

**AGREEMENT BETWEEN THE CITY OF RAPID CITY AND DTH, LLC
REGARDING RAINBOW RIDGE DEVELOPMENT**

This Agreement is made by and between the CITY OF RAPID CITY, of 300 Sixth Street, Rapid City, South Dakota 57701 (hereinafter "City"), and DTH, L.L.C., of 24054 Palmer Gulch Road, Hill City, SD 57745-6525 (hereinafter "Owner").

WITNESSETH:

WHEREAS, in 2013 the City approved Project No. 12-2039 / CIP No. 50912 Alma St., Gladys St., and Lennon Ln. Area Water Main Extension ("the Project") for the construction of water mains to provide water to the area from the new Northridge water reservoir; and

WHEREAS, the Project is located on land owned by DTH, L.L.C. ("Owner") and Owner executed both permanent water main easements and temporary construction easements with the City as part of the Project; and

WHEREAS, Rapid Construction Company, LLC was the contractor for the Project and performed the work within the Contract from December 2013 to May 27, 2014; and

WHEREAS, part of the Project concerned unclassified excavation near a proposed Gladys Street, cutting a section of the hillside on one side of the street, leveling the roadway for Gladys Street, and placing the material in a fill area on the downslope side of the street ("Unclassified Excavation"); and

WHEREAS, after the Unclassified Excavation was completed, compaction issues were discovered on the fill area; and

WHEREAS, Owner sustained additional costs as a result of the location of the water mains in Alma Street; and

WHEREAS, the City and Owner have reached an agreement to settle outstanding issues with the Project;

WHEREAS, the parties desire to enter into this Agreement to reduce their mutual agreements to writing.

NOW, THEREFORE, it is agreed as follows:

1. Purpose. This Agreement is made between City and Owner to memorialize the terms of a settlement reached between them for the complete and final disposition of their claims, differences, and causes of action, both known and unknown, which may be in controversy between the parties as a result of the Project.

2. Recitals. The recitals set forth above constitute an integral part of this Agreement and are incorporated herein by this reference as if fully set forth herein as agreements of the parties.

3. Work. The City has contracted with Advanced Engineering & Surveying, Inc. of Rapid City to prepare a grading plan. The parties agree that an area on the downslope of Gladys Street shall be removed, recompacted and graded in accordance with the Grading Plan prepared by Advanced Engineering to meet City specifications and requirements for unclassified excavation ("the Work"). The Grading Plan is attached as Exhibit A and is hereby incorporated into this Agreement as the parties' understanding of the Work as that term is used within this Agreement.

4. Owner Obligations. The parties agree that Owner will hire Lind-Exco, Inc. of Rapid City to perform the Work in accordance with the Grading Plan. All construction staking will be provided by Owner or Owner's contractor(s). The parties agree that Lind-Exco, Inc. has provided an estimate for the Work in the amount of Ninety-four Thousand, Six Hundred Six and 10/100 Dollars (\$94,606.10) (*estimate attached as Exhibit B*). The parties understand that Lind-Exco, Inc. is Owner's contractor for work outside of the scope of this Agreement and Exhibit 1, and Owner shall not seek payment from the City for any costs it incurs for Work outside of the scope of this Agreement.

Once the Work is complete, Owner shall submit to City the costs for the Work. Owner agrees that this submission will include the specificity necessary for the City to verify that the costs are only for Work within the scope of this Agreement. The parties agree that City shall have 45 days to process any payment.

Owner shall ensure that compaction tests occur during and after the Work, as needed, in accordance with City specifications, design criteria, and other requirements. Owner shall pay for the cost of any and all testing and promptly provide City with all test results of the Work. Owner agrees that City employees and/or agents may elect to observe some or all of the Work and/or compaction testing, and Owner agrees to allow any such observation.

5. City Obligations. The parties agree that City has hired Advanced Engineering & Surveying, Inc. of Rapid City to develop a grading plan, at its sole cost and expense. Owner has not paid or been billed any amount for the Grading Plan.

City agrees to pay Owner for its costs under Section 4, in an amount not to exceed Ninety-four Thousand, Six Hundred Six and 10/100 Dollars (\$94,606.10). If the cost of the Work exceeds \$94,606.10, Owner may seek additional payment equivalent to 5 percent of the estimate (\$4,730.31) by providing documentation to the Public Works Director justifying the additional expense. The Public Works Director may authorize a full or partial payment up to \$4,730.31 at his discretion.

If the cost of the Work exceeds the estimate, and/or if the Public Works Director declines to authorize an additional payment, Owner may seek additional payment by petitioning to the Common Council to amend this Agreement to allow for payment of an additional amount. If

Owner submits such a petition, Owner agrees that it will not request more than fifty percent (50%) of the amount of any unpaid costs. The parties agree that any additional payment is not promised or guaranteed as part of this Agreement, nor is such additional payment part of this Agreement except to the extent that this Section contemplates.

City agrees to pay Owner Eight Thousand One Hundred Seven and 89/100 Dollars (\$8,107.89) for additional costs it paid to its consultants, Dream Design International, Inc. from September 2014 to March 2015 that arose from the Project.

6. Construction easements. The parties agree that this Agreement in no way alters the temporary construction easements or permanent water main easements executed by Owner in favor of City.

7. Release. In exchange for City's entry into this Agreement, Owner agrees to release the City from any and all past, current and potential claims, demands, damages, actions, and causes of action, costs, expenses, compensation, and/or claims that it may now have or hereafter have, whether known or unknown, arising in any way out of the Project.

8. Acknowledgements. The parties acknowledge that this Agreement constitutes the settlement of claims disputed by the parties and is not an admission of any liability on the part of either party. The parties further acknowledge that they have had the opportunity to discuss the terms, conditions and consequences of this Agreement with their respective attorneys and that they completely understand and voluntarily accept all of the terms and conditions herein contained.

9. Third Parties. This Agreement is for the sole benefit of the parties hereto and their respective successors and permitted assigns. Nothing herein shall give or be construed to give any person or entity, other than the parties hereto, their respective successors, and permitted assigns, any legal or equitable rights hereunder.

10. General Recitals.

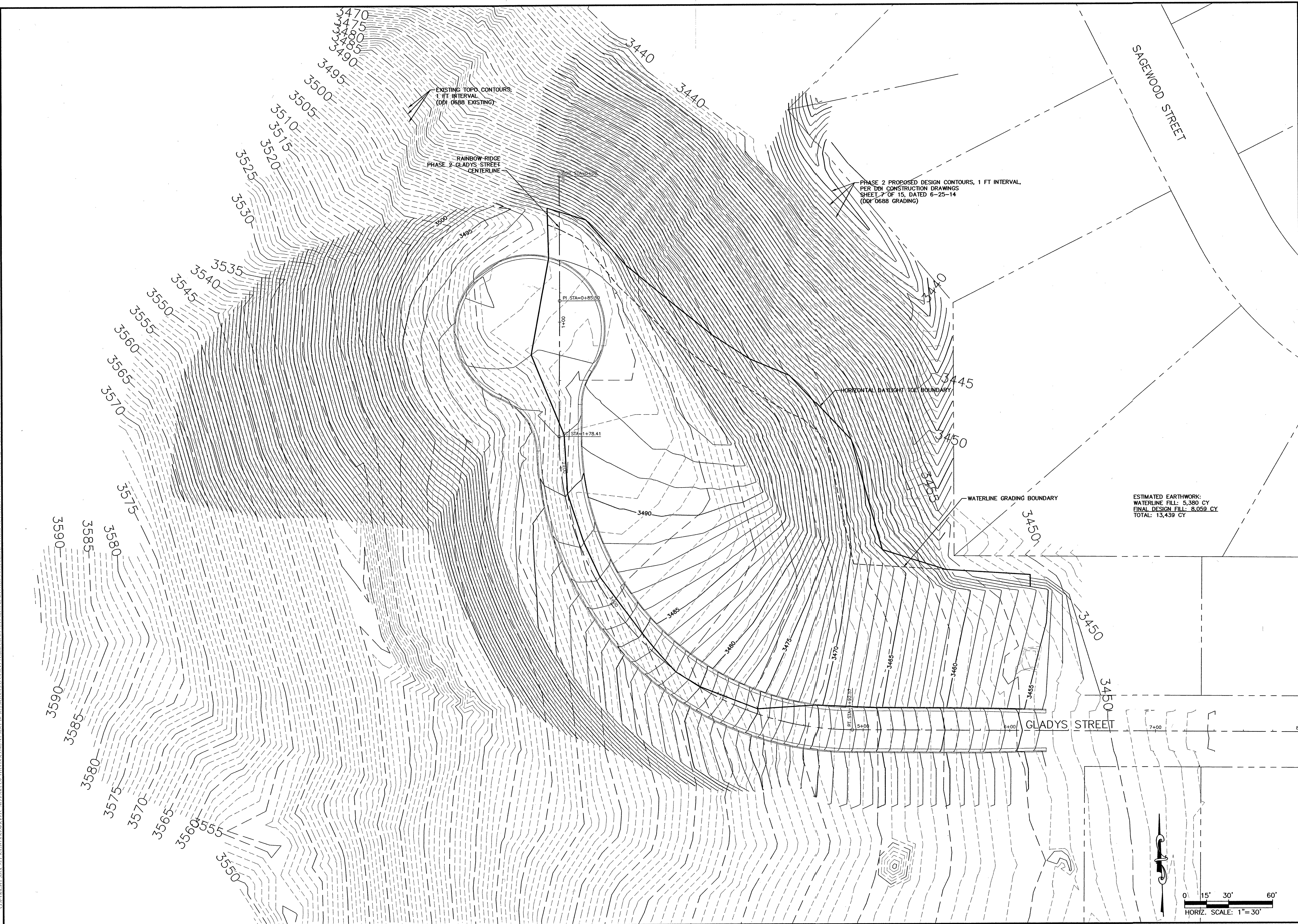
a. Time of Essence. Time is of the essence of this Agreement.

b. Waivers. The failure by one party to require performance of any provision herein shall not affect that party's right to require performance at any time thereafter, nor shall a waiver of any breach or default of this Agreement constitute a waiver of any subsequent breach or default or a waiver of the provision itself.

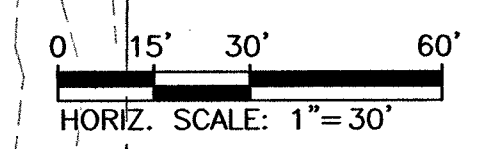
c. Amendments. This Agreement may only be amended by a written document duly executed by all parties.

d. Entire Agreement. This Agreement constitutes the entire agreement between the parties, and supersedes all prior negotiations, agreements and understandings, whether oral or written, other than as provided in Section 4.

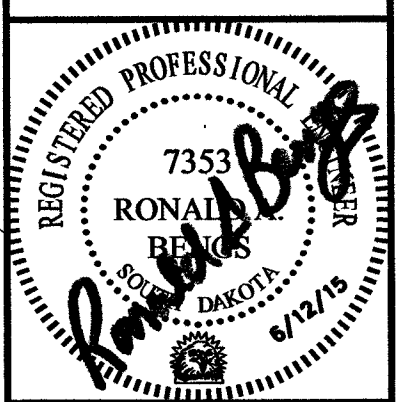
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ESTIMATED EARTHWORK:
WATERLINE FILL: 5,380 CY
FINAL DESIGN FILL: 8,059 CY
TOTAL: 13,439 CY



ADVANCED ENGINEERING & SURVEYING, INC.
3421 WEST MAIN STREET
RAPID CITY, SOUTH DAKOTA, 57702
PHONE: 605-718-8825 FAX: 605-718-8837
EMAIL: advancedeg@mlbnet.com



Designed By: RB
Drawn By: GH
Design Date: 11/11/14
Job No: AES:14-015
Surveyed By: Survey Date:
Revisions:

**RAINBOW RIDGE
SUBDIVISION PHASE 2
RAPID CITY, SD**

RAINBOWRIDGE.DWG

Sheet Title:
**REQUIRED
EXCAVATION
COMPOSITE**
Sheet:
C3.1

07/02/2015
RAINBOWGR

16:19
RAINBOW RIDGE GRADING REMEDIATION
BID TOTALS

<u>Biditem</u>	<u>Description</u>	<u>Quantity</u>	<u>Units</u>	<u>Unit Price</u>	<u>Bid Total</u>
100	UNCLASSIFIED EXCAVATION	12,239.000	CY	7.21	88,243.19
200	TESTING	1.000	LS	3,534.95	3,534.95
300	SURVEY	1.000	LS	2,827.96	2,827.96
TYPE OF WORK =====>					\$94,606.10
Bid Total =====>					\$94,606.10