

State of Colorado, Colorado Water Conservation Board  
Contract Routing Number (CLIN #): 09 PDA 00025  
Contract No. 150421  
Grant Amount: \$116,000

## GRANT CONTRACT

THIS CONTRACT, by and between the State of Colorado, for the use and benefit of the Department of Natural Resources, Colorado Water Conservation Board, located at 1313 Sherman Street, Suite 721, Denver, Colorado 80203, (the "**State**"), and Silver Spur Operating Company, LLC, a Colorado limited liability company, located at P.O. Box 714, Encampment, WY 82325, ("**Contractor**" or "**Grantee**").

### FACTUAL RECITALS

- A. Authority exists in the law and funds have been budgeted, appropriated and otherwise made available and a sufficient unencumbered balance thereof remains available for encumbering and subsequent payment of this contract through the Colorado Financial Reporting Systems (COFRS).
- B. Required approval, clearance and coordination have been accomplished from and with appropriate agencies.
- C. Grantee's bid was selected in accordance with Colorado law and State Procurement Rules pursuant to the issuance of a grant which was awarded to Grantee by the Colorado Water Conservation Board on March 2008;
- D. Authority for the agency entering into this Contract arises from Colorado Revised Statutes (CRS) 39-29-109(1)(a)(III), 37-75-102 and 37-74-104(2)(c) and Senate Bill 06-179 adopted by the 2006 General Assembly.
- E. The State has allocated grant funds to rehabilitate the New Pioneer Ditch diversion. Grantee is ready, willing and able to provide such a task.

NOW THEREFORE, in consideration of and subject to the terms, conditions, provisions and limitations contained in this contract, the State and Contractor agree as follows:

### AGREEMENT

#### 1. Definitions

The following terms as used in this contract shall be construed and interpreted as follows, unless the context otherwise expressly requires a different construction and interpretation:

- 1.1. "**Compensation**" means the funds payable to Contractor by the State which are related to the Goods and Services set forth in the Scope of Work set forth in **Exhibit A**, attached hereto and incorporated herein.
- 1.2. "**Contract**" means this contract for Goods and Services, its terms and conditions, attached exhibits, documents incorporated by reference under the terms of this contract, and any future modifying agreements, exhibits, attachments or references that are incorporated pursuant to State Fiscal Rules and Policies.

- 1.3. **"Exhibit"** means a statement of work document, schedule, budget, or other identified exhibit which has been incorporated into and attached to this contract.
- 1.4. **"Goods"** means anything that is produced or manufactured and that is obtained by the State, either in and of itself, or in conjunction with services.
- 1.5. **"Services"** means services performed or tangible material produced or delivered in the performance of services.

## **BASIC CONTRACT TERMS**

### **2. Statement of Work**

Contractor shall perform the Services described in **Exhibit A, Scope of Work**.

### **3. Performance Standard**

Contractor shall perform the Services described in **Exhibit A, Scope of Work**, in accordance with the highest standard of care, skill and diligence provided by a professional person or company in performance of work similar to the Services, and all services, and all consumables, products, and materials used in performance of the Services shall be of good quality and free from faults and defects. Contractor warrants that (a) services or goods provided under this contract shall meet the description in **Exhibit A, Scope of Work**, (b) there are no pending or threatened suits, claims, or actions of any type with respect to the services or goods provided and (c) the services and goods shall be free and clear of any liens, encumbrances, or claims arising by or through Contractor or any party related to Contractor.

### **4. Performance Term**

- 4.1. This contract shall be effective upon approval by the Colorado State Controller, or designee (the "Effective Date") and extend through December 31, 2009. Performance of this contract shall commence as soon as practicable after the Effective Date and shall be undertaken and performed in the sequence and manner set forth in **Exhibit A, Scope of Work**.
- 4.2. In the event the State desires to continue the Services and a replacement contract has not been fully approved by the termination date of this contract, the State, upon written notice to Contractor, may unilaterally extend this contract for a period of up to three (3) months. The contract shall be extended under the same terms and conditions as the original contract, including, but not limited to prices, rates and service delivery requirements. This extension shall terminate at the end of the three (3) month period or when the replacement contract is signed by the Colorado State Controller or an authorized delegate.

### **5. Grant Award (Compensation)**

- 5.1. Payment of compensation pursuant to this contract will be made as earned, in whole or in part, from available State funds encumbered in a maximum amount not to exceed \$116,000 for the performance of the Services required by this contract and **Exhibit A, Scope of Work**. Satisfactory performance under the terms of this contract shall be a condition precedent to the State's obligation to compensate Contractor.
- 5.2. The maximum compensation payable under this contract, and under any renewal hereof, shall include all Contractor fees, costs and expenses.
- 5.3. The State shall not be liable to Contractor for payment of work or services or for costs or expenses incurred by Contractor prior to the "Effective Date".

- 5.4. The maximum amount available during each fiscal year of this contract for the purchase of Goods and Services shall be \$116,000 in fiscal years 2008, 2009, and 2010.

## **6. Availability of Funds**

This contract is contingent upon the continuing availability of State appropriations as provided in Section 2 of the Colorado Special Provisions, incorporated as a part of this contract. The State is prohibited by law from making fiscal commitments beyond the term of its current fiscal period. If Federal appropriations or grants fund this contract in whole or in part, the contract is subject to and contingent upon the continuing availability of appropriated Federal funds for this contract. If State of Colorado or Federal funds are not appropriated, or otherwise become unavailable to fund this contract, the State may immediately terminate the contract in whole or in part without further liability.

## **PROCEDURES FOR AND OBLIGATIONS OF CONTRACT PERFORMANCE**

### **7. Billing/Payment Procedure**

- 7.1. The State shall establish billing procedures and pay Contractor the contract price or rate for Services performed, reviewed, and accepted or Goods delivered, inspected, and accepted pursuant to all the terms and conditions of this contract, including without limitation, performance, quality, milestones and completion requirements for payment set forth in **Exhibit A**, Scope of Work, and the State's inspection and acceptance rights in Section 8. Contractor shall submit invoices for payment on forms and provide requested documentation in a manner prescribed or approved by the State. Payments pursuant to this contract shall be made as earned, in whole or in part, from available funds encumbered for the purchase of the described Services and Goods. Incorrect payments by the State to Contractor due to omission, error, fraud, or defalcation shall be recovered from Contractor by deduction from subsequent payments under this contract or other contracts between the State and Contractor or collected as a debt due to the State.
- 7.2. Invoices and payments shall be mailed using the US Postal Service or other delivery service with a properly addressed stamped envelope to the address specified by the Contractor on form W-9 or other similar form and by the State in its billing procedures.
- 7.3. The State shall make payment in full with respect to each invoice within forty-five (45) days of receipt thereof; provided that the amount invoiced represents Goods and/or Services which have been accepted by the State and the form of the invoice is acceptable to the State. Uncontested amounts not paid by the State within forty-five (45) days shall bear interest on the unpaid balance beginning with the forty-sixth (46th) day at a rate of one percent (1%) per month until paid in full; provided, however, that no interest shall accrue with respect to unpaid amounts for which the State has delivered to Contractor notice of a good faith dispute. Contractor shall invoice the State separately for accrued interest on delinquent amounts. The billing shall reference the delinquent payment, the number of day's interest to be paid and the applicable interest rate.

### **8. Inspection and Acceptance**

The State reserves the right to inspect Services provided under this contract at all reasonable times and places during the term of this contract, including any extensions. If any of the Services does not conform to contract requirements, the State may require Contractor to promptly perform the Services again in conformity with contract requirements, at no additional cost to the State. When defects in the quality or quantity of Services cannot be corrected by re-performance, the State may:

- (a) require Contractor to take necessary action to ensure that future performance conforms to this contract requirements; and
- (b) equitably reduce the payment due to Contractor to reflect the reduced value of the Services performed.

These remedies shall in no way limit the remedies available to the State in other provisions of this contract or remedies otherwise available in equity or at law, all of which may be exercised by the State, at its option,

in lieu of or in conjunction with the preceding measures. Furthermore, the reduction, delay or denial of payment under this provision shall not constitute a breach of contract or default by the State.

## **9. Reporting**

Unless otherwise provided in this contract or the exhibits hereto, Contractor shall submit, on a quarterly basis and upon termination or completion of work, a written progress report analyzing the performance under this contract and specifying progress made for each activity identified in Contractor's duties and obligations. Such written analysis shall be in accordance with the procedures developed and prescribed by the State. The preparation of reports in a timely manner shall be the responsibility of Contractor and failure to comply may result in the delay of payment of funds and/or termination of this contract. Required reports shall be submitted to the State not later than the end of each calendar quarter, or at such time as otherwise specified. Notwithstanding anything herein to the contrary, including without limitation the priority provisions set forth in Section 35, specific reporting requirements set forth in **Exhibit A, Scope of Work**, or in other exhibits to this contract, shall take precedence over this general reporting provision.

## **10. Rights in Data, Documents, and Computer Software**

- 10.1 Any software, research, reports, studies, data, photographs, negatives or other documents, drawings, models, materials, or work product of any type, including drafts, prepared by Contractor in the performance of its obligations under this contract (the "Work Product"), shall be the exclusive property of the State and all Work Product shall be delivered to the State by Contractor upon completion, termination, or cancellation of this contract. The rights of the State with respect to such Work Product shall include, but not be limited to, the right to copy, publish, display, transfer, prepare derivative works, or otherwise use such Work.
- 10.2 Contractor shall not use, willingly allow, cause or permit such property to be used for any purpose other than the performance of Contractor's obligations under this contract, without the prior written consent of the State. The rights of the State with respect to such property shall include, but not be limited to, the right to copy, publish, display, transfer, prepare derivative works, or otherwise use such property.

## **11. Maintenance, Inspection and Monitoring of Records**

- 11.1 Contractor shall maintain a complete file of all records, documents, communications, notes and other written materials or electronic media, files or communications, which pertain in any manner to the operation of programs or the delivery of Services or Goods under this contract, and shall maintain such records for a period of three (3) years after the date of termination of this contract or final payment hereunder, whichever is later, or for such further period as may be necessary to resolve any matters which may be pending, or until an audit has been completed; provided, that if an audit by or on behalf of the Federal and/or Colorado State government has begun but is not completed or audit findings have not been resolved after a three (3) year period, such materials shall be retained until the resolution of the audit findings.
- 11.2 Contractor shall permit the State, the Federal Government or any other duly authorized agent of a governmental agency to audit, inspect, examine, excerpt, copy and/or transcribe Contractor's records during the term of this contract and for a period of three (3) years following termination of this contract or final payment hereunder, whichever is later, to assure compliance with the terms hereof or to evaluate Contractor's performance hereunder.
- 11.3 Contractor also shall permit these same described entities to monitor all activities conducted by Contractor pursuant to the terms of this contract. As the monitoring agency, in its sole discretion, may deem necessary or appropriate, such monitoring may consist of internal evaluation procedures, examination of program data, special analyses, on-site checking, formal audit examinations, or any other reasonable procedure. All such monitoring shall be performed in a manner that will not unduly interfere with contract performance.



## **12. Confidentiality of State Records and Information**

- 12.1 Contractor acknowledges that it may come into contact with confidential information in connection with this contract or in connection with the performance of its obligations under this contract, including but not limited, to personal records and information of individuals. It shall be the responsibility of Contractor to keep all State records and information confidential at all times and to comply with all Colorado State and Federal laws and regulations concerning the confidentiality of information to the same extent applicable to the State. Any request or demand for information in the possession of Contractor made by a third party who is not an authorized party to this contract shall be immediately forwarded to the State's principal representative for resolution.
- 12.2 Contractor shall notify all of its agent, employees, subcontractors and assigns who will come into contact with State information that they are subject to the confidentiality requirements set forth herein, and shall provide each with a written explanation of the requirements before they are permitted to access information or data. Contractor shall provide and maintain a secure environment that ensures confidentiality of all State records and information wherever located. No State information of any kind shall be distributed or sold to any third party or used by Contractor or its agents in any way, except as authorized by the contract and as approved by the State. State information shall not be retained in any files or otherwise by Contractor or its agents, except as set forth in this contract and approved by the State. Disclosure of State records or information may be cause for legal action against Contractor or its agents. Defense of any such action shall be the sole responsibility of Contractor.

## **13. Litigation Reporting**

Contractor, within ten (10) days after being served with a summons, complaint, or other pleading in a case which involves Services provided or Contractor's performance under this contract, which has been filed in any Federal or state court or administrative agency, shall deliver copies of such document to the State's principal representative, or in absence of such designation, to the chief executive officer of the department, agency, or institution executing this contract on behalf of the State.

## **14. Conflict of Interest.**

- 14.1 During the term of this contract, Contractor shall not engage in any business or personal activities or practices or maintain any relationships which conflict in any way with the full performance of Contractor's obligations under this contract.
- 14.2 Additionally, Contractor acknowledges that in governmental contracting, even the appearance of a conflict of interest is harmful to the interests of the State. Thus, Contractor shall refrain from any practices, activities or relationships that could reasonably be considered to be in conflict with the full performance of Contractor's obligations to the State in accordance with the terms and conditions of this contract, without the prior written approval of the State.
- 14.3. In the event that Contractor is uncertain whether the appearance of a conflict of interest may reasonably exist, Contractor shall submit to the State a full disclosure statement setting forth the relevant details for the State's consideration and direction. Failure to promptly submit a disclosure statement or to follow the State's direction in regard to the apparent conflict shall be grounds for termination of the contract.
- 14.4. Contractor and subcontractors, permitted under the terms of this contract, shall maintain a written code of standards governing the performance of their respective employees engaged in the award and administration of contracts. No employee, officer or agent of Contractor or any permitted subcontractor shall participate in the selection, or in the award or administration of a contract or subcontract supported by Federal funds if a conflict of interest, real or apparent, would be involved. Such a conflict would arise when:
- (a) an employee, officer or agent;

- (b) any member of the employee's immediate family;
- (c) an employee's partner; or
- (d) an organization, which employs, or is about to employ, any of the above,

has a financial or other interest in the firm selected for award. Contractor's or subcontractor's officers, employees, or agents shall neither solicit nor accept gratuities, favors, or anything of monetary value from Contractor, potential contractors, or parties to sub-agreements.

## **REPRESENTATIONS AND WARRANTIES**

**15. Warranties.** During the term of this contract and for a period of six (6) months following the State's final acceptance under this contract, Contractor warrants as follows:

- 15.1 All Services under this Contract shall be performed in accordance with the specifications set forth in this contract and **Exhibit A** and in a manner acceptable to the State. Contractor shall re-perform any Services that fail to satisfy this warranty.
- 15.2 All deliverables delivered under this contract by Contractor shall meet the specifications set forth in this contract and **Exhibit A**. Contractor shall correct or replace any deliverables which fail to satisfy this warranty.

The foregoing warranties and such other warranties as may be set forth in **Exhibit A**, Scope of Work, are a part of the minimum work requirements of this contract, and as such will be at no additional cost to the State.

## **16. Licenses, Permits, and Responsibilities**

Contractor certifies that, at the time of entering into this contract, it has currently in effect all necessary licenses, certifications, approvals, insurance, permits, and other authorizations required to properly perform the Services and/or deliver the Goods covered by this contract. Contractor warrants that it shall maintain all necessary licenses, certifications, approvals, insurance, permits, and other authorizations required to properly perform this contract, without reimbursement by the State or other adjustment in contract price. Additionally, all employees of Contractor performing services under this contract shall hold the required licenses or certification, if any, to perform their responsibilities. Contractor, if a foreign corporation or other entity transacting business in the State of Colorado, further certifies that it currently has obtained and shall maintain any applicable certificate of authority to do business in the State of Colorado and has designated a registered agent in Colorado to accept service of process. Any revocation, withdrawal or non-renewal of licenses, certifications, approvals, insurance, permits or any such similar requirements necessary for Contractor to properly perform this contract, shall be deemed to be a default by Contractor and grounds for termination of this contract by the State.

## **17. Tax Exempt Status**

Contractor acknowledges that the State of Colorado is not liable for any sales, use, excise, property or other taxes imposed by any Federal, State or local government tax authority. The State also is not liable for any Contractor franchise or income related tax. No taxes of any kind shall be charged to the State.

## **18. Legal Authority**

Contractor warrants that it possesses the legal authority to enter into this contract and that it has taken all actions required by its procedures, by-laws, and/or applicable laws to exercise that authority, and to lawfully authorize its undersigned signatory to execute this contract and to bind Contractor to its terms. Contractor agrees it shall submit voluntarily to the personal jurisdiction of the Federal and State courts in the State of Colorado and venue in the City and County of Denver, Colorado. The person(s) executing this contract on behalf of Contractor warrant(s) that such person(s) have full authorization to execute this contract.

## **19. Compliance with Applicable Law**

- 19.1 Contractor shall at all times during the execution of this contract strictly adhere to, and comply with, all applicable Federal and Colorado State laws, and their implementing regulations, as they currently exist and may hereafter be amended, which laws and regulations are incorporated herein by this reference as terms and conditions of this contract. Contractor also shall require compliance with such laws and regulations by subcontractors under subcontracts permitted under this contract.

## **REMEDIES**

### **20. Remedies**

In addition to any other remedies provided for in this contract, and without limiting the remedies otherwise available at law or in equity, the State may exercise the following remedial actions if Contractor substantially fails to satisfy or perform the duties and obligations in this contract. "Substantial failure" to satisfy duties and obligations shall be defined to mean material, insufficient, incorrect or improper performance, activities, or inaction by Contractor. These remedial actions are as follows:

- (a) Suspend Contractor's performance pending necessary corrective action as specified by the State, without Contractor's entitlement to adjustment in price/cost or schedule. Furthermore, at the State's option, a directive to suspend may include suspension of this entire contract or any particular part of this contract that the State determines in good faith would not be beneficial or in the State's best interests due to Contractor's substantial non-performance. Accordingly, the State shall not be liable to Contractor for costs incurred after the State has duly notified Contractor of the suspension of performance under this provision, and Contractor shall promptly cease performance and incurring costs in accordance with the State's directive;
- (b) Withhold payment to Contractor until the necessary Services or corrections in performance, development or manufacture are satisfactorily completed;
- (c) Request the removal from work on this contract of employees or agents of Contractor identified by the State, in its reasonable judgment, as being incompetent, careless, insubordinate, unsuitable, or otherwise unacceptable, or whose continued employment on this contract the State deems to be contrary to the public interest or not in the best interests of the State;
- (d) Deny payment for those Services or obligations which have not been performed which have not been provided and which, due to circumstances caused by Contractor, cannot be performed, or if performed would be of no value to the State. Denial of the amount of payment must be reasonably related to the value of work or performance lost to the State; and/or
- (e) Terminate this contract for default.

The above remedies are cumulative and the State, in its sole discretion, may exercise any or all of them individually or simultaneously.

### **21. Termination for Convenience**

- 21.1 When the interests of the State so require, the State may terminate this contract in whole or in part, for the convenience of the State. The State shall give written notice of termination to Contractor specifying the termination of all or a portion of this contract and the effective date of such. Exercise by the State of this termination for convenience provision shall not be deemed a breach of contract by the State. Upon receipt of written notice, Contractor shall incur no further obligations in connection with the terminated work and, on the date set in the notice of termination, Contractor shall stop work to the extent specified. Contractor also shall terminate outstanding orders and subcontracts as they relate to the terminated work. All finished or unfinished documents, data, studies, research, surveys, drawings, maps, models, photographs, and reports or other materials prepared by Contractor under this contract shall, at the option of the State, be delivered by Contractor to the State and shall become the State's property. The State may direct Contractor to assign Contractor's right, title, and interest under terminated orders or subcontracts to the State.



Contractor shall complete and deliver to the State the work not terminated by the notice of termination and may incur obligations as are necessary to do so within the contract terms.

- 21.2 If this contract is terminated by the State as provided herein, Contractor shall be paid an amount which bears the same ratio to the total compensation as the Services satisfactorily performed or the deliverables satisfactorily delivered or installed bear to the total Services or deliverables covered by this contract, less payments of compensation previously made. In addition, for contracts that are less than 60% completed, the State may reimburse the contractor for a portion of actual out-of-pocket expenses (not otherwise reimbursed under this contract) incurred by Contractor during the contract period which are directly attributable to the uncompleted portion of Contractor's obligations covered by this contract. In no event shall reimbursement under this clause exceed the contract amount. If this contract is terminated for cause, or due to the fault of the Contractor, the Termination for Cause or Default provision shall apply.

## **22. Termination for Default/Cause**

If Contractor refuses or fails to perform any of the provisions of this contract with such diligence as will ensure its completion within the time and pursuant to the requirements and terms specified in this contract, the State may notify Contractor in writing of such non-performance. If Contractor fails to promptly correct such delay or non-performance within the time specified, the State, may at its option, terminate this entire contract or such part of this contract as to which there has been delay or a failure to properly perform. If terminated for cause, the State shall only reimburse Contractor for accepted work or deliverables received up to the date of termination and final payments may be withheld. In the event of termination, all finished or unfinished documents, data, studies, research surveys, reports, other materials prepared by Contractor, or materials owned by the State in the possession of Contractor, at the option of the State, shall be returned immediately to the State or retained by the State as its property. At the State's option, Contractor shall continue performance of this contract to the extent not terminated, if any, and shall be liable for excess costs incurred by the State in procuring from third parties replacement services or substitute goods as cover. Notwithstanding any remedial action by the State, Contractor also shall remain liable to the State for any damages sustained by the State by virtue of any breach by Contractor and the State may withhold any payment to Contractor for the purpose of mitigating the State's damages, until such time as the exact amount of damages due to the State from Contractor is determined. Upon termination by the State, Contractor shall take timely, reasonable and necessary action to protect and preserve property in the possession of Contractor in which the State has an interest. Further, the State may withhold amounts due to Contractor as the State deems necessary to protect the State against loss because of outstanding liens or claims of former lien holders and to reimburse the State for the excess costs incurred in procuring similar goods or services. Any action taken by the State hereunder or pursuant to paragraph 15 shall not be cause for Contractor to terminate this Contract for default or material breach. If, after termination by the State, it is determined for any reason that Contractor was not in default or that Contractor's action/inaction was excusable, such termination shall be treated as a termination for convenience and the rights and obligations of the parties shall be the same as if this contract had been terminated for convenience, as described herein.

## **23. Insurance**

- 23.1 The Contractor shall obtain, and maintain at all times during the term of this agreement, insurance in the following kinds and amounts:
- a. Worker's Compensation Insurance as required by state statute, and Employer's Liability Insurance covering all of the Contractor's employees acting within the course and scope of their employment.
  - b. Commercial General Liability Insurance written on ISO occurrence form CG 00 01 10/93 or equivalent, covering premises operations, fire damage, independent contractors, products and completed operations, blanket contractual liability, personal injury, and advertising liability with minimum limits as follows:



- i. \$1,000,000 each occurrence;
- ii. \$1,000,000 general aggregate;
- iii. \$1,000,000 products and completed operations aggregate; and
- iv. \$50,000 any one fire.

If any aggregate limit is reduced below \$1,000,000 because of claims made or paid, the contractor shall immediately obtain additional insurance to restore the full aggregate limit and furnish to the State a certificate or other document satisfactory to the State showing compliance with this provision.

- c. Automobile Liability Insurance covering any auto (including owned, hired and non-owned autos) with a minimum limit as follows: \$1,000,000 each accident combined single limit.

- 23.2 The State of Colorado shall be named as additional insured on the Commercial General Liability and Automobile Liability Insurance policies (leases and construction contracts will require the additional insured coverage for completed operations on endorsements CG 2010 11/85, CG 2037, or equivalent). Coverage required of the contract will be primary over any insurance or self-insurance program carried by the State of Colorado.
- 23.3 The Contractor will require all insurance policies in any way related to the contract and secured and maintained by the Contractor to include clauses stating that each carrier will waive all rights of recovery, under subrogation or otherwise, against the State of Colorado, its agencies, institutions, organizations, officers, agents, employees and volunteers.
- 23.4 All policies evidencing the insurance coverages required hereunder shall be issued by insurance companies satisfactory to the State.
- 23.5 The Contractor shall provide certificates showing insurance coverage required by this contract to the State within 7 business days of the effective date of the contract, but in no event later than the commencement of the services under the contract. No later than 15 days prior to the expiration date of any such coverage, the contractor shall deliver the State certificates of insurance evidencing renewals thereof. At any time during the term of this contract, the State may request in writing, and the contractor shall thereupon within 10 days supply to the State, evidence satisfactory to the State of compliance with the provisions of this section.
- 23.6 Notwithstanding subsection (a) of this section, if the Contractor is a "public entity" within the meaning of the Colorado Governmental Immunity Act, CRS 24-10-101, *et seq.*, as amended ("Act"), the contractor shall at all times during the term of this contract maintain only such liability insurance, by commercial policy or self-insurance, as is necessary to meet its liabilities under the Act. Upon request by the State, the contractor shall show proof of such insurance satisfactory to the State.

## **24. Governmental Immunity**

Notwithstanding any other provision of this contract to the contrary, no term or condition of this contract shall be construed or interpreted as a waiver, express or implied, of any of the immunities, rights, benefits, protection, or other provisions of the Governmental Immunity Act. The parties understand and agree that liability for claims for injuries to persons or property arising out of negligence of the State of Colorado, its departments, institutions, agencies, boards, officials and employees is controlled and limited by the provisions of sections 24-10-101, *et seq.*, C.R.S., as now or hereafter amended and the risk management statutes, sections 24-30-1501, *et seq.*, C.R.S., as now or hereafter amended.

## **25. Force Majeure**

Neither Contractor nor the State shall be liable to the other for any delay in, or failure of performance of, any covenant or promise contained in this contract, nor shall any delay or failure constitute default or give rise to any liability for damages if, and only to the extent that, such delay or failure is caused by "force majeure." As used in this contract "force majeure" means acts of God; acts of the public enemy; public

health/safety emergency acts of the State or any governmental entity in its sovereign capacity; fires; floods, epidemics; quarantine restrictions; strikes or other labor disputes; freight embargoes; or unusually severe weather.

## **MISCELLANEOUS PROVISIONS**

### **26. Representatives**

Each individual identified below is the principal representative of the designating party. All notices required to be given to a party pursuant to this contract shall be hand delivered with receipt required or sent by certified or registered mail to such party's principal representative at the address for such party set forth below. Either party may from time to time designate by written notice substitute addresses or persons to whom such notices shall be sent.

**For the State:**

Name: Chris Sturm

Title: Project Manager, Intrastate Water Management and Development, CWCB

Address: 1313 Sherman Street, Room 721, Denver, CO 80203

Telephone: (303) 866-3441

**For Contractor:**

Name: Newell Geer

Title: Owner, Silver Spur Operating Company, LLC

Address: P.O. Box 1060, Walden, CO 80480

Telephone: (970) 723-4356

### **27. Assignment and Successors**

Unless otherwise specified in **Exhibit A**, Scope of Work, Contractor's rights and obligations under this contract shall be deemed to be personal and may not be transferred, assigned or subcontracted without the prior, written consent of the State, which shall not be unreasonably withheld. Any attempt at assignment, transfer or subcontracting without such consent shall be void, except that Contractor may assign the right to receive payments from the State pursuant to section 4-9-318, C.R.S. All subcontracts and subcontractors consented to by the State shall be made subject to the requirements, terms and conditions of this contract. Contractor alone shall be responsible for all subcontracting arrangements, directions and delivery of subcontracted work or Goods, and performance of any subcontracted Services. Contractor shall require and ensure that each subcontractor shall assent in writing to all the terms and conditions of this contract, including an obligation of the subcontractor to indemnify the State as is required under Section 3 of the Colorado Special Provisions, incorporated as a part of this contract.

### **28. Third Party Beneficiaries**

The enforcement of the terms and conditions of this contract and all rights of action relating to such enforcement shall be strictly reserved to the State and Contractor. Nothing contained in this contract shall give or allow any claim or right of action whatsoever by any third person. It is the express intention of the State and Contractor that any such person or entity, other than the State or Contractor, receiving services or benefits under this contract shall be deemed an incidental beneficiary only.

### **29. Severability**

To the extent this contract may be executed and performance of the obligations of the parties may be accomplished within the intent of the contract, the terms of this contract are severable. Should any term or provision hereof be declared invalid or become inoperative for any reason, such invalidity or failure shall not affect the validity of any other term or provision hereof.

### **30. Waiver**

The waiver of any breach of a term, provision, or requirement of this contract shall not be construed or

deemed as waiver of any subsequent breach of such term, provision, or requirement, or of any other term, provision, or requirement.

### **31. Entire Understanding**

This contract is intended as the complete integration of all understandings between the parties. No prior or contemporaneous addition, deletion, or other amendment hereto shall have any force or effect whatsoever, unless embodied herein in writing. No subsequent novation, renewal, addition, deletion, or other amendment hereto shall have any force or effect unless embodied in a writing executed and approved pursuant to the Colorado State Fiscal Rules.

### **32. Survival of Certain Contract Terms**

Notwithstanding anything herein to the contrary, all terms and conditions of this contract, including but not limited to its exhibits and attachments, which may require continued performance, compliance, or effect beyond the termination date of the contract, shall survive such termination date and shall be enforceable by the State in the event of the Contractor's failure to perform or comply as required.

### **33. Modification and Amendment**

- 33.1 This contract is subject to such modifications as may be required by changes in Federal or Colorado State law, or their implementing regulations. Any such required modification automatically shall be incorporated into and be part of this contract on the Effective Date of such change, as if fully set forth herein.
- 33.2 Except as specifically provided in this contract, no modification of this contract shall be effective unless agreed to in writing by both parties in an Amendment to this contract, properly executed and approved in accordance with Colorado State law and State Fiscal Rules.

### **34. Venue**

Venue for any action related to performance of this contract shall be in the City and County of Denver, Colorado.

### **35. Order of Precedence**

The provisions of this contract shall govern the relationship of the State and Contractor. In the event of conflicts or inconsistencies between this contract and its exhibits or attachments, such conflicts or inconsistencies shall be resolved by reference to the documents in the following order of priority:

- (a) Colorado Special Provisions, pages 12 to 13.
- (b) Remaining pages of the contract, pages 1 to 11.
- (c) **Exhibit A**, Scope of Work

## SPECIAL PROVISIONS

The Special Provisions apply to all contracts except where noted in *italics*.

1. **CONTROLLER'S APPROVAL. CRS §24-30-202 (1).** This contract shall not be deemed valid until it has been approved by the Colorado State Controller or designee.
2. **FUND AVAILABILITY. CRS §24-30-202(5.5).** Financial obligations of the State payable after the current fiscal year are contingent upon funds for that purpose being appropriated, budgeted, and otherwise made available.
3. **INDEMNIFICATION.** Contractor shall indemnify, save, and hold harmless the State, its employees and agents, against any and all claims, damages, liability and court awards including costs, expenses, and attorney fees and related costs, incurred as a result of any act or omission by Contractor, or its employees, agents, subcontractors, or assignees pursuant to the terms of this contract.  
**[Applicable Only to Intergovernmental Contracts]** No term or condition of this contract shall be construed or interpreted as a waiver, express or implied, of any of the immunities, rights, benefits, protection, or other provisions, of the Colorado Governmental Immunity Act, CRS §24-10-101 et seq., or the Federal Tort Claims Act, 28 U.S.C. 2671 et seq., as applicable, as now or hereafter amended.
4. **INDEPENDENT CONTRACTOR. 4 CCR 801-2.** Contractor shall perform its duties hereunder as an independent contractor and not as an employee. Neither contractor nor any agent or employee of contractor shall be or shall be deemed to be an agent or employee of the state. Contractor shall pay when due all required employment taxes and income taxes and local head taxes on any monies paid by the state pursuant to this contract. Contractor acknowledges that contractor and its employees are not entitled to unemployment insurance benefits unless contractor or a third party provides such coverage and that the state does not pay for or otherwise provide such coverage. Contractor shall have no authorization, express or implied, to bind the state to any agreement, liability or understanding, except as expressly set forth herein. Contractor shall provide and keep in force workers' compensation (and provide proof of such insurance when requested by the state) and unemployment compensation insurance in the amounts required by law and shall be solely responsible for its acts and those of its employees and agents.
5. **NON-DISCRIMINATION.** Contractor agrees to comply with the letter and the spirit of all applicable State and federal laws respecting discrimination and unfair employment practices.
6. **CHOICE OF LAW.** The laws of the State of Colorado, and rules and regulations issued pursuant thereto, shall be applied in the interpretation, execution, and enforcement of this contract. Any provision of this contract, whether or not incorporated herein by reference, which provides for arbitration by any extra-judicial body or person or which is otherwise in conflict with said laws, rules, and regulations shall be considered null and void. Nothing contained in any provision incorporated herein by reference which purports to negate this or any other special provision in whole or in part shall 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 will not invalidate the remainder of this contract, to the extent that this contract is capable of execution. At all times during the performance of this contract, Contractor shall strictly adhere to all applicable federal and State laws, rules, and regulations that have been or may hereafter be established.
7. **VENDOR OFFSET. CRS §§24-30-202 (1) and 24-30-202.4. [Not Applicable to Intergovernmental Agreements]** The State Controller may withhold payment of certain debts owed to State agencies under the State's vendor offset intercept system for: (a) unpaid child support debts or child support arrearages; (b) unpaid balances of tax, accrued interest, or other charges specified in CRS §39-21-101, et. seq.; (c) unpaid loans due to the Student Loan Division of the Department of Higher Education; (d) amounts required to be paid to the Unemployment Compensation Fund; and (e) other unpaid debts certified by the State Controller as owing to the State as a result of final agency determination or judicial action.



**8. SOFTWARE PIRACY PROHIBITION. Governor's Executive Order D 002 00.** No State or other public funds payable under this contract shall be used for the acquisition, operation, or maintenance of computer software in violation of federal copyright laws or applicable licensing restrictions. Contractor hereby certifies that, for the term of this contract and any extensions, Contractor has in place appropriate systems and controls to prevent such improper use of public funds. If the State determines that Contractor is in violation of this paragraph, the State may exercise any remedy available at law or equity or under this contract, including, without limitation, immediate termination of this contract and any remedy consistent with federal copyright laws or applicable licensing restrictions.

**9. EMPLOYEE FINANCIAL INTEREST. CRS §24-18-201 and §24-50-507.** The signatories aver that to their knowledge, no employee of the State has any personal or beneficial interest whatsoever in the service or property described in this contract.

**10. PUBLIC CONTRACTS FOR SERVICES. CRS §8-17.5-101.** *[Not Applicable to agreements relating to the offer, issuance, or sale of securities, investment advisory services or fund management services, sponsored projects, intergovernmental agreements, or information technology services or products and services]* Contractor certifies, warrants, and agrees that it does not knowingly employ or contract with an illegal alien who will perform work under this contract and will confirm the employment eligibility of all employees who are newly hired for employment in the United States to perform work under this contract, through participation in the E-Verify Program or the Department program established pursuant to CRS §8-17.5-102(5)(c). Contractor shall not knowingly employ or contract with an illegal alien to perform work under this contract or enter into a contract with a subcontractor that fails to certify to Contractor that the subcontractor shall not knowingly employ or contract with an illegal alien to perform work under this contract. Contractor (a) shall not use E-Verify Program or Department program procedures to undertake pre-employment screening of job applicants while this contract is being performed, (b) shall notify the subcontractor and the contracting State agency within three days if Contractor has actual knowledge that a subcontractor is employing or contracting with an illegal alien for work under this contract, (c) shall terminate the subcontract if a subcontractor does not stop employing or contracting with the illegal alien within three days of receiving the notice, and (d) shall comply with reasonable requests made in the course of an investigation, undertaken pursuant to CRS §8-17.5-102(5), by the Colorado Department of Labor and Employment. If Contractor participates in the Department program, Contractor shall deliver to the contracting State agency, institution of higher education or political subdivision a written, notarized affirmation, affirming that Contractor has examined the legal work status of such employee, and comply with all of the other requirements of the Department program. If Contractor fails to comply with any requirement of this provision or CRS §8-17.5-101 et seq., the contracting State agency, institution of higher education or political subdivision may terminate this contract for breach and, if so terminated, Contractor shall be liable for damages.

**11. PUBLIC CONTRACTS WITH NATURAL PERSONS. CRS §24-76.5-101.** Contractor, if a natural person eighteen (18) years of age or older, hereby swears and affirms under penalty of perjury that he or she (a) is a citizen or otherwise lawfully present in the United States pursuant to federal law, (b) shall comply with the provisions of CRS §24-76.5-101 et seq., and (c) has produced one form of identification required by CRS §24-76.5-103 prior to the effective date of this contract.

**Revised May 13, 2008**

# THE PARTIES HERETO HAVE EXECUTED THIS CONTRACT

GRANTEE:

STATE OF COLORADO:

BILL RITTER, JR. GOVERNOR

Silver Spur Operating Company, LLC

By   
For Executive Director, Department of Natural Resources

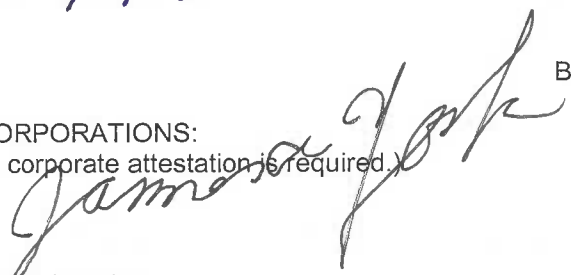
  
Signature of Authorized Officer

THAD W. YORK, GENERAL MANAGER  
(Print) Name & Title of Authorized Officer

Date 7/15/08

LEGAL REVIEW:  
Attorney General, John W. Suthers

CORPORATIONS:  
(A corporate attestation is required.)

Attest (Seal) By 

(Corporate Secretary or Equivalent)

By \_\_\_\_\_

(Place corporate seal here, if available)

## ALL CONTRACTS MUST BE APPROVED BY THE STATE CONTROLLER

CRS 24-30-202 requires that the State Controller approve all state Contracts. This Contract is not valid until the State Controller, or such assistant as he may delegate, has signed it. The Contractor is not authorized to begin performance until the Contract is signed and dated below. If performance begins prior to the date below, the State of Colorado may not be obligated to pay for the goods and/or services provided.

STATE CONTROLLER  
David J. McDermott, CPA

By 

Date 9-15-08

**Exhibit A**  
**Scope of Work**  
**New Pioneer Ditch Diversion Reconstruction Project**  
**Newell Geer, Silver Spur Land & Cattle**

April 29, 2008

The applicant is a private individual running a ranching operation in the North Park area near Walden. The New Pioneer Ditch has multiple appropriations in Water District 47 for a total of 50.1 cfs dating back to 1890. There are three principle shareholders on this ditch. The water is diverted from the Canadian River located on the Silver Spur Ranch. The North Park Angus Ranch and Walden Ventures, LLC also receive water. The ditch irrigates up to 950 acres of native grasses for high quality, high protein fine stemmed hay.

Under the current conditions, the New Pioneer Ditch may not be capable of delivering the necessary water for agriculture in the ditch service area. The existing diversion structure cannot seal off the river and jeopardizes the ability of the ditch to facilitate a call. The existing headgate also cannot effectively regulate water coming into the ditch. Extreme bank erosion has developed on both banks of the Canadian River at the point of diversion. This is reducing the amount of prime agricultural land and adding significant volumes of sediment to the river. Sediment loading to the river reduces water quality and increases the likelihood of listing on the Clean Water Act Section 303(d) list of impaired waters. If listed, additional funding will be required to develop a Total Maximum Daily Load (TMDL), a watershed plan, and implementation of that plan. Fish cannot pass the existing structure. They are unable to migrate upstream to spawning areas.

This project will construct a low-head diversion structure capable of diverting the entire river, if necessary to implement a call. It will be constructed in the shape of an upstream pointing "V" to reduce stress on both banks and direct high flows toward the channel center. The core of the structure will be constructed of interlocking concrete blocks to reduce seepage and facilitate a call. Boulders will be placed both up and downstream of the diversion to stabilize the structure, direct water toward the channel center, reduce bank erosion, and act as a fish and recreation boat passage. A concrete headwall will be constructed at the diversion point with a low-head rectangular orifice designed to pass 50.1 cfs at a minimum head. A slide gate will be installed at the diversions point to easily and efficiently regulate water into the ditch while increasing instream flows. The existing measuring flume will be moved up the ditch near the headwall to further improve management. The areas of erosion along both banks will be filled and reclaimed as agricultural land. The ditch will also be re-graded for approximately 1,500 feet due to inconsistencies in ditch bed gradient. The resultant structures will promote water conservation and efficiency.

The project will be used as a demonstration project. Tours will be available upon request of the landowner. Information about the project and scheduling a tour will be posted on the IBCC website for the North Platte.

**Task 1-Prepare bid documents, send out request for proposals and choose sub-contractors**

*Deliverable-Selection of Contractor(s)*

Project Manager will review existing preliminary plans and meet with contractors in Jackson County to determine appropriate cost-effective methods of construction and screen contractors. Bid documents will be prepared and RFP sent out to appropriate contractors. Manager will also meet with landowners to coordinate in-kind donations and construction timing.

Completion Date: September 8, 2008

Cost: \$3,500

## **Task 2-Mobilize equipment and stage materials**

*Deliverable-Materials and equipment delivered to site*

Project Manager will coordinate with landowners and contractors to stage equipment and materials on site.

Completion Date: September 15, 2008

Cost: \$3,000

## **Task 3-Demolition**

*Deliverable-Removal of existing structures*

Contractors will de-construct the existing diversion structure and separate the broken concrete from the boulders into separate piles for later use. The broken concrete will be used for buried foundation material and the boulders will be re-used for the diversion structure. The existing headgate and culvert will be removed and the site prepared for the new headgate. The old culvert will be re-installed in the ditch at an existing crossing several hundred yards downstream.

Completion Date: September 22, 2008

Cost: \$4,500

## **Task 4-Rock Excavation and Transport**

*Deliverable-Large boulders staged on site for diversion structure*

Contractors will excavate existing rock from on site and stage the material alongside the river at the location of the proposed diversion structure. Project manager will research possible alternatives to excavating the rock on site by investigating rock quarries in the area and determining if a cheaper option exists to haul rock to the site. Excavated sand, gravel and topsoil from on site will be used for fill in the eroded stream banks immediately downstream of the existing diversion structure. The 900 cubic yards of rock used for the project will be donated by the landowner at a rate of \$50/cubic yard for a total of \$45,000.

Completion Date: September 29, 2008

Cost: \$33,000 – This includes an additional \$13,000 for unforeseen costs in excavating. Preliminary discussions with contractors in the area indicate a difficulty in accurately determining the cost of this excavation. Preliminary unit costs for this task is \$10/cubic yard.

## **Task 5-Construct new concrete headgate and flume**

*Deliverable-New headgate structure, slide gate and flume*

Concrete contractor will form and pour a new headgate on site and install a slide valve on the face of the structure to control flows and relocate a measuring flume to the back of the structure.

Completion Date: October 6, 2008



Cost: \$40,000- The cost of concrete has risen dramatically in the last few months and this item may also experience an unforeseen rise in costs. Unit cost for concrete may be \$800/cubic yard.

#### **Task 6-Construct diversion structure**

*Deliverable-New diversion structure*

Contractor will use pre-cast concrete blocks as a foundation and core for the new diversion structure and will line the upstream face of the structure with plastic sheeting and shade it with sand and silt to minimize seepage through the structure. Large boulders will be placed downstream of the structure in a stair-step fashion to dissipate energy and allow for upstream fish migration. The approximate seven foot vertical drop will be spread out over two hundred feet.

Completion Date: October 13, 2008

Cost: \$16,000- The cost of the pre-cast blocks has nearly doubled in the last few months to approximately \$250 per block. This also is an unforeseen cost.

#### **Task 7-Fill eroded streambanks**

*Deliverable-Morphologically balanced stream dimensions and new agricultural land*

Contractor will use on native material to fill eroded areas downstream of the existing structure.

Completion Date: October 20, 2008

Cost: \$6,500

#### **Task 8-Re-grade ditch**

*Deliverable-Cleaned and graded ditch*

Landowners will re-grade and clean the ditch as part of their in-kind match.

Completion Date: October 27, 2008

Cost: \$3,000

#### **Task 9-Repair staging and excavation areas**

*Deliverable-Reclaimed land*

Contractor will clean up and re-seed staging areas

Completion Date: October 31, 2008

Cost: \$2,000

## Task 10-Project Management

*Deliverable-Project coordination, contractor supervision and grant management with final report*

Project manager will be on site to set survey grades, supervise construction, process invoices and write reports.

Completion Date: November 14, 2008

Cost: \$7,500

### Name of Project: New Pioneer Ditch

5/2/2008

| Objective<br>or<br>Task | Description of Work to be Done   | Direct<br>Costs  | WSRA<br>Funds    | Match<br>by<br>others | Planned<br>Task<br>Cost |
|-------------------------|--|------------------|------------------|-----------------------|-------------------------|
| Task 1.                 | Prepare bid documents, send out request for proposals and choose sub-contractors | \$3,500          | \$3,500          |                       | \$3,500                 |
| Task 2.                 | Mobilize equipment and stage materials   | \$3,000          | \$3,000          |                       | \$3,000                 |
| Task 3.                 | Demolition   | \$4,500          | \$4,500          |                       | \$4,500                 |
| Task 4.                 | Rock Excavation and Transport  | \$33,000         | \$33,000         | \$45,000              | \$78,000                |
| Task 5.                 | Construct new concrete headgate and flume  | \$40,000         | \$40,000         |                       | \$40,000                |
| Task 6.                 | Construct diversion structure  | \$16,000         | \$16,000         |                       | \$16,000                |
| Task 7.                 | Fill eroded streambanks  | \$6,500          | \$6,500          |                       | \$6,500                 |
| Task 8.                 | Re-grade ditch   | \$3,000          |                  | \$3,000               | \$3,000                 |
| Task 9.                 | Repair staging and excavation areas  | \$2,000          | \$2,000          |                       | \$2,000                 |
| Task 10.                | Project Management   | \$7,500          | \$7,500          |                       | \$7,500                 |
| <b>Total</b>            |  | <b>\$119,000</b> | <b>\$116,000</b> | <b>\$48,000</b>       | <b>\$164,000</b>        |

**Issues/Additional Needs:**

- Two of the three landowners have committed specific support as well as a unanimous decision by the Roundtable. Letters of support can be obtained if still needed.
- Detailed narrative is described in each task
- The probability of unforeseen issues encountered during construction is high in 3 of the tasks described. Reasons why and unit costs have been supplied.
- Project promotion described on page 1.

**Milestone Table for New Pioneer Ditch**

| Task     | Description of Work to be Done   | Sept '08-Nov '08 |   |   |
|----------|--|------------------|---|---|
|          |  | S                | O | N |
| Task 1.  | Prepare bid documents, send out request for proposals and choose sub-contractors |                  |   |   |
| Task 2.  | Mobilize equipment and stage materials   |                  |   |   |
| Task 3.  | Demolition   |                  |   |   |
| Task 4.  | Rock Excavation and Transport  |                  |   |   |
| Task 5.  | Construct new concrete headgate and flume  |                  |   |   |
| Task 6.  | Construct diversion structure  |                  |   |   |
| Task 7.  | Fill eroded streambanks  |                  |   |   |
| Task 8.  | Re-grade ditch   |                  |   |   |
| Task 9.  | Repair staging and excavation areas  |                  |   |   |
| Task 10. | Project Management   |                  |   |   |

**Personnel**

Project management, including preparation of detailed plans and specifications will be done by Crane Associates; this firm has extensive experience in engineering similar projects on the North Fork of the Gunnison and elsewhere. Jeff Crane, President of Crane Associates in Hotchkiss, Colorado, is a hydrologist specializing in stream restoration, irrigation diversion and habitat enhancement projects with twenty years experience with a major emphasis in water resource engineering and hydrology.

**Payment**

Invoicing for this project will be done based on the completion of the major project tasks. The request for payment shall include: a description of the work accomplished; an estimate of the percent completion for individual tasks and for the entire project in relation to the percentage of budget spent. Costs incurred prior to the effective date of the purchase order are not reimbursable.

The last 5 percent of the project budget will be withheld until final project documentation is complete. All products, data and information developed as a result of this contract must be provided to CWCB in hard copy and electronic format as part of the project documentation.