

CONSTRUCTION AGREEMENT

BETWEEN: Town of Marble and Trout Unlimited

REGARDING: Marble Wetlands Preserve

1. PARTIES.

This Agreement is entered into between the following parties: Trout Unlimited, LLC (Contractor), with an address of 1777 N. Kent St., Arlington, VA 22209, and the Town of Marble Board (Town), with an address of 322 West Park St., Marble, CO 81623, a political subdivision of the State of Colorado. The Contractor and the Town agree to the terms and conditions in this Agreement.

2. STATEMENT OF WORK.

a. The term "Contract Documents," means this Agreement and the following documents incorporated as though fully set forth herein:

i. Intergovernmental Agreement between State of Colorado Department of Public Health and Environment and Town of Marble (Original Contract Number 2023*2139), and all attachments thereto, including:

- (1) Exhibit A, Additional Provisions
- (2) Exhibit B, Statement of Work
- (3) Exhibit C, Budget
- (4) Exhibit D, Federal Provisions

(collectively, the "Prime Agreement");

ii. Marble Wetland Preserve VCUP.

b. The Contractor will adhere to the Bid Proposal Package dated August 12, 2022 (TU's Request for Proposal), but in the event of any conflict between the Contract Documents and the Request for Proposal, the Contract Documents will control.

c. The Contractor will commence and complete the proposed Marble Wetland Preserve Voluntary Clean Up (VCUP) to include those items listed in the Statement of Work approved by Colorado Department of Public Health and environment (CDPHE) Brownfields Response Program (Exhibit B to the Prime Agreement) and the associated VCUP (the "Project").

d. The Contractor, directly or through one or more qualified sub-contractors, will furnish all materials, labor, supervision, supplies and equipment to commence, diligently pursue, and complete the Project described herein as follows: (1) in a timely manner; (2) in accordance with all applicable federal, state and local laws and regulations affecting the Project, including but not limited to Contractor's requisite ownership, rights and licenses to perform its obligations; (3) in a manner that shall conform to the Contract Documents and applicable specifications; (4) in a manner that will be free from deficiencies and defects in materials, workmanship, design or performance, as applicable, performed by qualified personnel in a professional and workmanlike manner, and consistent with industry standards and generally accepted standards for the type of work being completed.

e. This agreement relies upon funding provided by CDPHE through the Prime Agreement, where the Town is designated as the contractor responsible for completing the Statement of

Work. The intention of the parties is for the Town to serve as the “fiscal agent” for the Project. Accordingly, the Town is entering into this sub-contract Agreement with Contractor to complete the entire Statement of Work.

f. Contractor acknowledges receiving copies of the Contract Documents. Contractor hereby assumes towards the Town all of the same obligations that the Town assumes towards the State under the Prime Agreement. Contractor acknowledges that the Prime Agreement imposes certain requirements on all subcontractors, which will include subcontractors of Contractor. Contractor shall provide relevant portions of the Prime Agreement to the subcontractors and ensure that all subcontractors comply with the applicable requirements of the Prime Agreement.

3. Effective Date. The effective date of this Agreement is the date on which this Agreement is approved and signed by both Parties. The Contractor will commence the work required by the Contract Documents as soon as feasible.

4. Compensation.

a. The Contractor agrees to perform all of the Project described in the Statement of Work and comply with the terms of the Prime Agreement for the maximum sum of \$95,000.00. The Town shall have no liability to compensate Contractor for any work performed beyond the scope of this Agreement, and any additional payment obligations beyond the maximum price and/or the current fiscal year are further subject to the appropriation and availability of funds.

b. Payment –Contractor acknowledges that the Town is not entitled to compensation under the Prime Agreement until submittal and acceptance by the State of a final report upon completion of the Project (see Prime Agreement, Exhibit A Additional Provisions, ¶1). Contractor and the Town shall cooperate with one another to ensure that all materials required for payment by the State are submitted to the State in as timely of a manner as practicable upon completion of the Project. The Town shall pay Contractor within 21 days of receipt of payment from the State. This is a pay-if-paid agreement, not a pay-when-paid agreement. Payment of Contractor is contingent upon receipt of payment from the State. Contractor, not the Town, bears the risk of non-payment by the State. In the event that the Town fails to make timely payment, Contractor may, at its sole option and discretion, pursue all rights and remedies it may have under this Agreement.

c. Lien Waivers—As a prerequisite for payment, Contractor shall provide, in a form satisfactory to the Town, a lien waiver in the amount of the application for payment, from the prime subcontractor for all completed work. Such waiver may be conditional upon receipt of payment of the amount stated in the application for payment.

5. Insurance. Contractor shall comply, and shall ensure all subcontractors comply, with the Prime Agreement requirements pertaining to insurance (see Prime Agreement ¶ 10).

6. Indemnification. To the fullest extent permitted by law, the Contractor shall defend, indemnify and hold harmless the Town and its trustees and agents from all claims, including but not limited to bodily injury and property damage, that may arise from the performance of, or failure to perform, the Project, to the extent caused by the negligent acts or omissions of, or breach of the terms of this Agreement by, the Contractor, the Contractor's subcontractors, or anyone employed directly or indirectly by any of them or by anyone for whose acts any of them may be liable, including reasonable attorneys' fees, costs, and expenses.

7. Independent Contractor Relationship – The parties agree that an Independent Contractor relationship is created by this Agreement. The Town is interested only in the results to be achieved, and the conduct and control of the work will lie solely with the Contractor. Contractor and its employees are not to be considered agents or employees of the Town for any purpose, and it is specifically understood and agreed that the Contractor and its employees are not entitled to any of the benefits that Town provides for its employees. Therefore, it is agreed that none of the benefits provided by Town to its employees, including, but not limited to, any federal or state withholding taxes, FICA, insurance in any form, retirement plans, worker’s compensation, or unemployment compensation, are available from Town to the Contractor under the terms of this Agreement.

8. Confidentiality – The Contractor shall comply with all state and federal laws and regulations, and all Prime Agreement contractual provisions, relating to confidentiality and privacy.

9. Audits and Availability of Records – Contractor shall comply with the record keeping requirements imposed by the Prime Agreement (reference ¶ 7).

10. Employment Requirements for Public Contracts – Pursuant to §§8-17.5-101, et seq., C.R.S., Contractor certifies, warrants, and agrees that it and its subcontractors that perform work under this Agreement do not knowingly employ or contract with an illegal alien who will perform work under this Agreement and will confirm the employment eligibility of all employees who are newly hired for employment in the United States to perform work under this Agreement, through participation in the E-Verify Program or the State verification program established pursuant to §8-17.5-102(5)(c), C.R.S. Contractor acknowledges and agrees to be bound by paragraph 19.K of the Prime Agreement.

11. Governmental Immunity – The Town retains governmental immunity to the maximum extent permissible under the Colorado Governmental Immunity Act, §24-10-101, et seq., C.R.S., and other applicable law. No term or condition of this Agreement shall be construed or interpreted as a waiver, express or implied, of any of the immunities, rights, benefits, protections, or other provisions, contained in these statutes and other applicable law.

12. Appropriations—The Town is prohibited from expending funds except in conformance with the Local Government Budget Law of Colorado. The Town is also prohibited from entering into fiscal obligations that extend beyond the current fiscal year. Payment to Contractor beyond the current fiscal year is contingent on the appropriation and continuing availability of the funds in any subsequent year. Because federal funds administered by the State of Colorado constitute the Town’s funding source for this Agreement, the Town’s obligation to pay Contractor shall be contingent upon such funding continuing to be made available for payment. If funds are not appropriated, or otherwise become unavailable to fund this Agreement, the Town may, upon written notice, terminate this Agreement, in whole or in part, without incurring further liability, except that the Town shall remain obligated to pay for services delivered and accepted and for which the Town receives reimbursement from the State.

13. Project Management – TU designates Tanner Banks as the Project Manager for the project. The Project Manager shall be the point of contact for all parties for questions regarding permits, landowner concerns, modification of this Agreement, or other items as they arise. The Project Manager shall be the administrator of this Agreement to complete the VCUP Statement of Work, funded by Colorado Department of Health and Environment (CDPHE) through the Prime Agreement. TU will ensure the project is implemented according to the design and specifications; will ensure the equipment utilized meets the requirements of the design and specifications; and will ensure that the project is implemented in a timely and efficient manner. Project collaborators can also be reached during course of reclamation work in the absence of the TU Project Manager. Specific contacts from each agency for reference to Contractor are as follows: Pat Willits – President, The Trust for Land Restoration at

patrickwillits@gmail.com or Mark Rudolph – Superfund and Brownfields Program, CDPHE at mark.rudolph@state.co.us

14. Notices – Each notice, demand, request, or other communication required to be given or served by either party to the Agreement on the other, or which either party desires to give or serve on the other shall be in writing and any statute, ordinance, or regulation to the contrary notwithstanding, shall not be effective for any purpose whatsoever unless given or served to the parties' addresses identified in Section 1 (PARTIES) of this Agreement. The parties may also agree to email delivery of any such notice, demand, request, or other communication, provided reasonable notice is given of such email delivery. The parties agree to the following general contact points (which) shall supersede any inconsistent provisions set forth in the Contract Documents:

TOWN OF MARBLE:

Ron Leach – Town of Marble, Designated Representative/Intergovernmental Agreement Manager, 970-963-1938, leach@townofmarble.com

CONTRACTOR:

Tanner Banks – Trout Unlimited, Mine Reclamation Project Manager
17 N Uncompahgre Ave. STE A, Montrose, CO 81401
970-390-9492, tanner.banks@tu.org

Warren Colyer – Trout Unlimited, Western Water and Habitat Program Director
312 N Higgins Ave, Missoula, MT 59802
406-540-2185, warren.colyer@tu.org

15. Assignment – Except for subcontracts entered into in accordance with the requirements of the Prime Agreement, Contractor shall not assign any rights or obligations under this Agreement without the Town's prior written consent. Any assignment in violation of this paragraph is void.

16. Binding Effect – This Agreement shall inure to the benefit of and be binding upon the parties, their heirs, executors, administrators, assignees, and successors. However, the Contractor may not assign its rights or obligations under this Agreement without the written permission of the Town.

17. Construction Against Drafting Party Prohibited – The parties and their respective counsel have had the opportunity to review this Agreement, and this Agreement will not be construed against any party merely because any provisions of the Agreement were prepared by a particular party.

18. Severability – If any part, term, or provision of this Agreement is held by the courts to be illegal or in conflict with any law of the State of Colorado, the validity of the remaining portions or provisions shall not be affected, and the rights and obligations of the parties shall be construed and enforced as if the Agreement did not contain the particular part, term or provision held to be invalid.

19. Timing – The parties agree that in the performance of the terms, conditions, and requirements of this Agreement, time is of the essence.

20. Governing Law – This Agreement shall be governed by the laws of the State of Colorado, both as to interpretation and performance. In the event that either party to this Agreement brings an action to interpret the terms of this Agreement or to enforce its terms, both parties shall be responsible for their own costs and attorney's fees incurred in such action. The exclusive venue for any action arising with respect to this Agreement shall be the Seventh Judicial District, State of Colorado.

21. Waiver – No waiver of any breach of this Agreement shall be held to be a waiver of any other or subsequent breach. All remedies afforded in this Agreement shall be taken and construed as cumulative, that is, in addition to every other remedy provided therein or by law.

22. Force Majeure – Neither party shall be liable to the other or be deemed to be in breach of this Agreement for any failure or delay in rendering performance arising out of causes beyond its reasonable control and without its fault or negligence. Such causes may include, but not limited to, acts of God or of a public enemy, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, or unusually severe weather. Dates or times of performance shall be extended to the extent of delays excused by this section, provided that the party whose performance is affected notifies the other promptly of the existence and nature of such delay.

23. Entire Agreement – This Agreement contains the entire agreement between the parties, and no statements, promises, or inducements made by either party or agent of either party that are not contained in this Agreement shall be valid or binding. This Agreement may not be enlarged, modified, or altered except in writing signed by the parties. This Agreement supersedes prior negotiations, representations or agreements, either written or oral. To the extent of any material conflict between the terms of this Agreement itself and any incorporated Contract Documents regarding Contractor’s performance, the more stringent provisions shall govern.

24. Authority – By their signatures below, the parties acknowledge that they have the necessary authority and approvals to execute this Agreement and bind the respective entities.

25. Facsimile Signatures – For the convenience of the parties, signatures to this Agreement may be provided through facsimile or email transmission. The signature of a party to this Agreement supplied by facsimile or email transmission shall be as binding as an original.

26. SIGNATORIES

Ryan Vinciguerra, Mayor, Town of Marble, Colorado

Date: _____

Attest: _____
Ron Leach, Town Clerk, Town of Marble, Colorado

Tanner Banks, Project Manager
Trout Unlimited

Date: _____

Warren Colyer, Western Water & Habitat Program Director
Trout Unlimited

Date: _____