

SPONSORED BY: COUNCILWOMAN CARLOW

COUNCILMAN'S RESOLUTION

RESOLUTION NO.

No. CR-01  
Series of 2005

\_\_\_\_\_  
Series of 2005

A RESOLUTION APPROVING A PEDESTRIAN UNDERPASS TRAIL AGREEMENT BETWEEN THE FARMERS HIGHLINE CANAL AND RESERVOIR COMPANY AND THE CITIES OF NORTHGLENN AND THORNTON.

WHEREAS, the Cities of Northglenn and Thornton entered into an Intergovernmental Agreement (IGA) dated October 9, 2003 for the funding, design, construction, and maintenance of a pedestrian/bicycle underpass of 120<sup>th</sup> Avenue at the Farmers Highline Canal; and

WHEREAS, said IGA includes provisions for the Cities to cooperate in obtaining necessary permits associated with the underpass project; and

WHEREAS, a license agreement is required from the Farmers Highline Canal and Reservoir Company concerning the construction and future maintenance of the underpass project.

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF NORTHGLENN, COLORADO, THAT:

The Pedestrian Underpass Trail Agreement between the Farmers Highline Canal and Reservoir Company and the Cities of Northglenn and Thornton is hereby approved and the Mayor is authorized to execute this agreement on behalf of the City of Northglenn

DATED at Northglenn, Colorado, this \_\_\_\_ day of \_\_\_\_\_, 2005.

\_\_\_\_\_  
KATHLEEN M. NOVAK  
Mayor

ATTEST:

APPROVED AS TO FORM:

\_\_\_\_\_  
DIANA L. LENTZ, CMC  
City Clerk

\_\_\_\_\_  
HERBERT C. PHILLIPS  
City Attorney

## PEDESTRIAN UNDERPASS TRAIL AGREEMENT

THIS AGREEMENT, made and entered into this \_\_\_\_\_ day of \_\_\_\_\_, 2005, among Farmer's High Line Canal and Reservoir Company, hereinafter referred to as "FHL", party of the first part, and the City of Thornton, Colorado, a Municipal corporation, hereinafter referred to as "Thornton", party of the second part and the City of Northglenn, Colorado, a Municipal corporation, hereinafter referred to as "Northglenn", party of the third part and Thornton and Northglenn hereinafter referred to as the "Cities" and collectively hereinafter referred to as the Parties.

### WITNESSETH:

THAT WHEREAS, FHL is owner and operator of a irrigation canal as the same extends through and bisects the City of Thornton, boundaries from 120<sup>th</sup> Avenue in Adams County and continuing in a North Easterly direction to the point where the canal terminates at the Signal Ditch headgate near 124<sup>th</sup> Avenue and Washington Street in the City of Thornton, Adams County, Colorado (the "FHL Ditch"), and has permitted the Cities to construct and maintain the FHL Trail adjacent to the ditch (the "FHL Trail") to wit:

WHEREAS, the Cities have entered into an Intergovernmental Agreement dated October 9, 2003 for the design, construction and maintenance of an underpass from the south edge of 120<sup>th</sup> Avenue at the FHL Trail continuing underneath 120<sup>th</sup> Avenue to the north edge of 120<sup>th</sup> Avenue at the FHL Trail as described in the plans and specifications marked Exhibit A (the "Project" or "pedestrian-bike trail"); and

WHEREAS, FHL agrees to permit the proposed installation of the Project to the extent that it connects two segments of the FHL Trail, subject to the terms, conditions, covenants and agreements set forth in this Agreement. Accordingly, in consideration of the mutual promises set forth in this Agreement, the Parties covenant and agree as follows:

#### 1. CONSTRUCTION.

1.1 Pursuant to the terms of this Agreement, a license is granted to the Cities to construct and maintain the Project pursuant to the plans and specifications approved by FHL and attached hereto as Exhibit B. FHL's review of the plans and specifications is solely for its own benefit and creates no obligation on FHL. All pedestrian-bike trails shall be constructed in accordance with plans and specifications first approved by FHL, however, such plans shall locate such trails not less than five feet from the edge of the irrigation canal as presently located. FHL, by this agreement does not approve or disapprove the design or safety of such pedestrian-bike trail as prepared by the Cities, or its agents, and assumes no liability or responsibility for the plans, specifications or designs of such pedestrian-bike trails and assumes no liability or responsibility of third parties utilizing such pedestrian-bike trails. Except for law enforcement and maintenance vehicles, the Cities are to permit no motorized vehicles on such pedestrian-bike trails. However the ditch superintendent and ditch riders for FHL shall have authority to utilize the pedestrian trails as its ditch road and the Cities shall furnish such ditch riders with keys to any gates interfering with such use by the ditch riders. The FHL Canal does not warrant that the within agreement is, or shall be, all of the authority

required by the "Cities" to construct the within improvements. The Cities understand they receive only what rights of use the FHL Ditch has acquired and has the authority to convey.

1.3 The Cities shall not spill any dirt, debris or other foreign material into the Canal. In the event that dirt, debris or other foreign material is spilled into the Canal, the Cities agree to completely clean the affected portions of the Canal. Nothing herein shall prevent FHL from performing historical and necessary maintenance or cleaning operations of its irrigation ditch when necessary to provide and properly deliver water to its shareholders and to comply with the requirements of the laws and the statutes of the State of Colorado. However, FHL agrees to notify the Cities in advance of any ditch cleaning operation and shall attempt to give at least 48-hour advance notice to the Cities of any ditch cleaning to be performed by FHL and/or its agents or employees. FHL retains the right to utilize its right-of-way and any necessary equipment for its ditch cleaning operation and shall not be liable if such equipment causes damage or injury to the Project as constructed by the Cities. It shall be the duty of the Cities to clean all tailings and debris from the FHL Ditch right-of-way caused by any cleaning and maintenance operation along the pedestrian trail or Underpass. The Cities shall also monitor the pedestrian trail as anticipated herein and clean all debris from such right-of-way resulting from or caused by third parties utilizing such bike trails.

1.4 The Cities agree that the Project shall proceed expeditiously and with reasonable diligence from the commencement of construction to its completion. The Project shall be completed by June 1, 2006. If the Project is not completed by that date, this Agreement expires and is of no force or effect. Provided the construction of the project is completed by June 1, 2006, this agreement shall continue in effect so long as the Cities continue to utilize pedestrian-bike trails referred to herein. Upon discontinuance of use of such bike trails constructed by the Cities this agreement shall terminate.

1.5 The Cities agree that the construction, operation, maintenance or repair of such pedestrian-bicycle trail and underpass will not interfere with the running of irrigation water by FHL. If the Cities' construction or operation interrupts FHL's water supply for any reason, the Cities shall pay as damages the actual cost of providing water to those stockholders whose delivery is interrupted as a result of the Project.

1.6 The Cities are responsible, at their own expense, for obtaining all local, state and federal permits or approvals and for compliance with all local, state and federal laws and regulations including but not limited to land use and environmental laws and regulations and specifically including the Endangered Species Act, prior to beginning construction. To the extent permitted by law, the Cities shall indemnify FHL for any and all costs, damages, fines and fees, including reasonable attorneys' fees incurred by FHL as a result of Licensee's failure to obtain such permits or approvals or failure to comply with all applicable laws and regulations.

1.7 During construction of the underpass FHL will allow the Cities to discharge or perform dewatering operations into the FHL canal and to allow construction of

the underpass. Cities have obtained the permission of the State Engineer's Office to discharge groundwater resulting from the construction of the underpass into the FHL Canal, and to the extent permitted by law, shall indemnify FHL for any damages caused by the introduction of said water into the canal. In addition, to the extent permitted by law, the Cities shall indemnify and defend FHL against any claim by any third party related to the dewatering activities and use of the foreign water placed into the FHL Canal.

Any dewatering/discharge into the FHL Canal shall immediately cease at the instruction of any FHL employee or Board member whether said instruction be conveyed verbally or in writing. Dewatering/discharge activities shall be suspended until permission to resume said activities is given in writing.

FHL assumes no responsibility for any return flow obligations incurred by the Cities as a result of the dewatering/discharge into the FHL Canal. FHL is free to use the water placed into the canal in any way it might choose, and to extinction.

2. LICENSE FEE.

2.1 Except where the license fee has been specifically waived by FHL via separate letter, the Cities shall pay to FHL a license fee of \$ 0.00. The license fee shall be paid prior to the commencement of the construction of the project. This license fee shall be in addition to any other costs for which the Cities are responsible pursuant to this Agreement including attorney and engineering fees.

2.2 If the license fee has been specifically waived by FHL, a copy of the letter to stating such action by FHL shall be attached to this Agreement as EXHIBIT C.

3. INSPECTION.

3.1 The Cities shall notify FHL at least five (5) days prior to the commencement of the Project or other than routine maintenance of the Project, permitted by the Agreement, except for emergency repairs which are provided for in this Agreement. FHL is permitted to inspect the Project during construction or anytime thereafter.

3.2 FHL's right to inspect the Licensee's Project in no way relieves the Cities of their liability for improper construction or maintenance of the Project. FHL's inspection is solely for the benefit of FHL and creates no obligation to FHL.

4. REIMBURSEMENT OF EXPENSES.

4.1 The Cities agree to reimburse FHL (or pay directly) for all reasonable engineering and legal costs incurred by FHL in preparing and approving this Agreement and the costs of inspection. Costs chargeable to the Cities shall be paid within 30 days of the billing date.

4.2 Statements for the costs chargeable to the Cities hereunder will be forwarded to the Cities and the same shall be paid to FHL within 30 days after the billing date. If payment has not been received by FHL within 30 days, the Cities shall have breached this Agreement and FHL may institute legal proceedings to collect the amount due and owing. In such proceeding, FHL shall be entitled to its costs and reasonable attorneys' fees from the Cities.

5. MAINTENANCE.

5.1 The Cities specifically agree and pledge to maintain and repair the Project so as not to require FHL to maintain or repair it. If the Cities fail to properly maintain or repair any portion of the Project for which it is responsible after ten days' notice of the need for same, FHL may, at its own option, conduct its own maintenance or repair, and the Cities shall reimburse FHL for the cost of such work within 30 days. In the event the Cities fail to maintain or repair the Project, it shall be held liable for any loss, damage or injury to FHL. If FHL conducts its own maintenance, repair or replacement, it does not waive the right to hold the Cities liable for damages caused by the Cities' failure to maintain repair or replace.

5.2 In the event of an emergency, FHL or the Cities may conduct maintenance or repair immediately, giving notice to the other party as soon as possible at the emergency contacts identified in herein. If FHL conducts emergency work, it shall be reimbursed for the cost of the work. Under no circumstances shall FHL be responsible or held liable for damages to the project resulting from the maintenance or repair to the Canal.

6. WATER LOSS.

6.1 The Cities agree that the Project will not increase carriage or transit loss over the loss which occurred historically. The Cities agree to compact earth materials so that such additional water losses will not occur. If the Project increases carriage or transit loss in the Canal, the Cities agree to repair the construction to prevent such additional loss.

7. LIABILITY.

7.1 By virtue of entering into this Agreement, FHL: (1) assumes no liability for the use, operation, or existence of the Project; and (2) assumes no additional responsibilities or obligations related to the maintenance of the Project or additional activities in the area described in Exhibit A which are required by this Agreement.

7.2 To the extent permitted by law the Cities hereby agree to indemnify and hold harmless FHL against all claims, damages, liability and court awards including costs, expenses and attorney fees incurred or arising out of or related directly or indirectly by utilization as such pedestrian-bike trail by third parties except for acts or omissions caused by willful misconduct of FHL, it's Board of Directors, officers or employees of FHL outside the scope of the performance of their duties.

8. EASEMENT RIGHTS.

8.1 The License granted to the Cities herein in no way restricts FHL's right to the use of its easement to construct, operate or maintain all existing structures and facilities of the Canal.

9. NOTICES.

9.1 Any notice required or permitted by this Agreement shall be in writing and shall be deemed to have been sufficiently given for all purposes if sent by certified or registered mail, postage and fees prepaid, addressed to the party to whom such notice is intended to be given at the address set forth below, or at such other address as has been previously furnished in writing to the other party or parties. Such notices shall be deemed to have been given when deposited in the U.S. mail.

CANAL COMPANY:

FHL High Line Canal and  
Reservoir Company  
725 Malley Drive  
Northglenn, CO 80233

City of Thornton  
9500 Civic Center Drive  
Thornton, CO 80229

COPY TO:

Law Offices of Brice Steele, P.C.  
Attn. Brice Steele, Esq.  
25 South 4<sup>th</sup> Avenue  
Brighton, CO 80601

City of Northglenn – City Manager  
11701 Community Center Drive  
PO Box 330061  
Northglenn, CO 80233-8061

10. WAIVER OF BREACH.

10.1 The waiver by any party to this Agreement of a breach of any term or provision of this Agreement shall not operate or be construed as a waiver of any subsequent breach by any party.

11. EXHIBITS.

11.1 All exhibits referred to in this Agreement are, by reference, incorporated into this Agreement for all purposes.

12. ATTORNEYS' FEES.

12.1 If any party breaches this Agreement, the breaching party shall pay all of the non-breaching party's reasonable attorneys' fees and costs in enforcing this Agreement whether or not legal proceedings are instituted.

Dated the day and year above written.

Farmer's High Line Canal and Reservoir

Company

By: \_\_\_\_\_  
President

ATTEST:

\_\_\_\_\_  
Secretary

STATE OF COLORADO

COUNTY OF ADAMS ) ss.  
)

Subscribed, sworn to and acknowledged before me this \_\_\_\_\_ day of \_\_\_\_\_, 2005, by \_\_\_\_\_, President and \_\_\_\_\_, Secretary.

\_\_\_\_\_  
Notary Public

My Commission Expires: \_\_\_\_\_  
Address of Notary Public: \_\_\_\_\_

CITY OF THORNTON

By: \_\_\_\_\_  
Bud Elliot, Deputy City Manager  
Infrastructure

ATTEST:

\_\_\_\_\_  
City Clerk

APPROVED AS TO FORM:

\_\_\_\_\_  
Attorney for City of Thornton

CITY OF NORTHGLENN

By: \_\_\_\_\_  
Kathleen M. Novak, Mayor

ATTEST:

\_\_\_\_\_  
Diana L. Lentz, CMC, City Clerk

APPROVED AS TO FORM:

\_\_\_\_\_  
Herbert C. Phillips, City Attorney