



TOWN OF MILLIKEN
TOWN BOARD
AGENDA MEMORANDUM

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| To: Mayor Tokunaga and Town Trustees | Meeting Date: |
| From: Linda Michow, Town Attorney | Wednesday, December 9, 2015 |
| Via: Kent Brown, Town Administrator | |

| Agenda Item # | Action: | Discussion: | Information: |
|--|----------|-------------|--------------|
| | x | | |
| Agenda Title: License Agreement between the Town of Milliken and Binder Family Farms LLC for Ditch Crossings | | | |
| Attachment: License Agreement with Exhibits | | | |

PURPOSE

The attached License Agreement allows the Town to cross sections of the irrigation ditch (“Ditch”) owned by the Binder Family Farms LLC in order to construct the Milliken/Johnstown Trail (“Trail”).

BACKGROUND

In connection with the Town’s plans to construct the Trail, the Town and Binder have agreed to allow the Town to extend one existing culvert (“Culvert Extension”), and to create three crossings of the Ditch as follows: a crossing over each of the two Pipelines and one crossing the Ditch (Collectively, the “Crossings”), as shown on Exhibit B in the attached License Agreement. The Town has submitted to Binder plans prepared by the Town’s engineers, Loris and Associates, Inc., detailing the specifications and construction of the Culvert Extension under the Milliken/Johnstown Trail. Binder has reviewed the plans and agrees to permit the proposed Crossings subject to the terms, conditions, covenants and agreements set forth in the attached License Agreement.

The ability of the Town and Binder to reach agreement on the Town’s construction over the Ditch is consistent with Colorado jurisprudence that encourages ditch owners and property owners to reach agreement on the alterations to any ditch. *See Roaring Fork Club L.P. v. St. Jude’s Co.*, 36 P.3d 1229 (Colo.2001).¹

Under the terms of the License Agreement, the Town is obligated to construct the trail improvements at the Crossings no later than March 15, 2016 in order to avoid interference with the Binder’s water supply. If the Trail Improvements are not completed by that date, the License Agreement may be extended by mutual written consent of the Parties. The

¹ In Roaring Fork, the Colorado Supreme Court specifically disapproved of unilateral action and self-help by a servient owner in moving forward with alterations absent consent from the dominant owner. *Roaring Fork*, 36 P.3d at 1239.

Town staff believes it will be able to complete construction on the Trail at the Crossings locations within that time frame.

BUDGET IMPLICATONS

Other than the costs associated with construction of the Trail, the Town will pay for the installation of a new trash grate as described in the License Agreement. The purpose of the trash grate is to keep the Ditch clear of litter and debris that may be caused by users of the Trail.

STAFF RECOMMENDATION

The Town Attorney and Town Staff recommend that the Board approve the attached License Agreement, which will enable the Town to move forward with construction of the Trail.

SUGGESTED MOTION

“I move to approve the License Agreement between the Town and Binder Family Farms LLC for the Crossings presented at the December 8, 2015 Board of Trustees Meeting and authorize the Mayor to sign the Agreement.”

**TOWN OF MILLIKEN AND BINDER FAMILY FARMS, LLC
LICENSE AGREEMENT FOR CROSSINGS**

1. **PARTIES.** The parties to this License Agreement are BINDER FAMILY FARMS, LLC, A Colorado limited liability company ("Binder") and the TOWN OF MILLIKEN, a Colorado statutory municipality ("Town"). Binder and Town are jointly referred to as the Parties.

2. **RECITALS.** Binder owns property legally described in **EXHIBIT A**, (attached and incorporated herein) situated in Weld County, Colorado and generally described as farmland adjacent to a concrete irrigation ditch connected to: 1) an existing irrigation ditch with an existing culvert under Weld County Road 46 ½ ("Ditch"), and 2) two separate pipelines to the west of the Ditch, each with existing culverts under Weld County Road 46 ½ ("Pipelines"). In connection with the Town's plans to construct the Milliken/Johnstown Trail, the Town desires to obtain the permission of Binder to extend one existing culvert ("Culvert Extension"), and to create three crossings as follows: a crossing over each of the two Pipelines and one crossing the Ditch (Collectively, the "Crossings"), as shown on **EXHIBIT B**. The Town has submitted to Binder plans prepared by the Town's engineers, Loris and Associates, Inc., detailing the specifications and construction of the Culvert Extension under the Milliken/Johnstown Trail. Binder agrees to permit the proposed crossings subject to the terms, conditions, covenants and agreements set forth in this License Agreement. Accordingly, in consideration of the mutual promises set forth in this License Agreement, the Parties covenant and agree as follows:

3. **CONSTRUCTION.**

3.1 Pursuant to the terms of this License Agreement, Binder hereby grants to the Town a permanent license to construct, maintain, repair and operate the trail over the three Crossings and the extension of the culvert described in Paragraph 2, above, (the "Trail Improvements") in strict conformance with the Town's plans and specifications reviewed by Binder and relevant sections attached hereto as **EXHIBITS B and C**, (attached and incorporated herein) and in conformance with all applicable governmental codes, rules and regulations. The Town is granted permission to extend the subject culvert as provided in the plans and specifications only at the location specified therein. Binder's review of the plans and specifications is solely for its own benefit and creates no obligation on Binder.

3.2 Except as to modifications made in strict conformance to the approved plans and specifications, all portions of the Pipelines, Ditch, bottoms, sides, banks, and all affected portions of Binder's easements which are disturbed by the Town's Trail Improvements shall be restored to their original condition to allow the flow of the water therein to run at the original amounts and velocity. Any and all fencing and other facilities appurtenant to Binder's easements shall be replaced in a condition equal to the condition of such facilities and appurtenances prior to construction.

3.3 The Town shall not spill any dirt, debris or other foreign material into the Pipelines or Ditch. In the event that dirt, debris or other foreign material is spilled into the Pipelines or Ditch by the Town's construction of the Trail Improvements, the Town agrees to completely clean the affected portions thereof.

- 3.4 The Town agrees that the Trail Improvements shall proceed expeditiously, with reasonable diligence from the commencement of construction to its completion. The Trail Improvements at the Crossings shall be completed not later than March 15, 2016. If the Trail Improvements are not completed by that date, this Agreement may be extended only by mutual written consent of the Parties. Any modifications of plans and specs that affect the Crossings shall be made only upon the prior written approval of Binder.
- 3.5 If the Town's construction of the Trail Improvements interrupts Binder's water supply for any reason, the Town shall pay as liquidated damages \$5,000.00 per day for any day that Binder cannot receive or deliver water from the Ditch or Pipelines as a direct result of the Trail Improvements.

4. **CONSIDERATION:**

- 4.1 In consideration for this permanent license, Town agrees to maintain, repair or replace the existing crossings for the Ditch and the two respective Pipelines which are under Weld County Road 46 ½ ("Existing Crossings", see **EXHIBIT B**) when and if the Town annexes Weld County Road 46 ½ or otherwise assumes responsibility for maintenance of that portion of Weld County Road 46 ½ from the County. If Town fails to properly maintain, repair or replace such portion of the Existing Crossings after ten (10) days' written notice from Binder of the need for same, Binder may, at its own option, conduct its own maintenance, repair or replacement, and Binder may pursue all available legal remedies against Town.
- 4.2 Additionally, Town shall be responsible to install, maintain, repair and, as needed, replace a trash grate located on the west side of the existing farm access to the Purvis Property, where the same intersects the Town's planned Milliken/Johnstown Trail (See **EXHIBIT B**). Should Town fail to properly maintain, repair or replace the trash grate, Binder may, after ten days' notice of the need for maintenance, repair or replacement, conduct its own maintenance, repair or replacement, and Binder may pursue all available legal remedies against town.

5. **INSPECTION:**

- 5.1 The Town shall notify Binder at least ten (10) days prior to commencement of constructing the Trail Improvements, or replacement or repair of the Trail Improvements at the Crossings, except for emergency repairs which are provided for in paragraph 6 of this Agreement. Binder is permitted to inspect the Trail Improvements or replacements and repairs during construction. Not less than twenty-four (24) hours prior to backfilling the Trail Improvements, if applicable, Town shall contact Binder by phone or facsimile and allow Binder to inspect the Trail Improvements prior to backfill, Binder shall inspect the Trail Improvements within twenty-four (24) hours of being noticed of backfill. The Town shall contact Binder upon completion of the Trail Improvements, whereupon Binder may inspect the completed Trail Improvements.

5.2 Binder's inspection is solely for the benefit of Binder and creates no obligation to Binder.

6. **MAINTENANCE.**

6.1 The Town shall be the owner of the Trail Improvements, and the Town specifically agrees and pledges to maintain, repair or replace the Trail Improvements described in **EXHIBIT C** so as not to require Binder to maintain, repair or replace them. If the Culvert Extension is defective for any reason not caused by Binder, the Town shall promptly cure any nonconforming design, work or any failure in materials or workmanship in the Culvert Extension. If the Town fails to properly maintain, repair or replace any portion of the Culvert Extension for which it is responsible, after ten days' notice of the need for maintenance, repair or replacement Binder may, at its own option, conduct its own maintenance, repair or replacement, and Binder may pursue all available legal remedies against Town.

6.2 In the event of an emergency caused by the Trail Improvements that necessitates repair of the Pipeline or the Ditch at any of the three Crossings, Binder or Town may conduct maintenance or repair immediately, giving notice to the other party as soon as possible at the emergency contacts identified in paragraph 11. If Binder conducts emergency work, it shall be reimbursed for the cost of the work.

6.3 Under no circumstances shall Binder be responsible or held liable for damages to the Trail Improvements resulting from maintenance or repair to the Ditch or Pipelines.

7. **WATER LOSS & QUALITY.**

7.1 The Town agrees that the Trail Improvements will not increase carriage or transit loss over the loss which occurred historically. The Town agrees to compact earth materials as necessary so that such additional water losses will not occur. If the Town's Installation increases carriage or transit loss in the Ditch or Pipelines, the Town agrees to repair the construction to prevent such additional loss.

7.2 The Town warrants that it will do nothing to adversely affect the current water quality which is being carried in the Ditch or Pipelines. In the event the Town breaches this warranty, the Town shall take all actions necessary to meet all water quality laws and regulations. To the extent permitted by law, the Town shall indemnify and hold Binder harmless for all costs, damages, fines and fees, including reasonable attorney's fees, which are incurred by the Town as a result of any adverse changes to water quality which result in the water failing to meet water quality laws and regulations

8. **PERMITS.** The Town is responsible, at its own expense, for obtaining all local, state and federal permits or approvals and for compliance with all local, state and federal laws and regulations, including but not limited to land use, environmental laws and regulation and specifically including the Endangered Species Act, prior to construction of the Trail Improvements. To the extent permitted by law, the Town shall indemnify and hold Binder harmless for any and all costs, damages, fines and fees, including reasonable attorney's

fees, which might be incurred by Binder as a result of the Town's failure to comply with this provision.

9. LIABILITY AND INDEMNIFICATION.

9.1 By virtue of entering into this Agreement, Binder: (1) assumes no liability for use, operation, existence or design of the Town's Trail Improvements; and (2) assumes no additional responsibilities or obligations related to the Town's future or additional activities in the area described in **EXHIBIT B** which are required by this Agreement.

9.2 To the extent permitted by law, the Town agrees to indemnify and hold harmless Binder from all claims and liability for damage or injury to property or persons arising or caused directly or indirectly by the Town's construction, restoration, maintenance of, or failure to maintain, the Trail Improvements and the Town's occupancy and use of the area located in **EXHIBIT B**.

9.3 This Agreement shall not confer any benefits to any person not a party to this Agreement.

10. EASEMENT RIGHTS. The License granted to the Town herein shall in no way restrict Binder's right to the use of its easements to construct, operate, or maintain all of Binder's existing structures and facilities of the Ditch and Pipelines at the Crossings.

11. 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 sent by facsimile at the numbers set forth below or 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 facsimile numbers or addresses as have been previously furnished in writing to the other party or parties. Such notice shall be deemed to have been given when sent by facsimile or deposited in the U.S. mail.

BINDER: Binder Family Farms, LLC
8783 WCR 46 ½
Milliken, CO 80543

COPY TO: Kenneth Lind
Lind, Ottenhoff & Root, LLP
355 Eastman Park Dr. #200
Windsor, CO 80550
Fax: 970-674-9535

TOWN: Town of Milliken
Post Office Box 229
Milliken, CO 80543

COPY TO: Linda Michow
Widner Michow & Cox LLP
13133 E. Arapahoe Rd.
Suite 120
Centennial, CO 80112

Fax: 970-587-2678

Fax: 303-754-3395

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

13. **RECORDATION.** This Agreement shall inure to the benefit of, and be binding upon, the parties and their respective legal representatives, successors, and assigns; provided, however, that nothing in this paragraph shall be construed to permit the assignment of this Agreement except as otherwise specifically authorized in this Agreement. This Agreement shall be recorded at the cost of Town. The obligations and benefits of this Agreement shall specifically run with the land described in **EXHIBIT A**. The failure to record all or portions of **EXHIBIT C** because of the size of the documents shall not affect this Agreement.
14. **EXHIBITS.** All exhibits referred to in this Agreement are, by reference, incorporated in this Agreement for all purposes.
15. **PARAGRAPH CAPTIONS.** The captions of the paragraphs are set forth only for convenience and reference, and are not intended in any way to define, limit, or describe the scope or intent of this Agreement.
16. **ADDITIONAL DOCUMENTS OR ACTIONS.** The parties agree to execute any additional documents and to take any additional action necessary to carry out this Agreement.
17. **INTEGRATION AND AMENDMENT.** This Agreement represents the entire agreement between the parties and there are no oral or collateral agreements or understandings. This Agreement may be amended only by an instrument in writing signed by the parties.
18. **DEFAULT.** Time is of the essence, and if any payment or any other condition, obligation or duty is not timely made, tendered or performed by either party, then this Agreement, at the option of the party who is not in default, may be terminated by the non-defaulting party, in which case, the non-defaulting party may recover such damages as may be proper. If the non-defaulting party elects to treat this Agreement as being in full force and effect, the non-defaulting party shall have the right to an action for specific performance or damages or both.
19. **ATTORNEY'S FEES.** If either party breaches this Agreement, the party found to be in default shall pay the non-defaulting party's reasonable attorney's fees, expert witness fees and expenses, and costs incurred in enforcing this Agreement, whether or not legal proceedings are instituted.
20. **GOVERNING LAW.** This Agreement shall be governed by the laws of Colorado.
21. **COUNTERPARTS.** This Agreement may be executed in several counterparts and, as so executed, shall constitute one Agreement, binding on all the parties even though all the parties have not signed the same counterpart. Any counterpart of this Agreement which has attached to it separate signature pages, which altogether contain the signatures of all the parties, shall be deemed a fully executed instrument for all purposes.
22. **NO WAIVER OF GOVERNMENTAL IMMUNITY ACT.** The Parties hereto understand and agree that the Town, its elected officials, directors, agents and employees, are relying on, and do not waive or intend to waive by any provisions of this Agreement, the monetary limitations or any other rights, immunities and protections provided by the Colorado Governmental Immunity Act, §§ 24-10-101 to 120, C.R.S., as the same may be amended from time to time, or otherwise available to the Town.

23. **FORCE MAJEURE.** Neither Party shall be liable for damages, delays, or failure to perform its obligations under this Agreement if performance is made impractical or impossible, or unpredictably and abnormally difficult or costly, as a result of any unforeseen occurrence, including but not limited to fire, flood, acts of God, civil unrest, failure of a third party to cooperate in issuing permits or authorizations, or other occurrences beyond the reasonable control of the party invoking this Force Majeure clause. The Party invoking this Force Majeure clause shall notify the other Party immediately by verbal communication and in writing of the nature and extent of the contingency within five (5) business days after its occurrence or discovery of its occurrence, and shall take reasonable measures to mitigate any impact of the event that triggered the invoking of this Force Majeure clause.

24. **ANNUAL APPROPRIATIONS.** Nothing herein is intended by the Town to violate the provisions of Colorado law and any potential expenditure for this Agreement outside the current fiscal year is subject to future annual appropriation of funds for any such proposed expenditure.

Dated: _____

TOWN OF MILLIKEN

BINDER FAMILY FARMS, LLC

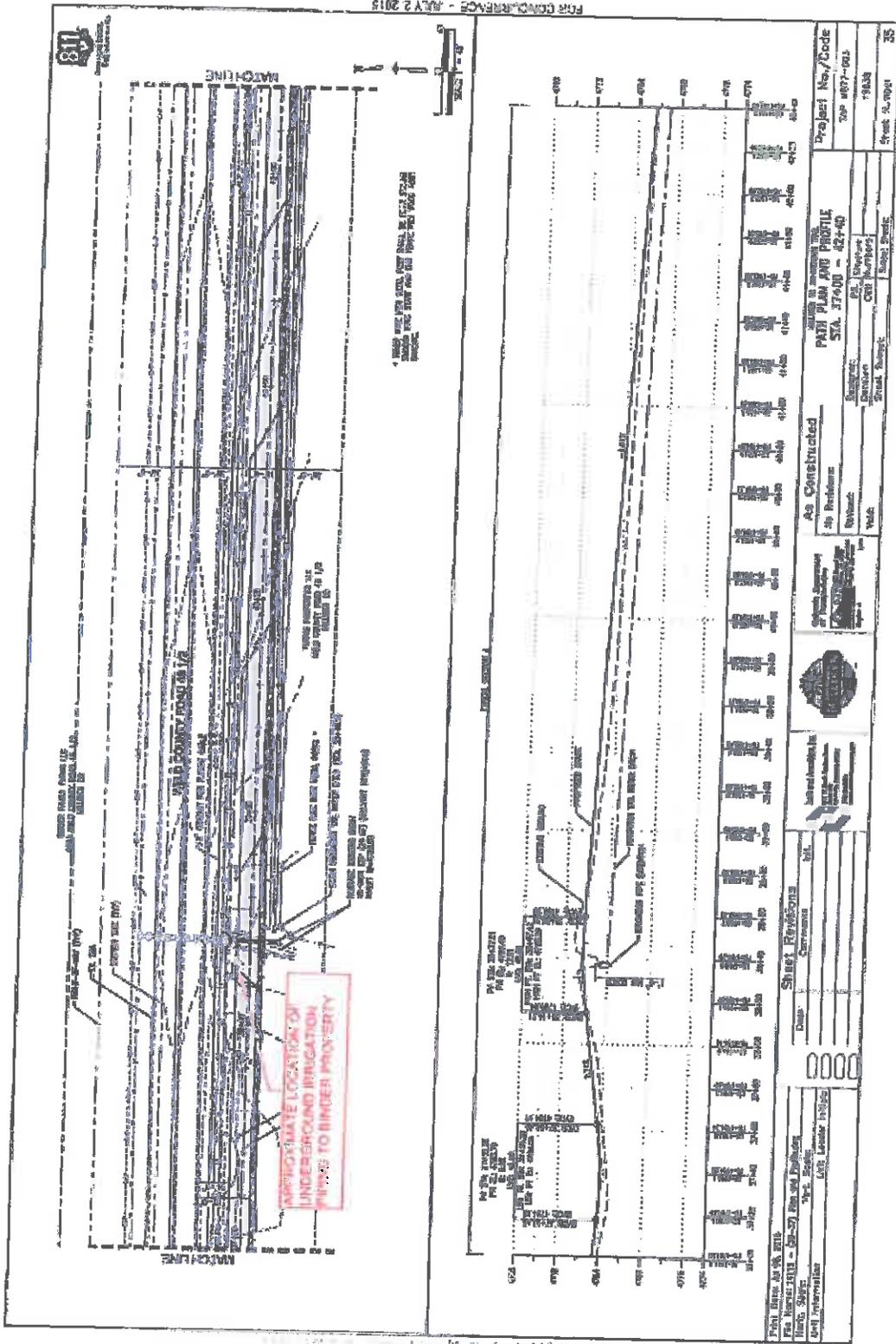
Mayor
By: Milt Tokunaga

By: Thomas Dale Binder,
Member/Manager

EXHIBIT A

That part of the Northwest Quarter (NW4) of Section Ten (10), Township 4 North (T4N), Range 67 West (R67W) of the 6th Prime Meridian lying south of the Little Thompson River, in the County of Weld, State of Colorado.





APPROXIMATE LOCATION OF UNDERGROUND IRRIGATION PIPES TO BINDER PROPERTY

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| Project Name: SR 200 Project No./Code: SR 200-001 Date: 08/01/15 Scale: 1/8" = 1'-0" | As Constructed No. of Profiles: 1 Review: 100% Year: 2015 | Project No./Code: SR 200-001 Date: 08/01/15 Scale: 1/8" = 1'-0" |
| Title: SR 200 Author: 10/15/15 Date: 10/15/15 Scale: 1/8" = 1'-0" | Project No./Code: SR 200-001 Date: 08/01/15 Scale: 1/8" = 1'-0" | Project No./Code: SR 200-001 Date: 08/01/15 Scale: 1/8" = 1'-0" |



