

BIG DITCH USE AND MAINTENANCE AGREEMENT

THIS AGREEMENT (“Agreement”) regarding the use and maintenance of the Big Ditch is dated for identification purposes December 1, 2015 (“the Effective Date”), by and between WASHOE COUNTY, a political subdivision of the State of Nevada (“County”), and the BIG DITCH COMPANY, a non-profit corporation (“Big Ditch Company”).

Recitals

WHEREAS, the parties understand that Big Ditch Company operates a ditch system approximately 2.76 miles in length through Washoe County and includes the channel of the ditch, ditch banks, bank slopes, and adjacent access roads or trails, generally located in the area shown on Exhibit A.

WHEREAS, Big Ditch Company represents that Big Ditch is located within the rights of way and easements owned by Big Ditch Company, the location of which has been established by prescription and/or dedication pursuant to both Nevada Statute and the U.S. Code and/or through subsequent agreements, for the purpose of constructing, operating, repairing and maintaining the Big Ditch;

WHEREAS, the typical period of use and operation of the Big Ditch by Big Ditch Company for irrigation purposes is from April 1st through November 1st (“the Irrigation Season”);

WHEREAS, Big Ditch Company denies any responsibility for and denies it actively engages in any stormwater conveyance within the County;

WHEREAS, County represents that, as a political subdivision of the State of Nevada, it has a duty to protect the public welfare and to preserve the lives and property of the people of the State of Nevada and the County of Washoe by the coordination of available resources for the mitigation of, preparation for, response to or recovery from emergencies or disasters;

WHEREAS, the County represents that in accordance with and for the purposes stated within Nevada Revised Statutes Chapter 414 entitled, “Emergency Management,” the County has adopted an Emergency Management Program contained at Washoe County Code sections 65.300 through 65.355 the stated purpose of which is to prepare for and to carry out any activity for the safety, welfare and protection of the people and property within Washoe County in a disaster, including but not limited to flood events;

WHEREAS, the County has for many years used the Big Ditch with Big Ditch Company’s consent to manage and convey stormwater, and in certain locations, conveys stormwater directly into the Big Ditch through storm drain connections or other improvements which accelerate stormwater flows (“Stormwater Improvements”);

WHEREAS, The County acknowledges that it receives a benefit from its use of the Big Ditch for the management and conveyance of stormwater and as an available resource for the mitigation of, preparation for, response to or recovery from emergencies or disasters;

WHEREAS, County now asserts it holds an independent easement right to convey stormwater in the Big Ditch which Big Ditch Company has no legal right to deny, which assertion Big Ditch Company denies and disputes (“Easement Dispute”);

WHEREAS, notwithstanding and without waiving their respective claims, rights and defenses with regard to the Easement Dispute, the Parties agree that as a temporary accommodation only and not as resolution of the Easement Dispute, the County may and will continue to utilize the Big Ditch for stormwater conveyance and emergency management on the terms and conditions as set forth herein;

WHEREAS, the above and foregoing recitals and preambles are incorporated herein by reference as though fully set forth at length and shall be interpreted in conjunction with this Agreement’s operative provisions.

NOW, THEREFORE, in light of the recitals and in consideration of the good faith promises by and between the parties set forth herein, it is understood as follows:

1. USE OF BIG DITCH

1.1 Use of Big Ditch. Subject to and conditional on the terms set forth in this Agreement, Big Ditch Company grants County (i) a nonexclusive right to convey stormwater into the Big Ditch through existing Stormwater Improvements located within the current jurisdictional limits of the County, as such Stormwater Improvements and jurisdictional limits exist on the Effective Date of this Agreement; (ii) the right to enter over, upon and across any property owned, operated or controlled by Big Ditch Company within the Big Ditch in connection with the County’s use of the Big Ditch channel or the operation, repair or maintenance of the Stormwater Improvements, as contemplated by this Agreement; and (iii) the right to use, occupy, operate, repair or maintain the Stormwater Improvements for the purpose permitted in this Agreement, provided County’s use, occupancy, operation, repair or maintenance of the Stormwater Improvements and/or Big Ditch does not impair, impede or in any manner disrupt any use of the Big Ditch property by Big Ditch Company, including without limitation, the delivery of irrigation water through the Big Ditch (such rights collectively referred to as the (“License”). For purposes of this Agreement, “stormwater” shall mean surface water runoff caused by a naturally occurring precipitation event or which may be accumulated and collected by the County and diverted to flow eventually into the Big Ditch through Stormwater Improvements.

1.2 Duration of Agreement. The term of this Agreement shall commence on the Effective Date and automatically terminate on June 30, 2021, unless terminated sooner as otherwise provided herein. This Agreement shall automatically be renewed for up to two (2)

terms of five (5) years each, unless either party provides the other with written notice of non-renewal at least ninety (90) days prior to the expiration of the then applicable term.

1.3 Reservations and Prior Rights

1.3.1 Except as provided in Section 2.7, the Agreement shall not permit the County to use the Big Ditch or any of Big Ditch Company's property so as to impair, impede or in any manner disrupt any use of the Big Ditch or Big Ditch Company's property by Big Ditch Company including without limitation, the delivery of irrigation water through the Big Ditch.

1.3.2 Big Ditch Company reserves the right to construct, maintain and operate new and existing facilities upon, over, across or under the Big Ditch, and to grant other such rights.

1.4 Offseason Use. County acknowledges and agrees Big Ditch Company does not employ a ditch tender other than during the Irrigation Season and Big Ditch Company shall not be responsible for maintenance for Stormwater purposes. County, outside of Irrigation Season (the "Offseason"), will maintain the Big Ditch as it determines necessary or appropriate for Stormwater transportation; provided County shall not perform any significant repairs or modifications to the Big Ditch without Big Ditch Company's prior consent unless an emergency situation exists (as described in Section 2.7) and Big Ditch Company is nonresponsive to County request for consent.

2. COUNTY DUTIES AND RESPONSIBILITIES

2.1 Payment to Big Ditch Company. Beginning March 1, 2016 and continuing on March 1st of each year thereafter during the term of this Agreement, County shall reimburse Big Ditch Company in arrears for a prorata share of the costs associated with the repair, maintenance and operation of the Big Ditch (the "Annual Fee"). The County's prorata share shall be calculated by: i) calculating the actual costs of repairing, maintaining and operating the entire Big Ditch (14,572 linear feet) during the calendar year immediately preceding the Annual Fee assessment date ("O&M Costs"), and expressing such on a per linear foot basis; ii) multiplying the per linear foot cost by forty percent (40%) and multiplying that dollar amount by that portion (in linear feet) of the Big Ditch located within the County jurisdictional boundaries from the most upstream Stormwater Improvement to the terminus of the canal. The initial linear distance in the County on the Effective Date is 11,775 feet. For purposes of the per linear foot calculation, the O&M Costs shall specifically exclude costs of health insurance maintained for the officers of Big Ditch Company and capital improvements related solely to irrigation, but shall include without limitation costs of liability insurance and mutually beneficial capital improvements. County shall pay Big Ditch Company the Annual Fee no later than thirty (30) days after receipt of invoice from Big Ditch Company.

2.11 Funding Out Clause. Pursuant to NRS 244.320, in the event the County fails to appropriate budget funds specifically for the purpose of ditch maintenance as

provided herein in any subsequent fiscal year after the effective date of the Agreement, Big Ditch Company hereby agrees to cancel this Agreement and hold County harmless from any penalty, charge or sanction arising solely from the failure to appropriate funds. County agrees to provide written notice to Big Ditch Company of this eventuality, should it occur.

2.2 Care and Use of the Big Ditch. The County shall use reasonable care and caution against damage or destruction to the Big Ditch and any property of the Big Ditch Company. County shall not use or permit the use of the Big Ditch or Stormwater Improvements for any unlawful purpose.

2.3 Compliance with Laws. County shall comply with all governmental laws, ordinances, rules, regulations and orders relating to the County's use of the Big Ditch and this Agreement.

2.4 Hazardous Materials, Substances and Wastes. In no event shall County (i) release, discharge or dispose of, or knowingly permit the release, discharge or disposal of, any Hazardous Substances into the Big Ditch, (ii) bring or store or permit any person to bring or store any hazardous wastes as defined in the Resource Conservation and Recovery Act, 42 U.S.C 6901 et seq. ("RCRA") onto or within the Big Ditch. Without limitation of the provision of Section 3 of this Agreement, County shall be responsible for all damages, losses, costs, expenses, claims, fines and penalties related in any manner to any Hazardous Substance released, discharged or disposed of into or on the Big Ditch which is/are caused by County's negligent acts or omissions, including, without limitation, the cost and expense of clean-up, restoration, containment, remediation, decontamination, removal, investigation, monitoring, closure or post-closure. County does not intend to waive any constitutional or statutory immunity it has under laws, to the extent applicable, and the County shall not be responsible for damages, losses, costs, expenses, claims, fines, and penalties related to any Hazardous Substance released or discharged into the Big Ditch by other individuals or entities. For purposes of this Section 2.4, the term "Hazardous Substance" shall mean (i) those substances included within the definitions of "hazardous substance", "pollutant", "contaminant", or "hazardous waste", in the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. §§ 9601, et. seq., as amended or in RCRA, the regulations promulgated pursuant to either such Act, or state laws and regulations similar to or promulgated pursuant to either Act, (ii) any material, waste or substance which is (A) petroleum, (B) asbestos, (C) flammable or explosive, or (D) radioactive; and (iii) such other substances, materials and wastes which are or become regulated or classified as hazardous or toxic under any existing or future federal, state or local law.

2.5 Maintenance of Stormwater Improvements. During the term of this Agreement, County will continue to maintain, repair and replace the Stormwater Improvements, but shall not perform any significant repairs or modifications to the Big Ditch without consulting with and without the prior consent of Big Ditch Company.

2.6 Permits and Approvals. County shall be solely responsible for obtaining and maintaining in good standing any applicable permits or approvals of any governmental entity required necessary for County's conveyance of stormwater or use or maintenance of the Big Ditch. Should County fail to comply with this Section 2.6 and fail to cure such default within thirty (30) days notice from Big Ditch Company, Big Ditch Company may immediately terminate this Agreement.

2.7 No Interference. Except (i) during the Offseason where an emergency situation exists, as the term of emergency is currently defined in Washoe County Code 65.300(4), or (ii) during the Irrigation Season where County has declared a state of emergency pursuant to Washoe County Code 65.320, County agrees Big Ditch Company's use of the canal for irrigation operations shall at all times have priority over County's use of the canal for stormwater conveyance. County will not permit its use of the canal to unreasonably interfere with the lawful uses of the canal by Big Ditch Company. County will not directly or indirectly use, occupy, operate, repair, improve or maintain the Big Ditch in any manner that impairs, impedes, delays, disrupts, diminishes, curtails or otherwise adversely affects the Big Ditch Company's use of the Big Ditch nor shall County engage in or permit any activity to occur or continue within the Big Ditch Company's Property which in the reasonable judgement of Big Ditch Company threatens or is inconsistent with Big Ditch Company's lawful use of the Big Ditch.

3. BIG DITCH DISCLAIMERS.

3.1 As-Is. County acknowledges that it has been given a full opportunity to inspect and investigate every aspect of the Big Ditch Company's Property and for the purpose of the County's use accepts the property condition of the Big Ditch Property in all respects. County specifically acknowledges and agrees that the Big Ditch Company's Property is provided on an "AS IS" basis and in the condition as of the date of this Agreement. County acknowledges that Big Ditch Company makes no representations or warranties, expressed or implied, concerning the title to the real property constituting the Big Ditch Company's Property, or scope, size or duration of such Big Ditch Company's Property.

3.2 Suitability. County understands and acknowledges that Big Ditch Company makes no representation or warranty, implied or expressed, as to the suitability or quality of the Big Ditch Company's Property or any materials, improvements, or facilities used in connection therewith, nor as to the legality, propriety or other matters related to the County's use of the Big Ditch Company Property, for any expressed purpose whatsoever. COUNTY SPECIFICALLY ACKNOWLEDGES THAT COUNTY IS NOT RELYING ON ANY REPRESENTATIONS OR WARRANTIES OF ANY KIND WHATSOEVER, EXPRESSED OR IMPLIED, FROM BIG DITCH COMPANY OR ITS AGENTS AS TO ANY MATTERS CONCERNING THE CONDITION, CAPACITY OR SUITABILITY OF THE BIG DITCH COMPANY PROPERTY FOR ANY PURPOSE, INCLUDING SPECIFICALLY COUNTY'S

INTENDED PURPOSES, AND EXPRESSLY DENIES MAKING ANY SUCH REPRESENTATIONS.

4. INDEMNIFICATION AND RELEASE

Subject to Chapter 41 of the NRS, County hereby releases, and shall indemnify, defend and holds harmless Big Ditch Company and its officers, directors, employees, representatives, agents and shareholders (“Indemnified Parties”) from and against any and all suits, losses, claim, liabilities, actions, causes of action, legal or administrative proceedings, fines, penalties, damages to persons or property, costs and expenses (including reasonable attorneys’ fees and court costs) (collectively, “Loss”), made against or incurred by Big Ditch Company resulting from:

(i) any act or omission of County, its employees, officers, agents, contractors or representatives related to or affecting the use, operation or maintenance of the Big Ditch or the Stormwater Improvements;

(ii) County’s breach of this Agreement;

(iii) the stormwater and the Stormwater Improvements;

(iv) the rights granted under this Agreement and County’s use of the Big Ditch;

(v) any point source pollution, water quality issues or other condition of any federal, state or local law, ordinance, rule or regulation related or attributable to the stormwater conveyed through a Stormwater Improvement caused by County; or

(vi) any failure of the Stormwater Improvements, or any unplanned impairment or interruption in the delivery of irrigation water caused by County or a failure in the Stormwater Improvements, excluding there from claims arising from physical damage to the Stormwater Improvements directly cause by the negligent or willful misconduct of Big Ditch Company.

No provision of this Agreement with respect to insurance shall limit the extent of the release and indemnity provisions of this Section 4; however, County agrees its right to assert NRS Chapter 41 liability limitations against Big Ditch Company shall be limited in all respects to only those claims against County in excess of available insurance coverage. The County’s obligations under this Section 4 shall not apply to the extent any such claims are caused by the negligent or willful acts of Big Ditch Company including, but not limited to, delivery of irrigation water, accidents or intentional acts with respect to equipment, vehicles or any apparatus used by Big Ditch Company, its directors, officers, agents or employees in the operations of Big Ditch Company.

5. COUNTY REPRESENTATIONS AND WARRANTIES. County represents and warrants to Big Ditch Company at the time of execution and continuing while this Agreement is effective:

5.1 County shall not impair or interfere with the delivery of water or use of Big Ditch by Big Ditch Company; and

5.2 County shall comply with all applicable laws, rules and regulations with respect to the conveyance of stormwater through the Big Ditch and with respect to the County's use of the Big Ditch for the mitigation of, preparation for, response to or recovery from emergencies or disasters; and

5.3 County shall be solely responsible for obtaining and maintaining in good standing any applicable permits or approvals of any governmental entity required of County related to the transportation of the stormwater and County's use of the Big Ditch.

6. DELIVERY OF IRRIGATION WATER. The Parties understand that this Agreement does not obligate Big Ditch Company to provide or deliver any water to County, and any irrigation delivery shall be made in accordance with Big Ditch Company's irrigation service terms and conditions.

7. ADDITIONAL STORMWATER IMPROVEMENTS. Any additional or new Stormwater Improvements intended to be made or used to dispose stormwater into the Big Ditch by the County or approved by the County after Effective Date of this Agreement may only be authorized and shall only enjoy rights under this Agreement after submittal to and with the written approval of Big Ditch Company, in its sole discretion. Any additional or new Stormwater Improvements approved by Big Ditch Company shall be incorporated into the terms of this Agreement.

8. MISCELLANEOUS.

8.1 Modification. This Agreement may be modified or amended only in writing with the mutual consent of both parties.

8.2 No Third Party Beneficiary. This Agreement is intended only to benefit the parties hereto, their successors and assigns, and does not create any rights, benefits or causes of action for any other person, entity or member of the general public.

8.3 No Severability. The parties acknowledge and agree that the terms and conditions of this Agreement represent, in the aggregate, the understanding of the parties regarding the use and maintenance of the Big Ditch by County and should any provision in this Agreement be declared invalid or unenforceable this Agreement shall terminate in its entirety.

8.4 Choice of Law. This Agreement shall be construed under the laws of the State of Nevada.

8.5 Entire Agreement. This Agreement constitutes the entire understanding and agreement of the parties with respect to the subject matter hereof and supersedes and replaces any and all prior understandings and agreements, if any there may be, whether verbal or in writing, with respect to the subject matter hereof.

8.6 Notices. All notices, demands or other communications required or permitted to be given in connection with this Agreement shall be in writing and shall be deemed delivered when personally delivered to a party (by personal delivery to an officer or authorized representative) or, if mailed, three (3) business days after deposit in the United States mail, postage prepaid, certified or registered mail, addressed to the parties as follows:

If to County: David M. Solaro, Arch, P.E.,
Director of Community Services
Washoe County
1001 E. 9th Street (if by personal service)
P.O. Box 11130 (if by mail)
Reno, NV 89520

If to Big Ditch Company: Ryan Ramsdell, President
Big Ditch Company
P.O. Box 18752 (if by mail)
Reno, NV 89511

Any party may change its contact or address for notice by written notice given in accordance with the foregoing provision.

8.7 Executed Originals. This Agreement may be executed with three (3) originals.

8.8 Due Authority. The parties hereto represent and warrant that the person executing this Agreement on behalf of each party has full power and authority to enter into this Agreement and that the parties are authorized by law to perform the services set forth herein.

8.9 Easement Dispute. The parties acknowledge there presently exists an Easement Dispute as stated above as to the parties' respective rights and interests in and to the use of the Big Ditch. The parties agree that no claim of right or defense of either party in existence on the effective date of this Agreement is waived by entering this Agreement or will be waived due to the passage of time. The parties further agree that neither party may point to the fact of this Agreement or the legal significance of any of the language of this Agreement as evidence of either a claim or right or defense relevant to the Easement Dispute.

IN WITNESS WHEREOF, the parties have caused this Agreement to be executed on the date and year stated below.

BIG DITCH COMPANY

WASHOE COUNTY

By _____
Ryan Ramsdell, President
Big Ditch Company

By _____
Chair,
Washoe County Commission

Attest:

Washoe County Clerk

STATE OF NEVADA)
) ss.
COUNTY OF WASHOE)

On this ____ day of _____, 20____ before me a Notary Public in and for the County of Washoe, State of Nevada, personally appeared **Ryan Ramsdell** proven to me to be the **President of the Big Ditch Company**, who executed the foregoing instrument and who acknowledged to me that he executed the same freely and voluntarily for the uses and purposes therein mentioned.

Notary Public