

**Purchase Agreement Between
Hellgate Valley Irrigation Company and the City of Missoula**

This Purchase Agreement, hereinafter referred to as "Agreement," is entered into and made effective this 22nd day of July, 2021, by and between the shareholders of Hellgate Valley Irrigation Company, Inc., a Montana corporation, with a principal place of business at 2298 Tipperary Way, Missoula, MT 59808, which will hereinafter be referred to as "Seller," and the City of Missoula, a municipal corporation organized and existing under the laws of the State of Montana, 435 Ryman St., Missoula, Montana 59802, hereinafter referred to as the "Buyer". Seller and Buyer may be referred to individually as "Party" and collectively as the "Parties."

RECITALS:

WHEREAS, Seller owns water rights, easements, and two concrete headgates, along with records documenting historical use of the water rights and easements (together the "Assets," as defined in Article 1) necessary to divert and convey surface water from the Clark Fork River to an area north of the Clark Fork River and west of Reserve Street where the water has been used for agricultural purposes (the "Place of Use");

WHEREAS, Buyer desires to obtain the Assets from Seller, and will likely close and decommission the diversion and conveyance structures necessary to deliver the water to the Place of Use in order to reduce costs associated with surface transportation and underground utility infrastructure improvements in the vicinity of the conveyance structures and the Place of Use, as well as to improve safety and access along the River, and reduce impacts associated with the irrigation diversion structure;

WHEREAS, Seller and Buyer together desire to convert the surface water rights to groundwater rights necessary to meet the needs of Seller's shareholders that wish to continue irrigating, with the remainder rights converted to groundwater rights to support municipal uses or to instream flows, with the review and final approval of the conversion by Montana Department of Natural Resources ("DNRC");

WHEREAS, the Seller desires to sell all rights and interest in the Assets to Buyer, and Buyer desires to purchase all of the Assets from Seller;

NOW THEREFORE, in consideration of the foregoing recitals, along with the promises and covenants contained in this Agreement, as well as other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties do hereby agree as follows:

Article 1 - SALE:

Seller hereby agrees to sell the Assets to Buyer, which expressly include all water rights owned or held in any form by Seller, and Buyer hereby agrees to purchase the Assets from Seller subject to the terms and conditions of this Agreement and in reliance on the representations and warranties contained herein. The purchase shall include, without limiting the generality of the foregoing, the following:

- c) All right, title, and interest in the water rights, in whatever form held, owned by the Seller; and
- d) All easements and the concrete headgates necessary or incidental to the diversion and conveyance of water to the Place of Use; and
- e) All records and other documents, in hard copy or electronic form, associated with the historical use of the water rights, as well as the conveyance ditch and diversion structure.

Article 2 - PURCHASE PRICE:

The purchase price of the Assets shall be \$804,215 ("Purchase Price").

Article 3 - CLOSING:

The closing date of the sale of the Assets shall be on or before October 31, 2021 ("Closing Date"). Such closing will take place at a mutually agreeable location.

On the Closing Date, Seller agrees to the following:

- a) Seller shall deliver all of the Assets to Buyer, in the same amount and in the same condition as they were when Buyer agreed to purchase. The Assets shall have no liens or other encumbrances, other than to Buyer.
- b) Seller agrees, if possible, to deliver the Assets in a manner that Buyer has requested, except that no additional cost shall be assessed to Seller for the delivery.
- c) Seller shall also deliver to Buyer any and all documents memorializing the transfer of Assets to Buyer, including any necessary deeds, bills of sale, assignment of rights, or documentation necessary to support the water right change in ownership filing.
- d) If necessary, Seller will assist Buyer in perfecting any recordation, registration, or other filings, including any necessary DNRC filings, regarding the transfer and new ownership of the Assets.

On the Closing Date, Buyer agrees to the following:

- a) Buyer will pay the Purchase Price to Seller on the Closing Date.

Article 4 - DEPOSIT:

Within fifteen days of the execution of this Agreement, Buyer shall deliver to Seller a deposit of the following amount: \$8,042.00 ("Deposit").

Except as stated in Article 5, if the sale of the Assets does not go through due to any action, inaction, or misrepresentation on the part of Buyer, Seller shall retain the Deposit. If the sale of the Assets does not go through due to any action, inaction, or misrepresentation on the part of the Seller, Buyer shall receive the Deposit back.

Article 5 – CONTINGENCIES

This Agreement is expressly contingent upon the following:

- (a) Buyer securing the funding necessary to close the purchase and acquisition of the Assets.
- (b) City Council approving the Closing and waiving of all contingencies.
- (c) Buyer being satisfied, after the review provided for in Article 6, as to the nature, extent, quantity, and validity of the Assets, as well as to the potential success of an

application to DNRC to covert the water rights to groundwater use and/or instream flow use.

- (d) Approval of this Agreement by the shareholders of the Hellgate Valley Irrigation company.

Article 6 - DUE DILIGENCE:

Buyer shall have until October 12, 2021, to perform a due diligence review of the Water Right (the "Due Diligence Period").

Buyer's due diligence review of the Assets may include, without limitation, an investigation and evaluation as to the nature, extent, quantity, and validity of the water right, as well as the condition of the diversion structure and conveyance infrastructure. Buyer shall also investigate the anticipated terms, conditions, timeframes, and other requirements in connection with Buyer's applications to change the water right as provided in Article 10, below.

To aid in effectuating this due diligence review, within two (2) weeks after the execution of this Agreement, Seller shall provide Buyer a proposed instrument of conveyance to transfer the water rights to Seller, and a complete copy of all deeds or other real estate records pertaining to the water rights, including rights of conveyance of the same. Seller shall take all other action necessary to provide documentation reasonably requested by Buyer to prove or support the free and clear title and validity of the water rights and other real property interests to be conveyed as part of this due diligence inquiry.

Seller shall at all times cooperate in good faith with Buyer in providing Buyer with such other information or documentation as may be reasonably requested by Buyer and Buyer's agents, and with providing other such information as may be reasonably available to Seller and helpful to Buyer's diligent review of the Water Right, including without limitation, photos, water and/or power meter readings, crop sales records, verbal or written statements, or such other information as readily available to or obtainable by Seller which may assist Buyer in determining that the Water Right has been put to beneficial use and has not been relinquished. In conducting its due diligence, Buyer may contact other persons including DNRC for information.

Buyer shall have sole discretion during the Due Diligence Period to cancel and void this Agreement without cause and without liability if it provides the Seller with written notice. If Buyer cancels the Agreement under this term, Buyer shall be fully refunded the Deposit.

Article 7 - SELLER'S COVENANTS:

Seller hereby represents and warrants the following:

- a) Seller has the organizational and legal authority to enter into this Agreement and complete each and all of Seller's obligations hereunder.

- b) To Seller's knowledge as of the date of closing, the water rights are free and clear of all liens, security interests, mortgages, pledges, encumbrances, ditch fees, taxes and assessments, and charges; have not been forfeited or abandoned; and are not subject to judgment, suit, lien,

receivership, or any other encumbrance whatsoever. Provided, however, the City acknowledges that water rights in Basin 76M have not been finally adjudicated and all such water rights will undergo a future adjudication process to evaluate the quantity, priority, and such other components as are typical for the adjudication process. At present, Seller's water right claims are based on a preliminary adjudication which is expressly subject to change during the final adjudication process. Therefore, the City acknowledges it is impossible for Seller to represent and warrant the quantity and priority of any given water right. Seller expressly disclaims any such representation and warranty and represents only that it is conveying the water rights on an "as is" basis as reflected in the water right records on file with the State of Montana which are based on the preliminary decree.

c) Seller is up-to-date with all registrations, filings, and other required legal documents for the claimed existence and continued diversion of the water associated with the water rights.

d) The sale of the Assets will not impact any pre-existing creditor.

e) There is no current or pending litigation that the Seller is involved in, and no threatened litigation or claims that Seller is aware of that might be asserted against the Assets.

f) To Seller's knowledge, Seller is the sole and exclusive owner of all of the Assets and there are no encumbrances of any kind that would prevent Seller from the sale of the Assets or assignment of any and all rights associated with the Assets. Seller is not aware of any other party beyond shareholders in Hellgate Valley Irrigation Company claiming rights to use, occupy or receive any benefit from the Assets except to note that the quantity and priority of the water rights is subject to a future adjudication process in which other parties may challenge the quantity, priority or other aspect of any given water right.

g) Seller represents there are no other outstanding liabilities associated with the operation of the irrigation company that have not otherwise been disclosed that may adversely affect the Assets of the Buyer's acquisition of the Assets.

Subject to the disclaimers as set forth herein, the Seller hereby expressly acknowledges that the Buyer is relying on each of these representations and warranties to enter into this Agreement. The representations and warranties given here are the only covenants Seller makes and expressly disclaims any other warranty, whether express or implied. The Buyer hereby agrees to make any and all claims relating to any of the warranties represented herein by one calendar year from the Closing Date. If any third parties are also involved in the claim and Buyer is able to recover any amount from them, the amount of claim against the Seller shall be reduced by the amount Buyer received from the third party.

Article 8 - BUYER'S COVENANTS:

Buyer hereby represents and warrants the following:

a) The City of Missoula as Buyer has the power to execute the Agreement, and all requisite action has been taken by Buyer in connection with entering into this Agreement, the instruments referenced herein, and the consummation of the transaction contemplated hereby. Buyer has the right, power and authority to execute, deliver, and perform this Agreement without obtaining any consents or approvals from, or the taking of any other actions with respect to, any third parties. Final approval of the purchase is subject to City Council approval.

b) At Closing Buyer will be able to pay the Purchase Price and any and all other expenses related to this Agreement.

c) Buyer has no express knowledge or reason to believe any of Seller's representations are false or inaccurate.

The Buyer hereby expressly acknowledges that the Seller is relying on each of these representations and warranties to enter into this Agreement. The representations and warranties given here are the only covenants Buyer makes and expressly disclaims any other warranty, whether express or implied. The Seller hereby agrees to make any and all claims relating to any of the warranties represented herein by one calendar year from the Closing Date. If any third parties are also involved in the claim and Seller is able to recover any amount from them, the amount of claim against the Buyer shall be reduced by the amount Seller received from the third party.

Article 9 - CONDITIONS PRECEDENT:

a) Conditions precedent to be performed by Seller. Seller hereby acknowledges and agrees that Buyer's obligation to complete the purchase of the Assets, as well as to perform all other obligations hereunder, is subject to the satisfaction of the following conditions by Seller, before the Closing Date:

- I) All warranties, representations, or other acknowledgments made in this Agreement will be entirely accurate and true in every respect on the Closing Date.
- II) Seller will ensure all paperwork required for the sale of the Assets and execution of this Agreement, including documents, forms, registrations, assignments, authorizations or other, will be duly completed.
- III) Seller will have all paperwork for the sale of Assets duly executed.
- IV) Seller will provide Buyer with any and all information required so that Buyer may step into the shoes of the Seller for the proper operation of the Assets.
- V) Seller will obtain all necessary consents required, under any existing contracts, leases, or otherwise, for Buyer's continued operation of the Assets.

b) Conditions precedent to be performed by Buyer. Buyer hereby acknowledges and agrees that Seller's obligation to complete the purchase of the Assets, as well as to perform all other obligations hereunder, is subject to the satisfaction of the following conditions by Buyer, before the Closing Date:

- I) All warranties, representations, or other acknowledgments made in this Agreement will be entirely accurate and true in every respect on the Closing Date.
- II) Buyer will ensure all paperwork required for the purchase of the Assets and execution of this Agreement, including documents, forms, registrations, assignments, authorizations or other, will be duly completed.

If either Party does not satisfy their obligations under this clause, the entire Agreement will be null and void and there shall be no further relationship or obligations between the Parties.

Article 10 – BUYER AND SELLER RESPONSIBILITIES SUBSEQUENT TO CLOSING:

a) After the Closing Date identified herein, the Buyer will cease operation of the ditch in order to construct surface transportation infrastructure in the Mullan BUILD Grant Area, which is generally in the area of the Place of Use, which does not provide for the full flow of the irrigation water. Seller should not expect any water in the ditch after the Closing Date.

b) Seller will need to report to Buyer 90 days prior to Closing Date which of its shareholders wish to continue irrigating, along with their irrigated acreage, so that the Buyer can begin to draft the necessary paperwork to initiate the appropriate DNRC process as quickly as possible. Within 60 days following Closing Date, Buyer shall file with the DNRC water right change applications to change or convert the surface water rights to: (1) groundwater rights necessary to meet the needs of Seller's shareholders that wish to continue irrigating; along with (2) the remainder of the rights converted to groundwater rights to support municipal uses or to instream flows (together the "Change Application"). Other than acknowledging a continuing obligation to act in good faith and diligently pursue the change applications to their conclusion, the Buyer makes no guarantee concerning the outcome of the DNRC process, including whether DNRC will approve the conversion of the full water right claimed by Seller; the risk of shortfall in any DNRC reduction in water right claimed by Seller lies solely with Seller. Buyer also acknowledges and understands that shareholders needing water may need to drill groundwater irrigation supply wells and begin pumping to meet their needs prior to final DNRC approval of the change application.

c) After Closing Date, Seller shall cooperate in good faith with Buyer's efforts to obtain approval of the Change Application. Thereafter, Seller shall cooperate with Buyer to support and defend the results of the Change Application during any final adjudication process of Basin 76M by supplying such information, and assistance as may be available to support the historic use of the water right claims. Seller's agreement to cooperate includes, but is not limited to: (a) responding promptly verbally or in writing to Buyer's reasonable requests for information about the nature and history of use of the water right; (b) assisting Buyer in obtaining declarations or other testimony, if available, that establishes Seller's beneficial use of the water right; and (c) granting Buyer or Buyer's agents, upon reasonable advance notice from Buyer, reasonable access to the property where the water right was used, for the limited purpose of performing scientific or engineering analysis associated with the water right. Nothing in this paragraph shall be construed to obligate Seller to incur any financial cost in conjunction with the filing and prosecution of the Change Application.

d) Seller is not required to pay any of the costs associated with the Change Application or its approval by DNRC and any objections, appeals, or other legal proceedings relating to the Change Application, unless the objection, appeal, or legal proceeding is based upon: (i) an action taken by Seller without Buyer's written consent, after the Closing Date; or (ii) a breach by Seller of any of its representations or warranties contained in this Agreement. In either of such cases, Seller will pay all costs to the extent that such objection, appeal, or legal proceeding is related to the actions of Seller, as described in the preceding sentence.

e) All of Seller's shareholders who wish to continue irrigation must take the necessary steps to, and pay any costs associated with, putting the water to beneficial use within 3 years of the

time the approval to convert surface water rights to ground water rights is authorized by the DNRC. Any remaining flow rate and volume not required for existing users, or not put to use within the time period stated above, will become the permanent property of the Buyer. Once the shareholder puts the water to beneficial use, that shareholder should notify the Buyer, and the Buyer will process the transfer of the ground water rights to that party.

f) Buyer will work with the Missoula County Airport Authority on an agreement to transfer the amount of water equivalent to the Airport's percentage of the flow rate and volume of the total water right owned by Hellgate Valley Irrigation Company, as determined by its number of shares and the total historical volume calculated by the DNRC through the water right change application process. The amount may be transferred to existing wells, prospective future wells, or both for the purpose of a new public supply well. The agreement reached with the Airport may include a ground lease for a City test well, as well as an option to lease additional lands for a public water supply well. In the event that an agreement cannot be reached, Buyer agrees to pay all costs and undertake all work to drill a well on Airport property and transfer the flow and volume determined to be associated with the Airport's shares upon conclusion of the DNRC process discussed in Article 10.

Article 11 - BUYER ACCESS:

Buyer may request access to Seller's irrigation facilities, including all diversion and return structures, ditches, head gates, and other appurtenances, to evaluate the current condition and make reasonable assessments of the future anticipated costs for repair, remediation, replacement, and removal efforts of the same; provided, however, the City acknowledges such facilities are located primarily on private property and the City may need to seek permission for access from private landowners who are not affiliated with Seller. Buyer shall also be allowed access to Seller's accounting records to evaluate the regular maintenance costs associated with operating the irrigation infrastructure. Seller shall allow Buyer or any of Buyer's agents to inspect any such documents at a reasonable time and place.

Article 12 - CONTINUED COOPERATION:

Seller shall, within reason, cooperate with Buyer before, during and after closing to effectuate the transactions contemplated in this Agreement including, without limitation, the execution of any documents or the taking of any action (or the restraining from taking of any action) necessary or desirable to achieve the intended results herein.

Article 13 - LIABILITIES:

The Parties hereby each acknowledge and agree that Buyer will not assume any of Seller's liabilities or obligations which may have arisen in connection with the ownership of the Assets before the Closing Date.

Seller hereby agrees to indemnify Buyer, and all of Buyer's agents, employees, officers, and representatives against any and all damage, liability, and loss, as well as legal fees and costs incurred, however caused, as a result of the ownership or operation of the Assets before the Closing Date, except to the extent such damage, liability and loss is attributable to the actions or inactions of the Buyer.

Article 14 - EXPENSES:

Each Party agrees to be responsible for their own expenses or costs relating to or in connection with anything in this Agreement.

Article 15 - FULL UNDERSTANDING; INDEPENDENT LEGAL COUNSEL:

The Parties each acknowledge, represent, and agree that they have read this Agreement; that they fully understand the terms thereof; and that it is executed by them after having had an adequate opportunity to consult independent legal counsel. This Agreement was the subject of negotiation between the Parties and therefore any rule of construction requiring that agreements be construed against the drafter shall not apply to the interpretation of this Agreement.

Article 15 - GENERAL PROVISIONS:

- a) **GOVERNING LAW:** This Agreement shall be governed in all respects by the laws of the state of Montana and any applicable federal law. Both Parties consent to jurisdiction under the state and federal courts within the state of Montana; with venue for any state law claims to be in the Fourth Judicial District of Montana. The Parties agree that this choice of law, venue, and jurisdiction provision is not permissive, but rather, mandatory in nature.
- b) **LANGUAGE:** All communications made or notices given pursuant to this Agreement shall be in the English language.
- c) **ASSIGNMENT:** This Agreement, or the rights granted hereunder, may not be assigned, sold, leased or otherwise transferred in whole or part by either Party.
- d) **AMENDMENTS:** This Agreement may only be amended in writing signed by both Parties.
- e) **NO WAIVER:** None of the terms of this Agreement shall be deemed to have been waived by any act or acquiescence of either Party. Only an additional written agreement can constitute waiver of any of the terms of this Agreement between the Parties. No waiver of any term or provision of this Agreement shall constitute a waiver of any other term or provision or of the same provision on a future date. Failure of either Party to enforce any term of this Agreement shall not constitute waiver of such term or any other term.
- f) **SEVERABILITY:** If any provision or term of this Agreement is held to be unenforceable, then this Agreement will be deemed amended to the extent necessary to render the otherwise unenforceable provision, and the rest of the Agreement, valid and enforceable. If a court declines to amend this Agreement as provided herein, the invalidity or unenforceability of any provision of this Agreement shall not affect the validity or enforceability of the remaining terms and provisions, which shall be enforced as if the offending term or provision had not been included in this Agreement.
- g) **ENTIRE AGREEMENT:** This Agreement constitutes the entire agreement between the Parties and supersedes any prior or contemporaneous understandings, whether written or oral, including the prior Purchase Agreement executed by the Parties.
- h) **HEADINGS:** Headings to this Agreement are for convenience only and shall not be construed to limit or otherwise affect the terms of this Agreement.
- i) **COUNTERPARTS:** This Agreement may be executed in counterparts, all of which shall constitute a single agreement. If the dates set forth at the end of this document are different, this Agreement is to be considered effective as of the date that both Parties have signed the agreement, which may be the later date.
- j) **FORCE MAJEURE:** Seller is not liable for any failure to perform due to causes beyond its reasonable control including, but not limited to, acts of God, acts of civil authorities, acts of

military authorities, riots, embargoes, acts of nature and natural disasters, and other acts which may be due to unforeseen circumstances.

k) SURVIVAL OF TERMS: Any provision of this Agreement which would, by its nature, be expected to survive termination, expiration, or the Closing Date, shall survive and remain in full force and effect.

l) NOTICES ELECTRONIC COMMUNICATIONS PERMITTED: i) Any notice to be given under this Agreement shall be in writing and shall be sent by first-class mail, airmail, or e-mail, to the address of the relevant Party set out at the head of this Agreement, or to the relevant email address set out below or other email address as that Party may from time to time notify to the other Party in accordance with this clause.

Notices sent as above shall be deemed to have been received 3 working days after the day of posting (in the case of inland first class mail), or 7 working days after the date of posting (in the case of airmail), or next working day after sending (in the case of e-mail).

In proving the giving of a notice it shall be sufficient to prove that the notice was left, or that the envelope containing the notice was properly addressed and posted, or that the applicable means of telecommunication was addressed and dispatched and dispatch of the transmission was confirmed and/or acknowledged as the case may be.

IN WITNESS WHEREOF, the parties hereto have executed this instrument the day and year first written above.

HELLGATE VALLEY IRRIGATION COMPANY, INC.

By _____
[Name], [Representative Title]

Dwayne C. Garner
Dwayne C. Garner
Dale Frey

CITY OF MISSOULA, MONTANA

By 
John Engen (Aug 4, 2021 14:50 MDT)
John Engen, Mayor

Dale Frey
Dale Clouse
Dale Clouse

Attest:
By 
Marty Rehbein (Aug 6, 2021 10:07 MDT)
Martha L. Rehbein C.M.C, City Clerk

Maureen Edwards
Maureen Edwards
Board of Directors

