**RESOLUTION NO. 42**

**SERIES NO. 2016**

**RESOLUTIONS OF THE CRESTED BUTTE TOWN APPROVING THE AMENDMENT TO PRE-ANNEXATION AGREEMENT PURSUANT TO SECTION 13-1-280 OF THE CRESTED BUTTE MUNICIPAL CODE BETWEEN THE TOWN AND CYPRESS FOOTHILLS, LP**

WHEREAS, the Town of Crested Butte, Colorado (the "**Town**") is a home rule municipality duly and regularly organized and now validly existing as a body corporate and politic under and by virtue of the Constitution and laws of the State of Colorado;

WHEREAS, Cypress Foothills, LP ("**Applicant**") submitted to the Town on September 29, 2016 a Proposal (the "**Proposal**") requesting that Applicant be given the right and approval to connect certain of its real property, approximately thirty one and a half acres (31.5) (the "**Subject Property**"), to the Town's water system pursuant to §13-1-280 of the Crested Butte Municipal Code (the "**Code**");

WHEREAS, §13-1-280 of the Code authorizes the Town to provide water services outside of the Town's municipal boundaries in certain circumstances, as further described in the Code;

WHEREAS, in connection with the Proposal, Applicant has agreed, in exchange for the right and approval to connect the Subject Property to the Town's water system, to convey certain water rights to the Town, subject to certain requirements and conditions, along with Applicant's performance of certain other obligations, all to be memorialized in an amendment (the "**Amendment**") to the Pre-Annexation Agreement by and between Applicant and the Town dated February 16, 2016 and recorded in the official real property records of the Clerk and Recorder of Gunnison County, Colorado on March 14, 2016 at Reception No.638399;

WHEREAS, at the Town Council's October 3, 2016 Town Council meeting, the Town Council, following presentations by Applicant and Town Staff, instructed Town Staff to prepare a draft of the Amendment and these resolutions for their consideration, discussion and possible action following further presentation by Town Staff and receipt of public comments related to the Amendment;

WHEREAS, following consideration of Town Staff's presentation of the Amendment, subsequent discussion of the Amendment with Applicant, receipt of recommendations from Town Staff and receipt and consideration of public comment on the Amendment during the Town Council's November 21, 2016 Town Council meeting, the Town Council now desires to approve the Amendment by these resolutions addressing the right and approval of Applicant to connect the Subject Property to the Town's water system, to convey certain water rights to the Town, subject to certain requirements and conditions, along with Applicant's performance of certain other obligations, the terms thereof to be addressed in the Amendment; and

WHEREAS, the Town Council finds that following consideration of Town Staff's presentation of the Amendment, subsequent discussion of the Amendment with Applicant, receipt of recommendations from Town Staff and receipt and consideration of public comment on the Amendment during the Town Council's November 21, 2016 Town Council meeting, these resolutions approving the Amendment are found by the Town Council to be in the best interest of the health, safety and welfare of the Town, its residents and visitors

NOW, THEREFORE, BE IT RESOLVED BY THE TOWN COUNCIL OF THE TOWN OF CRESTED BUTTE, COLORADO, THAT:

1. **Approval of Amendment**. The Town Council hereby approves the Amendment in the form attached hereto as **Exhibit "A**." The following findings support such approval as being in the best interest of the health, safety and welfare of the residents and visitors of Crested Butte.

1.1 The Amendment recognizes the authority of Gunnison County and the Town to approve land use applications that shall be submitted by Applicant in conjunction with the Amendment.

1.2 The Town has the capacity to serve Applicant's 23 proposed residential lots and associated accessory uses to be developed within the jurisdiction of Gunnison County with water services conditioned upon Applicant's conveyance of certain water rights to the Town, subject to certain requirements and conditions, along with Applicant's performance of certain other obligations, the terms thereof are addressed in the Amendment.

2. **Authorization of Mayor to Execute Amendment; Recording**. The Town Council hereby authorizes the Mayor to execute the Amendment in the form attached hereto with only those changes made thereto as are approved by the Town Attorney. Following execution by the Mayor, the Amendment shall be promptly recorded by the Town Clerk in the official real property records of the Clerk and Recorder of Gunnison County, Colorado.

INTRODUCED, READ AND ADOPTED BEFORE THE TOWN COUNCIL OF THE TOWN OF CRESTED BUTTE THIS 5 TH DAY OF December 2016.

TOWN OF CRESTED BUTTE, COLORADO

By: _____
Glenn Michel, Mayor

ATTEST

_____
Lynelle Stanford, Town Clerk

(SEAL)

**EXHIBIT "A"**
**(Amendment to Pre-Annexation Agreement)**

[attach form of Amendment here]

Gunnison County, CO
12/13/2016 3:48:10 PM
029

643828
Page 1 of 28
R 146.00 D 0.00

**RECORDING REQUESTED BY:**
**WHEN RECORDED RETURN TO:**
Town of Crested Butte
Attn: Town Clerk
P.O. Box 39
Crested Butte, CO 81224

# AMENDMENT TO PRE-ANNEXATION AGREEMENT

THIS AMENDMENT TO PRE-ANNEXATION AGREEMENT (this "**Amendment**") is made and entered into this 7th day of December, 2016 (the "**Effective Date**"), by and between the **TOWN OF CRESTED BUTTE, COLORADO** (the "**Town**"), a Colorado home rule municipality and **CYPRESS FOOTHILLS, LP** ("**Applicant**"), a Texas limited partnership.

RECITALS:

A. The Town and Applicant entered into a Pre-Annexation Agreement (the "**Agreement**") dated February 16, 2016 and recorded in the official real property records of the Office of the Clerk and Recorder of Gunnison County, Colorado on March 14, 2016 at Reception No. 638399 whereby the Town gave the right and approval to Applicant to connect the Subject Property (as defined in the Agreement) to the Town's sewer service system pursuant to §13-1-280 of the Crested Butte Municipal Code (the "**Code**").

B. At the Town Council's October 3, 2016 Town Council meeting, the Town Council considered Applicant's request that Applicant be given the right and approval to connect the East Parcel (as defined in the Agreement) of the Subject Property to the Town's water service system pursuant to §13-1-280.

B. Section 13-1-280, as amended by Ordinance 13, Series 2016, authorizes the Town to provide water services outside of the Town's municipal boundaries in certain circumstances following Town Council approval.

C. As part of Applicant's request to be given the right and approval to connect the East Parcel to the Town's water service system, Applicant has agreed, in exchange for such right and approval, to perform certain other obligations relative to the Subject Property as set forth herein.

D. During said Town Council meeting, the Town Council received and considered a Town Staff Report addressing Applicant's request to be given the right and approval to connect the East Parcel to the Town's water service system.

E. Following the Town Council's receipt of Applicant's presentation and consideration of Town Staff's Report, the Town Council considered Applicant's request to be given the right and approval to connect the East Parcel to the Town's water service system and moved to instruct the Town Staff and Town Attorney to prepare an amendment to the Agreement reflecting Applicant's request and including therein such other terms and condition as are deemed necessary and advisable.

F. The Town and Applicant now desire to memorialize the terms and conditions respecting Applicant's request to be given the right and approval to connect the East Parcel to the Town's water service system pursuant to §13-1-280 of the Code, the requirements and conditions in connection with such request and Applicant's performance of certain other obligations relative to the Subject Property as set forth herein.

AGREEMENT:

NOW, THEREFORE, for and in consideration of the mutual promises and covenants contained herein, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Town and Applicant agree as follows:

1. **Scope of Amendment; Conflict of Terms**. This Amendment amends and modifies the Agreement, however only to the extent provided herein. In the event of any conflict or inconsistency between any term or condition of this Amendment and any term or condition of the Agreement, this Amendment and the terms hereof shall in all cases prevail, govern and control. This Amendment is supported by the same consideration as the Agreement and the additional consideration as provided herein. Reference herein to the Amendment shall include the Agreement, *mutatis mutandi*, as amended hereby.

2. **Capitalized Terms**. Capitalized terms not otherwise defined herein shall have the meanings ascribed to such terms in the Agreement.

3. **Purpose**. The purpose of this Amendment is to set forth certain binding terms and conditions upon which the Town and Applicant agree as respects the discrete subject matters addressed herein.

4. **No Vested Right**. No vested rights or entitlements of any kind whatsoever are being granted or conveyed by the Town to Applicant other than the contractual rights between the parties arising by virtue of this Amendment.

5. **Term; Termination**. This Amendment shall have a term that coincides with Section 4 of the Agreement, with any termination of this Amendment occurring pursuant to the terms of the Agreement. In addition, in the event that the Agreement is terminated, or otherwise becomes null and void pursuant to the Agreement, this Amendment shall automatically terminate (or become null and void) therewith.

6. **Compliance with Law**. When fulfilling its obligations under this Amendment, Applicant shall comply with all relevant laws, ordinances and regulations in effect as of the Effective Date. In addition, Applicant shall be subject to all laws, ordinances and regulations of general applicability that become effective after the Effective Date.

7. **Right and Authority to Connect to Water System; Requirements**. By Applicant's performance of its obligations set forth herein, Applicant shall have the right and authority to connect the East Parcel to the Town's water system pursuant to §13-1-280 of the Code subject to the terms and conditions hereof. As more specifically set forth in Section 7.6 below, Applicant shall have the right to use treated water from the Town for all indoor uses on

the East Parcel, including all indoor uses within up to twenty-three (23) primary residences, up to twenty-three (23) detached accessory dwellings or buildings, and an owners' complex and associated amenities to be owned by the homeowners association for the East Parcel, irrigation and landscaping of all of the 0.46 acre park to be owned by the homeowners association for the East Parcel, irrigation and landscaping of up to 2,500 square feet per residential lot on the East Parcel, and all required fire flows. Upon Applicant's receipt of the Requisite Approval, Applicant and the Town will enter into a water services agreement (the "**Water Services Agreement**") that will be consistent with the terms and conditions of the Agreement and this Amendment, and that will not impose any additional system development charges, tap fees, assessments, or costs on the Applicant under Chapter 13 of the Code, other than as specified in the Agreement or this Amendment. The Water Services Agreement shall be recorded in the official real property records of the office of the Clerk and Recorder of Gunnison County, Colorado. Applicant's right and authority to connect the East Parcel to the Town's water system shall be conditioned upon compliance with the terms and conditions of the Agreement and this Amendment, including but not limited to the following:

7.1 ***Water Rights Dedication***. In exchange for the Town giving Applicant the right and authority to connect the Subject Property to the Town's water system pursuant to §13-1-280 of the Code, upon Applicant's receipt of the Requisite Approval, and immediately after the execution of the Sewer Connection Agreement and Water Services Agreement, Applicant shall convey to the Town (by Special Warranty Deed) interests in the McCormick Ditch in the amounts and priorities described on the attached **Exhibit "A"** (the "**McCormick Ditch Water Rights**"), subject to Applicant's reservation of rights as described below. Applicant provides no representations or warranties of any kind regarding the amount of historical consumptive use water or actual available flow rates associated with the McCormick Ditch Water Rights as discussed further in Section 7.2 below, or the amount of water that may be available to change to municipal use. The parties understand the McCormick Ditch Water Rights are currently owned by Verzuh Ranch, Inc., and that Applicant will need to acquire title to the McCormick Ditch Water Rights from Verzuh Ranch, Inc., in order to satisfy the above water rights dedication to the Town. The parties also understand the McCormick Ditch Water Rights were or are used for irrigation on what is known as (or formerly known as) the McCormick Ranch outside and east of the Town boundaries (the "McCormick Ranch"). The Town seeks to change the McCormick Ditch Water Rights in certain amounts, as discussed below, for uses within the Town water system and for Town purposes; and seeks to file a water court case for such changes in December 2016. Therefore, on or before December 15th, 2016, Applicant shall acquire authorization and consent from Verzuh Ranch, Inc., in writing and in a form acceptable to Town, which allows the Town's use of the McCormick Ditch Water Rights in the "Change Case" as defined below ("Verzuh Authorization"). Such Verzuh Authorization will provide that the Town has Verzuh Ranch Inc.'s irrevocable authority to file the Change Case with Town as the applicant, and prosecute such application to completion so long as this Amendment is still in effect. Such Verzuh Authorization shall also include an agreement by Verzuh Ranch, Inc. to: (1) cooperate, at no expense to Verzuh Ranch, Inc., with the Change Case; (2) not file a statement of opposition or other opposition to the Change Case; and (3) provide information in its possession, custody, and control as to the use of said McCormick Ditch Water Rights, including internal diversion records, irrigation records, aerial photographs, affidavits, and other available information concerning the historic use of the McCormick Ditch Water Rights. In the event

Applicant does not obtain the Verzuh Authorization by December 15th, 2016, this Amendment shall automatically terminate and be of no further force and effect. In the event the Agreement or this Amendment terminates for any reason and the Applicant's right to connect to the Town's water system becomes null and void, Town will abandon the Change Case and convey or grant any interests, contractual or otherwise, in the McCormick Ditch Water Rights back to Verzuh Ranch, Inc.

7.2 ***Water Court Case.*** No later than three months after the Verzuh Authorization or conveyance of the McCormick Ditch Water Rights to the Town, whichever comes first, the Town will file a change case in Water Court (the "**Change Case**") to: (a) change the type of uses, places of use and decree an alternate point of diversion at the Town's municipal intake for up to 9 (nine) acre feet of historic consumptive use (the "**HCU**") credit and associated diversion rate amount under the senior Priority 164 of the McCormick Ditch Water Rights as used on the McCormick Ranch; (b) potentially include up to 9 (nine) acre feet of HCU from the senior Priority 164 of the McCormick Ditch Water Rights in a plan for augmentation and/or exchange for Town purposes; (c) quantify the total acre feet of HCU credit associated with the existing and/or potential dry-up of historically irrigated acres under the senior Priority 164 of the McCormick Ditch Water Rights as used on the McCormick Ranch; and (d) change that portion of the senior Priority 164 of the McCormick Ditch Water Rights to be allocated to Applicant (see Section 7.3, below); Applicant shall provide a description of such change for inclusion in the Town's water court application no later than December 15th, 2016. The Town will take all reasonable and cost-effective steps to maximize the amount of HCU credit quantified in the Change Case, and Applicant will cooperate with those efforts. Applicant shall not file a statement of opposition or otherwise oppose the Change Case; except that Applicant may intervene at any time if Applicant reasonably believes its reserved rights pursuant to Section 7.3 below are being adversely affected or that this Agreement is or will be violated as it relates to the McCormick Ditch Water Rights under this Section 7. In addition, the Town agrees to keep Applicant reasonably apprised of the status of the Change Case and provide copies to Applicant of all pleadings and other documents filed in the Change Case. Applicant does not warranty or make any representation as to the amount of HCU credit, if any, the Town may be able to quantify and decree in the Change Case; and similarly, the Town provides no representations or warranties of any kind regarding the amount of historical consumptive use water that may be quantified or obtained in the Change Case, or the amount of historical consumptive use water that may be available to allocate to Applicant for its purposes. Applicant shall execute any documents, affidavits or covenants required by the Town, the water court, and/or the Division of Water Resources to memorialize, delineate, map and effectuate the dry up of any portions of the McCormick Ranch required to generate and quantify the HCU credit available for transfer, provided that Applicant is the appropriate party to execute such documents, affidavits, or covenants, and provided further that such documents affidavits, or covenants do not increase Applicant's obligations under this Amendment or result in any expense to Applicant.

7.3 ***Applicant's Reservation of Rights.*** Following entry of a final, non-appealable water court decree in the Change Case, the Town shall allocate the average annual HCU credit quantified by the court as follows: the Town shall receive the first six (6) acre feet of decreed HCU credit; Applicant shall receive the next six (6) acre feet of HCU credit; the Town and Applicant shall share equally in the next six (6) acre feet, i.e., any HCU credit from

12-18 acre feet shall be split 50/50; and Applicant shall receive any HCU credit in excess of 18 acre feet. Each party shall receive a proportionate share of the flow rates associated with the McCormick Ditch Water Rights commensurate with its HCU credit allocation. If the quantity of water physically and legally available for diversion at any given time under the McCormick Ditch Water Rights is less than 100%, the flow rates associated with the McCormick Ditch Water Rights shall be administered in strict priority, and the flow rates associated with the senior Priority 164 shall be operated between the parties commensurate with the allocation method for the decreed HCU credit described above, i.e., the Town shall receive the flow rate associated with its 6 acre feet first, Applicant shall receive the flow rate associated with its 6 acre feet second, etc.[1] Nothing in this paragraph shall prevent either party from taking any portion of the available flow that is not being taken by the other party at that point in time. Each party will be allocated, and responsible for complying with, a proportionate share of any diversion limits, return flow obligations, or other related terms and conditions of the final decree. Each party shall receive the exclusive right and entitlement to claim and enforce dry-up on the acres associated with its HCU credit allocation. Existing dry-up acres shall be assigned to the first HCU credits, and future dry-up acres shall be assigned to the later HCU credits. The Town shall cause a map to be prepared delineating the locations of the dry-up areas assigned to the Town and Applicant, in a manner that is consistent with this paragraph. Once the Change Case is completed and the allocation is made, the Town shall promptly convey Applicant's allocated interest in the McCormick Ditch Water Rights and HCU credits by Special Warranty Deed, together will all appurtenances to Applicant, or, at Applicant's written direction, to Applicant's designee or assign. Thereafter, Applicant agrees to not "call" for its McCormick Ditch Water Rights so as to prevent or curtail the Town from exercising its changed or exchanged McCormick Ditch interest at the Town municipal intake on Coal Creek. This restriction shall bind and run with Applicant's interest in the McCormick Ditch Water Rights. The Town shall not file a statement of opposition or otherwise oppose any future water court case changing the Applicant's interest in the McCormick Ditch Water Rights; except that Town may intervene at any time if Town reasonably believes its interests in the McCormick Ditch Water Rights are being adversely affected or that this Agreement is or will be violated as it relates to the McCormick Ditch Water Rights under this Section 7. In addition, in the event of such future change case involving the McCormick Ditch Water Rights, the Applicant agrees to keep the Town reasonably apprised of the status of the water court case and provide copies to the Town of all pleadings and other documents filed in the case.

7.4 ***Water Court Case Costs***. Applicant and the Town agree to split the first $50,000.00 of costs and expenses incurred by the Town in pursuing the Change Case. Applicant shall reimburse to Town, within 30 days of invoicing, all fees, costs and expenses to file and prosecute the Change Case up to a maximum amount not to exceed $25,000.00.

---

[1] For example, if the Court decrees 9 acre feet of HCU credit under Priority 164 of the McCormick Ditch (decreed for 0.64 c.f.s.), the Town will receive 6 acre feet and a corresponding 66.5% of the flow rate, or 0.426 c.f.s.; and Applicant will receive 3 acre feet and a corresponding 33.5% of the flow rate, or 0.214 c.f.s. If the flow rate in the Ditch is only 0.5 c.f.s., then Town shall be entitled to the first 0.426 c.f.s., and Applicant shall be entitled to the remainder 0.074 c.f.s., until the Town has diverted a volume of water that corresponds with 6 acre-feet of consumptive use credit.

7.5 ***Water Infrastructure.*** At the time Applicant submits its preliminary plan as part of the County Application, Applicant shall also submit to the Town its plan for connecting the East Parcel to the Town's water system and its plan for constructing Road A on the West Parcel according to the Town Specifications. Applicant shall be responsible for the installation of all utility infrastructure necessary to connect the Town's water systems to the East Parcel pursuant to and in accordance with the terms and conditions of a standard development improvements agreement to be executed by Applicant upon receipt of the Requisite Approval that is (a) substantially similar to the development improvement agreements the Town has previously used, and (b) not inconsistent with this Amendment. Such infrastructure shall be constructed in accordance with the Town Specifications, dedicated to the Town, and maintained by the Town following acceptance thereof, subject to a two-year warranty by the Applicant. Applicant shall pay the cost and expense of the Town's review and acceptance of the utility infrastructure.

7.6 ***Treated Water Service.*** The Town will provide treated water service to the East Parcel for all uses approved by Gunnison County in the Requisite Approval, including all indoor uses on the East Parcel, such indoor uses to include use within up to twenty-three (23) homes of 5,000 square feet, up to twenty-three (23) detached accessory dwellings or buildings of 750 square feet or less, and an owners' complex and associated amenities to be owned by the homeowners association for the East Parcel; irrigation and landscaping of all of the 0.46 acre park to be owned by the homeowners association for the East Parcel; irrigation and landscaping of up to 2,500 square feet per residential lot on the East Parcel (such allowance not to be combined or cumulated); and all required fire flows. Applicant understands and agrees that the Town will be the sole provider of treated water to the East Parcel and that Town shall not be obligated to provide more than the total number of equivalent residential units (EQRs) represented by such above development, as converted to gross maximum and average water demands and depletions using Town water engineering assumptions and standards. The treated water to be delivered by the Town under the terms of this Amendment may be used for all lawful in-building residential purposes and normal and reasonable outside irrigation of trees, lawns and gardens, such outdoor irrigation or landscaping area not to exceed irrigation of the 0.46 acre park to be owned by the homeowners association for the East Parcel, plus an additional 2,500 square feet per residential lot with treated water; such treated water further subject to all Town water-related ordinances and policies now or then in effect, and which are equally applicable to residents of Town. The recording of this Amendment and/or the Water Services Agreement will constitute a covenant running with the land restricting the use of treated water delivered hereunder to the terms and conditions contained in this Amendment and/or Water Services Agreement, and to all Town ordinances and policies now or in the future in effect, which are equally applicable to residents of Town, and the limitation to no more than the irrigation of the 0.46 acre park to be owned by the homeowners association for the East Parcel, plus an additional 2,500 square feet of lawn and garden irrigation per residential lot by drip or sprinkler irrigation means. The treated water to be delivered by the Town under the terms of this Amendment shall be used consistent with all Town water-related ordinances and policies now or then in effect, provided that such water-related ordinances and policies are equally applicable to all residents of the Town.

7.7 ***Use of Raw Water for Outside Uses.*** Applicant understands and agrees that the Town will not provide any raw water for irrigation or other uses. Nothing in this Amendment or the Agreement will prevent Applicant from seeking separate, additional raw water if it desires. Any and all raw water use on the Subject Property will be in accordance with Colorado water law governing the appropriation and use of water, provided, however that if Applicant seeks to change or develop any additional water rights or supplies, the Town may take such actions as it deems appropriate to protect its own water rights and supplies so long as any such actions are consistent with the Town's obligations under the Agreement and this Amendment. There will be no cross-connections of the Applicant's raw water supplies or infrastructure to the Town's treated water system. All backflow prevention devices shall be installed and inspected according to Town Code. Applicant will demonstrate in its plans, to the satisfaction of the Town, and be responsible for, the proper installation, maintenance and testing of required backflow prevention devices and for assuring that unprotected cross-connections, structural or sanitary hazards do not exist on the East Parcel. Applicant's water systems (for both treated and raw water) will be available for inspection as provided in the Code, to authorized Town Representatives to determine whether cross-connections or other structural or sanitary hazards exist, and to confirm that no treated municipal water is being used for outdoor irrigation or aesthetic purposes other than as provided herein.

7.8 ***Tap Fees, System Development Fees, Availability of Service Fee.*** As further set forth in Section 9.7 below, all tap fees, system development fees, availability fees and service charges, now or later in effect, and equally applicable to residents of Town, for treated water service will be assessed and determined utilizing the Town's applicable fees and rates at the time of application for a building permit for the structure for which service is sought. No water service will be provided to any structure absent payment of the appropriate fee and charges. Such fees and charges shall be paid to the Town at the time of building permit submittal to the County. The Town Public Works Department will determine scheduling of all physical taps or connections to the main lines, which scheduling will be done in accordance with then applicable Code, rules, regulations, standards and policies of the Town. Applicant understands and agrees it obligation to pay to the Town an availability fee according to Code 13-1-160 for each building site during the period of time in which the building sites are not connected to the Town water and sewer lines. The availability of service fee charges will commence and begin to accrue at the time of acceptance of water system infrastructure. Applicant understands that the Town is under no obligation to reimburse these or any applicable fees.

7.9. ***Limitations on Provision of Water Service.*** This Amendment is for the supply of treated water service as herein described and no expansion of uses, connections, or water service beyond those set forth herein is in any way authorized by this Amendment. The Town is not by this Amendment representing its ability to provide treated water service to any use or structure except as provided herein. Applicant understands and agrees that the Town's water supply is dependent upon sources from which the supply is variable in quantity and quality and beyond the Town's reasonable control; therefore, no liability will attach to the Town under this Agreement on account of any failure to accurately anticipate availability of water supply or because of an actual failure of water supply due to inadequate runoff, poor quality, failure of infrastructure, drought, or other occurrence beyond the Town's reasonable control. The Town agrees that it shall not treat actual or potential water users on the East Parcel any differently than

it treats actual or potential water users within the Town's municipal boundaries, except as set forth herein.

8. **Additional Requirements in Exchange for Right and Authority to Connect**. In exchange for granting Applicant the right and authority to connect to the Town's water system, Applicant shall comply with the following additional requirements:

8.1 ***Irrigation of Town Parcels***. Upon and in coordination with the construction of Eighth Street as contemplated in Section 6.4.12 of the Agreement, Applicant shall cause the delivery of raw water from the McCormick Ditch to the Town Parcels via underground pipe, appurtenances and related facilities (the "**Town Parcel Irrigation Facilities**") to be constructed by either Applicant or the Town pursuant to the Agreement. The design, location and construction of the Town Parcel Irrigation Facilities shall be in accordance with the Town Specifications and shall be approved in advance by the Town, such approval to not be unreasonably withheld. Such Town Parcel Irrigation Facilities shall be designed and constructed at Applicant's sole cost and expense. Following dedication to and acceptance thereof by the Town, the Town shall maintain the same provided that Applicant shall provide a two-year warranty on the materials and workmanship of such Town Parcel Irrigation Facilities. Such additional terms and conditions reflecting the Town Parcel Irrigation Facilities' design, installation and construction shall be included in the Sewer Connection Agreement and the development improvements agreement contemplated in Sections 6.1.2 and 6.4.14 of the Agreement, provided that such additional terms and conditions (a) shall be substantially similar to the terms and conditions of sewer connection agreements and development improvement agreements the Town has previously used and (b) shall not be inconsistent with this Amendment.

8.2 ***Voluntary Declaration of Covenant***. Upon Applicant's receipt of the Requisite Approval, Applicant shall record a declaration of covenant (the "**Declaration of Covenant**") encumbering all lots located on the East Parcel. The Declaration of Covenant shall be in substantially the same form as **Exhibit "B"** attached hereto.

8.3 ***Wood Burning Stove Requirements***. All solid-fuel burning devices as defined in Chapter 18, Article 8 of the Code located on the East Parcel shall conform to the requirements of such Article 8, as amended and modified from time to time. The Town shall have the right to inspect compliance with and enforce such requirements in accordance with the Code.

8.4 ***Grant Applications***. Applicant grants the Town the right to, and shall use all reasonable good faith efforts to assist the Town in, applying for grant funding for and allowing the design of, affordable housing on Town Parcel 3 and an emergency services center on Town Parcel 1. Applicant agrees to party with the Town and provide consent if necessary on any grant applications. Applicant agrees to allow the Town and associated parties to prepare site specific designs for new facilities and structures. Applicant's obligations under this Section 8.4 shall not require Applicant to incur any cost or expense and shall not be inconsistent with any other provision of this Amendment.

9. **Other Amendments to Agreement**.

9.1 Section 6.4.3 of the Agreement shall be revised to read as follows:

"Town Parcel 1, Town Parcel 2 and Town Parcel 4 shall be conveyed to the Town without any financial consideration. Town Parcel 3 shall be conveyed to the Town for $350,000.00, which amount is a portion of the anticipated costs of obtaining the No Action Determination."

9.2 The first sentence of Section 6.4.4 shall be revised to read as follows:

"The Deed of Conveyance shall require the Town to refrain from any uses of the Town Parcels affected by the Old Town Landfill that may disturb any cap associated with the approved cleanup, and abide by any other controls and conditions contained in the No Action Determination."

9.3 Section 6.4.12 of the Agreement shall be revised to add a final sentence to this section which shall read as follows:

"Once the parties have agreed upon the construction of Eighth Street pursuant to Section 6.4.12, Applicant shall enter into a standard development improvements agreement with the Town that is (a) substantially similar to the development improvement agreements the Town has previously used, and (b) not inconsistent with this Amendment. All infrastructure constructed pursuant to such development improvements agreement shall be constructed in accordance with the Town Specifications, dedicated to the Town, and maintained by the Town following acceptance thereof, subject to a two-year warranty by the Applicant."

9.4 Section 6.4.1.2 of the Agreement shall be revised to read as follows:

"Town Parcel 1 shall be zoned "P" Public. Any emergency services center to be located on the Town Parcels shall be located only on Town Parcel 1. No building constructed on Town Parcel 1 shall exceed 30 feet in height. The Town shall not develop the pond wetlands located within Town Parcel 1, other than as related to the extension of Road B, or for the temporary storage of irrigation water. In the event the Town uses the pond wetlands for the storage of irrigation water, it shall keep the pond full during the irrigation season and maintain the pond in a neat and attractive condition so that it serves as an aesthetic amenity for the Town Parcels and residential lots on the Applicant Retained Lands. In order to maintain the pond, the Town will periodically drain and/or clean the pond in order to keep the pond from gaining unreasonable amounts of sediment.

9.5 Section 6.4.1.6 of the Agreement shall be revised to read as follows:

"Within two years of annexation, Applicant will construct a river trail along with west bank of the Slate River through the West Parcel as shown on **Exhibit B** (the "**River Trail**") in order to provide potential connectivity to the existing Rec Path south and east of the Subject Property. Concurrently, with the construction of the River Trail, or sooner if

Applicant so desires, Applicant will construct fencing between the River Trail and the Town's Public Works Yard. Applicant shall choose the design, style, and material for such fencing, but Applicant shall consult with the Town to ensure that the final design, style, and materials selected for this fencing are reasonably sufficient to create a distinct barrier between the River Trail and the Public Works Yard that is no less secure than a chain link fence six feet in height. In addition, in order to provide boater access to the Slate River from its west bank, immediately north of the Road A bridge (the "**Boat Launch**"), and on the Slate River as it flows through the Property, Applicant and the Town shall enter into a boater access easement agreement concurrently with the conveyance of the Town Parcels memorializing such access in perpetuity. This easement agreement will address the terms and conditions for boater access to the Slate River as it flows through the Property as well as associated uses of the Boat Launch, including but not necessarily limited to, other permissible recreational uses of the Boat Launch and vehicular access to and from the Boat Launch. Finally, Applicant reserves the right, in its sole discretion, and at its sole expense, to require that the Town install odor controls on the wastewater treatment plant, as contemplated by the Public Works Facility Master Plan prepared by JVA, Incorporated, or as otherwise agreed to by the parties. Such odor control mitigation work shall be performed by the Town and/or its contractors.

9.6 Section 6.4.9 of the Agreement shall be revised to read as follows:

"The Town shall cooperate with Applicant to ensure compatible development and appropriate buffering between development of the East Parcel and the Applicant Retained Lands, on the one hand, and the Town Parcels and any Town properties, on the other hand. Development of the Town Parcels shall not compete from a market perspective with Applicant's residential development on the East Parcel and the Applicant Retained Lands, and the Town and Applicant shall cooperate with respect to the placement of Applicant's signage at agreed upon locations on the West Parcels. Immediately after Applicant obtains the Requisite Approval, the Town shall reasonably permit the installation of (a) temporary signage along Gothic Road (in a form reasonably acceptable to Applicant and the Town); and (b) buffers, and other mitigation measures at Applicant's expense on the West Parcel and on Town property around the Town Public Works Yard as contemplated in the Town Public Works facility master plan, or as otherwise agreed to by the Town Manager. Applicant's temporary signage along Gothic Road shall ultimately be replaced by permanent signage along Gothic Road (in a form reasonably acceptable to Applicant and the Town) pointing the way to Applicant's subdivision. Applicant shall have the right to erect permanent "entry feature" signage on the bridge across the Slate River, all property to be retained by Applicant adjacent thereto, as well as any additional signage Applicant desires on the East Parcel."

9.7 Sections 6.4.16, 6.4.17, and 6.4.19 of the Agreement shall be revised to read as follows:

"6.4.16 Applicant shall be responsible to pay availability fees for water and sewer service in accordance with Section 13-1-160 of the Code (the "**Availability Fees**"). Applicant shall pay all Availability Fees for the East Parcel and Applicant Retained Lands upon the Town's acceptance of all water and wastewater infrastructure.

6.4.17 Pursuant to Section 13-1-280 of the Code, tap fees for water and sewer service for residential lots on the East Parcel will be one and one half times (1.5x) per EQR of the in-Town rate (the "**Tap Fees**") as of the date of building permit application for such lot seeking service. The one half times (1.5x) multiplier will not be subject to change.

6.4.18 Monthly service fees for residential lots on the East parcel (the "**Service Fees**") will be two times (2x) per EQR of the in-Town rate pursuant to Section 13-1-280. The (2x) per EQR multiplier will not be subject to change, however, such monthly fees will be amended by the Town from time to time."

9.8 Section 6.4.10 of the Agreement shall be revised to read as follows:

"Lot lines on the East Parcel may extend to wetland boundaries, provided however that Applicant shall observe a 50-foot building setback from all high-quality wetlands on the East Parcel, and Applicant shall observe a 25-foot building setback from all low-quality wetlands on the East Parcel."

10. **Service Lines**. The installation, maintenance, repair and upgrade of all service lines (as defined in Section 13-1-40 of the Code), including that portion which traverses public property, shall be the sole and absolute responsibility of Applicant and the individual property owners of the Subject Property, at the same's sole cost and expense, except that water meters may only be maintained, repaired or replaced by the Town according to Section 13-1-220 of the Code.

11. **Easements**. Applicant shall obtain at its own cost and expense and shall convey in perpetuity to the Town as-built, non-exclusive easements for all water mains, sewer mains, lines, tanks, pump houses and other water and sewer facilities constructed under this Amendment and the Agreement located on or adjacent to the Subject Property, along with all necessary access easements for maintenance, upgrade and repair purposes. Unless otherwise approved by the Town, all such easements will be a maximum of thirty feet (30') in width unless a maximum width of thirty-five feet (35') is necessary to accommodate the parallel installation of water and sewer lines. Such easements shall be shown on the Final Plat of the subdivision of the East Parcel if and when approved by Gunnison County and where appropriate, in the reasonable determination of the Town, memorialized in separate grants of easements instruments.

12. **Water and Sewer Service Subject to the Town's Charter, Codes, Rules, Regulations and Policies**. All water and sewer service provided by the Town to Applicant and its assigns or successors in interest, in whole or in part, will be subject to, all provisions of the Code and the rules, policies or regulations of the Town now in effect or as may be hereafter adopted as to provision of water and sewer service by the Town, provided that all such provisions of the Code and such rules, policies and regulations are equally applicable to all residents of the Town.

13. **Costs and Expenses**. Except where the responsibility is otherwise assigned to a party in this Amendment or the Agreement, all costs and expenses associated with a particular performance item shall be the sole and absolute responsibility of Applicant.

14. **Enforcement**. The parties, their assigns or successors in interest, in whole or in part, to this Amendment and the Agreement recognize and agree that the damages flowing from any violation of the Amendment or the Agreement are irreparable, and there may be no adequate remedy at law for such violations. Accordingly, in addition to any other rights that may be available to them in law or equity, each party has the right to specifically enforce the Amendment and the Agreement against the other party, their assigns or successors in interest, in whole or in part, by seeking injunctive relief in the District Court in and for Gunnison County, Colorado. All remedies are cumulative and may be applied concurrently.

15. **No Waiver**. Applicant acknowledges and agrees that the Town is relying upon, and does not waive or intend to waive by any provision of this Amendment, the monetary limitations (currently $350,000.00 per person and $990,000.00 per occurrence) or any other rights, immunities, and protections provided by the Colorado Governmental Immunity Act, § 24-10-101, et seq., C.R.S., as from time to time amended, or otherwise available to the parties, their officers, or their employees.

16. **TABOR; Colorado Constitution, Article X, Section 20**. Notwithstanding any other provision in this Amendment to the contrary, the parties understand and acknowledge that the Town is subject to Article X, § 20 of the Colorado Constitution ("**TABOR**"). (a) The parties do not intend to violate the terms and requirements of TABOR by the execution of this Amendment. (b) It is understood and agreed that this Amendment does not create a multi-fiscal year direct or indirect debt or obligation within the meaning of TABOR and, therefore, notwithstanding anything in this Amendment to the contrary, all payment obligations of the Town are expressly dependent and conditioned upon the continuing availability of funds beyond the term of the parties' current fiscal period ending upon the next succeeding December 31. (c) Financial obligations of the Town payable after the current fiscal year are contingent upon funds for that purpose being appropriated, budgeted and otherwise made available in accordance with ordinances and resolutions of the Town and other applicable law. (d) Nothing contained in this Amendment shall constitute a pledge of the full faith and credit of the general tax revenues, funds or moneys of the Town except the amount appropriated for the purpose of making payments hereunder during the current fiscal year. (e) The Town's obligation to pay $350,000 to Applicant in exchange for the conveyance of Town Parcel 3 is subject to annual renewal and such obligation to pay shall be terminated upon the occurrence of an event of non-appropriation and, in such event, (i) The Town shall not be obligated to pay $350,000 for the conveyance of Town Parcel 3, and (ii) Applicant shall not be obligated to convey Town Parcel 3.

17. **Cooperation; Other Documentation; Instruments**. The parties shall reasonably cooperate with each other in order effect the transactions contemplated in this Amendment. The parties shall give, enter into, execute and approve such additional agreements, corporate approvals and instruments as are necessary and appropriate to effect such transactions.

18. **Assignment; Assumption**. Applicant's rights and obligations under paragraphs 7.2 and 7.3 shall be absolutely assignable by Applicant without the approval of the Town Council, written or otherwise, including but not limited to (a) Applicant's right to be reasonably apprised of the status of the Change Case and to be provided with copies of pleadings and other documents filed in the Change Case and (b) Applicant's right to have the Town convey

Applicant's allocated interest in the McCormick Ditch Water Rights and HCU credits by Special Warranty Deed, together with all appurtenances. All other rights and obligations contained in this Amendment may be assigned or transferred by Applicant only upon written consent approved by resolutions of the Town Council, which such consent shall not be unreasonably withheld. Any transfer or assignment without written consent, where such consent is required, shall be void *ab initio*. Upon any proper assignment or transfer hereunder, the assignee or transferee shall assume all the rights and obligations, as applicable, of Applicant hereunder.

19. **Authority**. The person executing this Amendment on behalf of Applicant does hereby covenant and warrant that as to Applicant, such person is duly authorized and has full right and authority to enter into this Amendment and that the person signing on behalf of Applicant is authorized to do so.

20. **Waiver of Defects**. In executing this Amendment, the parties waive all objections they may have over defects, if any, in the form of this Amendment, the formalities for execution, concerning the power of the Town to impose the conditions on Applicant as set forth herein, or over the procedure, substance or form of the resolutions adopting this Amendment.

21. **Entire Agreement**. This Amendment supersedes and controls all prior written and oral agreements and representations of the parties with respect to the subject matters addressed herein and represents the total integrated agreement between the parties with respect to such subject matters.

22. **Modification**. This Amendment shall not be amended or modified, except by subsequent written agreement of the parties approved by resolutions of the Town Council.

23. **No Waiver**. A waiver of any right or remedy on any one occasion shall not be construed as a bar to or waiver of any such right or remedy on any other occasion.

24. **General Release**. It is expressly understood that the Town cannot be legally bound by the representations of any of its elected officials, officers, employees, agents, representatives and attorneys or their designees, except in accordance with Town ordinances, the Code and the laws of the State of Colorado, and that Applicant, when dealing with the Town, acts at its own risk as to any representation or undertaking by the Town, its elected officials, officers, employees, agents, representatives, and attorneys or their designees, which is subsequently held unlawful by a court of law; provided, however, this paragraph shall not be construed to limit the rights and remedies of the parties otherwise provided by law, including under equitable doctrines such as estoppel.

25. **Notices**. Any notice or other information required by this Amendment to be sent to a party shall be sent by facsimile, e-mail, overnight courier or certified mail to the following:

Cypress Foothills, LP
Attention: Cameron Aderhold
8343 Douglas Ave., Suite 200
Dallas, Texas 75225

Facsimile: 214-283-1600
cameron.aderhold@cypressequities.com

with a copy to:

Cypress Foothills, LP
Attention: Brian Parro
8343 Douglas Ave., Suite 200
Dallas, Texas 75225
Facsimile: 214-283-1600
brian.parro@cypressequities.com

with a copy to:

Law of the Rockies
Attention: Marcus J. Lock
525 North Main Street
Gunnison, Colorado 81230
Facsimile: 970-641-1943
mlock@lawoftherockies.com

Town of Crested Butte
Attention: Michael Yerman
507 Maroon Avenue
P.O. Box 39
Crested Butte, Colorado 81224
Facsimile: 970-349-6626
myerman@crestedbutte-co.gov

with a copy to:

J. D. Belkin & Associates, LLC
Attention: John Belkin, Town Attorney
502 Whiterock Avenue, Suite 200
P.O. Box 2919
Crested Butte Colorado 81224
Facsimile: 970-497-4401
jbelkin@jbelkinlaw.com

Notice shall be effective when actually received by the party intended to be notified.

26. **Voluntary Agreement**. Applicant's continued compliance with all of the terms and conditions of this Amendment on a voluntary and contractual basis is a condition of its right to connect to the Town's water system.

27. **Attorneys' Fees; Costs**. Should this Amendment become the subject of a dispute between the Town and Applicant, the substantially prevailing party shall be entitled to reasonable attorneys' fees, costs, and expenses incurred in such dispute.

28. **Governing Law; Venue**. This Amendment and all rights conferred and obligations imposed hereunder shall be interpreted and construed in accordance with the laws and internal judicial decisions of the State of Colorado. The sole venue in any dispute shall be the District Court for Gunnison County, State of Colorado.

29. **No Third Party Beneficiary**. The parties intend no third party beneficiaries to this Amendment, and none shall be permitted hereunder.

30. **Recording**. Upon execution, Applicant shall record this Amendment in the Office of the Gunnison County Clerk and Recorder. The benefits and burdens of this Amendment shall run with the Subject Property and be binding upon the parties' successors and assigns. In the event this Amendment becomes null and void for any of the reasons set forth herein, the parties agree to execute and record a notice of termination of this Amendment and, in addition, if necessary to remove this Amendment as an exception to title to the Subject Property.

31. **Electronic Reproductions; Counterparts**. For purposes of enforcement of terms of this Amendment, electronic reproductions of this Amendment shall be deemed to be originals. This Amendment may be executed in multiple counterparts, each of which, when taken together shall constitute one and the same instrument.

[*Remainder of Page Intentionally Left Blank;*
*Signature Page(s) to Follow*]

WHEREFORE, the parties hereto have executed and entered into this Amendment by their duly authorized officers as of the Effective Date.

TOWN OF CRESTED BUTTE, COLORADO

By: _____
Glenn Michel, Mayor

ATTEST:

_____
Lynelle Stanford, Town Clerk

(SEAL)

TOWN OF CRESTED BUTTE CORPORATE SEAL JULY 2, 1880 GUNNISON COUNTY, CO

CYPRESS FOOTHILLS, LP
By: Cypress Foothills GP, LLC

By: _____
Name: BRIAN PARKO
Title: CFO + VP

STATE OF COLORADO )
) ss.
COUNTY OF GUNNISON )

The foregoing Amendment to Pre-Annexation Agreement was acknowledged before me this 6 day of December, 2016 by Glenn Michel, Mayor of the Town of Crested Butte, Colorado, a Colorado home rule municipality, on behalf of said entity.

_____
Notary Public

My commission expires: 12-18-2016

JESSICA L. EARLEY
NOTARY PUBLIC
STATE OF COLORADO
NOTARY ID #20084042246
My Commission Expires December 18, 2016

STATE OF ~~COLORADO~~ TEXAS )
) ss.
COUNTY OF ~~GUNNISON~~ DALLAS )

The foregoing Amendment to Pre-Annexation Agreement was acknowledged before me this 6th day of December, 2016 by BRIAN PARKO, CFO of Cypress Foothills, LP, a Texas limited partnership, on behalf of said entity.

_____
Notary Public

My commission expires: 3-7-18

STACIA DUGGAN
Notary Public, State of Texas
Comm. Expires 03-07-2018
Notary ID 5057779

## EXHIBIT "A"

## McCormick Ditch Water Rights

(a) 0.64 cubic feet of water per second of time decreed to the McCormick Ditch, being Ditch No. 168, Priority Number 164, in Civil Action No. 1325, in District Court, Gunnison County, Colorado, September 14, 1906, with an appropriation date of June 1, 1903, inclusive of 0.36 c.f.s. out of the 0.5 c.f.s. that was changed to add domestic and municipal uses by judgment and decree entered November 22, 1972, in Case No. W-578, District Court, Water Division No. 4, and which change was confirmed by the Order entered December 14, 1984, in Case No. 83CW20, District Court, Water Division No. 4.[2] The decreed point of diversion of the McCormick Ditch is located at a point whence the northeast corner of Section 3, Township 14 South, Range 86 West, 6th P.M., bears North 67 degrees East 890 feet;

(b) 1.853 cubic feet of water per second of time decreed to the McCormick Ditch, being Ditch No. 168, Priority Number 533, in Civil Action No. 5590, in District Court, Gunnison County, Colorado, January 27, 1961, with an appropriation date of June 1, 1903. The decreed point of division of the McCormick Ditch is located at a point whence the northeast corner of Section 3, Township 14 South, Range 86 West, 6th P.M., bears North 67 degrees East 890 feet; and

(c) 1.0 cubic feet of water per second of time decreed to the McCormick Ditch, being Ditch No. 168, Priority Number 558, in Civil Action No. 5590, in District Court, Gunnison County, Colorado, January 27, 1961, with an appropriation date of April 1, 1952. The decreed point of diversion of the McCormick Ditch is located at a point whence the northeast corner of Section 3, Township 14 South, Range 86 West, 6th P.M., bears North 67 degrees East 890 feet.

[2] The Town of Crested Butte claims the remaining 0.14 c.f.s. out of the 0.5 c.f.s. by virtue of a Special Warranty Deed between Verzuh and the Town, dated 8-7-2000, and subsequent change case for the 0.14 c.f.s. interest in Case No. 02CW63, Division 4 Water Court.

**EXHIBIT "B"**

**RECORDING REQUESTED BY:**
**WHEN RECORDED RETURN TO:**
Town of Crested Butte
Attn: Town Clerk
P.O. Box 39
Crested Butte, CO 81224

## DECLARATION OF COVENANT

THIS DECLARATION OF COVENANT (this "**Covenant**") is made this ___ day of _____, 20__ (the "**Effective Date**") by **CYPRESS FOOTHILLS, LP** ("**Owner**"), a Texas limited partnership.

## RECITALS:

A. Owner is the fee title owner of that certain real property described in **Exhibit "1"** attached hereto (the "**Property**").

B. Owner has obtained from the Town of Crested Butte, Colorado (the "**Town**"), a Colorado home rule municipality, the right and approval to connect the Property to the Town's water service system pursuant to §13-1-280 of the Crested Butte Municipal Code (the "**Code**") under a Pre-Annexation Agreement dated February 16, 2016 and recorded in the official real property records of the Office of the Clerk and Recorder of Gunnison County, Colorado on March 14, 2016 at Reception No. 638399, as amended and modified by an Amendment to Pre-Annexation Agreement dated _____, 20__ and recorded in the official real property records of the Office of the Clerk and Recorder of Gunnison County, Colorado on _____, 20__ at Reception No. _____ (collectively, the "Pre-Annexation Agreement").

C. In exchange for the Town allowing Owner to connect the Property to the Town's water service system pursuant to §13-1-280 of the Code, Owner has agreed and desires to impose a transfer fee expressed as a percentage of the value of each future transfer of any portion of or interest in the Property as set forth and determined according to the provisions contained herein.

D. Because such water service benefits will be needed as and to the extent that the Property is developed and transferred, and its value to future owners will be reflected in future property values, Owner has determined that it is reasonable and appropriate to impose a transfer fee expressed as a percentage of the value of each future transfer of any portion of or interest in the Property as set forth and determined according to the provisions contained herein.

E. The rate, exemptions, and other attributes of such transfer fee have been determined as set forth in this Covenant.

F. The transfer fee provided for herein shall be payable to the Town as described herein.

G. Each person acquiring any interest in any portion of the Property, as an essential condition of any conveyance to such person, shall be deemed for all purposes to have assented and agreed to the provisions of this Covenant; and shall hereby have waived any right to challenge or contest the provisions hereof or to seek any refund or abatement of the fee payable hereunder. The provisions of this Covenant shall run with the Property and be binding on all persons who hereafter acquire any interest in the Property.

**COVENANT:**

Owner hereby covenants and agrees, and binds encumbers the Property as follows:

1. **Covenant**. Owner hereby covenants and agrees that, there is hereby imposed a fee on all transfers by, without limitation, deeds, instruments, writings, certain leases and any other instruments by which any lands, tenements or other interests in the Property or any portion or interest therein are sold, granted, assigned, transferred or otherwise conveyed to or vested in a purchaser or transferee thereof, or any person, except as may be expressly exempt herein.

2. **Persons Liable for Fee**. Any seller or any other person who transfers any interest in the Property or any portion or interest therein which is subject to the fee imposed herein, and any purchaser or any other person to whom such a transfer is made, shall be jointly and severally liable for payment of the fee.

3. **Fee Due on Transfer**. Unless exempt hereunder, the fee is due on transfer of the property or any portion thereof.

4. **Definitions**. The following words and phrases, as used herein, shall have the following meanings:

"***Artifice* or *device***" means any transaction or transactions the substantial purpose of which is to evade the provisions of this Covenant and the imposition of the fee hereunder, including but not limited to the transfer to a corporation, partnership, limited partnership, joint venture, business trust or other association or organization together with the intent to ultimately assign the controlling interest in such association or organization.

"***Consideration***" means and includes actual cash paid and/or value of the property delivered, or contracted to be paid or delivered, in return for the transfer of ownership or title to real property (but not personal property), and shall include the amount of any lien, mortgage, contract indebtedness or other encumbrance, either given to secure the purchase price or any part thereof, or remaining unpaid on the property at the time of the sale. The term does not include the amount of any outstanding lien or encumbrance in favor of the United States, the State or quasi-government corporation or district for taxes, special benefits or improvements. In the event the transaction or transfer is by lease or similar agreement not specifically exempted herein, consideration means the capitalization of ten percent (10%) of the average annual rental over the entire term of the lease, including any renewal term, plus the actual consideration, if any, other than rent, paid or to be paid.

"***Deed in lieu of foreclosure***" means a conveyance by a property owner to a secured party or wholly owned subsidiary of the secured party of property which is the subject of a mortgage, deed of trust or other security instrument in consideration of the cancellation of all or part of the indebtedness secured by such security instrument or release of the debtor or guarantor from any personal liability of such indebtedness.

***"Fee"*** means the transfer fee imposed by this Covenant, which the Owner agrees is a "charge" for purposes of collection under Section 4-8-10 of the Town Code and C.R.S. §§ 31-20-105 and 106.

"***Financial institution***" means, for purposes hereof, an insured bank, commercial bank or trust company or credit union.

"***Real property***" means real property as defined by and under the laws of the State of Colorado that is part of the Property and any portion thereof.

"***Transfer***" means and includes any grant or conveyance of the ownership of title to real property that is evidenced by any deed, conveyance, instrument or writing wherein or whereby title to real property situated in the property is granted or conveyed, or the conveyance of a possessory interest and all other indicia of ownership in real property without the passing of legal title, subject to the exemptions provided herein.

5. **Amount of Fee**. The amount of the fee payable in each class shall be as follows:

5.1 Where there is no consideration or where the consideration is five hundred dollars ($500.00) or less, no fee hereunder shall be payable. The mere statement on the face of the instrument of transfer that the consideration received in connection therewith is five hundred dollars ($500.00) or less shall not be deemed adequate supporting evidence that the consideration in the subject transfer is five hundred dollars ($500.00) or less.

5.2 Where the consideration exceeds five hundred dollars ($500.00), the fee payable shall be three percent (3%) of such consideration.

6. **Exemptions**. The fee imposed herein shall not apply to:

6.1 Any document wherein the United States or any agency or instrumentality thereof, the State, any county, city and county, municipality, district or other political subdivision of the State is either the grantor or grantee.

6.2 Any document transferring title to real property in consequence of a gift of such property, where no consideration other than love and affection or charitable donation is evidenced by the terms of the document of transfer.

6.3 Any transfer by document, decree or agreement partitioning, terminating or evidencing termination of a joint tenancy, tenancy in common or other co-ownership in real

property; however, if additional consideration or value is paid in connection with such partition or termination, the fee shall apply and be based upon such additional consideration.

6.4 Transfers pursuant to a decree of separation or divorce except where the transfer is made to a third party.

6.5 Any transfer of title or change of interest in real property by reason of death, will or decree of distribution.

6.6 Any transfer made pursuant to business organization, reorganization or restructuring, including but not limited to mergers or consolidations of corporations, or by a subsidiary to a parent corporation, for no consideration other than cancellation or surrender of the subsidiary's stock or ownership interest. The transfer of at least seventeen percent (17%) of the stock in a corporation owning an interest in the Property or a portion thereof, or seventeen percent (17%) of any ownership interest in a business entity whose assets include an in interest in the Property or a portion thereof shall not be included in this exemption, and such transfer shall be subject to imposition of the fee imposed herein (i.e., the fee will be imposed on the consideration paid for the stock or other ownership interest so transferred, to the extent attributable to the value of the interest in the Property owned by the corporation or other business entity in which the stock or ownership interest is being transferred).

6.7 Any transfer to make effective any plan confirmed or ordered by a court of competent jurisdiction under the Bankruptcy Act or in an equity receivership proceeding.

6.8 Any transfer made and delivered without consideration for the purpose of confirming, correcting, modifying or supplementing a transfer previously recorded; making minor boundary adjustments; removing clouds of titles; or granting easements, rights-of-way or licenses.

6.9 Any decree or order of a court of record quieting, determining or resting title, including a final order awarding title pursuant to a condemnation proceeding.

6.10 Any lease of any real property or assignment or transfer of any interest in any such lease, provided that the terms and conditions of such lease do not constitute a de facto conveyance of the subject property. In the latter event, the fee shall be based upon the capitalization at five percent (5%) of the average annual rental over the entire term of the lease, including any renewal term, plus the actual consideration, other than rent, paid or to be paid. When the average annual rental cannot be determined, the fee shall be based upon the assessed value of the property covered by the lease.

6.11 Any transfer to secure a debt or other obligation, or release of real property which is security for a debt or other obligation.

6.12 Any executory contract for the sale of real property of less than three (3) years' duration, under which the purchaser is entitled to or does take possession thereof without acquiring title thereto, or any assignment or cancellation of any such contract.

6.13 (a) Any transfer under execution, sale or foreclosure sale under a power of sale or court decree of lien foreclosure; sheriff's deed; public trustee deed or treasurer's deed; or deed in lieu of foreclosure; provided that such transfer shall be exempt only: (i) if the grantee is the person holding the obligation or instrument which is being cancelled, in whole or part, in exchange for the transfer or upon which the proceeding is based, as applicable, or the grantee is a junior lienholder or exercising redemption rights pursuant to a lien that was recorded prior to commencement of the foreclosure or execution; (ii) if such grantee is the original obligation holder or a financial institution; and (iii) to the extent of the obligation which is being canceled, in whole or in part, in exchange for the transfer or is being satisfied at the execution or foreclosure sale and any obligations to prior lienholders paid from the sale.

(b) Notwithstanding Subparagraph (a) above, where the grantee is not the original obligation holder or a financial institution and where the other requirements of Subparagraph (a) are otherwise met, such transfer may still qualify for an exemption from the fee pursuant to this Paragraph; provided that the transferee must, as market conditions allow, resell the property in order to satisfy the obligation within two (2) years of the transfer. If, however, the property is not sold within two (2) years of the transfer or within any extension of such time beyond two (2) years as the Town Manager may allow for good cause shown, then the transfer shall not be considered exempt pursuant to this Paragraph and shall be considered an artifice and subject to the fee.

(c) A purchaser at an execution or foreclosure sale who holds no security interest or redemption rights in the property, and who acquires title to the property upon expiration of all redemption periods, is required to pay the fee.

(d) For deeds in lieu of foreclosure transfers, in order to qualify for an exemption from the fee pursuant to this Paragraph, the obligation that is being cancelled must be in default at the time of the transfer and no additional consideration shall be exchanged between the transferor and transferee in connection with such transfer. The transferor and transferee shall provide to the Town Manager an affidavit approved by the Town Attorney certifying the existence of the default at the time of the transfer and that no additional consideration has or will be exchanged in connection with the transfer.

6.14 Any transfer by the Owner, its affiliates, or a successor developer of the Property or any portion thereof, including but not limited to, any subdivided lot therein, which exemption shall be automatic, and shall not be subject to Section 7.

7. **Application for Exemption**.

7.1 In the event of any transfer that the grantor or grantee thereof desires to establish is exempt from the applicability of the fee, except pursuant to Section 6.14 above which exemption is automatic, or where the instrument of transfer contains language clearly establishing that the transfer is exempt, the grantor or grantee thereunder shall apply for and obtain from the Town Manager a certificate of exemption, which can then be recorded in the Office of the Gunnison County Clerk and Recorder. The application for a certificate of

exemption and such certificate shall be in substantially the same form as **Exhibit "2"** attached hereto, and shall be processed expeditiously by the Town Manager. A grantor or grantee of a transfer made pursuant to or and in accordance with Section 6.14 may, but need not, apply for a certificate of exemption.

7.2 Notwithstanding anything contained herein to the contrary, if an artifice or device is employed in connection with the transfer of real property then such transfer shall be subject to the fee.

7.3 Any person whose claim of exemption duly applied for under the provisions of this Section is denied by the Town Manager may immediately appeal to the Town Council for a determination of such exemption; and such appeal shall be considered by the Town Council within thirty (30) days of receipt of the same. In the event of a determination by the Town Council favorable to the appellant, any fee previously deposited, or so much thereof as may be allowed by the Town Manager, shall be promptly refunded to the person paying or depositing the same. If a decision is not made by the Town Council within thirty (30) days of the receipt thereof, the decision will be deemed favorable to the appellant.

8. **Lands Affected**. The fee imposed herein shall apply to all real property located within the Property and any portion thereof not specifically exempted hereunder.

9. **Enforcement**.

9.1 The Town Manager is charged with the enforcement of this Covenant.

9.2 On or before the time of any transfer upon which the fee is imposed hereunder, one of the persons liable for said fee shall cause a report to be provided to the Town Manager setting forth the true, complete and actual consideration for the transfer, the names and addresses of the parties thereto, and the location of the real property transferred.

9.3 For the purposes of collection of the fee imposed under this Covenant, all banks, title companies, escrow companies, building and loan institutions, attorneys, real estate agencies or other closing agents or agencies permitted as such to do business under the laws of the State may collect and remit the same to the Town for and on behalf of the persons liable for the fee.

10. **Due Dates; Delinquencies; Penalties; Interest**.

10.1 The fee is due and payable at the time of transfer, and becomes delinquent as provided in Section 10.3 below. Interest shall accrue at the rate of one and one-half percent (1.5%) per month, or fraction thereof, on the amount of the fee, exclusive of penalties, from the date the fee the fee is due and unpaid. Interest accrued shall constitute part of the fee.

10.2 The amount of any delinquent fee, together with interest due thereon, shall constitute a lien on the property for the amount thereof, which lien shall continue until the amount thereof is paid or until its discharge of record by foreclosure or otherwise. Such lien

may be foreclosed through the District Court of Gunnison County, Colorado, or by any other means available to the Town under law.

10.3 If the Town learns of any fee that is due, owning, and unpaid, the Town Manager shall give written notification to the seller, purchaser, transferor or transferee of the fee or any portion thereof that remains unpaid. Such notice shall be provided at the address shown on the instrument or writing effecting the transfer subject to the fee, if provided therein, otherwise the notice will be sent to the more recent address of such seller, purchaser, transferor or transferee, as applicable. Said notification shall be mailed by certified mail, postage prepaid, return receipt requested, and shall be effective on the date of mailing. If the fee, together with interest due thereon, are not paid in full within thirty (30) days of the effective date of notification, the Town Manager shall mark the same as delinquent on the Town's tax roll and shall certify such delinquency to the County Treasurer, pursuant to Sections 31-20-105 and 31-20-106, C.R.S., who shall extend such delinquencies upon the real property tax rolls of the County and collect the same in the manner set forth for real property taxes. For such purposes, Owner, for it successors in interests, transferees and assigns, hereby submits to, and waives any claims and defense to in connection therewith, without limitation, for purposes of collection, the rights, powers and authorities of the Town and the County Treasurer contained in Sections 31-20-105 and 31-20-106, C.R.S., and Chapter 4, Article 8 of the Code and other applicable law respecting any unpaid or delinquent fee, and any costs and expenses associated therewith. Upon certification of the delinquent taxes, the interest thereon shall also become due and owing.

10.4 The Owner agrees that in the event unpaid delinquent fees are certified to the County Treasurer as permitted by Section 10.3, the Owner shall not object to collection of the same by the Treasurer under C.R.S. §§ 31-20-105 and 106, as a charge due to the Town, in the manner set forth in that statute.

10.5 The amount of the fee, together with any interest thereon, imposed under the provisions of this Covenant shall be deemed a debt owed to the Town. Any person owing money to the Town under the provisions of this Covenant shall be liable in any action for the recovery of the delinquent amount, plus the attorney's fees and other costs expended by the Town in such action.

10.6 Any remedies provided for herein shall be cumulative and not exclusive and shall be in addition to any other remedies provided by law and in equity.

10.7 Prior to foreclosing the lien provided for in Section 10.2, or taking any other legal action to collect a fee that is due, owing, and unpaid pursuant to the terms of this Covenant, the Town shall comply with the notification procedure set forth in Section 10.3.

11. **Severability**. Any determination by any court of competent jurisdiction that any provision of this Covenant is invalid or unenforceable shall not affect the validity or enforceability of any other provision hereof.

12. **Modification**. This Covenant shall not be amended or modified, except by subsequent written agreement of the parties approved by resolutions of the Town Council and

recorded in the official real property records of the Clerk and Recorder of Gunnison County, Colorado.

13. **No Waiver**. A waiver of any right or remedy on any one occasion shall not be construed as a bar to or waiver of any such right or remedy on any other occasion.

14. **Governing Law; Venue**. This Covenant shall be interpreted and construed in accordance with the laws and internal judicial decisions of the State of Colorado. The sole venue in any dispute shall be the District Court for Gunnison County, State of Colorado.

15. **Recording; Run with the Land**. This Covenant shall be recorded in the official real property records of the Office of the Clerk and Recorder of Gunnison County, Colorado. The provisions of this Covenant shall run with the Property and be binding on all persons who hereafter acquire any interest in the Property or any portion thereof, whether as an owner, renter, trustee or mortgage beneficiary or otherwise.

16. **Recitals**. The recitals set forth above are deemed material provisions of this Covenant and enforceable in the same manner as any other term or condition hereof.

17. **Incorporation into Instrument of Transfer**. Each and every provision contained in this Covenant shall be deemed incorporated in each deed, instrument or document of transfer by which any right, title or interest in any of the Property or portion thereof is granted, devised, conveyed or otherwise transferred as if fully set forth therein.

18. **Statement Regarding Fee.** Upon written request by any interested party, the Town shall issue a written statement setting forth the amount of any unpaid Transfer Fee with respect to any specific portion of the Property identified in such request. Such statement shall be furnished as soon as reasonably practicable, but in no event later than 30 days after receipt of the request, and shall be binding on the Town.

19. **Term.** Except as provided herein, the term of this Covenant shall be perpetual unless the Property is annexed into the Town of Crested Butte, in which case this Covenant shall automatically terminate upon such annexation and shall be of no further force and effect as to any Transfer subsequent to the effective date of such annexation.

20. **Electronic Reproductions; Counterparts**. For purposes of enforcement of terms of this Covenant, electronic reproductions hereof shall be deemed to be originals.

WHEREFORE, Owner has made this Covenant by its duly authorized officers as of the Effective Date.

CYPRESS FOOTHILLS, LP

By:_____

Name:_____

Title:_____

STATE OF COLORADO )
) ss.
COUNTY OF GUNNISON )

The foregoing Declaration of Covenant was acknowledged before me this _____ day of _____, 201_ by _____, _____ of Cypress Foothills, LP, a Texas limited partnership on behalf of said entity.

WITNESS my hand and seal.

My commission expires:_____

_____
Notary Public

[SEAL]

# EXHIBIT 1

## Legal Description of the Property Subject to Declaration of Covenant:

A portion of a parcel of land known as Tract Q of Book 516 Page 474, Parcel 13 of Book 552 Page 63, Parcel 1 of Warranty Deed recorded at Reception No. 570819, Parcel 1 of Quitclaim Deed recorded at Reception No.570822, Parcel 1 of the Correction Warranty Deed recorded at Reception No.584439, Parcel 1 of the Special Warranty Deed recorded at Reception No.612899, and the Correction Deed recorded at Reception No.618498 all located in the SW 1/4 of Section 35, Township 13 South, Range 86 W of the Sixth PM, Gunnison County, Colorado being more particularly described as follows:

Beginning at the S1/4 Corner of said Section 35, said corner being a 3 1/4" Aluminum Cap from which the southwest Corner of said Section 35 bears N89°43'49"W a distance of 2650.49 feet; thence along an existing fence line as it exists in the field and as shown and described in a Boundary Agreement recorded in Book 769 at Page 881 the following three (3) courses:
1) N00°11'53"E a distance of 271.72 feet,
2) N00°50'11"W a distance of 932.90 feet,
3) N01°19'37"W a distance of 346.89 feet to a point on the northerly line of the Trampe Partition Parcel 13 and the southerly line of Spann Parcel 23 as described in Court Decree Amended Order of Partition as recorded in Book 552 at Page 63; thence along the northerly line of said Parcel 13 N90°00'00"W a distance of 570.01 feet to a point on the easterly line of the Town of Crested Butte Cemetery as described in Exhibit A(5) in Court Decree of Partition as recorded in Book 516 at Page 474; thence along the easterly line of said Cemetery Parcel S01°20'33"W a distance of 220.37 feet to the northerly corner of a parcel of land described in Book 518 at Page 403; thence along the northwesterly line of said parcel S29°46'00"W a distance of 470.46 feet to a point on the northerly line of said Trampe Partition Parcel 13, said point also being on the southerly line of said Cemetery Parcel; thence along said northerly line of said Parcel 13 N90°00'00"W a distance of 568.93 feet; thence along the wetland boundary more or less on the southerly bank of the Slate River the following six (6) courses:
1) S20°36'39"E a distance of 77.30 feet,
2) S32°48'09"E a distance of 178.03 feet,
3) S39°16'35"E a distance of 115.15 feet,
4) S52°37'46"E a distance of 40.69 feet,
5) S42°06'22"E a distance of 87.35 feet,
6) S66°34'01"E approximately 53.68 feet to the high water line of the Slate River; thence the following five (5) courses along the high water line of the Slate River approximately:
1) S44°00'17"E a distance of 2.43 feet,
2) S61°14'28"E a distance of 180.87 feet,
3) S45°20'59"E a distance of 257.67 feet,

4) S39°16'06"E a distance of 215.58 feet,
5) S50°53'25"E a distance of 97.51 feet to the southerly line of the SW1/4 of said Section 35; thence along said southerly line S89°43'49"E, a distance of 506.01 feet to the Point of Beginning.

Said Parcel as described above contains 30.436 acres, more or less.

All bearings shown hereon are relative to a bearing of N89°43'49"W between a GLO brass cap dated 1939 found at the southwest corner of Section 35 and a 3 ¼ inch aluminum cap stamped 18480 and dated 1995 found at the south quarter corner of Section 35.