

AGREEMENT FOR COVINGTON CREEK CULVERT REPLACEMENT PROJECT**Design, Permitting, and Construction**

THIS AGREEMENT FOR THE COVINGTON CREEK CULVERT REPLACEMENT PROJECT ("Agreement"), is entered into on the last date signed below by and between the CITY OF BLACK DIAMOND, a Washington municipal corporation ("City"), and KING COUNTY FLOOD CONTROL ZONE DISTRICT, a quasi-municipal corporation of the State of Washington ("District") (collectively, the "Parties").

RECITALS

- A. Lake Sawyer in Black Diamond empties into Covington Creek through three failing culverts underneath 224th Avenue SE. These culverts are rusted and are deteriorating. The culverts restrict flows, which could jeopardize the roadway during a flood event, and increase the difficulty for salmon migration.
- B. The City desires to design, obtain required permits, and construct a bridge to replace the culverts and this portion of roadway to allow for improved water flows and fish passage between Lake Sawyer and Covington Creek. This Agreement covers all work necessary to complete the project, including but not limited to City project management, consultant project management, data collection, coordination with other agencies, surveying, hydraulic and hydrologic modeling, design, cost estimate, specifications, temporary construction easement acquisition and costs, permitting, maintenance plans, contract documents, construction, construction management, relocation/replacement of existing utilities, landscaping, mitigation, and any legal expenses related to the foregoing work except for legal costs incurred in exercise of Section 16 herein (all of which constitutes the "Covington Creek Culvert Replacement Project" or "Project").
- C. The City and the District desire to reduce the level of flood risk between Lake Sawyer and Covington Creek by eliminating the current barriers and by completing the Project improvements, shown in Exhibit A and as summarized below:
 - 1. Replace the existing culverts and roadway with a bridge.
 - 2. Implement any mitigation measures required by permitting agencies.
- D. The District desires to authorize and the City desires to complete the Project as soon as possible, in order to protect the roadway (224th Avenue SE) which is one

of only two north/south arterial roadways in Black Diamond and to eliminate the fish barrier caused by the culverts .

- E. By Resolution FCD 2019-13, adopted on November 6, 2019, the District included the Project at a funding level of \$291,500.00 for its 2020 Budget, and included the Project on the 2020-2025 Six-Year Capital Improvement Plan. By Resolution FCD 2020-22, the District increased total potential funding for the Project to \$2,293,500 for its 2021 Budget, including a carryover of the \$291,500 from the 2020 Budget.

AGREEMENT

Based upon the foregoing, the Parties agree as follows:

1. Incorporation of Recitals—Scope of Agreement.
 - a. All recitals above are hereby incorporated and ratified as part of this Agreement.
 - b. This Agreement establishes the terms and conditions for the project initiation, project management, data collection, easement acquisition, permitting, maintenance plans, contract documents, construction, mitigation, and other work required for the completion of the Covington Creek Culvert Replacement Project, as that term is defined in the recitals above. This Agreement also sets out the District’s intent to provide funding and assistance for the Project, contingent on the terms and conditions herein.

2. Covington Creek Culvert Replacement Project and Reimbursement.
 - a. The City shall implement the Project as set out in the Project Charter, which was approved by the District on September 21, 2020, and is attached hereto as Exhibit A and incorporated herein by this reference. The Project Charter may be amended with prior District approval without requiring an amendment to this Agreement, conditioned on the City’s compliance with all District’s procedures for amending a Project Charter.
 - b. The City shall implement the Project referenced in Exhibit A, attached hereto and incorporated herein by reference, in accordance with this Agreement.

- c. The City shall obtain and be responsible for all necessary local, state, and federal permits and approvals for the Project, and shall fully comply with all applicable requirements and conditions thereof.
 - d. The City shall obtain and be responsible for all necessary special use permits, easements, and/or property acquisitions. Access to private properties for construction will be the responsibility of the City.
 - e. The District, through its service provider King County Water and Land Resources Division (“WLRD”), shall provide technical assistance to the City and coordinate with the City in conformance with WLRD’s Project Management Manual, on work needed within King County jurisdiction.
 - f. The Parties acknowledge and understand that as of the effective date of this Agreement, the estimated cost of the Project is included in the District’s 2020-2025 six-year CIP, and the District’s 2021 Budget and carryover from the 2020 Budget.
 - g. The District reserves the right to terminate this Agreement, and the City shall immediately terminate work upon receipt of notice to terminate in accordance with the terms herein; provided, that the District shall continue to accept and review City reasonable requests for reimbursement for work performed prior to the City’s receipt of the notice to terminate.
 - h. The City’s reasonable costs and expenses for the Project shall be reimbursed pursuant to the procedures, requirements, and restrictions set out in this Agreement.
3. District Review of Project. Under District resolution FCD 2016-22, the District requires that any jurisdiction implementing a capital project shall comply with WLRD’s Project Management Manual. The City prepared and submitted a Project Charter (Exhibit A, hereto), which was approved of by the District on September 21, 2020. The Charter shall include and the City shall provide to the District a schedule of the material and significant events and actions for the Project, which events and actions shall include, but not be limited to, temporary construction easement, permitting, contract documents, and construction.

The 30% design for the Covington Creek Culvert Replacement Project was completed by the City in advance of this Agreement. The first milestone for the Project as funded by the District pursuant to this Agreement is the 60% design. Upon the execution of this Agreement, the City shall proceed to the 60% design.

The City shall not proceed to the following milestones until the District has reviewed interim products consistent with its Capital project review protocols:

- a. The 90% design, until the 60% design has been reviewed;
- b. Final design, until the 90% design has been reviewed; and
- c. Construction, until final design has been reviewed.

The District shall submit any comments within thirty days of receipt of the documents.

4. District Inspections. The District shall have the right to inspect the City's Project area.
5. Contracts for Levee Work. No levee improvements will be constructed as part of this Project.
6. Retention and Review of Documents. The City shall submit to the District the Final Report of this Project, in a form and with detail required by the District. The City agrees to maintain documentation of all planning, modeling, analysis, and design of the Project sufficient to meet state audit standards for a capital project, recognizing that the costs of the Project are paid for in whole or in part by the City and the District. The City agrees to maintain any additional documentation that is requested by the District. City contracts and internal documents shall be made available to the District for review and/or independent audit upon request. The Parties shall retain all records in accordance with the Washington State Retention Schedules and shall comply with the Washington State Public Records Act, Ch 42.56.RCW.
7. Project Costs and Expenses.
 - a. The District's 2020 Budget included the Project at a funding level of \$291,500 for its 2020 Budget, and included the Project on the 2020-2025 Six-Year Capital Improvement Plan. By Resolution FCD 2020-22, the District increased total funding for the Project to \$2,293,500 for its 2021 Budget and carried over \$291,500 from 2020 to 2021.
 - a. The District is obligated to provide funding for the year 2020 and 2021. The total Project costs eligible for reimbursement by this District under this Agreement shall not exceed \$2,293,500, with \$291,500 available for costs incurred in 2020 (with any remainder carried over into 2021). To the extent

the Project requires future appropriations beyond 2021, or carryover to a future budget year by the District, the District's obligations are contingent upon the appropriation of sufficient funds. If no appropriation is made, this Agreement will terminate at the close of the last appropriation year for which the District allocated Funds under this Agreement.

8. Reimbursement of City Expenditures.

- a. No more than once a quarter, the City shall submit requests for reimbursement of City reasonable costs and expenses incurred on or after January 1, 2020 for the Project. Reimbursable costs include all documented City expenses reasonably associated with completing the Covington Creek Culvert Replacement Project as defined in the recitals above. The requests shall be in a form and shall contain information and data as required by the District. In connection with submittal of requests for reimbursement, the District may require the City to provide a status or progress report concerning submittal, preparation, or completion of any document or work required by this Agreement.
- b. The District shall review the requests to confirm that they are reimbursable and payable under this Agreement. The District shall endeavor to complete such review within thirty days of receipt of a request in order to determine whether they are reimbursable and payable under this Agreement. The District shall forward a response to the requested reimbursement to the City within forty-five days of the City's request.
- c. The District may postpone review of a City request for reimbursement where all or any part of the request is unreasonable, inaccurate, or incomplete. The District shall notify the City of any inaccuracies or incompleteness within thirty (30) days of receipt of the request. The City shall provide all additional information or data within thirty (30) days of the District's request for such additional information or data. If the request is still unreasonable, inaccurate, or incomplete in the opinion of the District, the dispute shall be resolved in accordance with paragraph 16 below. If the dispute is resolved in the City's favor, the District shall provide reimbursement within thirty (30) days of said resolution.

- d. The District may postpone payment of any request for reimbursement, up to a maximum of five percent (5%) of the request, where the City is delinquent in submittal, preparation, or completion of any document or work required by this Agreement.
9. Compliance with Laws and Regulations. The City shall be responsible for compliance with all applicable laws and regulations, and for obtaining all required permits, approvals, and licenses in connection with the Project.
10. Impact on Other Reaches or Segments. The District and the City agree that the improvements to Covington Creek under this Agreement shall not have a detrimental effect on other reaches of Covington Creek or the Green River. The improvements to Covington Creek shall be deemed not to have such a detrimental effect where the improvements fully protect the conveyance capacity of the creek and provide flood protection for adjacent properties during the 100-year flood.
11. Duration—Effective Date--Termination. This Agreement shall take effect on the date on which the second party signs this Agreement, and shall remain in effect until the Project is deemed complete under the scope of work and submittal agreements, unless earlier terminated pursuant to the provisions in this Agreement. Either party may terminate this Agreement upon sixty (60) days' advance written notice to the non-terminating party, and upon termination neither party shall have any performance obligations under this Agreement, except as expressly stated herein.
12. Third Parties. This Agreement and any activities authorized hereunder shall not be construed as granting any rights or privileges to any third person or entity, or as a guarantee or warranty of protection from flooding or flood damage to any person, entity or property, and nothing contained herein shall be construed as waiving any immunity to liability granted to the City, the District or King County, under state statute, including Chapters 86.12 and 86.15 RCW, or as otherwise granted or provided for by law.
13. Liens and Encumbrances. The City acknowledges and agrees that it will not cause or allow any lien or encumbrance arising from or related to the Project authorized by this Agreement to be placed upon the real property interests of King County and/or the District. If such lien or encumbrance is so placed, King County and/or the District shall have the right to remove such lien and charge back the costs of such removal to the City.

14. Indemnification. To the maximum extent permitted by law, the City shall defend, indemnify and hold harmless the District and King County, and all of their officials, employees, principals, agents and insurers, from any and all claims, demands, suits, actions, losses, costs, reasonable attorney fees and expenses, fines, penalties and liability of any kind, including injuries to persons or damages to property, arising out of, or as a consequence of, the Project under this Agreement. As to all other obligations under this Agreement, to the maximum extent permitted by law, each Party shall defend, indemnify and hold harmless the other Party, and all of its officials, employees, principals and agents, from any and all claims, demands, suits, actions, fines, penalties and liability of any kind, including injuries to persons or damages to property, arising out of or relating to any intentional or negligent acts, errors or omissions of the indemnifying Party (including its agents, employees, officials, and representatives) in performing its obligations under this Agreement. However, if any such damages and injuries to persons or property are caused by or result from the concurrent negligence of the District or its employees, agents, or representatives, and the City or its employees, agents, officials, or representatives, each Party's obligation hereunder applies only to the extent of the negligence of such Party or its employees, agents, officials, or representatives. This indemnification provision shall not be construed as waiving any immunity granted to the City, the District, or King County, under state statute, including chapters 86.12 and 86.15 RCW, as to any other entity.

The foregoing indemnity is specifically and expressly intended to constitute a waiver of each Party's immunity under industrial insurance, Title 51 RCW, as respects the other Party only, and only to the extent necessary to provide the indemnified Party with a full and complete indemnity of claims made by the indemnitor's employees. This waiver has been mutually negotiated.

15. Insurance. The District recognizes that the City is insured through the Association of Washington Cities risk pool and accepts such coverage for liability arising under this Agreement. The District is a member of the risk-pool Enduris, and agrees to maintain and keep in full force and effect a policy of general liability insurance in an amount not less than One Million Dollars (\$1,000,000) per occurrence with a reinsurance liability policy of not less than Ten Million Dollars (\$10,000,000) and will provide the City with an Evidence of Coverage (EOC) pursuant to Chapter 48.62 RCW.

16. Dispute Resolution. The Parties will seek to resolve any disputes under this Agreement as follows:
- a. For disputes involving cost reimbursements or payments, as provided for in paragraph 8 above, submittal of all relevant information and data to an independent Certified Public Accountant or a Construction Claims Consultant, if agreed upon by the Parties, for a non-binding opinion as to the responsibility.
 - b. If the foregoing does not result in resolution and for all other disputes, the Parties may mutually select any informal means of resolution, such as a meeting between the chief administrative officers of the Parties and/or their legal counsels. If such informal means are unsuccessful in resolving the dispute, the Parties may refer the dispute to mediation with a mutually agreeable neutral mediator. If the Parties cannot agree on a mediator, or if mediation is unsuccessful, then the Parties are free to seek judicial relief from the Superior Court for King County, Washington. Nothing in this paragraph shall be deemed to prevent a Party from seeking immediate temporary or preliminary injunctive or other equitable relief from a court of competent jurisdiction to avoid irreparable harm to the Party or the public.
 - c. Except where authorized by statute, court rule, or case law applicable to prevailing parties in court actions, each Party will be responsible for its own costs and attorney's fees in connection with the dispute resolution provisions of this paragraph 16.
17. Entire Agreement; Amendment. This Agreement, together with Exhibit A, represents a full recitation of the rights and responsibilities of the Parties and may be modified only in writing and upon the consent of both Parties. Should any conflict exist between the terms of this Agreement and the terms of the Exhibits, this Agreement shall control.
18. Notices, Communications and Documents. Unless applicable law requires a different method of giving notice, any and all notices, demands or other communications required or desired to be given hereunder by either Party (collectively, "notices") shall be in writing and shall be validly given or made to the other Party if delivered either personally or by Federal Express or other overnight delivery service of recognized standing, or if deposited in the United States Mail, certified, registered, or express mail with postage prepaid, or if sent by electronic

mail. If such notice is personally delivered, it shall be conclusively deemed given at the time of such delivery. If such notice is delivered by Federal Express or other overnight delivery service of recognized standing, it shall be deemed given one business day after the deposit thereof with such delivery service. If such notice is mailed as provided herein, such shall be deemed given three business days after the deposit thereof in the United States Mail as conclusively evidenced by the postmark. If such notice is sent by electronic mail, it shall be deemed given at the time of the sender's transmission of the electronic mail communication, unless the sender receives a response that the electronic mail message was undeliverable. Each such notice shall be deemed given only if properly addressed to the Party to whom such notice is to be given as follows:

To City: Seth Boettcher, Public Works Director
PO Box 599, 24301 Roberts Drive
Black Diamond, WA 98010
Phone: (360) 851-4446
Email: sboettcher@blackdiamondwa.gov

To District: Michelle Clark, Executive Director
516 Third Avenue, Room 1200, W-1201
Seattle, WA 98104
Phone: (206) 477-2985
Email: Michelle.Clark@kingcounty.gov

Any Party may change its address for the purpose of receiving notices as herein provided by a written notice given in the manner aforesaid to the other Party. In the event that one or both of the foregoing officers is no longer with the City or District (as applicable) at the time that notice is to be given, notice may be addressed to that person's successor.

19. Governing Law and Venue. This Agreement shall be interpreted, construed, performed, and enforced in accordance with the laws of the State of Washington, without reference to its choice-of-law rules. Any judicial action arising from or relating to this Agreement shall be brought exclusively in the courts of King County, Washington, which the Parties agree have exclusive venue and jurisdiction over all claims relating hereto.

20. Authority. The undersigned warrant that they have the authority duly granted by their respective legislative bodies to make and execute this Agreement.

IN WITNESS WHEREOF, the parties have executed this Agreement, which shall become effective on the last date signed below.

CITY OF BLACK DIAMOND

KING COUNTY FLOOD CONTROL
ZONE DISTRICT

By: _____

Carol Benson

Its: Mayor

By: _____

Dave Upthegrove

Its: Board Chair

DATE: _____

DATE: _____

APPROVED AS TO FORM:

APPROVED AS TO FORM:

By: _____

City Attorney

By: _____

Legal Counsel

Attest

Brenda Martinez
City Clerk