Harding County Haul Road Agreement

THIS HAUL ROAD AGREEMENT made and entered into this day of , 20 , by and between Harding County, PO box 126 Buffalo, SD 57720 ("County"), and Developer, Address ("Developer").

WHEREAS, Developer plans to use County Roads in transporting items related to the construction of its proposed project, including but not limited to products, equipment, materials and/or supplies over County Roads; and

WHEREAS, Developer wishes to use certain roads as Haul Routes in Harding County; and

WHEREAS, Developer acknowledges that its contemplated use of Harding County roads will exceed the normal and customary use for which the roads are designed; and

WHEREAS, the County is authorized to construct, alter, improve, maintain and regulate County Roads under the supervision and direction of the County Commission and the Highway Superintendent; and

WHEREAS, the County and Developer anticipate that as a result of Developer's use of County Roads, accelerated deterioration will likely occur and that repairs or improvements may be required, and maintenance expenses may be incurred by the County as a result of Developer's activities;

NOW, THEREFORE, in consideration of the terms, conditions, and covenants contained herein, it is mutually agreed as follows:

1. PURPOSE:

This Haul Road Agreement shall provide for Developer's minimum responsibilities for use of any Haul Road during Developer's construction of its proposed Project to indemnify and pay to Harding County for Developer's hauling operations along County Roads.

1. DEFINITIONS:

The following definitions and terms shall apply to the entirety of this Agreement:

* 1. Maintenance. "Maintenance" means grading, reshaping, asphalt patching, repair and/or modification that may be performed 1 on County roads during Developer's use of County roads as set forth in this Agreement.

* 1. County Road(s). "County Road" means a street, road, bridge, or other public way, including shoulders, designated for the purpose of vehicular traffic and under the jurisdiction of the County, including unorganized townships.
  2. Haul Road. "Haul Road" means any County Road, bridge, or other structure, which is used for transporting items including, but not limited to products, equipment, materials, manpower and/or supplies.

* 1. Haul Route. "Haul Route" means the system of haul roads between a source site and the destination and/or the source site and the nearest major intersection as determined by the County.

* 1. Improvements. "Improvements" mean roadway improvements, including but not limited to widening or modification of roadway approaches to accommodate transport vehicles, required by the County because of Developer's anticipated use of the County Roads as a Haul Road.

1. GENERAL AGREEMENT AS TO ROAD USE:

* 1. Developer understands and agrees that, although the Haul Roads covered by this Agreement are County Roads and are subject to normal traffic use, Developer, by virtue of its use of the County Roads as a Haul Route, assumes responsibility for Maintenance on such County Roads during the period of use of such roads as Hauls Roads and continuing until such roads have been restored as provided in paragraph 3.d. Such periodic maintenance shall only be required where damage is caused by project use and has impacted the usability of the roadway by the public, and all other maintenance obligations may be completed at the conclusions of use. In addition to Maintenance costs, Developer will be responsible or liable for any accident, injury, tort, or other theory of liability to any third party whose damages are caused by the actions of Developer by virtue of this agreement and Developer agrees to indemnify Harding County for any damages and costs of defense of any action or litigation, including attorney's fees, that are caused by actions of Developer.

Furthermore, the Developer shall indemnify and hold harmless Harding County and its Commissioners, trustees, administrators, employees, engineers and representatives (collectively the “Indemnified Party”) against any all claims and any consequential, incidental, indirect, special, exemplary or punitive damages (including loss of actual or anticipated profits, revenues or other product loss by reason of shutdown or non-operation; increased expense of operation, borrowing or financing; loss of use or productivity; or increased cost of capital); resulting from any road closure or any other act by the County.

* 1. In the best interest of maintaining the County Road system to ensure the safety of the travelling public, the Developer agrees to conduct, either individually or through a third-party consultant, a pre-construction assessment of County Roads to determine their usability as a potential Haul Road. Harding County representatives will be asked to participate in the assessment and shall be notified of the assessment no less than two (2) days prior to the scheduled start date. At a minimum, the consultant will conduct the following (hereafter "Pre- Construction Assessment"):

* + - Video the existing roads to document pre-construction conditions
    - Document weight restrictions
    - Capture existing pavement distresses or fatigue.
    - Provide a map of the proposed haul roads.
    - Include Proposed Improvements to the roadway. The Proposed Improvements shall be determined based on the estimated reduction in the life of the roadway resulting from the anticipated loads associated with the construction of the Project, so as to maintain the same remaining pavement life for the roadway(s).

1. Developer shall notify the County of any roadway upgrades proposed by Developer to improve usability of potential haul roads for project use. At a minimum, proposed improvements to gravel roadways shall include the addition of a dust control product but may also include cement stabilization of the roadway and placement of additional gravel to ensure the roadway can handle the loads generated from this project. The type of dust control additive and quantity per mile that is to be applied by the Developer shall be approved by the County prior to application and will be required prior to hauling. For paved roadways, the Developer may be required to place an asphalt overlay on the designated roads prior to hauling to maintain the remaining design life of the pavement. Once the haul road assessment is approved by both the Developer and the County, the Developer shall complete the proposed improvements and gain acceptance from the County for said improvements prior to hauling. The prior or initial condition of any roadways, for purposes of determining the maintenance obligations, shall be taken as pre- upgrade condition.

1. Based on the pre-construction roads assessment and proposed upgrades, The County will advise Developer whether Developer's desired use of a County Road will be permitted as a Haul Road. It is understood by the parties that it is at the discretion of Harding County to allow Developer's use of the County roads for a haul road.
2. Should the Developer or its Contractor have a need to cross a paved or chip sealed road with excavators, dozers or other track driven equipment, measures must be taken to protect the road surface (i.e. laying tires across the roadway) and a temporary crossing shall be constructed to protect the edges of the pavement or chip seal from breaking off. The location(s) where equipment is crossing the road shall be adequately signed per MUTCD and the temporary crossing will need to be removed from the borrow ditch portion of the roadway, not from the road top, by the contractor upon completion of its use.

1. Financial Assurance: To guarantee compliance with its obligation to perform Haul Road Restoration or other Maintenance during construction/hauling, Developer shall furnish, or cause to be furnished, to the County an irrevocable letter of credit, cash escrow, performance bond, guaranty, or such other security as is reasonably acceptable to the County (the “Security”). The Security shall be \_\_\_\_\_\_\_\_\_ per mile and must be provided to the County prior to the commencement of any Improvements. Developer’s obligation to provide Security shall terminate, and the County shall return the Security to the Developer, at the completion of all Haul Road Restoration efforts of the haul road(s) and upon issuance of a Haul Road Release.

1. Haul Road Restoration: Once Developer has ceased using the Haul Roads for the purposes stated herein, Developer shall notify the County within 3 days thereafter and the County then shall notify Developer of any Restoration that the County asserts is the obligation of Developer. Developer agrees that it will restore the Haul Roads to at least as good a condition as existed prior to Developer's use of the Haul Roads within 14 days. Damage will be determined by comparing the Pre-Construction Assessment to the condition following Developer's use of the Haul Roads. Restoration efforts required by the County may include, but not be limited to, reshaping the roadway, cement stabilization of the roadway, placement of additional gravel and application of dust control additive. If Developer is unable to restore the road to its prior condition, Harding County is entitled to monetary damages, and the County may seek reimbursement from the Security for the Project or on file with the State of North Dakota or any other governmental agency within the State.

1. The County hereby agrees to Developer's use of the Haul Roads covered by this Agreement subject to the conditions contained herein. Developer shall be responsible for obtaining all permits or licenses which the County or any other governmental entity may require to operate or move its vehicles on County Roads, including overweight/oversize permits. Permits may be declined at any time, including during spring/frost load restrictions or inclement weather. Also, the Developer is prohibited from hauling on paved and chip sealed roads any time the air temperature exceeds 82 degrees Fahrenheit.

This Agreement shall not serve to relieve any operator of a Developer vehicle from complying with applicable speed limits, weight restrictions, or other posted restrictions, including seasonal load restrictions.

A violation of this section may result in a fine of up to $500 per occurrence and payment for the estimated damages determined by the Highway Superintendent, or the revocation of this Road Use Agreement.

1. Any Improvements of the Haul Roads necessitated by Developer's operations and agreed upon by the Parties shall be considered incidental to the hauling performed and shall be made at Developer's sole expense unless otherwise authorized in addendum to this Agreement. Any such Improvement shall be subject to approval by the County prior to commencement of construction. Improvements made to said Haul Roads may be allowed to become permanent at the discretion of Harding County. However, the designation of an improvement as permanent shall not entitle Developer to be reimbursed for the same.

1. The Developer agrees to maintain the haul road(s) in a safe condition satisfactory to the Harding County Highway Department. Maintenance of gravel roads shall include blading of material, material replacement, dust control and snow removal as so determined. Any snow removal completed by the Developer shall meet the standards prescribed by the County. Maintenance of paved roads shall consist of cold mix or hot mix asphalt patching. Any cold mix patching on a paved roadway will be considered a temporary maintenance effort.
2. Following a significant rainfall event or other weather-related issue, including temperature restrictions

on paved and armor coated (chip seal) roadways, the County reserves the right to shut down any haul road without any consequential damages as outlined in paragraph 3.a.

1. It is further agreed that, while hauling is in progress, if an Engineer for Harding County or the County Highway Superintendent believes there is evidence of present damage occurring to the road or a bridge on the haul road, the hauling shall immediately cease upon the order of the Harding County Highway Superintendent and the Developer shall provide the appropriate repairs to the road(s) and/or bridge(s). If a hazardous road condition is identified by Harding County, the Developer shall have 24 hours, after receiving notification from Harding County, to complete the repair of the hazardous condition or properly sign the area according to the Manual on Uniform Control Devices currently adopted by the North Dakota Department of Transportation. Failure to complete the repair will allow Harding County or a qualified contractor, as determined by Harding County, to complete the repair and forward the invoice to the Developer for payment or reimbursement.
2. Road Closures:

Developer shall use reasonable efforts to avoid the closure of any haul road. Nevertheless, Developer may be permitted to close a road that is designated as a haul road for brief periods in the interest of safety of the travelling public, and to permit the passage of large loads and the installation of improvements; provided, that Developer shall have provided the County with seventy-two (72) hours’ prior notice of any planned road closure and obtained the County’s approval thereof.

4. GENERALTERMS:

1. Compliance with Laws and Regulations

Developer shall comply with all Federal, State, and local laws and regulations.

1. Insurance

Developer shall secure and keep in force during the term of this agreement, from insurance companies, government self-insurance pools, or government self-retention funds authorized to do business in South Dakota, the following insurance coverages:

1. Commercial general liability insurance – minimum limits of liability required are $1,000,000 per person and $2,000,000 per occurrence.
2. If Developer may use an automobile in relation to the attached agreement, Developer must secure automobile liability insurance with a minimum liability of at least $1,000,000. The above limits may be satisfied through a policy or policies of insurance, primary and excess, including the so-called umbrella or catastrophe form.
3. The County, its agencies, officers, and employees (County) shall be endorsed as an additional insured on the above policies.

The Developer shall furnish a certificate of insurance coverage evidencing the requirements in 1 through 3 above to the undersigned County representative prior to commencement of this agreement.

Developer’s insurance coverage shall be primary (i.e., pay first) as respects any insurance, self-insurance, or self-retention maintained by the County.

The insolvency or bankruptcy of the insured Developer shall not release the insurer from payment under the policy, even when such insolvency or bankruptcy prevents the insured Developer from meeting the retention limit under this policy.

The Developer must secure any necessary Workers Compensation coverage that may be required by South Dakota law.

1. Severability

If any portion of this Agreement is held invalid it shall have no effect upon the validity of the remaining portions of this Agreement.

1. Scope and Construction of Terms

The definitions in this Agreement shall control the meaning of terms used herein. Where no definition is expressly stated herein, a term shall have that meaning clearly indicated by, or reasonably implied from, the context in which such term is used.

Developer shall be liable for and shall indemnify and hold Harding County harmless from any and all actions, matters or costs and expenses, including reasonable attorney fees, associated with any endeavors which Developer undertakes in its performance under this Agreement without limitation. This does not waive any claim to sovereign or governmental immunity belonging to Harding County.

1. This Agreement shall be governed and construed as to interpretation and performance in accordance with the laws of the State of South Dakota. Any lawsuit or action pertaining to or affecting this Agreement shall be venued in the state or federal courts of the location where the agreement pertains, and such courts shall have exclusive jurisdiction to hear any and all matters concerning this Agreement and/or its enforcement.

1. In the event Developer fails or refuses to comply with its obligations under this Agreement, Harding County shall have the right to curtail or restrict Developer's use of all Harding County roads.

1. While performing any service or duty under this Agreement, Developer is an independent contractor and is not an officer, agent, or employee of Harding County.

1. Harding County expressly reserves any and all immunities and defenses available to it and does not, by entering into this Agreement waive any defenses or immunities otherwise available to it.

1. This agreement may not be amended except in writing signed by an authorized representative of each party. Any such amendment is subject to the same approval requirements as in this Agreement.
2. The terms of this Agreement shall be binding upon the parties' representatives, successors and assigns to the extent permitted by law.

Notification. All notices and oral or written communications relating to this agreement may be forwarded to:

On behalf of the County:

Harding County

Attn: Jeremy Humbracht, County Hwy Superintendent

410 Ramsland St

PO box 126

Buffalo, SD 57720

On behalf of the Developer:

Attn:

Address:

Phone:

IN WITNESS WHEREOF, the Parties hereto executed this Road Use Agreement as of the first date hereinabove written.

**Developer Harding County**

Signed: Signed:

Name: Name:

Title: Title:

Witness: Witness:

Name: Name:

Title: Title: