

Road Use Agreement

THIS AGREEMENT ("Agreement") made in duplicate originals effective as of this ___ day of ___, ___ ("the Effective Date")

BETWEEN:

Pueblo County (the "**County**")

-AND-

(the "**Company**")

1. DEFINITION OF TERMS USED IN THIS AGREEMENT

"Appurtenance" means: A sidewalk, ditch, or any type of wall, fence, guardrail, curb, pavement marking, traffic control device, illumination device, mailbox or barrier adjacent to or in, along or on a Road, or any construction, obstruction, erection or any situation, arrangement or disposition of any earth, rock, tree or other material or thing adjacent to or in, along or on a Road that is not on the traveled portion of the Road.

"Business Days" means: Monday to Friday, during normal business hours, excluding federally recognized holidays.

"Haul Route" means: those Roads which are identified in Exhibit A hereto to be and as amended pursuant to this Agreement which specifies all Roads to be used by the Company to move/haul goods, equipment and materials for Project construction and which have been approved as Haul Routes by the County, either with or without restrictions, together with any Appurtenances and all associated improvements to said Roads for intersection upgrades and access points. The Haul Route restrictions do not pertain to passenger traffic that includes motorcycles, passenger cars, or light trucks such as pickup trucks, which may travel on other Roads.

"Legal Load" means: The load of any vehicle that meets the U.S. Department of Transportation Federal Highway Administration ("FHWA") Categorical classification of CLASS 5, CLASS 6, CLASS 7, CLASS 8, CLASS 9, CLASS 10, CLASS 11, CLASS 12 AND CLASS 13 as defined in the FHWA Traffic Monitoring Guide Appendix C VEHICLE TYPES. Vehicles that exceed these limitations will require an oversize permit

C.R.S. 42-4-510(11) from the Colorado Department of Transportation and a two-week notice given to the County.

“Consultant” or **“Neutral Engineer”** means: An engineering consultant appointed by the County to perform the -Pre-Construction Survey, Post Construction Survey and construction observations or inspections of Road Activities. The Consultant or **“Neutral Engineer”** has been part of a pre-selected group by the **“On-Call Road Inspection & Engineering Services for Road Use Agreements”** Request for Qualifications, dated May 31, 2023.

“Road” means: A public road under the direction, control and management of the County, including:

- i. a developed, public road on which improvements such as grading or surfacing have been made for the purpose of public access and includes any appurtenances such as culverts or bridges forming part of a public road and any structure incidental to a public road including but not limited to the support of any roadway.
- ii. undeveloped surveyed public road allowance or public road plan.
- iii. unimproved two-track section line roads.

“Road Damage” means:

- i. Potholes or wheel-depressed areas which remain after the roads have been maintained or graded.
- ii. Damage to shoulders due to heavy vehicles running off the edge of the road.
- iii. Damage to ditches due to heavy vehicles collapsing ditches by running on the shoulders of the road.
- iv. Damage to culverts crushed by hauling activities or being **“plugged”** by sediment from closed ditches.
- v. Damage to road surface causing the subsidence of the surface for the purpose of proper roadway drainage.

“Pre-Construction Survey” means: The existing condition of each Road in the Haul Route shall be established by the County or a consultant selected by the County through visual inspection, videotapes and photographs, at the Company’s sole expense, prior to commencing Project construction. Such inspection shall be documented by a report signed by both parties.

“Post-Construction Survey” means: The post-construction condition of each Road in the Haul Route shall be established by the County or a consultant selected by the County through visual inspection, videotapes and photographs taken, at Company’s sole expense, within thirty (30) days after the completion of Project construction. Such inspection shall be documented by a report signed by both parties.

“Project” means: The facility for which a 1041 Permit application submitted by the Company was approved by the County Board on __ (Resolution No P&D __) (“Project Approval”).

“Road Activities” means: Activities engaged in by the Company in connection with development of the Project including but not limited to:

- i. Traversing Haul Route Roads with heavy machinery, including but not limited to, trucks, construction machinery, and equipment and other related items;
- ii. Transporting heavy equipment and materials and performing required repairs as identified by the County during construction and in the Post Construction survey;
- iii. Making specific modifications and improvements (both temporary and permanent) to the Roads (including various improvements associated with culverts, bridges, road shoulders and other fixtures) and to allow such equipment and materials to utilize Haul Route Roads with a County approved Right of Way (ROW) permit necessary to complete improvements;
- iv. Constructing or improving access with an entrance, driveway, or other connection to certain Roads with a County approved Roadway Access Permit (RAP).

“Road Repair Plan” means: A plan that details the extent and schedule of rehabilitation to Roads in the designated Haul Route to bring them up to an acceptable level of service for local residents and the Road Activities for this project if required by the Pre-Construction Survey. If none of the Roads in the Haul Route network are required to be rehabilitated by the Pre-Construction Survey, the Road Repair Plan pertains to repairs/rehabilitation to Roads (if necessary) in the Haul Route network during construction and following the Post-Construction Survey.

2. PURPOSE OF AGREEMENT

The purpose of this Agreement is to define the terms and conditions under which the Company shall be permitted to conduct Road Activities within roads defined by the approved Haul Route in order to protect such Roads from damage associated with the Project construction and to clarify the scope and extent of the Company’s obligation to improve and repair the County’s Roads pursuant to C.R.S. 42-4-512.

This Agreement is intended to engage both the County and the Company in an effort to minimize Road Damage to County roads and where possible to minimize interruptions to the traveling public from traffic related to the Project’s construction activities. The parties acknowledge that this Agreement is intended to address these matters and to protect the roads in the Haul Route from damage.

3. RESPONSIBILITIES OF THE PARTIES

In the event there is damage from the use of any Roads within the County to the extent such damage is caused by the use of said Roads by the Company, its agents, employees, contractors for the hauling or moving of goods, equipment or materials for the Project, the Company shall be solely responsible for all costs associated with the complete repair as mutually agreed upon between the parties of all such damage except to the extent such damage is caused by the Company, its agents or third parties, and for the restoration of any such damaged Road to a condition which is at least as good as the condition in which the Road existed as documented by the Pre-Construction Survey. Notwithstanding the foregoing, if any Road Damage occurs that make the Roads impassable or otherwise a public safety issue, Company shall complete the repairs on the damaged Road as soon as practical after such damage occurs. The Company shall retain and mobilize sufficient equipment to make emergency repairs. If the Company cannot reasonably maintain the heavy equipment onsite to make necessary repairs, it shall retain the services of a licensed and bonded Contractor who is capable of making such repairs to roads in the Haul Route. In the event that Pueblo County Inspectors are required to investigate claims made by property owners or other County employees of damaged County Roads, the County will invoice the Company for the County employee's time. The County Construction Inspector assigned to this Road Use Agreement will be billed at an hourly rate of \$25.00 per hour and it typically takes two hours to investigate and document an emergency repair.

(a) Company shall be responsible for dust control, to include regular watering and dust palliative measures such as magnesium chloride, to be applied on unpaved Roads in accordance with manufacturer's recommendations during Project construction as needed on all affected roads in the Haul Route;

(b) Company is authorized to use the Roads indicated on Exhibit A as Haul Routes in connection with the Project.

(c) Company shall not utilize any Roads as Haul Routes in connection with the Project except as provided herein.

(d) Company may not travel over Roads in excess of the Legal Load, except as provided herein when separately permitted or approved through the Colorado Department of Transportation for Overweight / Oversized (OW-OS) Transportation per C.R.S. 42-4-510(11) and will require a two-week notice given to the County with a digital copy of the permit provided to the County via email or uploaded into the RUA permit in OpenGov.

(e) Pursuant to the County's issuance of a building permit for the Project (or a Notice to Proceed from Planning and Development), the Company is authorized to improve Haul Routes in the locations and to the specifications as indicated on Exhibit A.

4. TERM

(a) This Agreement shall commence on the Effective Date and shall continue until such time as the Project construction is completed and the Road Repair Plan, *infra*, has been completed as evidenced by a Letter of Acceptance to be issued to the Company by the County, unless terminated by the County or the Company as provided herein before that date.

(b) This Agreement may be terminated by the County or Company in the event either party violates any term herein provided however that written notice of violation specifying the specific nature of the violation and setting forth the specific requirements which the other party must meet in order to correct any claimed violation. The other party shall have thirty (30) days after receipt of such notice of violation in which to meet the requirements identified by the terminating party to correct such alleged violation or to provide the other party (i) proof satisfactory to terminating party that the other party is not in violation or (ii) proof that the other party is diligently working to correct such violation, in which event the other party shall also explain in detail (a) what steps it is taking to correct any claimed violation, (b) the reasons why it is not able to complete such corrective action within the thirty (30) day notice period and (c) specifying additional time necessary to complete such efforts. Upon receipt from the other party of any notice satisfying condition (ii) above, the parties shall enter into a written agreement specifying all corrective actions which the parties will take and the deadlines for completing same. Failure by a party to complete corrective action by the deadlines set forth in any such supplemental agreement shall be deemed to be a violation of this Agreement as to which the notice and cure provisions set forth above shall not apply. This Agreement may be terminated by the Company by providing thirty (30) days written notice to the County upon the occurrence of any of the following (i) expiration or termination of the Project approval by the County, (ii) A decision by the Company not to use Roads as Haul Routes, (iii) A determination by the Company to not to construct the Project.

(c) Notwithstanding the termination of this Agreement, the provisions respecting liability and indemnification, to the extent of liabilities which may have accrued prior to the termination, and provisions respecting settlement of accounts, shall remain in full force in accordance with their terms for one (1) year following termination of this Agreement.

5. PRE-CONSTRUCTION ROAD SURVEY BY COUNTY OF HAUL ROUTES

Within thirty (30) days after the Effective Date, or at such other time mutually agreed upon by the parties, the County and Company shall contract for the execution of a Pre-Construction Road Survey of the roads within the proposed Haul Route.

For Asphalt surface roads, the Pre-Construction Road Survey shall include, as a minimum acceptable scope, the following activities:

- a list of the roads with their corresponding Pavement Condition Index (PCI) as per ASTM D6433-20 for the entirety of the Haul Route,
- a photographic or video record of all areas showing cracks (block cracking, edge cracking, fatigue cracking, linear and transverse cracking, reflection cracking and slippage cracking), potholes and any other pavement failings which may be worsened by heavy hauling or construction activities,
- a full profilograph testing of the haul route,
- a list of all culverts and bridges that exist on any road in the Haul Route network along with load ratings for each culvert or bridge compared against the anticipated construction truck traffic loads (including oversized loads),
- any relevant data concerning the structural integrity, distresses, skid resistance, and overall riding quality of the pavement.

For a gravel road, the Pre-Construction Road Survey shall include, as a minimum acceptable scope, the following activities:

- A georeferenced video survey of the unpaved road showing the general condition and aggregate surfacing,
- Sampling and measurement of aggregate base thickness if warranted by observation during the video survey.
- An analysis of whether the road requires upgrade to a fully constructed asphalt cross-section to sustain performance during construction and/or what measures of stabilization would be required to maintain performance while mitigating negative effects on the community.

Within fifteen (15) days following the County's acceptance of the Pre-Construction Road Survey, the County, acting reasonably in considering actions necessary to protect County Roads and the health and safety of the traveling public from impacts of Project construction, shall notify the Company either (a) that it is not necessary to impose any restrictions on the Company in relation to the activities specified in the Agreement, and the Company may proceed to use the Roads as Haul Routes in strict compliance with this Agreement or (b) all reasonable restrictions on, improvements or requirements for, the use of any Road as a Haul Route and variations necessary from County road standards, including but not limited to load weight or size limits, limitations on hours or conditions or manner of operation, reasonable dust control measures or any other matters relating to the use of the Roads reasonably required to support the Project's proposed use of such Roads as Haul Routes shall be executed. In the event that Company disagrees with any restriction, standard or improvement recommended by the County, the Company shall have fifteen (15) days in which to provide written notice to the County detailing any such item

and all information on which Company relies in connection with such notice. Upon receipt of such notice from the Company, the County shall cooperate in good faith with Company to resolve such issues.

The Pre-Construction Road Survey shall be documented by a report agreed to by both parties detailing all methods, findings, restrictions, requirements, variations and improvements required for use of the Roads as Haul Routes. The document shall be prepared by one of the County's pre-qualified Consultants and shall be signed and sealed by a Professional Engineer registered within the State of Colorado. All costs incurred by the Consultant associated with the development of this document shall be covered, in whole, by the Company. The Company's use of any Haul Route shall be subject to any reasonable restrictions or conditions imposed by the County and shall be in strict compliance with this Agreement.

6. RESTRICTIONS AND DEVIATIONS FROM ROAD RESTRICTIONS

(a) In the event Company wishes to revise the Haul Route, Company shall notify County in writing of its desire to make such a revision, providing County with a proposed revised Haul Route map and specifying in detail the purpose for any requested change. No revision of the Haul Route nor use of a new Haul Route shall occur until the parties have completed an addendum to the Pre-Construction Road Survey to include the proposed revised Haul Route in accordance with paragraph 4 above. The Company is hereby expressly forbidden from using any Road as a Haul Route until it has fully complied with the provisions hereof and has received written approval from the County for any such proposed revision and an addendum to the Pre-Construction Survey Report has been completed as provided herein which includes any roads added to the Road Repair Plan if necessary for safe transport and public use of the roads. Any deviations from Road restrictions granted by the County must comply with County regulations. Any written agreement by the Parties to revise the Haul Route shall automatically constitute as an amendment to this Agreement.

7. SECURITY

(a) The County may require that the Company post security for Haul Route repairs and reasonable dust control that are required by paragraph 8(c) below, in an amount to be determined by a Neutral Engineer based on a review of the Pre-Construction Survey of the Haul Route Roads, such amount not to exceed six million dollars (\$6,000,000) which is hereby stipulated by the parties to be an amount reasonably sufficient to secure Company's performance of all of its obligations under this Agreement.

(b) If the County requires that the Company post security, the Company shall not utilize the Haul Routes as provided herein until:

(i) it has delivered to the County the security required in the form of an irrevocable letter of credit, escrow or bond or other financial security instrument reasonably acceptable to the County; and

- (ii) a Pre-Construction Survey pursuant to 7(a) has been completed.
- (c) If any security is provided by Company to the County under this Agreement, such security shall be released upon completion of Project construction as evidenced by a Letter of Acceptance, *infra*, issued by the County.

8. INSPECTIONS

- (a) The Pre-Construction and Post-Construction Surveys of the Haul Route pursuant to this Agreement shall be carried out at reasonable times in the presence of official designates of both the County and the Company at a time set by the County or by the designate of the County alone if so agreed to by the Company after fifteen (15) days prior written notice to Company of the time and place of such inspection.
- (b) The County or the Company may, at any time during the term of this Agreement, request that an inspection of a Haul Route Road be carried out to evaluate specific issues identified with the Haul Route Roads. Any such inspections shall be documented by video or photograph, as appropriate, and shall be done at Company's sole expense.
- (c) Except in cases of emergency in which inspections requested under paragraph 7(b) repairs shall be carried out as soon as possible upon receipt of notice via email, to a contact provided pursuant to this Agreement, inspections requested under paragraph 7(b) shall be carried out within two (2) business days of receipt of a written request for such inspection by the other party, or such other time as the parties mutually agree, and in the presence of official designees of both the County and the Company. The parties shall cooperate to schedule such interim inspections at reasonable times corresponding with the completion of deliveries using a particular Haul Route except in the case of emergencies.
- (d) The County and the Company shall acknowledge the results of all inspections by having the inspection document(s) signed by such official designees as are present at the inspection.
- (e) All actual and reasonable costs of videotaping and photographing Haul Route pursuant to this Agreement shall be paid by the Company to the County within thirty (30) days after receipt by the Company of a copy of all photographs and videos taken and an itemized invoice with a detailed summary of the scope of work performed.
- (f) Video or photographic evidence of Haul Route inspections by the County or the Company shall be uploaded to the OpenGov Permit for this Road Use Agreement as soon as practicable. Note that upload limits for OpenGov is approximately 100 mb per document uploaded. If a document exceeds the upload limit Company shall contact County to make alternative arrangements for delivery.

9. OTHER TERMS AND CONDITIONS

The following terms and conditions shall apply at all times during the term of this Agreement:

(a) Restriction on Use

The County establishes herein that the hours which this Project may make use of the County Roads within the Haul Route shall be during daylight hours only, seven days a week. County may order Company to temporarily cease using a Haul Route if, acting reasonably, the County determines that the prevailing weather conditions, damage to the Road, or other emergencies warrant suspension of use of the Haul Route.

(b) Maintenance If repair is required to the Haul Routes, including any appurtenances thereto, due to damage to the extent caused by the Company or its contractors in connection with the Project's construction, the Company shall timely provide, at its sole expense, all equipment, materials and labor required to restore the Road surface to substantially the same condition as documented in the Pre-Construction Survey, except that the Company shall not be liable for Road repairs to the extent such damage is caused by the County, its agents or third parties.

(c) Damages

- (i) Pursuant to CRS 42-4-512, the Company shall be liable at all times for the repair, to the reasonable satisfaction of the County, of any damage to the Roads to the extent caused in whole or in part by the Company's use of such Roads in connection with the Project. Any repairs undertaken shall restore the Road to the same condition as documented in the Pre-Construction Survey except to the extent such damage can be shown to have been caused by the County, its agents or third parties.
- (ii) Within fifteen (15) days after completion of the Post-Construction Survey, the County and Company shall meet to compare the Pre-Construction Survey data and Post-Construction Survey data, and if there is any wheel lane rutting, subsidence, or other damage caused by Project construction to the Haul Route in excess of the Road condition shown in the Pre-Construction Survey, Company and the County shall mutually determine the extent of the repairs needed to return the Haul Route to Pre-Construction condition ("Post-Construction Repairs"). County agrees that any Roads improved by Company to support construction activities will be accepted as a return of such Roads to the Pre-Construction Survey condition if they are constructed according to the Pueblo County Public Works Design Standards. Such improved roads will also be subject to obtaining the necessary County permits for work performed in the Right of Way and be subject to inspection by designated County Inspectors or the Consultant. The Company shall provide notice specifically identifying the scope of Post-Construction

Repairs and the methods and materials to be used to make the repairs and the expected date by which such repairs shall be completed (“Road Repair Plan”). Within seven (7) days of receipt of the Road Repair Plan, County shall identify any public infrastructure improvement made by Company to the Roads pursuant to this Agreement that County elects not to accept as a part of the County road system and shall either (a) accept Road Repair Plan or (b) provide Company with a written notice of deficiencies in Company’s Road Repair Plan. Upon receipt of a notice of deficiencies in the Company’s Road Repair Plan, the parties shall meet and sign a Road Repair Plan. If the Parties are unable to agree on the Post-Construction Repairs or the Road Repair Plan within thirty (30) days, the parties may submit the dispute for resolution as provided for in this Agreement.

(iii) The Company shall, unless a longer time has been agreed by the parties, complete all identified Road repairs in the Road Repair Plan within 180 calendar days after the Road Repair Plan has been accepted by the parties. If Company fails to timely complete the Post-Construction Repairs within 180 calendar days after the parties accept the Road Repair Plan, or within such additional time as the parties may agree is necessary to complete such repairs, the County may undertake all repairs necessary to return the Roads to the Pre-Inspection condition at Company’s sole cost and expense. At the election of the Company and as a part of the Road Repair Plan, the parties may enter into negotiations to mutually agree to have the County complete all or part of the repairs identified in the Road Repair Plan at the cost of Company.

(iv) In the event the Company is prevented by the weather or weather-related conditions or Force Majeure events from completing the repairs required by the County, pursuant to the time specified in 8(c)(iii) above, within five (5) business days of receipt of written notice from Company, the County, acting reasonably, may approve such time specified by Company or specify a further period of time within which the Company must complete such repairs.

(v) Upon completion of all Road repairs pursuant to the Road Repair Plan, Company shall provide written notice to County. Within fifteen (15) days following the County’s receipt of such notice, the County shall either (a) issue a letter accepting the Road repairs to the Company (“Letter of Acceptance”), or (b) identify in detail such additional actions that County finds necessary for the Company to complete the Road Repair Plan.

(d) Costs and Cost Sharing

In the event that the Company fails to complete the repairs required by the County, pursuant to paragraph 8(c)(i), (ii) or (iii) above, the County may draw upon the security to effect such repairs in accordance with the provisions of the security. In the event that the security is not sufficient to cover the County’s cost of repairs, or if no security was posted, Company shall be liable to the County for all reasonable costs (including reasonable attorney fees

and costs) incurred by the County in performing the Post-Construction Repairs to repair damage to such Roads pursuant to the Road Repair Plan to the same condition as documented in the Pre-Construction Survey and recovering the costs of such repairs. The County shall provide to Company an itemized invoice with details of all such expenses incurred by the County and a summary of the scope of work performed. If there is any overlap in haul routes with any other project the two (or more) parties may participate in cost sharing which may include but not limited to cost sharing of the road survey, reconstruction of roads and emergency repairs. Cost sharing and negotiations shall be conducted between the parties themselves, the County will not be responsible for distributing shared costs.

(e) Emergencies

(i) The County may, in emergency situations, and acting reasonably, and without giving any prior notice to the Company take immediate action necessary to complete repairs to the Roads that the County deems necessary for public safety.

(ii) The County may, in emergency situations, and acting reasonably, and without giving any prior notice to the Company temporarily close any Road or prohibit its use as a Haul Route due to Force Majeure in order to maintain public safety.

(f) Notification

The County shall provide notification to the Company of any action taken for Road repair under 8(e) above as soon as is reasonably practicable.

(g) Indemnity

The Company shall indemnify the County against all actions, proceedings, claims, demands and costs suffered by the County to the extent that they are directly attributable to damage caused by the Company, its employees, agents, contractors or subcontractors to the Roads, but such indemnity shall not apply to the extent caused by the intentional acts or negligence of the County, its employees, agents, contractors or subcontractors, or any acts of third parties. Each party's liability to the other party shall be limited to direct damages and shall exclude any other liability, including, without limitation, liability for special, indirect, punitive or consequential damages in contract, tort, warranty, strict liability or otherwise. County does not waive any protections under the law including but not limited to the Colorado Governmental Immunity Act.

(h) Force Majeure

No party shall be deemed to be in default with respect to non-performance if due to strikes, lockouts, fire, pandemic, epidemic, storm, acts of God or terrorists, or any other cause (whether similar or dissimilar to those enumerated) beyond its control; but lack of finances shall in no event be deemed to be a cause beyond a party's control.

(i) Disputes

The Parties shall make a good faith effort to resolve any disagreements without litigation about the cause, nature and/or scope of damage, defects or required repairs, the projected costs of those repairs or the performance or completion of repair of damages by the Company pursuant to this Agreement. In the event the negotiation efforts of the parties are unsuccessful or upon written demand by either party, the parties, within twenty-one (21) calendar days shall mutually agree upon a resolution of the dispute by the designated "Neutral Engineer". The Company shall be responsible to pay all necessary fees of the "Neutral Engineer" during the course of their dispute resolution.

The parties and the Neutral Engineer shall promptly agree to procedures for submitting reports and information to the Neutral Engineer and for an on-site inspection by the Neutral Engineer (if deemed necessary by either party or by the Neutral Engineer). The Neutral Engineer shall complete its review and inspection within thirty (30) business days of its engagement by the parties and issue its written report. The costs for such inspection and report by the Neutral Engineer shall be paid by the Company.

If the written report of the Neutral Engineer is unacceptable to either party, such party shall notify in writing the Neutral Engineer and the other party within twenty-one (21) calendar days following issuance of the report and shall then have the right to seek a final resolution in the District Court of Pueblo County.

10. NOTICES

All notices required to be given under the terms of this Agreement, shall be in writing and shall be addressed to the parties as follows:

County:

Pueblo County Public Works

33601 United Avenue

Pueblo, CO 81001

Attention: Gregory George, Public Works Director

with a copy to:

Company:

Attn: _____

Either party may change its address for service by giving written notice to the other party. Any notice shall be deemed to have been given and received: if delivered personally, on the day delivered; if sent by certified or registered mail, on the 4th business day following the day it was posted; if sent via nationally recognized overnight courier, on the day after deposit; and if electronically transmitted, at the start of the next regular business day. In the case of postal disruptions, or an anticipated postal disruption, all notices to be given under this Agreement shall be electronically transmitted, delivered by hand or by nationally recognized overnight courier.

11. ASSIGNMENT

Except as otherwise provided herein, this Agreement shall not be assigned by either party hereto without the prior written consent of the other party, which consent shall not unreasonably be withheld. Company shall be permitted to assign this Agreement to the following without the prior written consent of County: (a) an Affiliate; purchaser of all or substantially all of the assets of the Company; or (b) a public utility company provided that it is licensed to do business and maintains an office in the State of Colorado, and further provided however that no assignment of this Agreement by Company shall be effective until such time at the assignee has delivered to the County its written attestation to fulfill all obligations of the Company hereunder. "Affiliate" shall mean and refer to any person or entity controlling, controlled by, or under common control with Company. If Company assigns its entire interest in the Project and provided that transferee agrees to be bound under the terms of this Agreement, Company shall have no continuing liability under this Agreement. Assignment of this agreement in no way constitutes agreement or approval by Pueblo County of the assignment or transfer of the Project 1041 Permit or any other permit or agreement for the Project has been issued by Pueblo County.

12. WAIVERS

- (a) Failure by either party, at any time, to require strict performance by the other party of any provision of this Agreement will in no way affect the first party's rights hereunder to enforce such provision; nor will any waiver by either party of any breach be held to be a waiver of any succeeding breach or waiver of any other provision;
- (b) No waiver of any breach of a covenant or provision of this Agreement shall take effect or be binding upon a party unless it is in writing.

13. SUCCESSORS AND ASSIGNS

Subject to the limitations on Assignment set forth above, this Agreement shall inure to the benefit of, and be binding upon the County and the Company and their respective successors and permitted assigns.

14. SEVERABILITY

If any provision of this Agreement shall be held invalid, illegal or unenforceable in any respect by a court of competent jurisdiction, such invalidity, illegality or unenforceability shall not affect any other provision hereof but the invalid, illegal or unenforceable terms shall be reformed, as nearly as possible, to achieve its original intent in a manner which is not invalid, illegal or unenforceable.

15. COUNTERPARTS

This Agreement may be executed in any number of counterparts, each of which shall be deemed an original, with the same effect as if the signatures thereto and hereto were upon the instrument. Delivery of an executed counterpart of a signature page of this Agreement by telecopy shall be as effective as delivery of an originally signed counterpart to this Agreement

16. AMENDMENTS

This Agreement constitutes the entire agreement and undertaking of the Parties with respect to the use and repair of the Roads and supersedes all offers, negotiations, and other agreements concerning the same. There are no representations or undertakings of any kind not set forth herein. No amendment or modification to this Agreement or waiver of a party's rights hereunder shall be binding unless it shall be in writing and signed by both parties to this Agreement. In the event of conflict between the provisions of this Agreement and any other instrument, this Agreement shall control with regard to any matter relating to the Company's use or repair of Haul Route Roads and the other instrument shall control with regard to any matter relating to its subject.

17. HEADINGS AND SECTION NAMES

The headings and section names used in this Agreement are for ease of reference only and shall not in any way be construed to limit or alter the meaning of any provision herein.

18. COOPERATION

Whenever the consent, approval, acceptance of any party hereto is required in this Agreement such consent, approval or acceptance shall be in writing and shall not be unreasonably withheld or delayed, and, in all matters contained herein, the parties shall have an implied obligation of reasonableness, except as may be expressly set forth otherwise.

19. VENUE AND CHOICE OF LAW

This agreement shall be construed and enforces exclusively pursuant to the laws of the State of Colorado. The parties also agree that the venue of any action to enforce the

provisions of this agreement, or any document executed in connection with this agreement, shall be in Pueblo Colorado. In addition, the parties hereby agree that any action brought by Company contesting any action taken by the County shall be governed by Rule 106 of the Colorado Rules of Civil Procedure.

IN WITNESS WHEREOF the parties hereto have executed and delivered this Agreement as of the date and year first above written

Name: Pueblo County

By: _____

Print Name: Gregory George

Title: Public Works Director

Date: _____

Name: _____

By: _____

Print Name: _____

Title: _____

Date: _____

Exhibit A
Approved Haul Route