ROARING FORK TRANSPORTATION AUTHORITY
TO CITY OF GLENWOOD SPRINGS

SOUTH BRIDGE CONNECTION EASEMENT AGREEMENT

THIS SOUTH BRIDGE EASEMENT AGREEMENT ("Agreement") is made and entered into this ____ day of _____, 2018 by and between the ROARING FORK TRANSPORTATION AUTHORITY, a Colorado regional transportation authority organized pursuant to Title 43 of the Colorado Revised Statutes ("RFTA"), and the CITY OF GLENWOOD SPRINGS, COLORADO, a Colorado home rule municipal corporation (the "City") (individually, a "Party", collectively, the "Parties").

WHEREAS, RFTA is the record title owner of the former D&RGW right-of-way and tracks known as the Aspen Branch that extends from Glenwood Springs to Woody Creek, Colorado (the "Corridor"), which includes an area located south of Glenwood Springs in the vicinity of the proposed South Bridge, to be more specifically identified on the **South Bridge Connection Easement Agreement Exhibit A**, which will be attached and incorporated herein by this reference once a mutually agreed upon design and location have been finalized for the South Bridge Connection;

WHEREAS, the City desires to connect south Glenwood via Midland Avenue and Airport Road to Highway 82 via a new bridge crossing the Roaring Fork River and the RFTA tracks and right-of-way (the "South Bridge Connection") to provide for continuity through the City and over the Roaring Fork River to Highway 82;

WHEREAS, the South Bridge Connection will promote the life, health and safety of residents of the City and unincorporated Garfield County; and

WHEREAS, RFTA desires to grant an "Easement," consistent with the **South Bridge Connection Easement Description, Attached as Exhibit A**, which will be attached and incorporated by this reference once a mutually agreed upon design and location have been finalized for the South Bridge Connection, to the City, and the City desires to develop and maintain said Easement as a public right-of-way to be used for vehicular, utility, and pedestrian purposes.

NOW, THEREFORE, for and in consideration of the mutual promises made herein and other good and valuable consideration, the receipt and sufficiency of which are acknowledged, the Parties agree as follows:

1. <u>Incorporation of Recitals</u>. The foregoing recitals are true and correct and are incorporated herein by this reference.

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2. <u>Grant and Acceptance of Easement</u> RFTA hereby grants to the City, and the City hereby accepts, a perpetual, non-exclusive Easement across, over, and under the Property described in **Exhibit A**, recorded in the Office of the Garfield County Clerk and Recorder at Reception No. _____, incorporated by this reference. The City's use of the Easement shall be limited to the sole purposes of (a) installing, constructing, maintaining, repairing, replacing, modifying, and reconstructing a public, interim earthen roadway barrier crossing or permanent grade-separated railroad crossing and appurtenant infrastructure, including utilities, necessary to the South Bridge Connection, while maintaining the rights of RFTA to commence freight or passenger service or some other transportation options on the Corridor and public safety; and (b) subsequent maintenance of all such improvements and utilities

RESERVING, however, unto RFTA, its successors and assigns, the right to construct, maintain, use, operate, relocate, reconstruct, and renew any facilities within the Corridor deemed in RFTA's sole discretion appropriate for the use of the Corridor for freight or passenger rail service, some other above, at, or below grade transportation options, shipping, trail, and/or conservation purposes as it may at any time, and from time-to-time, desire within the Corridor, including the right and privilege to use the Corridor for any and all purposes, including the construction, use, and maintenance of the South Bridge Connection earthen roadway barrier crossing or grade-separated structure, free of any liability whatsoever to the City; and also reserves, the exclusive right to construct, place, operate, maintain, alter, repair, replace, renew, improve, and remove communications and utility lines above, below, and on the surface of the Corridor, including without limitation transmission by conduit, pipe, fiber optics, cable, wire, or other means, of electricity, voice data, video, digitized information, or other materials, information, or utilities; and all right and privileges as RFTA and its successors and assigns may require to investigate and remediate any and all hazards on the Corridor, including, without limitation, environmental contamination.

3. <u>Maintenance</u>. The City shall, at its own cost, maintain and repair the South Bridge Connection. If the crossing is developed to be a grade-separated structure, the City shall maintain it from the underside of the bridge deck up, including the bridge abutments, and RFTA will maintain from the underside of the deck of the bridge down, including ballast, ties, and rail.

In the event that the activation of freight or passenger rail or another transportation option service upon the Railroad Corridor has been approved by the RFTA Board of Directors and any other applicable federal or state authorities, the City shall design, fund, and construct a grade-separated rail crossing consisting of: (i) a vehicular bridge; (ii) lowering the grade of the rail corridor to accommodate the crossing; and, if directed by RFTA (iii) reconstructing the ballast without tracks to the same condition as it was at the time of the initial construction by the City so as to ensure that freight or passenger rail service or some other transportation option can be operated on, under, or over the Railroad Corridor; however, the City's financial obligation for a transportation option other than freight or passenger rail service shall not exceed what the cost of

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completing (i) and (ii) above would have been. Alternatively, the City, at its sole discretion and cost, may elect to eliminate and abandon the South Bridge Connection.

Should RFTA need to extend, modify, or relocate the South Bridge Connection for any reason not related to those contained in Paragraph 9, and after review and approval of plans detailing the extension, modification, or relocation by the City, which approval will not be unreasonably withheld, and approval by the PUC, if necessary, RFTA shall be entitled to do so as long as the extension, modification, or relocation does not materially interfere with the connectivity of the South Bridge Connection. If the sole cause of the need for such extension, modification, or relocation is the needs of RFTA, such cost will be borne by RFTA if RFTA approves the project and costs thereof, it being understood that any funding for such a project is subject to appropriation of funding.

If the City should desire to extend, modify, replace, relocate, or remove the South Bridge Connection to further the City's needs unrelated to the reasons set forth in Paragraph 9 below, then such cost shall be borne by the City. Any such extension, modification, relocation, or replacement or repair by the City shall only be made in accordance with plans prepared by City and reviewed and approved by RFTA, which approval will not be unreasonably withheld, and approval by the PUC, if necessary.

For extensions, modifications, or relocations that are jointly caused and will benefit both parties, and are not related to the reasons set forth in Paragraph 9, the allocation of costs shall be by further agreement, or if no agreement, then as determined by the PUC in a hearing.

4. **Subject To Appropriation.** Any monetary obligations of RFTA or City under this Agreement shall extend only to monies appropriated for the purpose of this Agreement by RFTA's Board and City Council respectively and encumbered for the purposes of this Agreement.

5. **No Additional Easement.** Nothing contained herein shall be construed to grant any other easement across the Property, or across any other real property owned by RFTA.

6. **Non-Interference.** The Parties agree that their individual uses of the Easement shall be managed in a way that is reasonably undertaken to avoid interference with the other Party's use of the Easement as contemplated by this Agreement.

7. **Restoration.** The City shall, at its sole cost, promptly restore all portions of the Property not used for the South Bridge Connection to substantially the same condition that existed immediately prior to any disturbance or damage caused by the City through its construction on the Property.

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8. **Good Faith.** There is an obligation of good faith on the part of the Parties, including the obligation to make timely communication of information that may reasonably be believed to be material to the other Party.

9. **Railbanking Protection**. City acknowledges that RFTA's Corridor is not abandoned and is under the jurisdiction of the federal Surface Transportation Board ("STB"). City further acknowledges that the Corridor is "railbanked" under the National Trails System Act, 16 U.S.C. §1247(d), so that RFTA is required to preserve the Corridor for future rail use. City's improvements and use shall not interfere with RFTA's use of the Corridor for freight or passenger rail service, other transportation options, shipping, trail, and/or conservation purposes and that no disturbance or interference of said any such uses shall be allowed hereunder without the prior written approval of RFTA. This Easement shall not be deemed to give City exclusive possession of any part of the Easement area described, and nothing shall be done or suffered to be done by City at any time that shall in any manner impair the usefulness or safety of the Corridor or of any track or other improvement on the Corridor or to be constructed thereon by RFTA in the future. If RFTA in its sole discretion upon advice of legal counsel believes that an action permitted by this Easement has or will cause a severance of the Corridor from the interstate freight rail network so as to jeopardize the rail banked status of the Corridor, RFTA shall notify the City and RFTA and the City shall work together to revise this Easement to correct the potential severance or impediment to freight rail service. If the conveyance or existence of the Easement at any time results in a third-party petition to the STB or a court of law that the Corridor has been severed from the interstate freight rail network so as to jeopardize the rail banked status of the Corridor, the City shall bear the cost of defending RFTA against such claim. If the STB or a court of law determines that the Corridor is no longer eligible for rail banked status under 16 U.S.C. §1247(d) due to the existence of the interim earthen roadway barrier crossing, the City, at its own expense, shall either grade-separate the South Bridge crossing in a manner consistent with Paragraph 3 or remove the City's earthen barrier crossing from the Corridor and restore the Corridor in a manner consistent with Paragraph 3. In the event the City fails to act, RFTA shall have the right, at its sole discretion, to terminate this Easement and remove the City's earthen barrier crossing from the Corridor using any RFTA reserved funds designated for that purpose, or a combination of City, state, and RFTA funds. Unless otherwise agreed between the City and RFTA, any such funds used by RFTA to remove the earthen barrier crossing and restore the Corridor shall be reimbursed by the City.

10. **Breach And Termination**. In the event of a breach of any provision of this Agreement, written notice of the breach, which shall include a reasonably specific description of what constitutes the breach and what corrective action or cure is required by the party giving the notice, shall be given by the non-breaching party. If within thirty (30) days after receipt of such written notice, the breaching party has not cured the breach, of if cure cannot be reasonably accomplished within thirty (30) days has not commenced what curative measures are possible and is not prosecuting the same to timely completion, the non-breaching party may, in addition to such

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contractual remedies as may be available, may proceed in a court of competent jurisdiction in law or equity to seek injunctive relief, specific performance, and/or damages incurred as a result of the Breach. The prevailing party in any such court action shall be awarded attorneys' fees and costs. In the event the Agreement is terminated, the obligations contained in Paragraphs 3 and 9 shall survive any such termination of this Easement Agreement.

11. **No Waiver of Governmental Immunity Act.** Nothing herein shall be deemed a waiver of the Colorado Governmental Immunity Act by either Party. C.R.S. § 24-10-101 *et seq.*

12. **No Joint Venture.** Nothing in this Agreement shall be construed to create a joint venture, partnership, employer/employee or other relationship between the Parties other than independent contracting parties. Except as permitted under the remedies provisions hereunder, neither Party shall have the express or implied right to act for, on behalf of, or in the name of the other Party.

13. **No Third-Party Beneficiary.** No third party may enforce or rely upon this Agreement.

14. **Term.** This Agreement shall become effective upon signature of the last Party to sign, and the Easement provided for herein shall exist in perpetuity unless terminated in accordance with Paragraph 10 or otherwise altered by the mutual agreement of the Parties.

15. **Amendment and Assignment.** This Agreement may be amended by the Parties solely through a written agreement signed by both Parties. This Agreement may not be assigned by either Party.

16. **Counterparts.** This Agreement may be executed in counterparts, each of which shall be deemed an original, and all of which, when taken together, shall be deemed the same instrument. Facsimile or photographic signatures of either Party to this Agreement or subsequent modifications thereto, shall be effective for all purposes.

17. **Governing Law, Venue and Survival.** The laws of the State of Colorado to the extent not preempted by federal law shall govern the validity, performance and enforcement of this Agreement. Should either Party institute legal action for enforcement of this Agreement, venue of such action shall be in the United States District Court for the District of Colorado if the court has jurisdiction; if not, then all actions shall be filed in Garfield County, Colorado.

18. **Whole Agreement.** This Agreement sets forth the whole agreement of the Parties. No representations, either verbal or written, shall be considered binding on either Party to the extent not set forth herein.

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19. **Section Headings.** The section headings in this Agreement are inserted only for the purpose of convenient reference and are in no way to define, limit or prescribe the scope or intent of this Agreement or any part thereof.

20. **Authority.** Each person signing this Agreement represents and warrants that the individual is fully authorized to enter into and execute this Agreement and to bind the Party it represents to the terms and conditions thereof.

21. **Notice and Representatives.** All notices required under this Agreement shall be transmitted in writing and shall be deemed duly given when hand-delivered or sent by certified mail, return receipt requested and postage prepaid, or by electronic communication, addressed to the designated representative(s) as follows:

To City:	City of Glenwood Springs Attn.: City Manager 101 West South Bridge Glenwood Springs, CO 81601
With copy to:	City of Glenwood Springs Attn.: City Attorney 101 West South Bridge Glenwood Springs, CO 81601
To RFTA:	Roaring Fork Transportation Authority Attn: Chief Executive Officer 2307 Wolfsohn Road Glenwood Springs, CO 81601
With copy to:	Roaring Fork Transportation Authority RFTA General Counsel 2307 Wolfsohn Road Glenwood Springs, CO 81601

22. **Change of Representatives.** Either Party may, in its sole discretion, change its individual designated representative and the address to which future notices shall be sent by providing written notice to the other Party.

23. **Severability.** Should any provision of this Agreement be found to be in conflict with any law of the United States or the State of Colorado or to otherwise be unenforceable, the remaining provisions shall be deemed severable and the validity of such shall not be affected

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provided that the remaining provisions can be construed in substance to constitute the agreement which the parties intended to enter into under this Agreement.

24. **Approval by the PUC.** This Agreement is contingent on approval by the PUC of the City's application to construct the South Bridge Connection based on a design, cost, and cost allocation acceptable to the Parties.

25. **Contractor Insurance.** Following completion of the South Bridge Connection and in the event that the Corridor is activated for freight, passenger, or other transportation use, the City agrees that it shall require any Contractor retained by City to perform any work near or around the South Bridge connection and that places people or equipment within 50 feet of the centerline of the Corridor at the South Bridge Connection to procure and maintain at the Contractor's own expense, with a company reasonably acceptable to RFTA, Comprehensive General Liability Insurance (including automobile), to be maintained during the period of any construction activities,) in amounts not less than those required for railroads operating in Colorado, or such other mandatory insurance requirements as may be established by applicable federal, state, or local agencies having jurisdiction over such activities, whichever is highest. Such Comprehensive General Liability Insurance policy shall, at a minimum, be maintained for:

A. All damages arising out of bodily injuries to or death of one (1) person and subject to that limit for each person;

B. All damages arising out of bodily injuries to or death of two (2) or more persons in any one occurrence;

C. Regular Contractor's Property Damage Liability Insurance for all damages arising out of injury to or destruction of property in any one occurrence and subject to the same limit per occurrence; and

D. All damages arising out of injury to or destruction of property during the policy period. If the tracks on the Property are being used in active railway operations, Contractor shall also provide Railroad Protective Liability insurance naming only the ***Railway*** as the Insured with coverage for each occurrence and in an annual aggregate amount. The policy must be issued on a standard ISO form CG 00 35 12 04 and include the following:

- Endorsed to include the Pollution Exclusion Amendment
- Endorsed to include the Limited Seepage and Pollution Endorsement.
- Endorsed to remove any exclusion for punitive damages.
- No other endorsements restricting coverage may be added.
- The original policy must be provided to the ***Railway*** prior to performing any work or services under this Agreement

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- Definition of "Physical Damage to Property" shall be endorsed to read: "means direct and accidental loss of or damage to all property owned by any named insured and all property in any named insured' care, custody, and control arising out of the acts or omissions of the contractor named on the Declarations.

Such insurance policy shall contain no exclusions the effect of which are to exclude or defeat assumed contractual liability and/or indemnity; and said policy shall specifically reference this Easement Agreement and its indemnity provisions and shall insure the liability assumed by City in this Agreement, below. Furthermore, said insurance policy shall name RFTA as an additional insured; however, there shall be no exclusion the effect of which is to exclude any personal injury or death or damage to property sustained by any directors, officers, agents, attorneys or employees of RFTA. Any exclusion for working on or near a railroad must be deleted from the policy. City shall furnish RFTA with certificates of insurance evidencing such insurance to be in full force and effect and that same will not be canceled without at least thirty (30) days advance written notice by the insurance carrier to RFTA.

26. City Insurance. During the life of the South Bridge Connection and the Easement, City shall procure and maintain from a company reasonably acceptable to RFTA, at City's own expense, Comprehensive General Liability Insurance in amounts not less than RFTA's then current Comprehensive General Liability Insurance coverage for the Corridor, and City shall name RFTA as an additional insured on its Comprehensive General Liability Insurance policy. City shall furnish RFTA with certificates evidencing the insurance to be in full force and effect and that same will not be canceled without at least thirty (30) days advance written notice by the insurance carrier to RFTA.

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IN WITNESS WHEREOF, the Parties hereto have executed this South Bridge EASEMENT AGREEMENT in duplicate originals on the day and year first written above.

CITY OF GLENWOOD SPRINGS, COLORADO

ATTEST:

_____ By:_____

Catherine Mythen, City Clerk Michael Gamba, Mayor

APPROVED AS TO FORM: Date: _____

_____

Karl Hanlon, City Attorney

ROARING FORK TRANSPORTATION AUTHORITY

ATTEST:

_____ By:_____

Secretary George Newman, Chair

APPROVED AS TO FORM: Date: _____

_____

Paul J. Taddune, General Counsel

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SOUTH BRIDGE CONNECTION EASEMENT DESCRIPTION

Exhibit A

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