AGENDA ITEM or FINAL CONTRACT REVIEW SUBMITTAL FORM

Agenda Item: Reclamation Agreement; Showalter

Action Requested: Board of County Commissioners' Signature

Parties to the Agreement: BOCC and Showalters

Term Begins: **Term Ends:** **Grant Contract #:**

Summary:

Agreement is to identify the reclamation activities and responsibilities of the Property Owner for the restoration of the land disturbances identified in Stop work order/notice of violation.

Fiscal Impact:

Submitted by: Laura Stanley for Matthew Hoyt **Submitter's Email Address:** lstanley@gunnisoncounty.org

Finance Review: (●) Required ( ) Not Required

Comments:
No concerns, deposit received in Finance.ln

Reviewed by: GUNCOUNTY1\lNienhueser Discharge Date: 9/24/2019

County Attorney Review: (●) Required ( ) Not Required

Comments:
Appears legally sufficient. MRH

Reveiwed by: GUNCOUNTY1\mhoyt Discharge Date: 9/25/2019 Certificate of Insurance Required

Yes ( ) No (●)

County Manager Review:

Comments:

Reveiwed by: GUNCOUNTY1\mbirnie Discharge Date: 9/27/2019

(●) Consent Agenda ( ) Regular Agenda ( ) Worksession Time Allotted: 0

Agenda Date: 10/1/2019

Revised April 2015

RECLAMATION AGREEMENT

THIS RECLAMATION AGREEMENT (herein "Agreement") is entered into this ___ day of _____, 2019, among the **Board of County Commissioners of the County of Gunnison, Colorado**, whose address is 200 E. Virginia, Gunnison, Colorado 81230 ("Gunnison County"), and **Barton Earl Showalter and Elizabeth Thompson Showalter**, whose address is 5610 Mercedes Ave., Dallas, TX 75206-5824 (together, "Property Owner").

1. Purpose.

a. The purpose of this Agreement is to identify the reclamation activities and responsibilities of the Property Owner for the restoration of the land disturbances initiated on the real property described as **Lot 5, East River Ranches**, according to the plat filed at Reception No. 476686, Gunnison County, Colorado (herein the "Property"), as identified in the Notice of Violation and Stop Work Order dated July 14, 2019 (the "Notice").

b. Gunnison County and Property Owner agree that in order to resolve the issues identified in the Notice, an agreement guaranteeing the Property Owner's performance secured by suitable security to protect the interests of Gunnison County and the public in the amount set forth herein is an appropriate condition.

c. The parties herein have entered into this Agreement to memorialize such understandings and agreements. The relationship of the parties to this Agreement is contractual; Property Owner is an independent third party and not an agent of Gunnison County.

2. Property Owner Bound. The Property Owner agrees to accept and be bound by the terms and conditions of this Agreement.

3. Completion Deadline.

a. The Property Owner agrees to complete the reclamation activities within the Property in accordance with the specifications as identified in paragraph 7 herein ("Reclamation") no later than November 1, 2020, Acts of God and any cause beyond the reasonable control of the Property Owner excepted, including without limitation labor disputes, laws, regulations, or orders of any governmental entity, orders of court, inability to obtain any required authorization, act of war or conditions arising out of or attributable to war, riot, civil strike, insurrection or rebellion, fire, explosion, earthquake, storm, flood or other adverse weather condition, delay or failure by suppliers or materialmen, contractors, or subcontractors, shortage of or inability to obtain labor, supplies or materials.

b. The completion deadline set forth in this paragraph 3 may be extended by Gunnison County in its sole discretion upon written request of the Property Owner if Gunnison County determines that: (1) such extension of time will not operate to the detriment of Gunnison County, the public, the property or the environment; and (2) Gunnison County's security is adequate to ensure full performance by the Property Owner by the extended completion date; and (3) that such an extension would not be in conflict with any other matters of concern. Gunnison County may require the Property

Owner to provide, at Property Owner's cost, supplemental estimates of the costs of completion and to provide additional security as a prerequisite to its extension of any completion date. Any extended completion date granted by Gunnison County hereunder may be further extended in like manner. Such written request shall be provided by Property Owner at least seven (7) days before the deadline set forth in Paragraph 3a above.

4. Estimated Cost. The total cost of the Reclamation is estimated currently to be $53,760.

5. Security.

a. In order to secure all obligations of the Property Owner herein, the Property Owner and Gunnison County agree that the Property Owner shall, at Property Owner's sole cost, and before starting work on any phase of the Reclamation, provide to Gunnison County a performance guarantee in the amount of $24,377.50, which is 125 percent of the currently estimated cost of the Reclamation work outside of the delineated wetland (work in the delineated wetland will be covered by a separate performance guarantee from the Property Owner to the Army Corps of Engineers), including a reasonable contingency amount. The security will be in the form of cash. The security will be placed by Gunnison County in an interest bearing account controlled by Gunnison County. Interest shall accrue to Property Owner at 1% less than received by Gunnison County (but not at a rate less than zero).

b. Pending full performance of all of the terms and conditions hereof by the Property Owner, Gunnison County shall retain said security and shall remain the beneficiary of such security. In the event of any uncured default hereunder Gunnison County in its sole discretion, and without any other authority required, may draw upon said security up to the full amount. Upon timely performance of all terms and conditions hereof, said security shall be tendered by Gunnison County to the Property Owner, except as provided in paragraph 7.c.

6. Certification. No later than November 30, 2020, the Property Owner shall provide to Gunnison County:

a. Proof of completion of the Reclamation, demonstrating that the Property Owner's obligations regarding Reclamation under this Agreement have been fully and faithfully performed according to design and time specifications. Upon receipt by the Office of the Gunnison County Attorney of such certification, Gunnison County shall review the same and shall make an independent judgment whether to accept the same in the sole discretion of Gunnison County. Property Owner agree not to cover or otherwise prevent inspection of the Reclamation completed hereunder until Gunnison County's representative have had reasonable opportunity to inspect such Reclamation.

b. A sworn affidavit, signed by the Property Owner, that the Reclamation completed has been paid for, in full, by the Property Owner. The Property Owner shall be responsible for the information so provided. Said written certification will be reviewed by Gunnison County, but Gunnison County shall have no responsibility or liability to any party regarding the veracity of the information so provided.

7. Scope of Work.

a. The reclamation work to be completed by the Property Owner shall include and

be according to the remediation plan described in August 30, 2019 correspondence from Kendall Burgemeister to Gunnison County Community Development, as amended by the revised plan submitted by Kendall Burgemeister to Gunnison County Community Development on September 11, 2019, and all attachments thereto, and by the revised Remediation Plan sheet L3, dated September 20, 2019, which are incorporated by reference into this Agreement as if fully set forth herein.

b. The conditions of this Agreement are such that if the obligations hereunder of the Property Owner are well, truly, faithfully and timely performed by Property Owner, inspected and certified to by the Property Owner, and such performance is accepted by Gunnison County in Gunnison County's sole discretion, the Property Owner's obligations to Gunnison County under this Agreement except as set forth in 7.c below shall be at an end; otherwise such conditions and obligations shall remain in full force and effect.

c. For a period of two years from and after the acceptance of the Reclamation described in paragraph 7.a above, Property Owner shall, at its own expense, maintain, reseed and replant and further reclaim such work as, in Gunnison County's reasonable opinion, becomes necessary. Gunnison County shall have the right to retain up to $4,875.50 of the security for up to two years following the acceptance of all of the work described in paragraph 7.a above, to ensure that the disturbed areas have been reclaimed to Gunnison County's satisfaction.

8. Partial Release of Security. Gunnison County recognizes that as work proceeds upon the Reclamation, Gunnison County's need for security shall be reduced. Accordingly, Gunnison County may make a reasonable partial release of the security to be delivered to Gunnison County pursuant to paragraph 5 herein upon receipt of a written certification by the Property Owner stating the estimated cost of remaining completion. Upon receipt of such certification, Gunnison County shall review the same and shall make an independent judgment whether to accept the same in the sole discretion of Gunnison County. If Gunnison County does make a partial release, Gunnison County shall retain security equal to125 percent of such estimated cost of remaining Reclamation plus 25 percent of the original estimated cost of the Reclamation.

9. Property Owner's Default. In the event of any default hereunder by the Property Owner, Gunnison County shall give notice to the Property Owner specifying the nature of such default, which notice shall be given by certified mail with return receipt requested, or by electronic mail, addressed to the Property Owner at the address provided in paragraph 24 below. In the event the Property Owner does not remedy such default to the satisfaction of Gunnison County within 14 days following such notice, Gunnison County may elect, in its discretion to exercise all remedies available to it, including but not limited to:

a. To specifically enforce the terms and conditions of this Agreement;

b. To draw upon or otherwise obtain the benefit of the security;

c. To exercise any other rights and obtain any other remedies provided by law, including but not limited to the right to recover its attorneys' fees, costs and expenses associated with the enforcement of this Agreement;

d. To obtain from the Property Owner either an extension of Gunnison County's security hereunder to guarantee the completion of the Reclamation only on the

conditions: (1) that suitable additional security is provided to Gunnison County to guarantee the completion of said Reclamation within the new time period determined by Gunnison County; and (2) that Gunnison County determines that it would not be detrimental to the interest of Gunnison County, the public or the owners of property within the Project to allow such extension.

e. To engage a manager to supervise the completion of Reclamation as identified herein. The costs incurred for hiring a manager shall be the responsibility of the Property Owner and may be withdrawn by Gunnison County from the security. Furthermore, all Gunnison County staff time spent thereafter on this Project shall be calculated at an hourly rate and shall be charged to the Property Owner and may be withdrawn from security.

10. Recording. Upon its execution, this Agreement shall be recorded by the Property Owner's expense and shall be a covenant running with the property herein described in order to put prospective purchasers or other interested parties on notice as to the terms and provisions hereof. Upon the expiration of the time period in paragraph 7.c, above, the County shall execute a Release of Reclamation Agreement, releasing the Property Owner, and its successors and assigns, from the obligations of this Reclamation Agreement, which may be recorded by Property Owner at Property Owner's expense.

11. Retention of Police Powers and Governmental Immunity. Gunnison County retains the power and right to impose additional requirements upon the Property Owner with regard to the Reclamation if the failure to do so would be cause harm to the public or the environment, or in the event of substantially changed conditions; that is, nothing in this Agreement is or shall be construed to be a bargaining away of Gunnison County's police power. In addition, nothing in this Agreement is, or shall be construed to be, a waiver, in whole or part, by Gunnison County of governmental immunity provided by the Colorado Governmental Immunity Act.

12. Transfer or Assignment. No transfer or assignment of any of the rights or obligations of the Property Owner under this Agreement shall be permitted without prior written approval of Gunnison County which approval shall not unreasonably be withheld.

13. Title and Authority. The Property Owner expressly warrants and represents to Gunnison County that he is the record owner of the Property. The Property Owner understands that Gunnison County is relying on such representations and warranties in entering into this Agreement.

14. Litigation. Nothing contained herein shall prevent either party from obtaining a judicial determination of the violation of its rights hereunder; provided however, that written notice to the other party advising the other party of the alleged violation, and advising that in the event the matter is not resolved by the parties within 14 days thereafter, shall be a condition precedent to the commencement of any litigation.

15. Time of Essence. It is mutually agreed that time of performance is an essential part of this Agreement and that all terms, covenants and conditions herein shall extend to and become obligatory upon the successors and assigns of the respective parties hereto.

16. Venue and Choice of Law. This Agreement is entered into in Gunnison County, Colorado and it is agreed that the exclusive jurisdiction and venue of any action pertaining to the interpretation or enforcement of this Agreement shall be in the District Court of Gunnison

County, Colorado. The exclusive choice of law pertaining to this transaction shall be that of the State of Colorado without giving effect to Colorado choice of law principles.

17. Severability. If any term or provision of this Agreement shall be invalid or unenforceable, the remainder of this Agreement and the terms and provisions thereof shall not be affected thereby and all other terms and provisions of this Agreement shall be valid and enforceable to the full extent permitted by law.

18. Hold Harmless Clause. The Property Owner shall indemnify, defend and hold harmless Gunnison County, its officials, employees and agents from and against liability for damages, injury or death which may arise from the direct or indirect operations of the Property Owner, or its contractors or subcontractors, in performance of the Reclamation.

19. Entire Agreement. This Agreement contains the entire and only agreement between the parties regarding reclamation of the Property, and no oral statements or representations not contained in this Agreement shall be of any force and effect between the parties. This Agreement shall not be modified or amended in any manner except by written instrument executed by the parties.

20. Binding Agreement. This Agreement shall be binding upon and inure to the benefit of the heirs, personal representatives, successors and assigns of the parties hereto.

21. Notice. All notices and other communications required or permitted under this Agreement shall be in writing and shall be, as determined by the person giving such notice, either hand delivered or mailed by registered or certified mail, return receipt requested to the required party at the following addresses:

Gunnison County:
Board of Gunnison County Commissioners
of the County of Gunnison, Colorado
c/o Office of the Gunnison County Attorney
200 East Virginia, Gunnison, CO 81230

Property Owner:
Barton Earl Showalter and Elizabeth
Thompson Showalter
5610 Mercedes Ave.
Dallas, TX 75206-5824

Copy to:
Law of the Rockies
Attn: Kendall Burgemeister
525 N. Main St., Gunnison, CO 81230
kburgemeister@lawoftherockies.com

IN WITNESS WHEREOF the parties have executed this Agreement the date first above written.

BOARD OF GUNNISON COUNTY COMMISSIONERS OF THE COUNTY OF GUNNISON, COLORADO

By:_____

ATTEST:_____
Deputy Gunnison County Clerk

Barton Earl Showalter and Elizabeth Thompson Showalter

By:_____
Barton Earl Showalter

By:_____
Elizabeth Thompson Showalter

STATE OF ~~TEXAS~~ COLORADO)
)ss.
COUNTY OF ~~DALLAS~~ GUNNISON)

The foregoing instrument was acknowledged before me this 20th day of September, ~~2019~~ 2019, Barton Earl Showalter and Elizabeth Thompson Showalter. Witness my hand and seal.
My commission expires: 6/25/2021.

AGNES KRONERAFF
NOTARY PUBLIC
STATE OF COLORADO
NOTARY ID #20134039223
My Commission Expires June 25, 2021

_____
Notary Public