable to the Company and/or the Company's shareholders for actual damages for any unauthorized disturbance of the flow of water through the TROC without the Company's prior written permission. Upon completion of the Project or after completion of any maintenance or repair of the Improvements by the Town, the Town shall clean the Project Area and any other affected areas of the TROC and will cause the TROC bank area to ~~be placed~~ in the same or better condition than it was before the activity began, including the compacting of any disturbed soils. ~~Any portion of the TROC bank disturbed by the Town shall be lined with rock to within one (1) foot of the top of the bank.~~ Following construction of the Project, any subsequent repairs, or maintenance that might affect the Company's use and operation of the TROC shall occur during a time period when the affected portion of the TROC is not being used to carry water, and be completed before such use begins, unless the Town obtains the Company's prior written approval, or unless emergency conditions dictate otherwise. Subject to appropriation and legal availability of funds, the Town expressly agrees that it shall be liable to the Company and/or the Company's shareholders for actual damages for any unauthorized disturbance of the flow of water through the TROC, to the extent that such disturbance is caused by or due to the activities of the Town or those working on its behalf.

7. Construction Costs. Construction of the Project and, maintenance and repair of the Improvements shall be entirely without cost to the Company. The Company's costs associated with the review of the plans and specifications and the preparation of this Agreement are deemed paid by the consideration for this Agreement; however, to the extent the Company is compelled to expend additional funds in the review of revised plans and specifications- or revisions to this Agreement, or for other unexpected reasons, the Town agrees to reimburse the Company for any such reasonable additional expenses.
8. The Town further understands and agrees as follows:
- a. Approval by the Company of the plans and specifications and the construction of the Project and related Improvements shall not constitute approval or authorization of existing or proposed drainage and/or stormwater improvements by the Town or others impacting the TROC and related or appurtenant structures. ~~including the Improvements.~~
 - b. The Town shall not install a fence, plant trees, brush or vegetation that obstruct access to the TROC or the Project Area, or construct any building within the TROC or Project Area unless written authorization is first received from the Company.
 - c. The Town shall not allow any other entity to install other construction improvements within the easement- granted, nor shall it add utility crossings or other equipment within the easement, without first obtaining the written permission of the Company to do so, which permission can be withheld at the Company's discretion.
 - d. If at any time the Improvements or any work by the Town on the Improvements causes any settling in the TROC or its embankments, or any part of the Project Area, the Town shall, upon notification from the Company, immediately make all repairs required by the Company at the Town's expense.
 - e. The existing ditch is unlined. Should any water seepage and/or leakage from the TROC occur as a result of Town's construction of the Project installation of the Improvements, upon notification from the Company, Town shall repair the TROC to stop the seepage and/or leakage to the satisfaction of the Company. In the event Town fails to perform such repair, the Company may perform such repair and Town shall reimburse the Company for any reasonable expenses incurred in repairing the TROC in order to stop the water seepage and/or leakage.
9. Enforcement Costs and Fees. In the event that any party institutes legal proceedings with respect to this Agreement or the enforcement thereof, the prevailing party shall be entitled

to court costs and reasonable attorneys' fees incurred by such party in connection with such legal proceedings. The Town's exposure to payment of attorney fees under this sub-section shall be subject to the limitations on local governments set forth in the Colorado Constitution and Colorado case law.

10. No Warranties. This Agreement, and any grant by the Company, is subject to all restrictions, reservations, rights-of-way, easements, documents or agreements existing or of record ~~in the Records~~ at the time this Agreement is recorded. The Company makes no representations or warranties (including, without limitation warranties of title) in or by this Agreement or any grant herein.
11. Binding Effect, No Assignment. This Agreement and all the terms and conditions thereof shall extend to and be binding upon the successors and assigns of each of the parties hereto. This Agreement shall not be assigned by the Town without the written consent of the Company.
12. Recording. Upon execution by the Parties, the Town shall promptly record this Agreement or an executed copy thereof with the Clerk and Recorder of Larimer County.
13. Notice. Any notice required or permitted hereunder shall be deemed effective when deposited in the United States mail, postage prepaid, certified mail, return receipt requested, and addressed to the party to whom notice is to be given, as follows:

If to Company: P O Box 104
Lucerne, CO 80646

If to the Town: Town of Timnath

or such other address as may be furnished to the other party by written notice.

14. Indemnification. Except as limited by Colorado law, the Town shall be liable for, and shall indemnify and hold Company, its shareholders, successors and assigns, harmless from any damages and expenses, including attorneys' fees, arising in connection with the exercise by the Town of its rights pursuant to this Agreement, including, but not limited to, any personal injuries, deaths, property damage, mechanic's liens or other claims and causes of action of any kind arising out of the Town's construction of the Project and the maintenance and repair of the Improvements by the Town or its employees or invitees, except to the extent caused by the negligence or intentional misconduct of the Company or its shareholders, employees, agents, contractors or subcontractors.

IN WITNESS WHEREOF, the parties have caused these presents to be duly executed by the proper persons, and have affixed their seals hereto on the day and year first above written.

THE CACHE LA POUDDRE RESERVOIR COMPANY

By: _____
Mike Hungenberg, President

ATTEST:

By: _____
Kenton Brunner, Secretary

TOWN OF TIMNATH

By: _____

Its: _____

ATTEST: (if necessary)

By: _____

Its: _____

DRAFT