

TOWN OF SUPERIOR
RESOLUTION NO. R-44
SERIES 2019

A RESOLUTION OF THE BOARD OF TRUSTEES OF THE TOWN OF SUPERIOR APPROVING A DITCH CROSSING AGREEMENT WITH SOUTH BOULDER & COAL CREEK IRRIGATING DITCH COMPANY AND BC LANTERNS ROCK CREEK, LLC

BE IT RESOLVED BY THE BOARD OF TRUSTEES OF THE TOWN OF SUPERIOR, COLORADO, as follows:


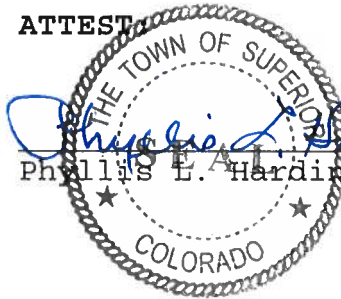
Section 1. The Ditch Crossing Agreement between South Boulder & Coal Creek Irrigating Ditch Company, BC Lanterns Rock Creek, LLC and the Town of Superior is hereby approved in the form attached hereto.

ADOPTED this 12th day of August, 2019.



Clint Folsom, Mayor

ATTEST


Phyllis E. Hardin, Town Clerk-Treasurer

**DITCH CROSSING AGREEMENT BETWEEN
SOUTH BOULDER & COAL CREEK IRRIGATING DITCH COMPANY,
BC LANTERNS ROCK CREEK LLC,
AND THE TOWN OF SUPERIOR**

THIS AGREEMENT is made this 12th day of August, 2019, by and between the South Boulder & Coal Creek Irrigating Ditch Company, a Colorado nonprofit corporation (the "Ditch Company"), BC Lanterns Rock Creek LLC, a Colorado limited liability company ("Developer"), and the Town of Superior, a Colorado statutory town ("Town") (collectively, the "Parties").

WHEREAS, the Ditch Company is the owner of real property described as Tract D, Rock Creek Ranch Filing No. 7B, County of Boulder, State of Colorado, identified as Boulder County Assessor's Parcel Number 157519406013 ("Ditch Company Property");

WHEREAS, the Ditch Company owns and operates the South Boulder and Coal Creek Ditch and First Extension Ditch (collectively the "Ditch") and associated water rights;

WHEREAS, the Ditch Company diverts water from South Boulder Creek through the Community Canal and thereafter delivers the water through the Ditch for use by its shareholders;

WHEREAS, the Ditch Company Property is a tract of land that is used by the Ditch Company to access, operate, maintain, repair, and replace a portion of the Ditch and related infrastructure for the delivery of water and includes a piped portion of the Ditch consisting of an underground pipeline running the length of the Ditch Company Property ("SBCC Pipeline");

WHEREAS, the Developer desires to extend water and reuse water pipelines across the Ditch Company Property and the SBCC Pipeline (the "Ditch Crossing");

WHEREAS, the Ditch Company is willing to permit construction of the Ditch Crossing subject to the terms and conditions set forth in this Agreement;

WHEREAS, after construction of the Ditch Crossing, the Town is willing to undertake continued maintenance obligations of the Ditch Crossing subject to the terms and conditions set forth in this Agreement.

NOW, THEREFORE, for and in consideration of the foregoing, which are a substantive part of this Agreement and not mere recitals, and the mutual covenants and agreements contained herein, the Ditch Company, Developer, and Town agree as follows:

1. **License Agreement.** The Ditch Company hereby grants to the Developer a temporary license agreement (the "License Agreement") for the purpose of accessing Ditch Company Property for installation, construction, reconstruction, repair, and improvement of the Ditch Crossing in

substantially the location depicted in the plans attached hereto as **Exhibit A** (the “Plans”), but subject to the terms of this Agreement. Such rights granted to the Developer under the License Agreement are subordinate and subject to the Ditch Company Rights described in Section 6, and accordingly the Developer shall not in any way interfere with the Ditch Company Rights regarding the Ditch and the SBCC Pipeline as described in more detail Section 6, below. The License Agreement shall remain in effect until such time as the License Agreement is terminated pursuant to Section 4.b., below, or terminated by default as described in Section 16, below.

2. **Construction of the Ditch Crossing.** The Ditch Crossing shall be constructed by the Developer in accordance with the Plans (“Construction”), and further subject to the following:

- a. Construction of the Ditch Crossing shall be at the sole cost of the Developer and at no cost to the Ditch Company.
- b. Construction shall be performed in a workmanlike manner in compliance with industry standards and in compliance with all applicable rules and regulations. The work shall also be free of any liens or other encumbrances and shall use new quality materials acceptable to the Ditch Company.
- c. Except as may be modified by the Plans, all portions of the SBCC Pipeline, Ditch Company Property, and related Ditch Company infrastructure that are disturbed as a result of Construction activities shall be restored to their original condition and all fencing and other facilities appurtenant to the SBCC Pipeline and Ditch Company Property shall be replaced in a condition at least equal to the condition of such property, facilities and appurtenances that existed prior to the Construction of the Ditch Crossing. The restoration of the disturbed areas shall be professionally engineered and performed in accordance with the Ditch Company’s engineering recommendations.
- d. Construction of the Ditch Crossing shall not interfere with the Ditch Company Rights including, without limitation, the operation, maintenance, and repair of the SBCC Pipeline and Ditch, and the delivery of water, as further described in Section 6.
- e. The Developer shall obtain prior approval of the Ditch Company for the date the Developer intends to commence any Construction activities to ensure the Construction does not interfere with the use of the SBCC Pipeline and to permit the Ditch Company to inspect and monitor Construction. The Ditch Company shall be under no obligation to approve commencement of Construction during a “Water Season,” which consists of the time beginning in March or early April and running through October or early November of the same year when the Ditch Company is allowed to divert its water rights for irrigation, or at a time when the Construction will extend into the Water Season.

- f. The Developer agrees that the Construction permitted by this Agreement shall proceed with reasonable diligence from the initiation of such Construction to its completion. The Ditch Company may request that the Developer cease Construction activities at any time as needed to access, operate, maintain, repair, replace, or protect the SBCC Pipeline from damage, or to inspect the Construction. The Developer shall strictly comply with any such requests.
- g. The Ditch Company may monitor and inspect the Construction. The Developer shall comply with all requests by the Ditch Company to modify Construction as needed to be consistent with the Plans. Further, the Developer will comply with any requests by the Ditch Company during Construction to modify Construction in a manner that deviates from the Plans, but only so long as such requests are reasonable in terms of cost and time, and consistent with Section 6.
- h. The Developer agrees to reimburse the Ditch Company for all engineering and legal costs incurred by the Ditch Company in monitoring and inspecting the Construction, with invoicing and payment subject to Section 8, below. Based upon the Plans, the Parties estimate such costs should not exceed ten thousand dollars (\$10,000). Notwithstanding, the Ditch Company will notify the Developer if it appears the costs are exceeding that amount and the Developer agrees to reimburse the Ditch Company the actual documented costs in accordance with the invoicing and payment procedures in Section 8, below.

3. **Acceptance of Ditch Crossing.** Upon completion of Construction of the Ditch Crossing, the Developer shall provide the Ditch Company with notice of substantial completion of Construction (the "Completion Notice"). Within thirty (30) days after receipt of the Completion Notice, the Ditch Company shall provide a specific list of any variations in such Construction from the Plans prepared by a licensed engineer, or any variations in Construction from the terms of this Agreement, which matters shall be promptly remedied by the Developer. Any such remedy will be treated the same as Construction subject to Section 2, above, and will again be subject to the foregoing 30-day period for the Ditch Company to again provide a specific list of variations from the Plans or this Agreement. If necessary, such 30-day review periods will continue until the Ditch Company's satisfaction with the Construction. At such time that the Ditch Company is satisfied with the Construction, the Ditch Company shall deliver to the Developer and the Town final written acceptance of the Ditch Crossing ("Final Acceptance").

4. **Easement and Ownership upon Final Acceptance.** Upon Final Acceptance, the following shall occur automatically:

- a. The Town shall have a perpetual easement for the Ditch Crossing (the "Easement") subject to the terms hereof. The location of the Easement shall be as generally depicted in the Plans, except if the location of the Ditch Crossing is not in substantial compliance with the Plans, the Ditch Company may require the Developer to provide

an as-built survey of the Ditch Crossing by providing written notice to the Developer at any time before the final written acceptance, in which case the Ditch Company may record an amendment to the location of the Easement based upon the as-built survey; and

- b. The License Agreement shall terminate so long as the Developer has satisfied any obligations under Section 4.a and has paid all reimbursements owed to the Ditch Company pursuant to Sections 2.h and 8 of this Agreement. Once terminated, the Ditch Company shall provide documentation of termination of the License Agreement in a form reasonably acceptable to the Developer upon the Developer's request.

5. Easement Obligations. The Town's Easement shall be subordinate and subject to the Ditch Company Rights as described in Section 6 below. The Town shall at its sole cost reasonably maintain, repair, and replace the Ditch Crossing as needed to protect the Ditch Company Rights and do so in a way that does not adversely impact the Ditch Company Rights. The Ditch Company may notify the Town in writing if the Ditch Crossing requires work to protect the Ditch Company Rights, in which case the Town shall commence such work in an expedient manner and will reimburse the Ditch Company for any costs incurred in monitoring said work pursuant to the invoicing and payment procedures in Section 8, below. Any material work involving the Ditch Crossing by the Town shall require written notice to and approval from the Ditch Company. Any work by the Town that will potentially disturb the SBCC Pipeline is not authorized by this Agreement or the Easement and will require a new agreement. If the Ditch Company in its discretion needs to perform work to operate, maintain, repair, or replace the SBCC Pipeline, and such work will impact the Ditch Crossing, the Ditch Company shall provide prior notice to the Town and will, to the extent reasonable and practicable to do so, conduct its work in a way that minimizes the disturbance to the Ditch Crossing. Upon the completion of any work by the Ditch Company or the Town that impacts the Ditch Crossing, it will be the Town's obligation to maintain, repair, or replace the Ditch Crossing at its sole cost.

With the exception of the structures that constitute the Ditch Crossing, the following is expressly prohibited within the Ditch Company Property or Easement: structures of any kind, any deep-rooted trees, and the planting, construction, or placement of any other materials of any kind that could potentially interfere with the Ditch Company Rights, without prior written authorization by the Ditch Company.

6. Ditch Company Rights. No actions or inactions by the Developer or the Town under this Agreement shall adversely affect or interfere with the Ditch Company's Rights, which are hereinafter defined for purposes of this Agreement to include the right of ingress and egress to the Ditch Company Property, and to the SBCC Pipeline and related Ditch Company infrastructure (collectively "SBCC Infrastructure"), and the right to inspect, maintain, operate, repair, and replace the SBCC Infrastructure, as reasonably necessary to permit the Ditch Company's full use and enjoyment of the SBCC Infrastructure and of any water rights that may

be delivered through the SBCC Infrastructure, along with the right to maintain and fully utilize the Ditch Company Property. The rights granted under the License Agreement and the Easement are subordinate and subservient to the Ditch Company Rights. Prohibited interferences to the Ditch Company Rights include, but are not limited to, the following:

- a. Any loss of water volume or flow rate to which the Ditch Company is entitled, any transit losses of water, or any detrimental change in the timing of delivery of that water;
- b. Any detrimental change in the ability to access, maintain, operate, repair, or replace the SBCC Infrastructure except as specifically shown in the Plans;
- c. Any intermingling of stormwater runoff with the Ditch Company's water;
- d. Any adverse impact to the quality of the Ditch Company's water; and
- e. Any spoils, trash, or debris left on Ditch Company Property or other disturbances to the Ditch Company Property except as specifically shown in the Plans.

7. **Emergency Responses.** Notwithstanding anything to the contrary in this Agreement, nothing herein shall be construed as precluding the Ditch Company from taking any immediate actions it deems necessary in an emergency. An emergency situation for purposes of this Agreement is any circumstances where the risk of inaction is (i) the loss of water to which the Ditch Company is entitled; (ii) damage or threat of damage to the SBCC Infrastructure, Ditch Company Property, or Ditch Crossing; or (iii) any hazard or potential hazard to the health, safety, welfare or property rights of the public. If the Ditch Company responds to such an emergency, it shall notify the Town or Developer, as may be applicable, as soon as is practicable under the circumstances. To the extent the emergency response addresses an obligation of the Town or the Developer under the terms of this Agreement, the Ditch Company shall be entitled to full reimbursement of such costs pursuant to Section 8 from the Town or the Developer, whichever is responsible. This emergency provision does not, however, create a contractual obligation for the Ditch Company to take any specific actions.

8. **Expense Reimbursements to the Ditch Company.** The following provisions apply to all expense reimbursements to the Ditch Company:

- a. All engineering, legal, and other Ditch Company costs or expenses incurred in reviewing the Plans for purposes of this Agreement and for preparing this Agreement shall be reimbursed by the Developer prior to or at the time of execution of this Agreement.
- b. All reimbursements owed to the Ditch Company by the Developer or the Town under Sections 2.h, 5, 7 and/or 16 of this Agreement shall be fully paid to the Ditch

Company within thirty (30) days of receipt of an invoice that contains an itemized statement of the expenses incurred. The Ditch Company may impose interest of 12% per year, compounded monthly, for outstanding invoices not paid within 30 days.

- c. If any Construction interrupts the water supply of the Ditch or SBCC Pipeline for any reason, in addition to Ditch Company expenses that may be incurred, the entity that caused the interrupted water supply shall compensate the Ditch Company for all damages associated with the loss in water supply and/or the cost of replacement water. The Developer and the Ditch Company agree that during the License Agreement, damages for lost water physically and legally available for diversion or delivery to the Ditch Company will be calculated at a fixed amount of \$500 per acre-foot.

9. **Term.** Except for the License Agreement which shall terminate as described above, this Agreement shall be perpetual, unless modified or terminated by written agreement signed by the Town and Ditch Company, or their heirs, successors or assigns, or by the order of any court of competent jurisdiction, or unless there is a default or other action or nonaction resulting in termination.

10. **Notices.** Any notice required or permitted by this Agreement shall be in writing and shall be deemed to have been sufficiently given for all purposes if delivered by facsimile, by electronic mail, by recognized overnight delivery service, or by hand-delivery, 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 delivered: (i) when deposited for delivery by U.S. Mail or overnight delivery service; or (ii) upon receipt by hand-delivery, electronic mail, or facsimile.

Ditch Company:

c/o Robert Alexander, President
5201 St. Vrain Road
Longmont, CO 80503
Email: ralexander@bouldercounty.org

Developer:

BC Lanterns Rock Creek LLC
Attn: Steve Erickson
712 Main Street
Louisville, CO 80027
Email: serickson@livebouldercreek.com

with a copy to:
Holland & Hart LLP
Attn: Craig Willis

555 17th Street, Suite 3200
Denver, CO 80202
Email: wckillis@hollandhart.com

Town:

Town Manager, Town of Superior
124 East Coal Creek Drive
Superior, CO 80027
Email: mattm@superiorcolorado.gov

11. **Enforcement.** In any action brought by any party to enforce the terms and provisions of this Agreement, the prevailing party shall be entitled to recover all of its reasonable legal costs and expenses therefor, including attorneys' and expert witness fees, as well as all additional such costs and expenses incurred in enforcing and collecting any judgment rendered in such action.

12. **No Waiver of Breach.** The failure of one of the Parties to insist upon the strict performance of any provision of this Agreement or to exercise any right, power, or remedy upon a breach thereof, shall not constitute a waiver of that or any other provision of this Agreement or limit that party's, or the other party's, right thereafter to enforce any provision or exercise any right in this Agreement.

13. **Exhibits.** Any Exhibits referred to in this Agreement are, by reference, incorporated in this Agreement for all purposes.

14. **Binding Effect.** It is mutually understood and agreed that this Agreement and all the terms and conditions hereof shall extend to and be binding upon the Parties hereto, their heirs, personal representatives, successors and assigns. Moreover, this Agreement creates covenants that shall run with the Ditch Company Property and with the Easement, as such land now exists or as may be subdivided in the future; provided however, that nothing in this Section shall be construed to permit the assignment of this Agreement except as otherwise specifically authorized herein.

15. **Recordation.** This Agreement shall be recorded in the office of the Boulder County Clerk and Recorder by the Developer with a copy sent to the Ditch Company and the Town within seven (7) days of recording.

16. **Remedies and Termination.** If any Party hereto believes another Party has breached this Agreement, it shall provide written notice of the breach. If the breach is not cured within sixty (60) days, remedies may include specific performance, termination of this Agreement, damages, and any other relief allowed by law. Should this Agreement be properly terminated, the Developer if terminated prior to meeting all of the Developer's obligations under Sections 2 – 4), or the Town if the Developer's License Agreement had previously terminated under Section 4.b hereof, shall remove at its sole cost and expense the Ditch Crossing and all structures necessary to return the SBCC Pipeline and the Ditch Company Property to a condition which, at

a minimum, is equivalent to the condition of the SBCC Pipeline and the Ditch Company Property prior to the initiation of Construction and reasonably acceptable to the Ditch Company. In the event of such termination, all relevant portions of this Agreement shall survive termination of the Agreement until such time as the Ditch Crossing and structures are removed and the condition of the SBCC Pipeline and the Ditch Company Property is restored. The Developer or the Town may, at any time unrelated to termination, remove the Ditch Crossing and restore the SBCC Pipeline and Ditch Company Property at no cost to the Ditch Company prior to termination of the License Agreement. However, the removal of the Ditch Crossing and restoration of the SBCC Pipeline and Ditch Company Property, whether due to termination of this Agreement or otherwise, shall be subject to all provisions of this Agreement, including but not limited to Sections 2 and 3 hereof, similar to the original Construction, and shall require prior approval by the Ditch Company regarding any necessary plans or specifications, and shall not adversely affect the Ditch Company Rights. Any costs incurred by the Ditch Company associated with the removal of the Ditch Crossing and restoration of the SBCC Pipeline and Ditch Company Property shall be reimbursed by the entity doing the work (Developer or Town) pursuant to Section 8, above.

17. **Authority.** The Parties to this Agreement represent that they have the full power and authority to enter into and perform this Agreement.

18. **No Third Party Beneficiary.** This Agreement shall be for the sole benefit of the Parties hereto, and no other party is entitled to have any rights or benefits by reason of this Agreement as a third-party beneficiary or otherwise.

19. **Assignment.** This Agreement may be assigned by the Developer and the Town only with the consent of the Ditch Company, which consent shall not be unreasonably withheld. This Agreement may be assigned by the Ditch Company to a new owner of the Ditch, the SBCC Pipeline, or the Ditch Company Property, or by consent of the Developer and the Town, which consent shall not be unreasonably withheld. Upon any assignment, and in order for the assignment to be effective, the assignee shall provide to the non-assigning party a writing indicating its agreement to accept and assume all the provisions and obligations of this Agreement.

20. **Liability and Indemnification.**

- a. The Ditch Company shall have no liability for use (licit or illicit), operation, maintenance, design, Construction, or existence of the Ditch Crossing during the term of this Agreement. This agreement on liability includes, without limitation, any acts, activities, or omissions to act by the Developer or the Town, their officers, agents, employees, representatives, contractors, or assigns.
- b. The Developer shall indemnify and hold harmless the Ditch Company in any lawsuit against all claims, losses, liabilities, damages, injury, judgments, and expenses

(including court costs and reasonable attorneys' fees) that are asserted against and/or incurred by the Ditch Company (the "Claims"), that are the result directly or indirectly from this Agreement, the Construction, the Ditch Crossing, and/or any action or omission to act by the Developer on Ditch Company Property during the term of the License Agreement, including without limitation, claims by third parties regarding damage to property or person, and the defense of such claims; provided, however, that such obligation to indemnify and hold the Ditch Company harmless shall not extend to any Claims arising in whole or in part or directly or indirectly as a result of the negligence or willful misconduct of the Ditch Company or its officers, directors, employees, agents, contractors, subcontractors or affiliates.

- c. To the extent permitted by law, the Town shall indemnify and hold harmless the Ditch Company in any lawsuit against all claims, losses, liabilities, damages, injury, judgments, and expenses (including court costs and reasonable attorneys' fees) that are asserted against and/or incurred by the Ditch Company, that are the result directly or indirectly from this Agreement, the Ditch Crossing, and/or any Construction, operation, maintenance, repair, restoration, replacement, or other actions or omissions to act by the Town regarding the Ditch Crossing and/or the Ditch Company Property during the term of the Easement, including without limitation, claims by third parties regarding damage to property or person, and the defense of such claims.

21. **Consideration.** As consideration for the grant of this Agreement, the Developer shall, upon execution of this instrument, pay unto the Ditch Company the sum of \$3,500.

22. **Subject to Annual Appropriation.** Nothing herein shall constitute a multiple fiscal year obligation of the Town pursuant to Colorado Constitution Article X, Section 20. Notwithstanding any other provision of this Agreement, the Town's obligations under this Agreement are subject to annual appropriation by the Town's Board of Trustees. Any failure of the Town's Board of Trustees to appropriate adequate monies to finance the Town's obligations under this Agreement shall be a basis for termination of this Agreement by the Ditch Company subject to the provisions of Section 16 hereof.

23. **Governmental Immunity.** The Town and its officers, attorneys and employees, are relying on, and do not waive or intend to waive by any provision of this Agreement, the monetary limitations or any other rights, immunities, and protections provided by the Colorado Governmental Immunity Act, C.R.S. § 24-10-101, *et seq.*, as amended, or otherwise available to the Town and its officers, attorneys or employees.

IN WITNESS WHEREOF, the parties have executed this Agreement in duplicate originals on the day and year first written above.

Town:

TOWN OF SUPERIOR:

Clint Folsom

Clint Folsom, Mayor

ATTEST:
Phyllis L. Hardin

Phyllis L. Hardin, Town Clerk

