



# LINCOLN COUNTY MONTANA

## Resolution 2022-04

### RESOLUTION TO VACATE THE RAINY CREEK ROAD

THE BOARD OF COUNTY COMMISSIONERS FOR LINCOLN COUNTY,  
MONTANA FINDS:

**WHEREAS**, Lincoln County approached Kootenai Development Company (KDC) about taking over management of said road as it has been closed for approximately 19 years.

**WHEREAS**, KDC as per the attached road maintenance agrees to exclusively maintain said road in a reasonable and prudent manner at the company's expense and liability, while leaving the southern part of the road open to the public allowing access to Tub Gulch.

**WHEREAS**, The United States Forest Service (USFS) through its representative at the public hearing on November 10, 2021 raised concerns of access. KDC offered to provide an access agreement that would not impede the USFS ability to perform any duties they may have.

**WHEREAS**, The USFS stated we can agree at some level, but the USFS is thinking long term for public access.

**WHEREAS**, KDC in response has agreed to a 25 year agreement to be reviewed, and renewed or renounced, returning the road to the County.

**WHEREAS**, Limiting access on a superfund site would limit liability to the County and KDC, while not impeding public access available through other avenues.

**NOW, THEREFORE BE IT RESOLVED THAT THE LINCOLN COUNTY BOARD OF COMMISSIONERS:**

1. Recognizes the needs and concerns of the aforementioned parties and offers valid consideration of each comment.
2. That Resolution 2022-04 and its attachments reaffirms our commitment to limit liability and provide reasonable access.





# LINCOLN COUNTY MONTANA

## THE BOARD FURTHER RESOLVES:

1. If a provision of this resolution conflicts with a provision of a previously adopted resolution, this resolution will prevail.
2. This resolution and its various sections, clauses and paragraphs and attachments are severable. If any part, sentence, clause or phrase is adjudged to be unconstitutional or invalid, the remainder of the resolution will not be affected.
3. This resolution and its attachments will be effective upon adoption and signatory completion, and entered into the minutes in accordance with 7-5-121 and 7-5-123, MCA.

## END OF RESOLUTION

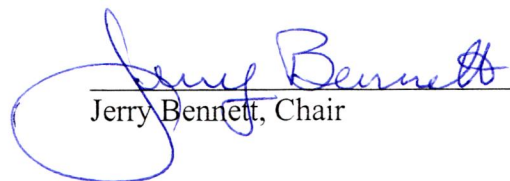
Approved as to Form:

  
\_\_\_\_\_  
Marcia Boris, County Attorney

Date presented to the Board Jan 3<sup>rd</sup> 2022 Approved (X) Disapproved ( ) Amended ( )

Adopted this 3<sup>rd</sup> day of January, 2022.

LINCOLN COUNTY BOARD OF COMMISSIONERS

  
\_\_\_\_\_  
Jerry Bennett, Chair

ATTEST:

  
\_\_\_\_\_  
Robin A. Benson, Clerk of the Board

When Recorded, Mail To:

Kootenai Development Company  
7500 Grace Drive  
Columbia, MD 21044  
Attn: Tony Penfold

298410 BOOK: 394 RECORDS PAGE: 663 Pages: 11  
STATE OF MONTANA LINCOLN COUNTY  
RECORDED: 01/18/2022 1:11 KOI: EASEMENT  
ROBIN A. BENSON CLERK AND RECORDER  
FEE: \$0.00 BY: Michelle Byrd Deputy  
FOR: LINCOLN COUNTY BOARD OF COMMISSIONERS 512 CALIFORNIA AVE,

(Space above for Recorder's use only)

## EASEMENT AGREEMENT

THIS EASEMENT AGREEMENT (this "**Agreement**") is made and entered into on this 5<sup>th</sup> day of January, 2022 ("**Effective Date**") by and between KOOTENAI DEVELOPMENT COMPANY, a Colorado corporation ("**Grantee**"), and LINCOLN COUNTY, a political subdivision of the State of Montana ("**Owner**"). Grantee and Owner are sometimes individually referred to herein as a "**Party**" and collectively as the "**Parties**".

### RECITALS

A. Grantee owns that certain real property more particularly described on Exhibit A, attached hereto and incorporated herein by reference (the "**Grantee Property**").

B. Owner owns that certain right of way located in Lincoln County, Montana, known as Rainy Creek Road and more particularly described and depicted on Exhibits B-1 and B-2, attached hereto and incorporated herein by reference ("**Rainy Creek Road**").

C. Contemporaneously with the execution of this Agreement, Owner has vacated the portion of Rainy Creek Road described and depicted on Exhibit B-1, which portion of Rainy Creek Road is located within the boundaries of the Grantee Property (the "**North Portion**"). Grantee, by virtue of its ownership of the Grantee Property, is the owner of the North Portion and has closed the North Portion for public use.

D. Owner has retained ownership of the portion of Rainy Creek Road described and depicted on Exhibit B-2 (the "**South Portion**") which remains open to public use.

E. Grantee desires to obtain and Owner is willing to grant to Grantee a non-exclusive easement over, across, and through the South Portion for the purposes described below, subject to the terms and conditions set forth herein.

### AGREEMENT

In consideration of the promises and agreements made by the Parties herein, the sufficiency of which is hereby acknowledged by both of the Parties, Owner and Grantee hereby promise and agree as follows:



1. Recitals. The Recitals are hereby incorporated herein.

2. Grant of Easement. Subject to the terms, covenants, agreements and conditions of this Agreement, Owner hereby declares, establishes, creates, reserves and grants to Grantee a non-exclusive easement (the “**Easement**”) in and to, over, across and through the South Portion (the “**Roadway Easement Area**”) for pedestrian and vehicular ingress and egress to the Grantee Property. The Roadway Easement Area is generally in the location depicted on Exhibit B-2 attached hereto. For the Easement Term (defined below), the Easement shall: (i) be for the benefit of Grantee and its successors as owners of the Grantee Property, and any part thereof; (ii) be for use by Grantee and its tenants, agents, employees, visitors, and other licensees and invitees (including emergency vehicles) (collectively, the “**Grantee Parties**”); and (iii) be appurtenant to and for the benefit of, and run with, the Grantee Property.

3. Effective Date and Term. This Agreement shall be effective as of the Effective Date and shall remain in full force and effect for a term of twenty-five (25) years therefrom (“**Easement Term**”); provided, however, that Grantee shall have the right, exercisable upon written notice to Owner, to extend the Easement Term for up to an additional twenty-five (25) years (“**Term Extension Right**”). Grantee may exercise the entire Term Extension Right at one time, or in multiple, shorter extensions totaling 25 years. Any exercise notice from Grantee to Owner shall state the duration of the extension. Promptly following the termination of the Easement, at either Party’s request, Owner and Grantee shall cooperate to cause a termination of this Agreement to be filed of record in the real property records of Lincoln County, Montana, provided that Owner’s rights under Section 7 hereof shall survive any such termination in accordance with the terms of Section 7 below.

4. Maintenance. During the Easement Term, Grantee shall be responsible for maintenance of the Roadway Easement Area pursuant to a separate written agreement between the Parties.

5. Non-Interference. Owner shall not interfere with or obstruct the use and enjoyment of the Roadway Easement Area by the Grantee Parties.

6. Public Right-of-Way. Owner and Grantee acknowledge and agree that the grant of this Easement does not affect, alter, reduce or derogate from any existing rights or easements existing in favor of Owner or the public at large covering any portion of the Roadway Easement Area.

7. Options for North Portion. Owner shall have the following options to reacquire the North Portion:

7.1 Upon the expiration of the Easement Term in accordance with Section 3 above, Owner shall have the right to require Grantee to reconvey the North Portion to Owner, via an easement deed, subject to all matters of record (the “Easement Deed”). Owner shall notify Grantee of Owner’s election to exercise the foregoing option, which notice must be delivered in writing to Grantee within forty-five (45) days after the expiration of the Easement Term. If such a timely notice is delivered to Grantee, Grantee shall execute and deliver to Owner, within ten (10) business days after receipt of such notice from Owner, the Easement Deed for the North Portion.



If Owner fails to timely deliver such exercise notice, Owner's right to have the North Portion reconveyed to Owner pursuant to this Section 7.1 shall expire and be of no further force or effect.

7.2 If, at any time (either during the Easement Term or thereafter) Grantee elects to transfer the North Portion (separate and apart from a transfer of the Grantee Property as a whole), before any such transfer of the North Portion, Grantee shall notify Owner in writing of the opportunity to have the North Portion reconveyed back to Owner; Owner shall have forty-five (45) days after receipt of such notice to notify Grantee of Owner's election to have the North Portion reconveyed to Owner. If Owner timely delivers such election notice to Grantee, Grantee shall execute and deliver to Owner, within ten (10) business days after receipt of such notice from Owner, the Easement Deed for the North Portion. If Owner fails to respond during such forty-five (45) day period, Owner shall be deemed to have rejected such offer and Owner shall have no further right under this Section 7.2 to have the North Portion reconveyed to Owner.

Upon expiration of Owner's rights under Sections 7.1 and 7.2 above, without timely exercise of the option to have the North Portion reconveyed to Owner pursuant to the Easement Deed, at either Party's request, Owner and Grantee shall cooperate to cause a termination of the rights under this Section 7 to be filed of record in the real property records of Lincoln County, Montana. Upon the recording of the Easement Deed as contemplated hereby, the provisions of this Section 7 shall be of no further force or effect.

8. Remedies. In the event of any default or failure to perform by a Party hereunder, except as otherwise provided herein, the non-defaulting party shall be entitled to any remedy normally available therefor at law or in equity.

9. Attorneys' Fees. In any action brought to enforce or contest any provision of this Agreement, or to obtain a declaration of the rights or responsibilities of any party hereunder, the prevailing party shall be entitled to recover all costs and expenses, including, without limitation, reasonable attorneys' fees, incurred by such party in connection with such action.

10. No Waiver. No provision of this Agreement may be waived except by written instrument signed by the party to be charged with such waiver. Failure by any party to this Agreement to enforce any provision of this Agreement shall not constitute a waiver of such provision, and no waiver by any party to this Agreement of any provision of this Agreement on one occasion shall constitute a waiver of any other provision or of the same provision on another occasion.

11. Covenants Running With Land. This Agreement and each of the provisions of this Agreement touch and concern the South Portion and the Grantee Property, and shall be covenants running with the land, binding on the South Portion and the Grantee Property and on Owner and Grantee and their respective successors as owners of the South Portion and the Grantee Property, and each part thereof, and shall inure to the benefit of and be enforceable by Owner and Grantee and their respective successors as owners of the South Portion and the Grantee Property, and each part thereof. Any transfer or encumbrance of the South Portion and/or the Grantee Property or any part thereof shall include the benefit of this Agreement and the right to enforce this Agreement. Any transfer of the South Portion or the Grantee Property, or any part thereof or interest therein,

shall be subject to the terms and provisions of this Agreement and to the obligations with respect to such property so transferred provided in this Agreement.

12. Further Assurances. Owner, and its successors as owners of the South Portion, shall from time to time execute and deliver to Grantee, and its successors as owners of the Grantee Property, any instruments reasonably requested by Grantee or its successors as owners of the Grantee Property, to effect or confirm any provision of this Agreement.

13. Severability. If any clause or provision of this Agreement shall be held invalid or unenforceable, the remainder of this Agreement shall not be affected thereby.

14. Captions. The section and subsection captions used in this Agreement are included for convenience only, and shall be irrelevant to the construction of any provision of this Agreement.

15. Notices. All notices, requests, claims, demands and other communications under this Agreement will be in writing and will be deemed given if delivered personally, or the next business day if sent by overnight courier (providing proof of delivery), or on the same business day if sent via electronic mail on a business day during normal business hours to the Parties at the following addresses (or at such other address for a party as specified by like notice), provided that any notice sent via electronic mail must also be sent by another method of delivery as set forth herein:

If to the Owner, to:

Lincoln County Commission  
512 California Avenue  
Libby, MT 59923  
Attn: County Commissioner, District 1  
Email: [Bteske@libby.org](mailto:Bteske@libby.org)

If to the Grantee, to:

Kootenai Development Company  
7500 Grace Drive  
Columbia, MD 21044  
Attn: Tony Penfold  
Email: [tony.penfold@grace.com](mailto:tony.penfold@grace.com)

or to their respective successors as the owners of the South Portion and the Grantee Property, respectively, at the address provided by such Persons in writing. Each Person entitled to receive notice may change its address for notices by notice given to the other party or owner as provided herein.

16. Governing Law. The validity, performance and enforcement of this Agreement shall be governed by the laws of the State of Montana without giving effect to the principles of conflicts of law of such state.



17. Indemnification. Grantee shall indemnify, defend, and hold harmless Owner from and against any and all claims, suits, actions, debts, damages, costs, losses, obligations, death, injury to persons or property or liabilities (including reasonable attorney's fees and court costs) (referred to herein collectively as the "**Claims**") asserted against Owner arising from the breach of this Agreement by Grantee or use of the Easement by Grantee or any of the Grantee Parties, other than as a result of the negligence or intentional acts of Owner.

18. Insurance. Grantee shall obtain and keep in force a policy of public liability insurance (in an amount not less than \$1,000,000 per occurrence and \$2,000,000 aggregate), subject to reasonable deductibles, on an "occurrence" basis covering risks arising out of the use of the Easement and Roadway Easement Area by Grantee.

19. Entire Agreement; Amendment. This Agreement contains the entire agreement of the Parties and supersedes any and all prior agreements between the Parties relating to the subject matter hereof. This Agreement may be amended only by mutual consent of the Parties.

20. Counterparts. This Agreement may be executed in any number of counterparts, each of which, when executed, shall be deemed to be an original and all of which shall constitute one and the same agreement.

*Signatures on Following Page*

IN WITNESS WHEREOF, the undersigned have executed and delivered this Agreement as of the date first above written.

**Grantee**

KOOTENAI DEVELOPMENT  
COMPANY, a Montana corporation

By: 

Name: Keith Cole

Title: Vice President

**Owner**

LINCOLN COUNTY, a political  
subdivision of the State of Montana

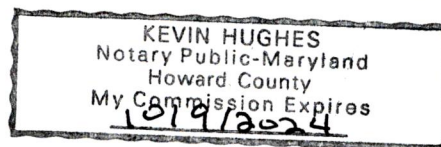
By: 

Name: Jerry Bennett

Title: Chairman



STATE OF Maryland )  
COUNTY OF Howard ) ss.



The foregoing Agreement was acknowledged before me this 12<sup>th</sup> day of January, 2022, by Keith Cole as Vice President of KOOTENAI DEVELOPMENT COMPANY, a Montana corporation.

WITNESS my hand and official seal.

My commission expires Oct 9, 2024

Kevin Hughes  
Notary Public

STATE OF Montana )  
COUNTY OF Lincoln ) ss.



The foregoing Agreement was acknowledged before me this 5<sup>th</sup> day of January, 2022, by Jerry Bennett as Chairman of LINCOLN COUNTY, a political subdivision of the State of Montana.

WITNESS my hand and official seal.

My commission expires Feb 9, 2025

Corrina Brown  
Notary Public





**Exhibit A**

Grantee's Property

Certain real property located in Sections 14, 15, 21, 22, 23, 26, 27 and 28, Township 31 N, Range 30 West, Montana Principal Meridian, Lincoln County, Montana as generally depicted on the following page.

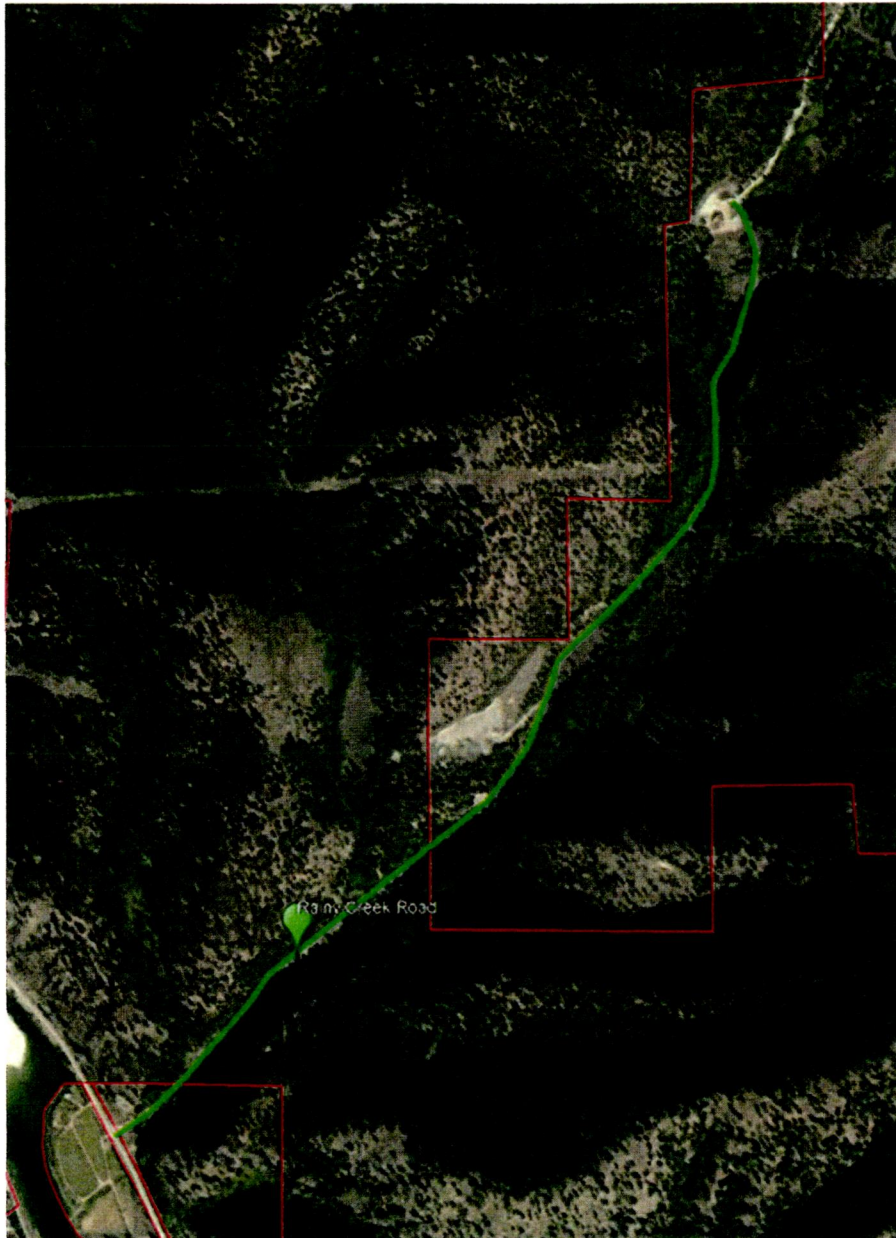
Kootenai Development  
Company Property



**Exhibit B-1**

Rainy Creek Road – North Portion

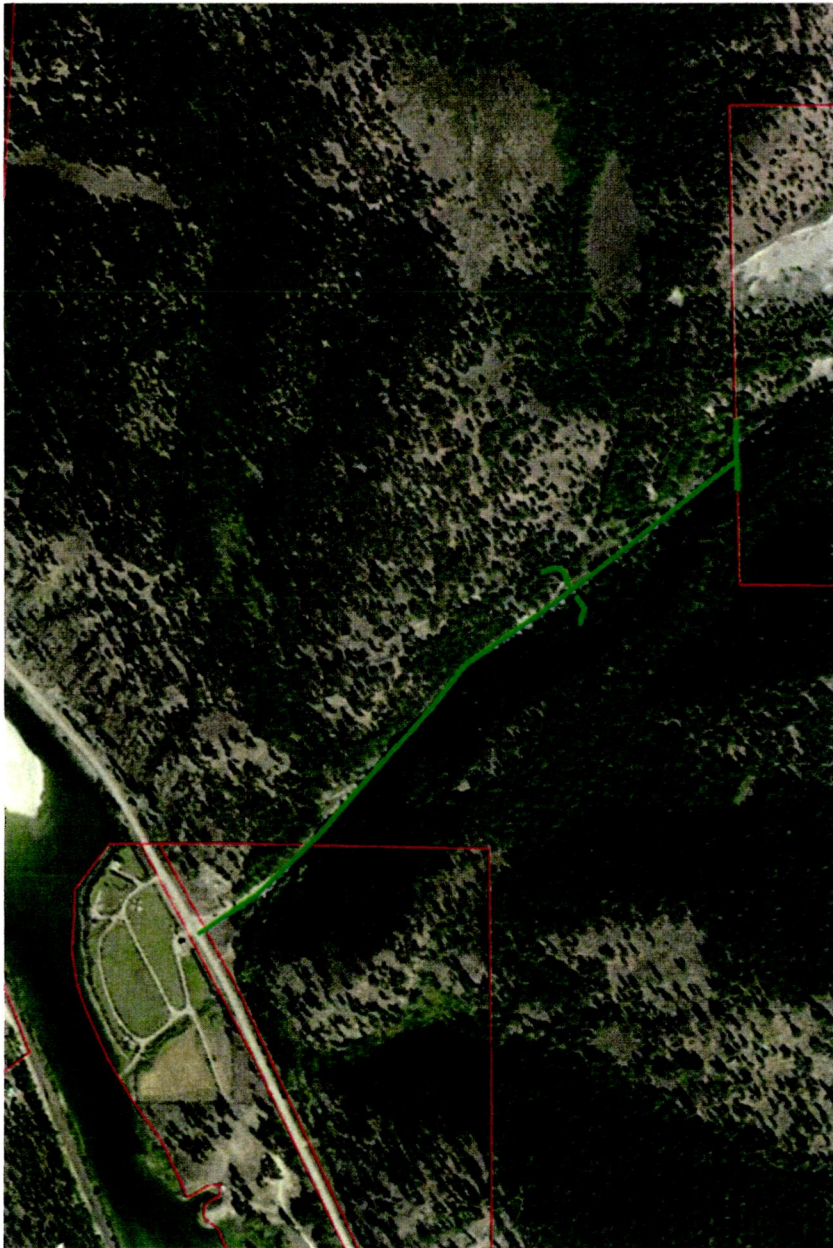
The portion of Rainy Creek Road as it passes through the portions of Sections 15, 21, and 28, Township 31 N, Range 30 West, Montana Principal Meridian, Lincoln County, Montana owned by Grantee as generally depicted below:



## Exhibit B-2

### Rainy Creek Road - South Portion

The portion of Rainy Creek Road as it passes through Section 32, Township 31 N, Range 30 West, Montana Principal Meridian, Lincoln County, Montana and the portion of Rainy Creek Road located in Section 28, Township 31 N, Range 30 West, Montana Principal Meridian, Lincoln County, Montana south of the Kootenai Development Company property line located in Section 28, Township 31 N, Range 30 West, Montana Principal Meridian, Lincoln County, Montana, as generally depicted below:





## ROAD MAINTENANCE AGREEMENT

THIS ROAD MAINTENANCE AGREEMENT (this "**Agreement**") is made and entered into on this 5<sup>th</sup> day of January, 2022 (the "**Effective Date**"), by and between KOOTENAI DEVELOPMENT COMPANY, a Montana corporation ("**Company**"), and LINCOLN COUNTY, a political subdivision of the State of Montana ("**County**"). Grantee and Owner are sometimes individually referred to herein as a "Party" and collectively as the "**Parties**".

### RECITALS

WHEREAS, the County has granted to the Company an access easement over, across, and through the South Portion of Rainy Creek Road as more particularly described in that certain Easement Agreement of even date herewith, the terms of such Easement Agreement hereby incorporated herein by this reference ("**Easement Agreement**"). All capitalized terms not defined herein shall have the meanings set forth in the Easement Agreement.

WHEREAS, the Easement Agreement contemplates the entry into this Agreement by the Parties to set forth the terms of the Company's maintenance obligations with respect to the Roadway Easement Area for the duration of the Easement Agreement.

### AGREEMENT

NOW, THEREFORE, in consideration of the premises and the mutual agreements and covenants contained herein, and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged by the Parties, the Parties hereby agree as follows:

1. Road Maintenance. During the term of this Agreement, the Company shall have the exclusive responsibility to repair and maintain the Roadway Easement Area in a reasonably prudent manner, at the Company's cost and expense. The Company will undertake to repair and maintain the Roadway Easement Area to the extent that the Company deems reasonable and necessary to keep the Roadway Easement Area in a safe condition. The Company's obligations hereunder include grading, removal of debris and obstructions, and snow removal. Should it arise that the Parties agree to returning said road to Lincoln County, it shall be returned in the state it was received, paved where paved and graded where graded. The Board of County Commissioners or other governmental or quasi-governmental authority having jurisdiction shall be the party responsible for temporarily closing the South Portion of Rainy Creek Road, including any applicable portion of the Roadway Easement Area, when hazardous conditions exist and shall be responsible for the placement and maintenance of any traffic control devices necessary to warn and regulate traffic.

2. Term. The term of this Agreement shall commence on the Effective Date and shall expire and be of no further force and effect at the expiration of the Easement Term, as may be extended pursuant to the Easement Agreement.

3. Compliance With Laws. The Company agrees to conduct any maintenance, repair or similar activities in the Roadway Easement Area in compliance with any applicable laws and regulations. Any permits or authorizations required for such activities will be duly obtained by and in the name of the County, as the owner of the South Portion of Rainy Creek Road, but the



Company shall solely bear all costs of obtaining and complying with any such permits or authorizations.

4. Indemnification. The Company shall indemnify, defend, and hold harmless the County from and against any and all claims, suits, actions, debts, damages, costs, losses, obligations, death, injury to persons or property or liabilities (including reasonable attorney's fees and court costs) (referred to herein collectively as the "**Claims**") asserted against the County and arising from the breach of this Agreement by the Company, other than as a result of the negligence or intentional acts of the County.

5. Insurance. The Company shall obtain and keep in force a policy of public liability insurance (in an amount not less than \$1,000,000 per occurrence and \$2,000,000 aggregate), subject to reasonable deductibles, on an "occurrence" basis covering risks arising out of the performance of the Company's obligations pursuant to this Agreement.

6. Miscellaneous.

6.1 Notice. All notices, requests, claims, demands and other communications under this Agreement will be in writing and will be deemed given if delivered personally, or the next business day if sent by overnight courier (providing proof of delivery), or on the same business day if sent via electronic mail on a business day during normal business hours to the Parties at the following addresses (or at such other address for a party as specified by like notice), provided that any notice sent via electronic mail must also be sent by another method of delivery as set forth herein:

If to the County, to:

Lincoln County Commission  
512 California Avenue  
Libby, MT 59923  
Attn: County Commissioner, District 1  
Email: [Bteske@libby.org](mailto:Bteske@libby.org)

If to the Company, to:

Kootenai Development Company  
7500 Grace Drive  
Columbia, MD 21044  
Attn: Tony Penfold  
Email: [tony.penfold@grace.com](mailto:tony.penfold@grace.com)

6.2 Governing Law. The validity, performance and enforcement of this Agreement shall be governed by the laws of the State of Montana without giving effect to the principles of conflicts of law of such state.

6.3 Headings. The heading references herein are for convenience purposes only, do not constitute a part of this Agreement and shall not be deemed to limit or affect any of the provisions hereof.

6.4 Entire Agreement; Amendment. This Agreement contains the entire agreement of the Parties and supersedes any and all prior agreements between the Parties relating to the subject matter hereof. This Agreement may be amended only by mutual consent of the Parties.

6.5 Waiver. The failure of any Party to require performance of any provision of this Agreement shall not be construed as a waiver of its rights to insist on performance of that same provision, or any other provision, at some other time. No right or breach may be waived except in writing signed by the Parties. The waiver by any party of any right created by this Agreement in one or more instances shall not be construed as a further continuing waiver of such right or any other rights created by this Agreement.

6.6 Severability. Any term or provision of this Agreement which is invalid or unenforceable shall be ineffective to the extent of such invalidity or unenforceability without rendering invalid or unenforceable the remaining rights of the person intended to be benefited by such provision or any other provisions of this Agreement.

6.7 Counterparts. This Agreement may be executed in any number of counterparts, each of which, when executed, shall be deemed to be an original and all of which shall constitute one and the same agreement.

6.8 Further Assurances. Subject to the terms and conditions hereof, each Party agrees to use its best efforts to do, or cause to be done, all things necessary, proper, or advisable under applicable laws and regulations to consummate the transactions contemplated by this Agreement as expeditiously as practicable, including without limitation the performance of such further acts or the execution and delivery of any additional instruments or documents as any Party may reasonably request in order to carry out the purposes of this Agreement and the transactions contemplated hereby.

6.9 Assignment; Successors. This Agreement shall be binding upon and shall inure to the benefit of the Parties and their respective successors and assigns. This Agreement and the Company's rights hereunder may be assigned by the Company to any successor as owner of the Grantee Property, subsidiary, affiliate, partner or joint venturer of the Company, but the Company may not assign this Agreement to any other person or entity without the prior written consent of the County, which consent shall not be unreasonably withheld, conditioned, or delayed.

6.10 Attorneys' Fees. If any litigation between the County and the Company with respect to this Agreement shall be resolved or adjudicated by a judgment of any court, the Party prevailing or substantially prevailing under such judgment shall be entitled, as part of such judgment, to recover from the other Party its reasonable attorneys' fees and costs and expenses of litigation from the other Party.

6.11 Entire Agreement. This Agreement, including any exhibits attached hereto, constitute the final and complete expression of the Parties' agreements with respect to the rights

and obligations with respect to the terms hereof. Each Party agrees that it has not relied upon or regarded as binding any prior agreements, negotiations, representations or understandings, whether oral or written, except as expressly set forth herein.

IN WITNESS WHEREOF, the Parties have executed this Agreement as of the day and year first above written.

**Company**

KOOTENAI DEVELOPMENT  
COMPANY, a Montana corporation

By: [Signature]  
Name: Kathy Cole  
Title: Vice President

**County**

LINCOLN COUNTY, a political  
subdivision of the State of Montana

By: [Signature]  
Name: Jerry Bennett  
Title: Chairman