

City of Las Cruces®

PEOPLE HELPING PEOPLE

Council Action and Executive Summary

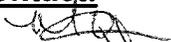
Item # 10 Ordinance/Resolution# 12-084

For Meeting of _____ For Meeting of November 21, 2011
 (Ordinance First Reading Date) (Adoption Date)

TITLE: A RESOLUTION AUTHORIZING THE ACQUISITION OF A 45.833-ACRE PERPETUAL MINERAL EASEMENT FROM BURN CONSTRUCTION COMPANY, INC., IN THE AMOUNT OF ONE HUNDRED AND FIFTY THOUSAND DOLLARS (\$150,000.00), IN ACCORDANCE WITH THE DESIGN AND IMPLEMENTATION OF PLAN 4 OF THE LAS CRUCES DAM RESTORATION STUDY, SECTION 1135 PROJECT, IN CONJUNCTION WITH THE ARMY CORPS OF ENGINEERS.

PURPOSE(S) OF ACTION:

Concurrence by Council to proceed with the Proposed Plan 4 from the Army Corps of Engineers for the Las Cruces Dam, Section 1135 Project.

COUNCIL DISTRICT: 6		
Drafter/Staff Contact: Bill Hamm 	Department/Section: Public Works	Phone: 528-3410
City Manager Signature: 		

BACKGROUND / KEY ISSUES / CONTRIBUTING FACTORS:

Resolution 11-095, Plan 4, was passed on October 18, 2010, by the Las Cruces City Council, which authorized City Staff to proceed with the design and implementation of the Las Cruces (LC) Dam Restoration Study, Section 1135 Project (the Project) in conjunction with the Army Corps of Engineers (ACOE). The implementation of Plan 4 includes decreasing the wind and water erosion from disturbed sites, restoring the arroyo riparian habitat, and recreational and educational opportunities for the LC Dam. The mineral easement is located within the Project's limits of Plan 4 and must be acquired in order to fully implement Plan 4.

The Project area is located directly behind the LC Dam (east of I-25 as shown in Attachment "A") and is situated on approximately 700 acres of flood pool, maintenance roads, and right-of-way for the dam's outfall channel. The dam was initially constructed in the early 1970s by ACOE to reduce flood damages from flows originating in the Las Cruces and Alameda Arroyos and is owned and operated by the City of Las Cruces (City).

The land acquired to assemble the dam property was negotiated with numerous property owners through coordinated efforts by the City and ACOE in the late 1960s. The estate of Elisa T. Burn was one of those property owners and a negotiated settlement was reached in 1968. As part of the negotiated settlement, resulting in the City acquiring ownership of the land, a perpetual easement was granted back to Elisa T. Burn for the removal of sand, rock, gravel,

and aggregates. This easement totals a surface area of 45.833 acres, as shown as Exhibit "A", and is still in effect today. The easement is currently owned by the successor to Elisa T. Burn, Burn Construction Company, Inc., as shown as Exhibit "B".

Since this easement significantly encumbers the land within the Project's boundaries, the City desires to assume ownership and control of the 45.833-acre easement shown on Exhibit "C", and combine it with other lands behind LC Dam for the Project. The ACOE Preliminary Restoration Plan designated the Las Cruces Dam Ecosystem Restoration Project as vital to limit further degradation and adverse impact of the disturbances caused to the historic arroyo riparian ecosystem of the Las Cruces and Alameda Arroyos. The City's acquisition of the easement will protect the 45.833 acres from future removal of materials.

An appraisal of the easement, Attachment "B", was performed by Douglas P. Bauer of Bauer Mineral Appraisals and concluded a current market value of one hundred and fifty thousand dollars (\$150,000.00). Dennis Burn, President of Burn Construction Company, Inc., accepted the appraised value of the easement as fair compensation in order to assign and transfer ownership of the easement to the City via a letter signed by Dennis Burn as shown as Exhibit "D".

The approximate total project cost is \$4,500,000.00. The federal government will bear 75% of the Project cost with the City bearing a cost match of 25%. The cost includes all project phases: i.e., feasibility studies, project design & implementation, and maintenance of the Project area. When the cost-share agreement is received from ACOE, the City's 25% match will come out of the Flood Control Fund and all work-in-kind can be credited to the 25% match.

SUPPORT INFORMATION:

1. Resolution
2. Attachment "A", Vicinity/Aerial map.
3. Attachment "B", Appraisal.
4. Exhibit "A", Plat of Survey.
5. Exhibit "B", Assignment from Burn to Burn Construction.
6. Exhibit "C", Assignment to the City of Las Cruces.
7. Exhibit "D", Letter of Offer to Burn Construction.

SOURCE OF FUNDING:

Is this action already budgeted?	Yes	<input checked="" type="checkbox"/>	See fund summary below
	No	<input type="checkbox"/>	If No, then check one below:
	<i>Budget Adjustment Attached</i>	<input type="checkbox"/>	Expense reallocated from: _____
		<input type="checkbox"/>	Proposed funding is from a new revenue source (i.e. grant; see details below)
		<input type="checkbox"/>	Proposed funding is from fund balance in the _____ Fund.
Does this action create any revenue?	Yes	<input type="checkbox"/>	Funds will be deposited into this fund: _____ in the amount of \$ _____ for FY _____
	No	<input checked="" type="checkbox"/>	There is no new revenue generated by this action.

BUDGET NARRATIVE

N/A

FUND EXPENDITURE SUMMARY:

Fund Name(s)	Account Number(s)	Expenditure Proposed	Available Budgeted Funds in Current FY	Remaining Funds	Purpose for Remaining Funds
AW Flood Control 4400	44806010-854121-70436	\$150,000.00	\$500,000.00	\$350,000.00	ACOE Partnership

OPTIONS / ALTERNATIVES:

- Vote "Yes"; this will authorize the acquisition of a 45.833-acre perpetual mineral easement from Burn Construction Company, Inc., in the amount of one hundred and fifty thousand dollars (\$150,000.00), in accordance with the design and implementation of Plan 4 of the Las Cruces Dam Restoration Study, Section 1135 Project, in conjunction with the Army Corps of Engineers.
- Vote "No"; this will not authorize the acquisition of a 45.833-acre perpetual mineral easement from Burn Construction Company, Inc., in the amount of one hundred and fifty thousand dollars (\$150,000.00), in accordance with the design and implementation of Plan 4 of the Las Cruces Dam Restoration Study, Section 1135 Project, in conjunction with the Army Corps of Engineers.
- Vote to "Amend"; this could allow Council to select an alternate plan presented by the ACOE.
- Vote to "Table"; this could allow Council to revisit the proposal at a future date, but could jeopardize allocated ACOE funding.

REFERENCE INFORMATION:

The resolution(s) and/or ordinance(s) listed below are only for reference and are not included as attachments or exhibits.

1. Resolution No. 11-095

RESOLUTION NO. 12-084

A RESOLUTION AUTHORIZING THE ACQUISITION OF A 45.833-ACRE PERPETUAL MINERAL EASEMENT FROM BURN CONSTRUCTION COMPANY, INC., IN THE AMOUNT OF ONE HUNDRED AND FIFTY THOUSAND DOLLARS (\$150,000.00), IN ACCORDANCE WITH THE DESIGN AND IMPLEMENTATION OF PLAN 4 OF THE LAS CRUCES DAM RESTORATION STUDY, SECTION 1135 PROJECT, IN CONJUNCTION WITH THE ARMY CORPS OF ENGINEERS.

The City Council is informed that:

WHEREAS, Resolution 11-095, Plan 4, was passed on October 18, 2010, by the Las Cruces City Council, which authorized City Staff to proceed with the design and implementation of the Las Cruces (LC) Dam Restoration Study, Section 1135 Project (the Project) in conjunction with the Army Corps of Engineers (ACOE); and

WHEREAS, the objectives of this initiative include decreasing the wind and water erosion from disturbed sites, restoring the arroyo riparian habitat, and recreational and educational opportunities for the LC Dam; and

WHEREAS, the Project area is located directly behind the LC Dam (east of I-25) and is situated on approximately 700 acres of flood pool, maintenance roads, and right-of-way for the dam's outfall channel. The dam was initially constructed in the early 1970s by ACOE to reduce flood damages from flows originating in the Las Cruces and Alameda Arroyos and is owned and operated by the City of Las Cruces (City); and

WHEREAS, the land acquired to assemble the dam property was negotiated with numerous property owners through coordinated efforts by the City and ACOE in the late 1960s. The estate of Elisa T. Burn was one of those property owners and a negotiated settlement was reached in 1968. As part of the negotiated settlement, resulting in the City acquiring ownership of the land, a perpetual easement was granted back to Elisa T. Burn for the removal of sand, rock, gravel, and aggregates; and

WHEREAS, this easement totals a surface area of 45.833 acres and is still in effect today. The easement is currently owned by the successor to Elisa T. Burn, Burn Construction Company, Inc. Since this easement significantly encumbers the land within the Project boundaries, the City desires to assume ownership and control of the 45.833-acre easement and combine it with other lands behind LC Dam for the Project. The ACOE Preliminary Restoration Plan designated the Las Cruces Dam Ecosystem Restoration Project as vital to limit further degradation and adverse impact of the disturbances caused to the historic arroyo riparian ecosystem of the Las Cruces and Alameda Arroyos. The City's acquisition of the easement will protect the 45.833 acres from future removal of materials; and

WHEREAS, an appraisal of the easement was performed by Douglas P. Bauer of Bauer Mineral Appraisals and concluded a current market value of one hundred and fifty thousand dollars (\$150,000.00). Dennis Burn, President of Burn Construction Company, Inc., has accepted the appraised value of the easement as fair compensation in order to assign and transfer ownership of the easement to the City; and

WHEREAS, the approximate total project cost is \$4,500,000. The federal government will bear 75% of the project cost with the City bearing a cost match of 25%. The cost includes all project phases: i.e., feasibility studies, project design & implementation, and maintenance of the Project area. When the cost-share agreement is received from ACOE, the City's 25% match will come out of the Flood Control Fund and all work-in-kind can be credited to the 25% match.

NOW, THEREFORE, Be it resolved by the governing body of the City of Las Cruces:

(I)

THAT the assignment agreement attached hereto as Exhibit "C" between the City of Las Cruces and Burn Construction Company is hereby approved.

(II)

THAT the Mayor is hereby authorized to execute the assignment and any other documents necessary to finalize the assignment agreement and transfer on behalf of the City.

(III)

THAT City staff is hereby authorized to do all deeds necessary in the accomplishment of the herein above.

DONE AND APPROVED this _____ day of _____ 2011.

(SEAL)

APPROVED:

ATTEST:

Mayor

City Clerk

VOTE:

Mayor Miyagishima: _____

Councillor Silva: _____

Councillor Smith: _____

Councillor Pedroza: _____

Councillor Small: _____

Councillor Sorg: _____

Councillor Thomas: _____

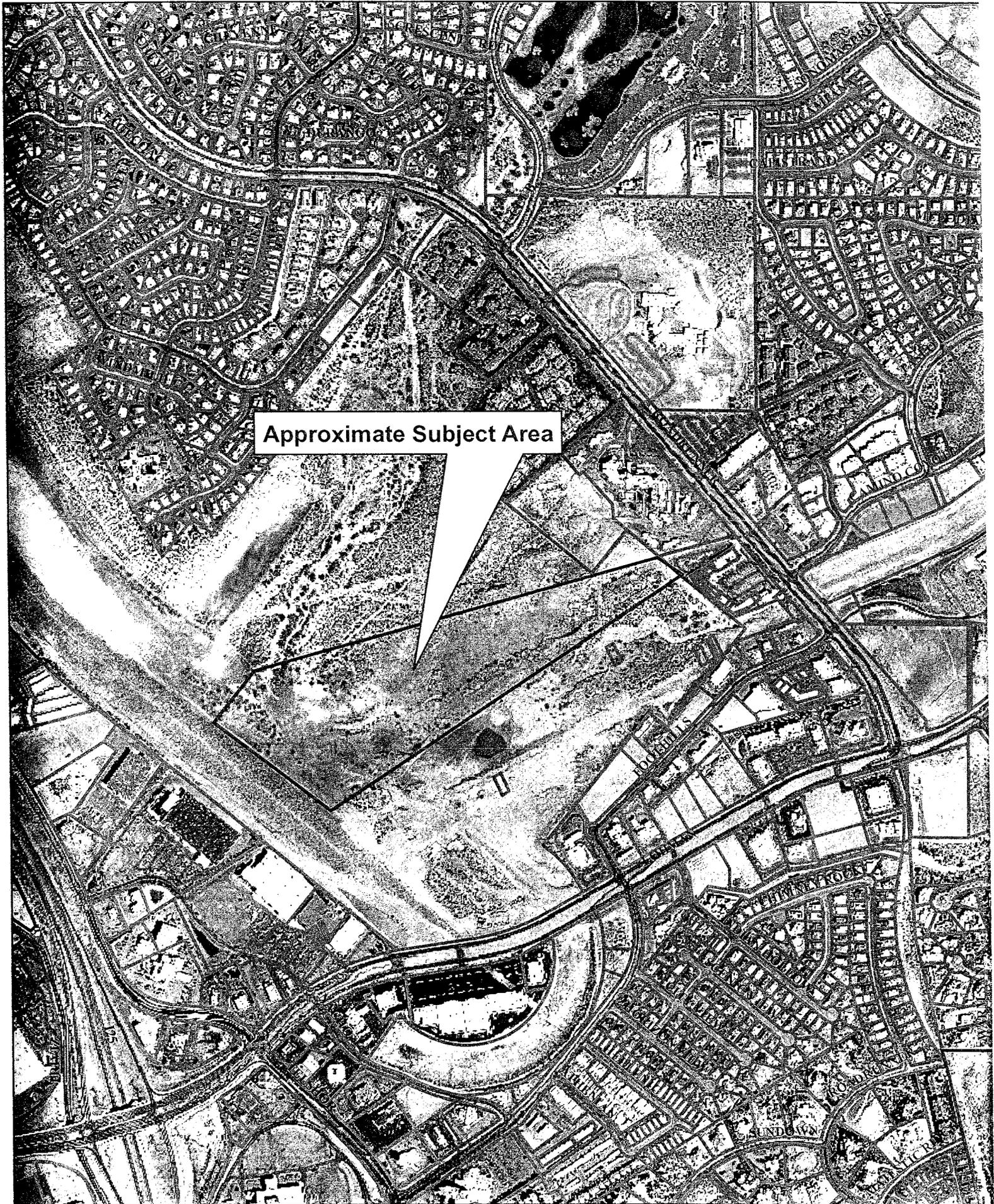
Moved by: _____

Seconded by: _____

APPROVED AS TO FORM:



City Attorney



Douglas P. Bauer
Bauer Mineral Appraisal
2876 S Devinney Ct.
Lakewood, Colorado 80228
Phone: (303) 997-4214
Internet: dougbau@yahoo.com

February 17, 2011

Bill R. Hamm
Land Management Administrator
Public Works Dept.
City of Las Cruces
P.O. Box 20000
Las Cruces, New Mexico 88004

Re: Appraisal of Burn Construction Company Easement – LC Dam Easement

Dear Mr. Hamm:

Pursuant to the request of the City of Las Cruces, I have completed and submit herewith an appraisal of the above referenced property for the purpose of estimating its market value as defined in the report.

This report is made following my on-site inspection of the subject property, and a study of the relevant markets. Based upon my investigation and application of the appropriate appraisal approaches, I estimate the market value, as of January 13, 2011, and as discussed in this report to be:

\$150,000

This is a summary appraisal report as described in SR2-2(b) of the Uniform Standards of Professional Appraisal Practice (USPAP). Retained in my files are my field notes, drawings, maps, and work papers upon which, in part, my opinions were based. Thank you for this opportunity to be of service.

Yours truly,



Douglas P. Bauer
Temporary New Mexico Certified General Real Estate Appraiser Permit #TP-2860

Appraiser's Certification

I certify that, to my best knowledge and belief:

- the statements of fact contained in this report are true and correct.
- the reported analyses, opinions, and conclusions are limited only by the reported assumptions and limiting conditions, and are our personal, unbiased professional analyses, opinions, and conclusions.
- I have no present or prospective interest in the property that is the subject of this report, and I have no personal interest or bias with respect to the parties involved.
- my compensation is not contingent upon the reporting of a predetermined value or direction in value that favors the cause of the client, the amount of the value estimate, the attainment of a stipulated result, or the occurrence of a subsequent event.
- the appraisal was made and the appraisal report prepared in conformity with the Appraisal Foundation's *Uniform Standards of Professional Appraisal Practice* (USPAP).
- I have made a personal inspection of the property appraised.
- No one provided significant professional assistance in the preparation of this report.
- As of January 13, 2011, I estimate the market value of the subject property to be:

\$150,000



Douglas P. Bauer

Temporary New Mexico Certified General Real Estate Appraiser Permit #TP-2860

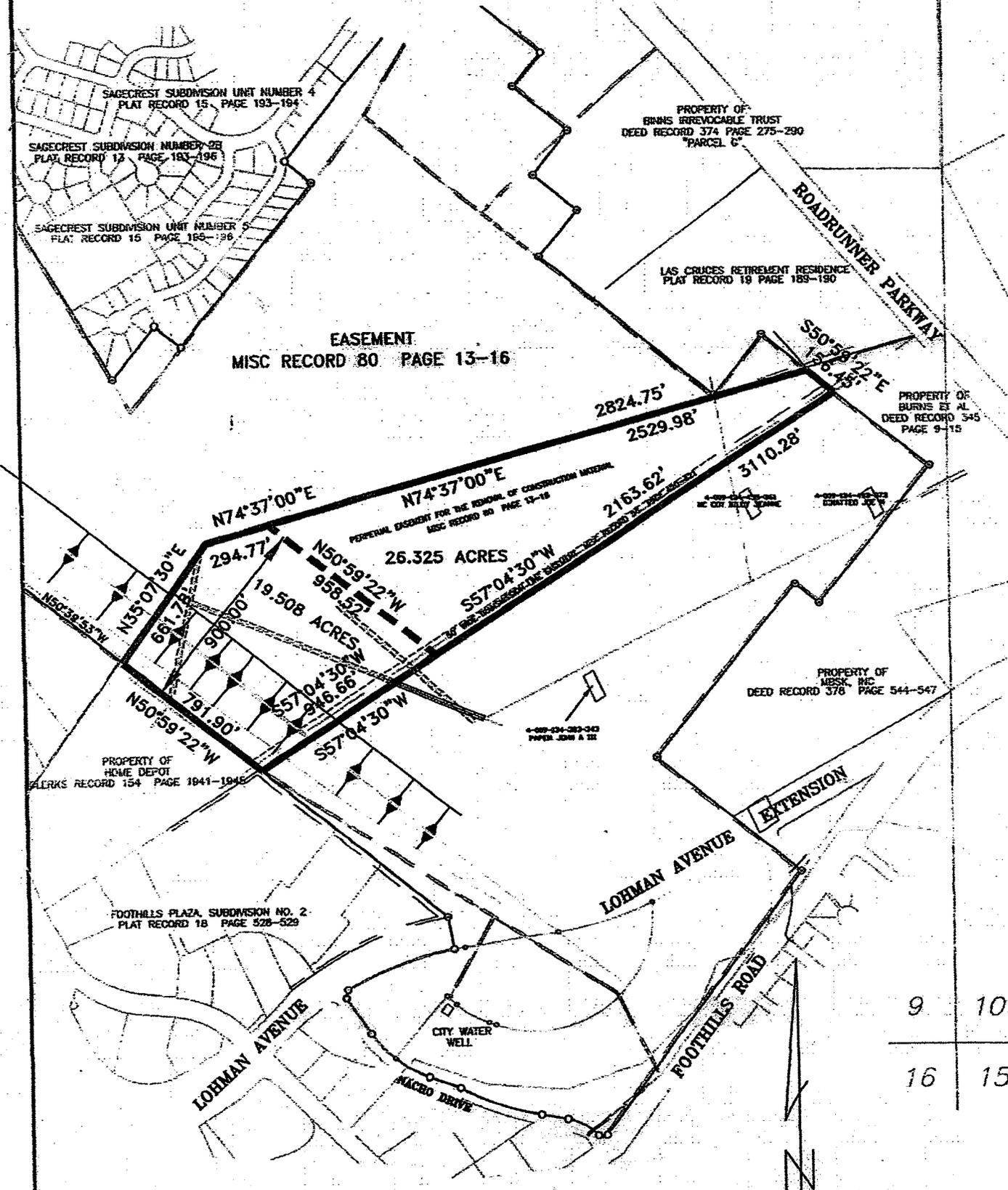
Summary of Salient Facts and Conclusions

Property Location:	The subject property is located in central Doña Ana County within the east part of the Las Cruces city limits and north of Lohman Avenue (County Hwy 76). The property is west of Roadrunner Parkway and is bounded on the west side by the LC Dam within the boundaries of the Las Cruces Flood Control Project.
Legal Description:	Within the S½, S. 9, T. 23 S., R. 2 E., NMPM
Size and Configuration:	45.833 acres
Purpose of the Appraisal:	To estimate the market value of a perpetual easement for the removal of construction material.
Function or Intended Use:	The appraisal is to be used to establish the market value of the Perpetual Easement for possible purchase by the City of Las Cruces.
Intended Users:	The intended users of the appraisal are the City of Las Cruces and Dennis Burn, President, Burn Construction Co., Inc.
Property Ownership:	The subject easement is owned Burn Construction Co., Inc.
Date of Valuation:	The effective date of the appraisal is January 13, 2011 which is the date of my last inspection of the subject property.
Hypothetical Conditions:	None
Extraordinary Assumption:	That limited fill mining is a legal use of the property and that the surface owner wouldn't attempt to interfere with such operations.
Highest and Best Use:	Investment and/or consolidation with the servient estate, limited mining of construction material.
Estimated Market Value:	\$150,000

EASEMENT EXHIBIT SHOWING A 45.833 ACRE EASEMENT EXHIBIT

LOCATED IN SECTION 9, T.23S., R.2E., N.M.P.M.
WITHIN THE PROPERTY OF THE LAS CRUCES FLOOD CONTROL PROJECT
CITY OF LAS CRUCES, DONA ANA COUNTY, NEW MEXICO

4
9



9 10
16 15

ASSIGNMENT

KNOW ALL MEN BY THESE PRESENTS, that heretofore and on the 22nd day of August 1968, the City of Las Cruces granted an easement to the assignor herein, ELISA T. BURN, a widow, Las Cruces, New Mexico, for the removal of sand, gravel, aggregates, and dirt from a 45.833 acre tract of land, which easement was recorded in Book 80 at pages 13-16 of the Miscellaneous Records of Dona Ana County, New Mexico; and

NOW, THEREFORE, in consideration of the sum of Ten and no/100 (\$10.00) Dollars and other valuable consideration, receipt of which is hereby confessed and acknowledged, and further subject to the conditions hereinafter stated, ELISA T. BURN does irrevocably assign, transfer and convey to BURN CONSTRUCTION COMPANY, INC., all of her right, title and interest in and to the above stated easement from the City of Las Cruces, and in and to all sand, gravel, aggregates, and dirt included in said easement.

The conditions of this assignment are:

1. Upon the death of Elisa T. Burn, this assignment shall be considered as a deed of conveyance to all of that which has been assigned hereinabove.
2. During the life of Elisa T. Burn, Burn Construction Company, Inc., shall pay to her the sum of Two Thousand and no/100 (\$2,000.00) Dollars per year, with such payment being made at her request and at least on or before the 31st day of December of each year, commencing with the year 1972.
3. All rights and title of Elisa T. Burn to the assignment and the mineral rights mentioned hereinabove shall, upon her death, vest immediately with Burn Construction Company, Inc., it being intended by her that none of such title, easement, or right pass to her estate.

Done this 28th day of January 1972.

Elisa T. Burn
Elisa T. Burn

STATE OF NEW MEXICO)
COUNTY OF DONA ANA) SS:

The foregoing instrument was acknowledged before me this 28th day of January 1972, by Elisa T. Burn, a widow.

My commission expires:

H. P. ...
Notary Public

6.2.72

EXHIBIT I

STATE OF NEW MEXICO, COUNTY OF DONA ANA, ss:

I hereby certify that this instrument was filed for records:
Rec. No. 10578 Bk. 206 Pg. 129-30 Records of Misc.



ASSIGNMENT

KNOW ALL MEN BY THESE PRESENTS, that heretofore and on the 22nd day of August 1968, the City of Las Cruces granted an easement to ELISA T. BURN, a widow, Las Cruces, New Mexico, for the removal of sand, gravel, aggregates, and dirt from a 45.833 acre tract of land, which easement was recorded in Book 80 at pages 13-16 of the Miscellaneous Records of Dona Ana County, New Mexico; and

THAT on the 28th day of January 1972 ELISA T. BURN assigned, transferred and conveyed to BURN CONSTRUCTION COMPANY, INC. all of her right, title and interest in and to the above stated easement from the City of Las Cruces, and in and to all sand, gravel, aggregates, and dirt included in said easement upon certain conditions set forth in said Assignment attached as Exhibit I; and

THAT under the terms and conditions of said Assignment, upon the death of ELISA T. BURN, all rights and title of ELISA T. BURN to the Assignment and the mineral rights mentioned hereinabove shall vest immediately with Burn Construction Company, Inc. it being intended by ELISA T. BURN that none of such title, easement, or right pass to her estate; and

THAT ELISA T. BURN died on 10 February 1986; and

FURTHER, THAT Paris R. Burn, Jr. was appointed Personal Representative of the Estate of Elisa T. Burn on 20 March 1986.

NOW THEREFORE, in consideration of the death of Elisa T. Burn, all rights and title of Elisa T. Burn and the Estate of Elisa T. Burn, to the Assignment is assigned, transferred and conveyed to BURN CONSTRUCTION COMPANY, INC. including all of Elisa T. Burn and the Estate of Elisa T. Burn's right, title and interest in and to the above stated easement from the City of Las Cruces, and in and to all sand, gravel, aggregates, and dirt included in said easement.

DONE this 20th day of February 1986.


 PARIS R. BURN, JR., Personal Representative,
 Estate of Elisa T. Burn

STATE OF NEW MEXICO)

COUNTY OF DONA ANA)

The foregoing was acknowledged before me this 20th day of February 1986, by Paris R. Burn, Jr., Personal Representative, Estate of Elisa T. Burn.


 Notary Public

By Commission Expires:



129



October 28, 2011

PW: 11-643

Dennis Burn, President
Burn Construction Company, Inc.
Las Cruces, NM

HAND DELIVERED

**RE: United States Army Corps of Engineers Las Cruces Dam Restoration Project -
Perpetual Easement for the Removal of Construction Material.**

Dear Mr. Burn:

By Resolution 11-095, the Las Cruces City Council authorized City Staff to proceed with the design and implementation of the Las Cruces Dam Restoration Study, Section 1135 Project (The Project) in conjunction with the Army Corps of Engineers. The objectives of this initiative include decreasing the wind and water erosion from disturbed sites, restoring the arroyo riparian habitat, and recreational and educational opportunities for the Las Cruces Dam.

As a result, the City desires to acquire a 45.833-acre perpetual easement, which will be used for the removal of construction material, currently owned by Burn Construction Co., Inc. This easement is located within the Las Cruces Dam property and would be used to complete the Project. The recombined easement and the City-owned "servient" parcel will be used with other lands behind LC Dam for the Project.

The City is prepared to compensate you for the permanent mineral easement containing 45.833 acres, which is based on an appraisal prepared by Douglas P. Bauer, Bauer Mineral Appraisals in the amount of

One Hundred and Fifty Thousand Dollars (\$150,000.00)

Attached is a copy of the appraisal for your review.

If Burn Construction Co., Inc., agrees to this offer, please indicate by signing this letter in the designated area below and return to my office as soon as possible, so the Project can continue. Should you wish to submit a counteroffer for the purchase of the requested easement, please submit a written counteroffer to City of Las Cruces, Public Works Department, Attn: Michael Johnson, Director, PO Box 20000, Las Cruces, NM 88004. I would suggest that this counteroffer of value be the opinion of a qualified appraiser (paid for by you). The acceptance of a successful price of the easement is conditional upon City Council approval.

Offer Letter / Page 2
Burn Construction Company Easement – Las Cruces Dam

Your cooperation is greatly appreciated. If you have any questions or require further information, please call me at (575) 528-3125. Your prompt response to this request would be greatly appreciated.

Sincerely,



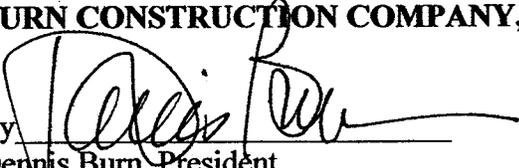
Michael D. Johnson P.E.
Public Works Director

Enclosures

Pc: Bill R. Hamm, Land Management Administrator

Offer accepted this 28th day of OCTOBER, 2011.

BURN CONSTRUCTION COMPANY, INC.

By 
Dennis Burn, President
Burn Construction Company, Inc.