

DRAFT

COLORADO DEPARTMENT OF TRANSPORTATION & Florida Consolidated Ditch Company <u>Ditch Construction Agreement</u>	Construction project no.: (22420) NH 5501-029
	Location: US 550/160 South Connection Project

This agreement is entered into by and between the State of Colorado, acting by and through the Colorado Department of Transportation (hereinafter referred to as “State”) and the Florida Consolidated Ditch Company (hereinafter referred to as “FCDC”), both collectively referred to as the “Parties.”

- I. **WHEREAS**, the State desires to construct a design build transportation project described as Federal Aid Project No. NH 5501-029, US 550 160 South Connection, project code 22420, hereinafter referred to as the “Project”
- II. **WHEREAS**, the Project crosses over and impacts the FCDC’s property interests with respect to certain drainage and irrigation structures and water conveyance ditch known as the Mason Lateral, hereafter referred to as “Ditch”;
- III. **WHEREAS**, the FCDC is a Ditch Company recognized under Article 42 of Title 7 of the Colorado Revised Statutes and has adjudicated water rights in the Ditch.
- IV. **WHEREAS**, the Parties desire to enter into this Ditch Construction Agreement whereby the State and its Contractor will be allowed to construct and maintain the Highway Project, including relocating portions of the Ditch, while protecting and preserving FCDC’s ability to carry and deliver water up to its decreed amounts without interference and not limiting or impairing the carrying capacity of the Ditch;

NOW THEREFORE, in consideration of the mutual promises hereinafter expressed, the parties agree as follows:

ARTICLE 1
DITCH CONSTRUCTION

- A. The Project is a Design/Build contract that will complete the final design and actual construction of the Project. The final design and construction shall be in accordance with this Agreement, as well as CDOT’s written specifications, standards of practice (which may include design format), and construction methods, to the extent such design documents are available and have been approved by the FCDC.
- B. The State will administer the construction and other work to avoid any disruption or interference with (A) use of the ditch to deliver water; and (B) maintenance of the ditch the season of use. Water flows typically begin on **April 1** and ends on **November 1**, each year with periodic stock water flows to be determined during the winter months.
- C. The existing dimensions of the Mason Lateral ditch crossing at US 550 shall be used as the initial basis for the design, subject to such changes as may be necessary to accommodate the delivery of the FCDC’s water up to its current decreed water rights and any other existing uses of the culvert.

- D. The Installation will be designed in a manner reasonably acceptable to the FCDC that minimizes storm water drainage into the ditch from US 550 so that such drainage does not exceed historical rates, and that keeps spills or hazardous materials on US 550 from entering the ditch.
- E. The State shall coordinate any work on the Installation with the FCDC and shall first obtain the FCDC's acceptance in writing of final design plans and schedule including methods and procedures covering all work on FCDC property or that could impact FCDC property prior to construction. Acceptance of design plans, or rejection with comments of design plans shall be returned to the State by no later than 30 calendar days after submission to the FCDC.
- F. Upon completion of the construction, the State shall remove all equipment, surplus material, and debris, leaving the Ditch in a neat condition satisfactory to the FCDC. The State shall provide as-constructed drawings to the FCDC, and obtain FCDC acceptance in writing for all ditch construction work. Nothing in this Agreement shall be construed as a limitation on the FCDC's ability to operate, maintain and repair FCDC Property, including without limitations its ditch, under and through the structure crossing, nor as a limitation on the State's obligation to maintain, repair or replace the Installation in the future.
- G. All notices or exchanges of information required or permitted hereunder, including invoices, submittals for review and requests for approval, shall be delivered to:

Justin Catalano, Ditch Rider
Florida Consolidated Ditch Company
P.O. Box 2138
Durango, CO 81301
with copies e-mailed to: justincatalanocfqh@gmail.com

Pete Foster, P.E.
Wright Water Engineers
1666 N. Main Ave. Ste C
Durango, CO 81301
With copies e-mailed to: pfoster@wrightwater.com

Kevin Walters
Colorado Department of Transportation
Region 5 Utility Engineer
3803 N. Main Ste 300
Durango, CO 81301
with copies e-mail to: kevin.walters@state.co.us

Any Party may modify the contact information at any time by providing written notice to the other Parties.

ARTICLE 2 **INSPECTION**

- A. The State shall notify the Company at least five (5) days prior to commencement of construction to the Ditch as permitted by this Agreement. The FCDC shall be permitted to inspect the Contractor's work as deemed necessary.
- B. Upon receiving written notice that the Ditch work is completed, the FCDC shall inspect the

construction to ensure that it was built consistent with the approved plans and that the work appears satisfactory. Final approval shall not be given until the Ditch has been in continuous operation a minimum of **45** days. The FCDC shall approve the work or notify the State regarding any concerns that it observed, in writing. Any concerns shall be resolved by the State to the FCDC's satisfaction prior to the FCDC issuing final approval and acceptance of the work.

ARTICLE 3
REIMBURSEMENT OF EXPENSES AND PERMITS

- A. The State agrees to pay all costs and expenses relating to the Ditch construction as part of the Project. The State also agrees to pay the FCDC for its legal and design engineering review and construction inspection costs by way of a separate Agreement between the State and the FCDC. The State shall be responsible for obtaining any necessary permits or approvals for the work, including a FCDC Crossing Permit, as part of the Project cost. The Crossing Permit will be acquired by the Contractor prior to commencing work on the Ditch.

ARTICLE 4
MAINTENANCE, REPAIR AND REPLACEMENT

- A. The State shall be responsible for maintaining the Ditch during construction of the Project and shall not impair the daily operation and maintenance activities as it serves the affected ditch shareholders. Irrigation flows typically commence on or about April 1st and will cease on or about November 1st each year. Periodic stock water flows to be determined during the winter months.
- B. The State shall provide for temporary diversion of water during the course of construction activity occurring during irrigation season provided that irrigation water is available. No interruption of water flows shall be allowed unless otherwise approved in writing by the FCDC.
- C. After construction of the Project, the FCDC shall be responsible for maintaining its irrigation conveyances depicted on Exhibit A in accordance with all applicable provisions of §37-84-101 et seq., C.R.S. The State shall be responsible for maintaining the portions of irrigation conveyances located within the highway ROW in accordance with all applicable provisions of §37-84-101 et seq., C.R.S., in order to insure the health safety and welfare of the traveling public.

ARTICLE 5
DEBRIS

- A. The FCDC shall be responsible for exercising reasonable care and diligence in removing and keeping debris free and clear of the Ditch so as to prevent or minimize the free flow of water resulting in the escape or overflow of water.
- B. The State shall likewise be responsible for exercising reasonable care and diligence in removing and keeping debris free and clear of the Ditch as it crosses the right-of-way of US 550 so as to prevent or minimize the free flow of water underneath the highway and in order to insure the health safety and welfare of the traveling public.
- C. Both the FCDC and the State shall work together in accomplishing this goal by providing notice to the other party when debris becomes an issue and reacting promptly when such notice has been given. Notice to CDOT for debris removal can accomplished by contacting the CDOT maintenance superintendent at (970) 385-1651 or by contacting the CDOT main office at (970)

385-1400. Notice to the FCDC can be accomplished by calling the Ditch Rider for the Mason Lateral at (970) 749-9800 or by calling the FCDC Secretary at (970) 749-4675.

ARTICLE 6
DESIGN CRITERIA

- A. The State shall be required to address the following design criteria relating to the Ditch:
- B. Hydraulic capacity shall be adequate to allow the decreed water rights of (What is the decreed allotment? 15 cubic feet per second).
- C. The Ditch must remain within the State's highway right of way, which CDOT represents to own in fee title, and/or must be within the FCDC's Ditch easement, acquired in connection with the Project. An abbreviated copy of the Right-of-Way plans for this Project depicting the new Ditch alignment is attached herewith as **Exhibit B** for reference.
- D. Ditch structures such as pipes, parshall flumes, and diversion boxes shall be constructed of concrete. No metal pipe will be allowed. No existing structures are to be reused as part of this Project and any salvaged items removed from the Ditch shall remain the property of the FCDC.
- E. Portions of the relocated Ditch where the hydraulic grade line is higher than the surrounding topography (e.g. fill sections) may require the ditch to be piped (atmospheric). Anticipated locations where this is presumed include STA 893+00 Rt. thru 905+00 Rt. and STA 909+00 Rt. thru 918+50 Rt. FCDC reserves the right to require piped ditch sections over existing open channel based upon a review of the final irrigation plans.

ARTICLE 7
INSURANCE

- A. The State shall obtain and maintain sufficient insurance in an amount acceptable to the FCDC to complete the Ditch work as required by the Crossing Permit. Certificates of insurance shall name the FCDC as an additional insured for the comprehensive liability insurance and all other types of insurance that allow additional insureds. Certificates of Insurance shall be provided to the FCDC prior to commencing work on the Ditch.

ARTICLE 8
CONTRACT DOCUMENTS

- A. This Ditch Construction Agreement;
- B. Exhibit A to this Agreement, which consists of the State's engineering plans and specifications at the time this Agreement was executed;
- C. Any final and complete engineering plans and specifications for the Ditch construction submitted to the FCDC by the State and that are approved by the FCDC subsequent to the effective date of this Agreement; and
- D. The State's abbreviated right-of-way plans attached hereto as Exhibit B, which depict the fee title ownership that the State represents to the FCDC that the State owns and/or that the State will acquire as new right-of-way or replacements easements upon which to relocate portions of the Ditch.

ARTICLE 9
MISCELLANEOUS

- A. The failure of one of the Parties to insist upon 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 right, or any other Party's right, to thereafter enforce any provision or exercise any right in this Agreement. Time is of the essence and Parties may strictly enforce all time requirements contained herein.
- B. This Agreement is binding upon and shall inure to the benefit of the Parties hereto as well as their agents, employees, representatives, or any successors or assigns.
- C. The State and the FCDC mutually agree to work cooperatively to avoid and resolve conflicts. If the FCDC fails to perform in accordance with any provisions of this Agreement, the State shall give the FCDC written notice of such failure, at least thirty (30) days to cure or justifiably explain such failure, and the State's intent to terminate this Agreement for cause. If such cure or explanation is not reasonably resolved after thirty (30) days, the State may terminate the Agreement and pursue legal action for damages available under Colorado law. If the State fails to perform any material provision or obligation of this Agreement, the FCDC shall give the State written notice of such failure, at least thirty (30) days to cure or justifiably explain such failure, and the FCDC's intent to terminate this Agreement for cause. If such cure or explanation is not reasonably resolved after thirty (30) days, the FCDC may terminate this Agreement and pursue legal action for damages available under Colorado law.
- D. If a dispute arises regarding this Agreement that cannot be amicably resolved, the Parties agree to first endeavor to settle the dispute through nonbinding mediation using a mutually acceptable mediator before resorting to litigation. Each party shall incur its own costs of mediation. If a dispute is not resolved within 60 days of a written request for mediation, then any Party may seek to enforce its rights under this Agreement in Court.
- E. The Parties, by and through its signatory, warrants that it possesses the legal authority to enter into this Agreement and that it has taken all actions necessary to lawfully bind the FCDC to the Agreement.
- F. Any modification to this Agreement must be made by formal amendment to this Agreement and executed by the Parties prior to it becoming effective.
- G. No term or condition of this Agreement shall be construed or interpreted as a waiver, express or implied, on any of the immunities, rights, benefits, protections, or other provisions, of the Colorado Governmental Immunity Act, §24-10-101, et. seq., C.R.S. or the Federal Tort Claims Act, 28 U.S.C. §1346(b) and 2671 et. seq., as applicable now or hereafter amended.
- H. Colorado law, rules and regulations issued pursuant thereto, shall be applied in the interpretation, execution and enforcement of this Contract. Any provision included or incorporated herein by reference which conflicts with said laws, rules, and regulations, shall be null and void. Any provision incorporated herein by reference which purports to negate this or any other Special Provision in whole or in part shall not be valid or enforceable or available in any action at law, whether by way of complaint, defense, or otherwise. Any provision rendered null and void by the operation of this provision shall not invalidate the remainder of this Contract, to the extent capable of execution.
- I. The State of Colorado does not agree to binding arbitration by any extra-judicial body or person

in accordance with Colorado's Uniform Arbitration Act. Any provision to the contrary in the contract or incorporated herein by reference shall be null and void.

- J. This Ditch Agreement is not confidential. FCDC understands and agrees that the State of Colorado and its agencies and departments are bound by applicable public disclosure laws including, without limitation, the provisions of C.R.S. § 24-72-101, *et. seq.* (Colorado Open Records Act), as presently or subsequently amended, and the State of Colorado may be required to disclose the Ditch Agreement in its entirety if requested to do so under such statutes. FCDC understands that this Ditch Agreement is a public record and further agrees it will not hold the State of Colorado, or its administrators, officers, agents, or employees liable for release of information contained in public records under such statutes.
- K. The invalidity or unenforceability of any provision of this Agreement shall not affect any other provision of this Agreement, which shall thereafter be construed in all respects as if such invalid or unenforceable provision were omitted.
- L. The making, execution and delivery of this Agreement by the Parties has been induced by no representations, statements, warranties or agreements other than those expressed in this Agreement. This Agreement and the Contract Documents embodies the entire understanding of the Parties as to the subject matter hereof and there are no further or other agreements or understandings, written or oral, in effect between the Parties relating to its subject matter unless expressly referred to in this Agreement. Modification of this Agreement by the Parties may be made only by a writing signed by the Party or Parties to be bound by the modification.
- M. This Agreement shall be executed in duplicate originals and each duplicate original shall be valid and enforceable against each Party. Signatures transmitted by facsimile or electronically shall be treated for all purposes as if they were original signatures.
- N. This Agreement shall be effective on the last date it is signed by the Parties.

IN WITNESS WHEREOF, the Parties hereto have caused the foregoing Agreement to be executed day and year first above written.

State of Colorado, Department of Transportation:

By: _____

Mike McVaugh
Region 5 Transportation Director

Date: _____

Florida Consolidated Ditch Company:

By: _____

Roger Cole, President
Florida Consolidated Ditch Co.

Date: _____