

745
City of Las Cruces[®]
 PEOPLE HELPING PEOPLE

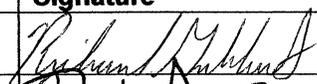
Council Action and Executive Summary

Item # 9 Ordinance/Resolution# 10-060 Council District: All

For Meeting of August 17, 2009
 (Adoption Date)

TITLE: A RESOLUTION APPROVING A MEMORANDUM OF UNDERSTANDING (MOU) FOR TRAIL DEVELOPMENT BETWEEN THE CITY OF LAS CRUCES AND ELEPHANT BUTTE IRRIGATION DISTRICT. THE RESOLUTION FURTHER AUTHORIZES THE MAYOR TO SIGN THE MOU ON THE CITY'S BEHALF.

PURPOSE(S) OF ACTION: Joint agreement between the City of Las Cruces and Elephant Butte Irrigation District (EBID) to develop a trail system using the access roads along EBID canals, laterals, and drains.

Name of Drafter: Andy Hume 		Department: Community Dev./MPO		Phone: 528-3047	
Department	Signature	Phone	Department	Signature	Phone
Community Development		528-3066	Budget		541-2107
			Assistant City Manager		541-2271
Legal		541-2128	City Manager		541-2076

BACKGROUND / KEY ISSUES / CONTRIBUTING FACTORS:

In its efforts to expand the alternative transportation network, the Las Cruces Metropolitan Planning Organization (MPO) has established a dialog with Elephant Butte Irrigation District (EBID) to continue development of possible trail connections along EBID property, i.e. laterals, canals and drains. The MPO has taken the lead in these discussions as the EBID property and possible trail connections cross the jurisdictional boundaries of the City of Las Cruces, Dona Ana County and the Town of Mesilla. The MOU is the first step toward developing the trail system.

The Memorandum of Understanding (MOU) is a blanket document outlining the agreement between EBID and the City of Las Cruces to develop a trail system using EBID property. The MOU provides the guidelines by which the City of Las Cruces and EBID will agree to provide access along certain laterals and drains. The MOU outlines various requirements about EBID access and maintenance, restrictions for motorized access, allowances for landscaping and design elements. The MOU also outlines the responsibilities that EBID and the City of Las Cruces must fulfill to make the trail system successful and implement specific sections of the trail system along identified laterals and drains.

This MOU will not create any trail links. Each link will be planned, designed and brought before the EBID Board of Directors and the Las Cruces City Council for approval. Each link

link must be created with a Right-of-Way Permit between EBID and the City of Las Cruces, as per the MOU.

This MOU neither requires nor mandates a direct budgetary impact for the City at this time. As trails are proposed for implementation, budget items and impacts will be identified and addressed through City Council action at that time.

SUPPORT INFORMATION:

Fund Name / Account Number	Amount of Expenditure	Budget Amount
N/A	N/A	N/A

1. Resolution
2. Exhibit "A" – Memorandum of Understanding
3. Exhibit "B" – Right of Use Application
4. Exhibit "C" – EBID Permit/License Fee Schedule

OPTIONS / ALTERNATIVES:

1. Vote YES to approve the Resolution. This action approves the Memorandum of Understanding and allows City staff to coordinate trail development with EBID.
2. Vote NO to deny the Resolution. This action denies the Memorandum of Understanding and will not allow City staff to coordinate trail development with EBID.
3. Modify the Resolution and vote YES to approve the modified Resolution. The Council may modify the Resolution by adding conditions as deemed appropriate. This can be accomplished by staff submitting a substitute Resolution.
4. Table/Postpone the Resolution and direct staff accordingly.

RESOLUTION NO. 10-060

A RESOLUTION APPROVING A MEMORANDUM OF UNDERSTANDING (MOU) FOR TRAIL DEVELOPMENT BETWEEN THE CITY OF LAS CRUCES AND ELEPHANT BUTTE IRRIGATION DISTRICT. THE RESOLUTION FURTHER AUTHORIZES THE MAYOR TO SIGN THE MOU ON THE CITY'S BEHALF.

The City Council is informed that:

WHEREAS, the City of Las Cruces and Elephant Butte Irrigation District desire to develop a system of trails; and

WHEREAS, the Memorandum of Understanding establishes the means to develop a trail system; and

WHEREAS, the trail system would connect to and expand the existing alternative transportation network; and

WHEREAS, the trail system would also expand the alternative recreation network to take advantage of the excellent climate Las Cruces offers.

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

(I)

THAT the Memorandum of Understanding between the City of Las Cruces and Elephant Butte Irrigation System, as shown in Exhibit "A," attached hereto and made part of this resolution is hereby approved.

(II)

THAT City Staff are hereby authorized to do all deeds necessary in the accomplishment hereinabove.

DONE AND APPROVED this _____ day of _____ 2009.

APPROVED:
(SEAL)

APPROVED:

Mayor

ATTEST:

VOTE:

City Clerk

Mayor Miyagishima	_____
Councillor Silva	_____
Councillor Connor	_____
Councillor Archuleta	_____
Councillor Small	_____
Councillor Jones	_____
Councillor Thomas	_____

Moved by: _____

Seconded by: _____

APPROVED AS TO FORM:

[Handwritten Signature]

City Attorney

**MEMORANDUM OF
UNDERSTANDING BETWEEN
ELEPHANT BUTTE IRRIGATION
DISTRICT
AND CITY OF LAS CRUCES
FOR THE USE OF DISTRICT DRAINS,
CANALS, AND LATERALS
AS MULTI-USE, NON-MOTORIZED
PATHWAYS**

This Memorandum of Understanding, hereinafter MOU, is made and entered into by and between the Elephant Butte Irrigation District, hereinafter EBID, and the City of Las Cruces, hereinafter the City.

WHEREAS, EBID is a political subdivision of the State of New Mexico and an irrigation district formed under the New Mexico statutes entitled "Irrigation Districts Cooperating with the United States Under Reclamation Laws" found at NMSA 1978, §§ 73-10-1 to 73-11-55; and

WHEREAS, the City is a municipal corporation formed under the laws of the State of New Mexico; and

WHEREAS, EBID and the City desire to facilitate the City's creation and maintenance of multi-use, non-motorized pathways on EBID property within City limits; and

WHEREAS, the New Mexico Legislature approved the Trails Act in 2007, an amendment to the New Mexico Tort Claims Act, NMSA 1978, Section 41-4-6 (c), that retains the immunity of EBID where it allows trail uses of its property; and

WHEREAS, EBID and the City desire to jointly and cooperatively exercise their governmental authority to enter into this MOU in accordance with the terms and conditions set forth below.

NOW, THEREFORE, in consideration of the mutual covenants and agreements contained herein, the parties hereby consent and agree as follows:

1. Recitals: The above recitals are hereby incorporated into this MOU.
2. Purpose of MOU: The purpose of this MOU is to allow the City to use one bank shelf of designated EBID drains, canals and laterals within City limits for multi-use, non-motorized pathways. This MOU shall function as a blanket agreement, authorizing the issuance by EBID of special use permits for discrete segments of EBID's system.
3. Term and Effective Date: This MOU becomes effective upon the date of the last signature hereon. This MOU shall continue for an initial term of five (5) years and shall be renewable for successive five-year (5-year) periods by agreement of the parties, up to a total of twenty-five (25) years. Since this recreational use of EBID property is new, and authorized under a new law, the parties understand and agree that this agreement is experimental and initially short but renewable terms for this Agreement are appropriate. Both parties recognize and agree that they will be flexible in amending the terms of this Agreement as experience with its implementation and use is deemed required by either party. After twenty-five (25) years the parties may negotiate a new agreement in order to continue the uses authorized.

4. Definitions: (For the purposes of this document only.)

- A. Water Prism: The maximum cross-sectional area of the flow stream of a canal, lateral or drain.
- B. Multi-Use: Bicycle, pedestrian and non-motorized uses.
- C. Bank Shelf: One side, as authorized by EBID by special use permit, of an EBID canal, lateral or drain exclusive of the water prism and its freeboard; or stated otherwise, the area above the freeboard along the top of the berm to the outside toe of slope; or, as otherwise limited by the specific terms stated in the individual EBID special use permit.

5. Restriction to One Side of the Bank Shelf: Each EBID special use permit issued to the City under this Agreement will designate which side of an EBID drain, canal or lateral the City is authorized to use. Under no circumstances shall the City use, or EBID allow for simultaneous use of, both sides of a drain, canal or lateral for multi-use non-motorized pathways; however, EBID may allow for crossover of the City's use from one side to the other side, provided that the crossover will not be over an EBID water control structure.

6. Prohibition on Interference with Maintenance: EBID shall have the authority to prohibit access to any

multi-use pathway at any time, if EBID determines that such use will interfere with EBID operation and maintenance procedures.

7. Responsibilities of the City:

A. Submission of application for and receipt of a special use permit for each section of EBID property that the City desires to incorporate into the City's trail system. Each special use permit shall be limited to the use of one bank shelf designated by EBID and shall contain specifications for authorized development and use and required maintenance, prior to commencing any activities on EBID drains, canals and laterals. The permits must be approved by the EBID Board of Directors. A sample/generic special use permit application is attached as Exhibit A to this Agreement, but the parties understand that terms of actual special use permits issued pursuant to this Agreement may differ.

B. Construction, installation and ongoing maintenance of structures and facilities associated with the pathways in accordance with specifications set forth in special use permits issued by EBID. Maintenance shall include, but is not limited to, the pathways, landscaping, and any other structures included in the City

development on the specified bank shelf.

- C. Designation of a representative from the City who shall serve as the single point of contact for a representative of EBID.
- D. Enforcement of the limitation on use of the pathways, including but not limited to ensuring that no motorized traffic utilizes the pathways, with the exception of City equipment, which is permitted when necessary on the pathways.
- E. Compliance with the following general requirements/conditions:
- No structure or park equipment within or impediment to the water prism or the freeboard;
 - Landscaping is not permitted on the bank shelf reserved for EBID or within the water prism and landscaping shall not impede emergency or maintenance vehicles;
 - No water shall be removed or redirected from EBID facilities without meeting specific EBID conditions for water use;
 - Any use of EBID facilities for multi-use pathways is subservient to the intended agricultural function of

canals, laterals and/or drains. One bank must be a minimum 8 feet wide for EBID vehicle traffic and EBID shall solely determine the bank retained for its use;

- No use shall be permitted which will degrade the quality of the water in the canals, laterals or drains.
- Along the entire length along and on the top of the berm on the side of the EBID canal, lateral or drain used by the City, the City shall leave at least an eight-foot (8') wide area for EBID vehicle passage for maintenance and in the event of emergencies. Such area need not be straight but must allow for unobstructed motor vehicle use.
- All special use permits issued by EBID to the City shall be non-exclusive;
- The City must insure that its licensees do not use or enter the water prism or freeboard of the EBID canal, lateral or drain.

- F. In the event that facilities or landscaping installed by the City are damaged during irrigation procedures, the City shall be solely responsible for the cost associated with repairing and replacing the landscaping.

No liability shall fall upon the District for damage to any facilities or landscaping installed by the City in and around the irrigation facilities.

- G. Prior to making any installations on the permitted property, the City shall submit to EBID an application for a special use permit for each discrete segment of an EBID canal, lateral or drain, containing a detailed plan showing the locations of any such installations on permitted property and pay EBID all required administrative fees for the permit. No land use fees will be charged by EBID. The administrative and inspection fees shall be in accordance with the policy attached hereto as Exhibit B or the current policy then in effect. EBID shall determine the division of its canals, laterals and drains into segments for purposes of special use permits. All construction on the permitted property shall be performed in accordance with specifications approved by EBID. Unless waived in writing by EBID, the City will make installations and perform construction in the non-irrigation season when water is not present in the water delivery/distribution system. A construction clearance, as referenced in subparagraph H, does not

constitute a written waiver. At least ten (10) days prior to the beginning of any construction on the permitted property, the City shall provide EBID notice of the date that construction will begin and a schedule listing all construction activities and the dates when such construction activities will be performed. The City shall give EBID written notice of all changes in the schedule and delays in construction as soon as practicable.

- H. The City shall contact EBID a minimum of 72 hours in advance of start of construction to obtain a construction clearance. Phone number: (575) 526-6671. NOTE: A CONSTRUCTION CLEARANCE DOES NOT ASSURE THAT THE CANALS, LATERALS OR DRAINS WILL BE WITHOUT WATER.
- The City's materials, facilities, improvements and appurtenances constructed, installed, operated and maintained on the permitted property shall not interfere with EBID's use of EBID's existing and/or future irrigation facilities on or adjacent to the permitted property.
 - EBID may regulate the scheduling of

construction, if any, located on the permitted property relating to irrigation operation, traffic control, backfilling, compacting, or paving, and relating to locating or relocating materials, facilities, improvements or appurtenances.

- If relocation of the City's materials, facilities, improvements or appurtenances is necessitated by EBID's use of facilities or the construction of improvements by or on behalf of EBID, the City shall bear the entire cost of relocating said materials, facilities, improvements and appurtenances. Should any such relocation become necessary EBID will, except in emergencies, contact the City to allow the City a reasonable amount of time to mitigate the impact on its facilities before EBID starts its work.

I. The City shall provide policing for the permitted property and acknowledges that EBID shall not be responsible for any liability associated with the safety of individuals utilizing the permitted property or with criminal activity on or in the

vicinity of the permitted property. The City shall respond promptly to EBID requests for policing of any problem areas identified by EBID arising out of the use of EBID property authorized under this agreement.

J. At all times, the City will maintain the trails or a trail system in a manner necessary to retain EBID's immunity under NMSA 1978, Section 41-4-6(c).

8. Responsibilities of EBID:

A. Review in a timely manner all applications for establishment of a pathway and issue a special use permit if, in the sole discretion of EBID, such a permit should be issued. The permit shall at a minimum define the applicable area upon which a pathway shall be allowed, the authorized improvements and structures, and general maintenance obligations of the City.

B. Maintain those structures that are required to perform the day-to-day delivery of water.

C. Specify limitations on the type and frequency of traffic allowable under any special use permit and provide feedback to the City regarding observed violations of those limitations.

- D. Permit the City to post and maintain signs, such as “No Motorized Vehicles”, approved by EBID.
- E. Should damage occur to an EBID canal, lateral, drain or other property as a result of activities authorized under this Agreement, EBID shall repair its property or facilities and the City shall reimburse EBID its reasonable costs of such work. The City shall not repair EBID property or facilities without the express advance permission of EBID. Any work on EBID property performed by the City shall be in accordance with EBID engineering and other EBID requirements.
9. Annual Inspection: The parties shall jointly perform an annual inspection of the permitted property prior to the beginning of the irrigation season. The City and EBID will appoint representatives, and as part of the inspection they will generate a report identifying major repair concerns and setting forth a schedule of repairs that the City shall ensure are timely completed. Failure to rectify any identified maintenance and repair needs within thirty (30) days of identifying the need for maintenance and repair may, in the sole discretion of EBID, result in the termination of the special use permit, and the permitted property may, in the sole discretion of EBID, revert back to the sole use and control of EBID, with all improvements and structures becoming the property of EBID. In the event of such a reversion, EBID may require the City to remove any City-installed improvements and restore that area to the condition which previously existed.
10. Equal Opportunity Compliance: The City and EBID agree to abide by all State and Federal laws, rules, and regulations pertaining to equal employment opportunity. In accordance with all such laws and rules and regulations, the City and EBID agree to assure that no person in the United States shall on the grounds of race, color, national origin, sex, sexual preference, age, or handicap, be excluded from employment with or participation in, be denied the benefits of, or be otherwise subjected to discrimination under, any program or activity performed under this MOU. If the City and/or EBID are found to be out of compliance with these requirements during the life of this MOU, the City and EBID agree to take appropriate steps to correct these deficiencies.
11. Third Party Beneficiary Clause: This MOU is not intended to create in the public, or any member thereof, any third party beneficiary rights or claims or to authorize anyone not a party to the MOU to maintain a suit for wrongful death, bodily and/or personal injury to person, damage to property, and/or any other claim(s) whatsoever pursuant to its provisions.
12. Liability/New Mexico Tort Claims Act: By entering into this MOU, each party agrees that it shall be responsible for liability arising from

personal injury or damage to property occasioned by its own agents, invitees, contractors, or employees in the performance of this MOU and activities arising as a result of special use permits issued under this MOU, subject in all cases to the immunities and limitation of the New Mexico Tort Claims Act (NMSA 1978, Section 41-4-1, et seq.) and any amendments thereto. In particular, NMSA 1978, Section 41-4-6, including the 2007 amendment, governs the liability of the parties to this agreement as to third parties. This section is intended only to define the liabilities between the parties hereto and it is not intended to modify in any way the parties' liabilities as governed by common law, statutory law or specifically the New Mexico Tort Claims Act. Neither party nor their "public employees", as defined in the New Mexico Tort Claims Act, waive sovereign immunity or any defense or any limitation of liability pursuant to law. It is the intent of both parties to this MOU that EBID will not be subjected to the defense of claims or the payment of claims or judgments arising or resulting from the use of EBID property under this agreement.

13. Insurance: The City shall at all times during the term of this MOU have and keep in force liability, property, casualty and workers' compensation insurance in amounts not less than those as set forth in the New Mexico Tort Claims Act. The City cannot add EBID on said policies as an additional insured because the City is self-insured, however paragraphs 12, 14, and 15 are intended, in addition to their stated purposes, to serve the

same purpose as the addition of EBID onto the City's insurance policies would have served. The City agrees to assume all risk in the performance of its services hereunder and in its operations and/or activities in connection herewith and shall be solely responsible and answerable in damages for any and all accidents, deaths, bodily and/or personal injuries to person(s), damage to property and/or for claims of any other nature. The City will additionally provide a full defense to EBID or any of EBID's public employees named in any claim, lawsuit, or other proceeding arising out of the use of EBID property authorized under this agreement and, to the extent they are not covered in the City's provision of a defense, the City will reimburse EBID for all other costs incurred by EBID in defending against any claims, demands, actions or lawsuits including attorney, witness and expert witness fees and other litigation related expenses which arise from the City's use of EBID property as authorized in this MOU.

14. Contractual and Other Liabilities: Each party shall be liable for its acts or failure to act in accordance with this MOU, except as otherwise provided herein. Both parties agree that individuals utilizing the permitted property are solely responsible for their activities on the permitted property. However, in the event liability arises as a result of providing permitted property, the City shall assume all liability, including that associated with agricultural activities that cause harm

- to individuals who utilize the permitted property. Liabilities contemplated include such matters as the spraying of herbicides and pesticides at times when individuals are utilizing the permitted property.
15. Survival of Obligations: The provisions of sections 12, 13 and 14 shall survive termination of this MOU and of any special use permit issued under it.
 16. Dispute Resolution: Before any party to this MOU may bring suit against the other party in any court concerning any issues relating to this MOU, such party must first seek in good faith to resolve the issue through negotiation.
 17. Authorization of Expenditures: The City is not committed to expenditure of any funds until such time as they are budgeted, obligated, encumbered and approved for expenditure by the City. The City's decisions as to whether its funds are sufficient for fulfillment of the MOU shall be final, except in the event of restoration of EBID property and the City's liability requirements. If funds are not available for maintenance of pathways, the special use permits associated with those pathways that have inadequate maintenance funding shall terminate upon written notice to EBID by the City, and all improvements upon EBID canals, drains and laterals may become the property of EBID if EBID so notifies the City in writing. Otherwise, the City shall restore the drains, canals and laterals to the condition in which the City found them at the time of issuance of the special use permit. The City may reapply for terminated permits, if after termination, the City determines that it has adequate resources to maintain the pathways. However issuance of the renewal permits shall be at the discretion of EBID.
 18. Employment Status: This MOU in no way alters the employment status of EBID employees or City employees who shall remain under the supervision of their respective entities, which entities will cover all employee benefits including, but not limited to, wages, fringe benefits, and workers' compensation coverage associated with their employment.
 19. Revenue Generation: No revenues will be derived from the operations of the facilities referred to in this MOU. Other than the administrative fees authorized herein, neither party shall be allowed to charge the other or any member of the public for the use of EBID property authorized under this agreement.
 20. Other Uses: The City's use of EBID property authorized by special use permits issued under this Agreement is non-exclusive. EBID reserves the right to authorize commercial, utility or other uses of the same property permitted to the City for recreational

purposes and to charge third parties for those other uses. EBID will make reasonably diligent efforts to require other users to avoid affecting any City improvements on EBID property and/or to require other users to replace or repair, or compensate the City to replace or repair any City improvements affected by the other uses.

- 21. Property: There will be no jointly owned property acquired as a result of this MOU. Any personal property of the City placed upon EBID property shall be removed by the City or shall become the property of EBID upon the termination of special use permits, as provided in other provisions of this agreement.
- 22. Sanctions/Fines: Each party shall be solely responsible for fiscal or other sanctions, penalties, or fines occasioned as a result of its own violation or alleged violation of the requirements applicable to performance of its obligations under this MOU. Each party shall be liable for its acts or failure to act in accordance with this MOU, subject to the immunities and limitations of the New Mexico Tort Claims Act.
- 23. Amendment: This MOU shall not be altered, modified or amended except by an instrument in writing and executed by the parties hereto. The parties recognize that this MOU provides for new uses of EBID property, allowed under a new law. Therefore, each party agrees to reasonably and freely amend this MOU as requested by the other party for the purposes of accomplishing the parties' goals of public trail use.

- 24. Modifications of Prior Agreements: This MOU is not intended to and shall not modify any obligations set forth in any prior contracts or agreements in effect between the parties.
- 25. Termination of MOU: EBID may terminate this MOU for cause for the City's failure to comply with its requirements under this MOU. EBID may terminate any individual permit for cause for reasons set forth in the permit or herein. This MOU will automatically expire at the end of the term set forth in Paragraph 3, unless extended in writing by both parties. The City may terminate this MOU without cause upon ninety (90) days written notice to EBID at the following address. Upon termination the City's improvements shall be removed or shall be left intact, in accordance with the provisions of Paragraphs 9, 17, 20 and 21 herein. Upon termination of this MOU by either party, all special use permits issued under authority of this MOU shall immediately terminate.

Notice to EBID by certified letter to:
 Notice to City by
 certified letter to:
 Manager/Treasurer
 City Manager
 Elephant Butte Irrigation District
 City of Las Cruces
 530 S. Melendres
 PO Box 20000
 Las Cruces, New Mexico 88005.
 Las Cruces, New
 Mexico 88004

26. Loss of Immunity. Should EBID lose its immunity from damages arising from the uses of its property authorized by this Agreement, by judicial decision or by legislative change, this Agreement and all special use permits authorized under this Agreement shall terminate upon written notice provided by EBID to the City. The determination as to whether EBID has lost its immunity as a result of a judicial decision or legislative change is solely that of EBID and such determination is binding upon the City.

sublease any of its rights or privileges under this Agreement. The City cannot allow any use of EBID property for any purposes other than are authorized by this MOU and special use permits issued under this MOU.

27. Assignment. The City shall not assign its rights under this Agreement nor under any special use permit authorized by this Agreement. The City shall not subcontract or

28. Environmental and Historic Review. If any environmental, wildlife, water quality, historic preservation or any similar review or process is required as a result of the City's activities on EBID property under this Agreement, the City shall be responsible for pursuing such process, while consulting carefully and closely with EBID, and the City shall be responsible for any costs which arise or result.

IN WITNESS WHEREOF, the parties have set their hands and seals this day and year set forth below.

City of Las Cruces

By: _____
Terrence Moore, City Manager

Date: _____

Elephant Butte Irrigation District

By: _____
James Salopek, President
Board of Directors

Date: _____

Attest: _____
Secretary

24MP 10
EXHIBIT B
Elephant Butte Irrigation District
Engineering Department

Phone: 505-526-6671

Fax: 505-541-5716

Office: 530 South Melendres Street, Las Cruces NM 88005

Mailing: PO Drawer 1509, Las Cruces NM 88004-1509

RIGHT OF USE APPLICATION

1. APPLICATION DOES NOT GUARANTEE APPROVAL.
2. THE APPLICATION FEE IS \$50.00 AND IS NON-REFUNDABLE WHETHER YOUR APPLICATION IS APPROVED OR DENIED.
3. THIS APPLICATION WILL NOT BE PROCESSED UNLESS ALL ITEMS ARE LEGIBLE, COMPLETED IN ENTIRETY, AND ATTACHED AS DESCRIBED BELOW.
4. ALLOW 60-90 DAYS FOR PROCESSING.
5. CONTACT THE EBID ENGINEERING DEPARTMENT FOR ASSISTANCE IN COMPLETING ALL REQUIREMENTS.

FOR USE BY EBID ONLY:
 Permit Application Fee Paid
 ENG Job No. _____
 Limited Use _____ Special Use _____
 Governed by _____ Individual _____
 Total Fee _____
 Date: _____
 Denied

Applicant's Name: _____

Business Name: _____

Mailing Address: _____

Phone: _____ **Cell:** _____

Type of Use (or Agreement)

Area:	_____ Beehive	_____ Use of ROW	_____ Electric Agreement
Crossing:	_____ Bridge	_____ Culvert	_____ Telephone
Discharge:	_____ De-watering	_____ Lift Pump	_____ Utilities* _____
Parallel:	_____ Harvest Gate	_____ Trail/path	_____ Turbine _____
Removal:	_____ Sediment (dirt, sand)	_____ Trees	_____ Bamboo _____
Other:	_____ Encroachment Agreement		

*For Utilities, specify: _____ Cable _____ Electric _____ Gas _____ Telephone _____ Water _____ Road _____

Purpose (describe what you propose to do, quantities, direction, etc.) _____

Location (describe exactly where the activity will take place, name the main lateral, main or other EBID facility.) _____ Aerial _____ Buried

EBID Facility: _____ Station ID _____

Address (if different from above): _____

Account No. _____ Parcel No. _____

Vicinity Map Attached/Other: _____

Site Plan (plan view of construction site)

1. Attach a map(s) showing location and site of structures or installation including EBID facilities.
2. Include a north arrow, site survey, easements, property lines, and features affected by construction.
3. Provide site photos (through photos). For crossings and harvest gates, provide photos of all directions (north, south, east, west).

Construction Design Drawings (engineering design details exact size, length, width, height, materials, etc.)

1. Drawings and materials must comply with design criteria (available at the EBID office or on the Internet at www.ebid-nm.org).
2. Provide detailed construction plan, three (3) sets. Include a digital data file if available (NM-Central State Plane Coordinates, 83).
3. Provide estimated construction dates. Include beginning and ending dates. (Notify EBID when construction begins and ends.)
4. Elevation or design profile is required for crossings and harvest gates.
5. Design/construction to be performed by: Self EBID Professional Name _____

Sign name of applicant in permit application. For partnership, licensees should sign as "members of partnership", for corporation, the officer authorized to execute contracts should sign, with title, the sufficiency of such signature being attested by the Secretary, with corporate seal.

LICENSEE

SIGNATURE _____
 TITLE _____
 SIGNATURE _____
 TITLE _____
 DATE _____
 Permit is for farm use purposes-please waive administration fee.

I have read and reviewed the General Conditions language contained on the reverse side of this Application, and hereby accept the terms and conditions expressed or implied herein. I also agree to comply with all additional Special Conditions that may apply as specified on the Right of Use Permit. I further agree to pay all applicable permit fees within 60 days of Board approval or this application becomes void. I understand the rules and regulations of Elephant Butte Irrigation District and agree to abide by same during the term of the Right of Use Permit.

THIS APPLICATION WILL BE RESEARCHED AND PRESENTED TO THE EBID BOARD OF DIRECTORS FOR APPROVAL. IF APPROVED AND PERMIT FEES ARE PAID IN FULL, A PERMIT WILL BE ISSUED TO YOU. IF DENIED, A LETTER WILL BE MAILED TO YOU.

THIS IS NOT A PERMIT

EXHIBIT "B"
General Conditions

SECTION 1. Rights of Elephant Butte Irrigation District (EBID): The Elephant Butte Irrigation District (hereinafter Licensor) operates and maintains the New Mexico portion of the Rio Grande Project. It has fee simple and easement rights over canals, ditches and other rights-of-way within the District boundaries.

SECTION 2. Assignment and Ending Nalaxy: Licensee shall not assign this license, in whole or in part, without Licensor's prior written consent, and absent such consent, any attempted assignment shall be void. Licensee shall make all requests for Licensor's consent to an assignment, modification, or amendment of the license in writing and shall accompany each request with a service charge of \$50.00. Such service charge shall be the property of Licensor and not refundable to Licensee.

SECTION 3. Termination of the License:

3.1 Either party may terminate this license with or without cause upon not less than thirty (30) days notice.

3.2 If Licensee fails to comply with the conditions set forth herein, or if either party terminates this license, Licensee shall remove at its own cost, within thirty (30) calendar days after written notice from Licensor, any materials, improvements or facilities placed on Licensed Property by Licensee, its directors, officers, employees, or agents. If Licensee fails to remove any of the materials, improvements or facilities within the thirty (30) day period, Licensor at its election, (i) with or without giving notice to Licensee, may remove and store the materials, improvements or facilities or (ii) give notice to Licensee that Licensor will retain the materials, improvements or facilities. Upon Licensor's giving notice to Licensee that Licensor will retain the materials, improvements, or facilities, Licensee's right, title and interest in the materials, improvements, or facilities immediately shall vest in Licensor.

3.3 If Licensor removes any materials, improvements or facilities pursuant to Section 3.2, Licensee shall reimburse Licensor for the costs of such removal or storage (as conclusively determined by Licensor) within ten (10) calendar days after Licensor presents Licensee a statement of such costs. Licensee shall release Licensor from all damages resulting to Licensee from such removal or storage.

3.4 If Licensee's right, title and interest in any of the materials, improvements or facilities vest in Licensor pursuant to Section 3.2, then Licensor shall execute, acknowledge and deliver to Licensee an instrument, acceptable to Licensor, transferring to Licensor all Licensee's right, title and interest in the materials, improvements or facilities. The provisions of this Section shall survive termination of this license.

SECTION 4. Maintenance of Licensed Property and Interface with Licensor's Use of Licensed Property:

4.1 Licensee, at its own expense, shall maintain the Licensed Property and all Licensee's materials, improvements and facilities thereon in good, sanitary and safe condition as conclusively determined by Licensor. Such maintenance shall involve but not be limited to, (a) repair and upkeep of the structure(s); (b) the removal of deposited sediment, trash, and other debris from within and adjacent to the structure(s); (c) control of vectors and other pests associated with the structure(s); and (d) repair of damages to the affected facilities of the Rio Grande Project as determined by the EBID. Such maintenance shall be conducted by the Licensee and, upon request by the EBID between the end of each irrigation season and December 31st of each year, or at other times upon written notification by the EBID. Such maintenance shall not interfere in any manner whatsoever with the construction, operation, and maintenance of any part of the Rio Grande Project. EBID shall be notified at least forty-eight (48) hours in advance of any planned maintenance, unless under emergency conditions when notification shall be first to Licensor or its agents shall interfere with the use of the Licensed Property by Licensee, or the interest of any other individual or entity in the Licensed Property.

4.2 If Licensee defaults in the performance of any provision of Section 4.1, as conclusively determined by Licensor, and Licensor gives notice of the default, Licensee shall correct such default to the satisfaction of Licensor within the required period of time set forth in the Notice (Correction Period). If Licensee fails to correct the default within the Correction Period, Licensor may take any action determined by Licensor to be necessary to correct such default, without limitation making any repair or modification to or removing any such materials, improvements or facilities. Licensee shall reimburse Licensor for the costs of correcting such default, as conclusively determined by Licensor. Upon written notice, Licensor shall present Licensee a statement of such costs and Licensee shall reimburse Licensor for such damages resulting to Licensor from correcting such default, including without limitation, the costs of damages arising from all repairs or modifications to or removal of any materials, improvements, or facilities on the Licensed Property.

SECTION 5. Nonexclusive Right: This license is nonexclusive and nothing herein shall prevent Licensor from accessing, using, or otherwise utilizing the Licensed Property or prohibit Licensor from permitting another entity to access or use the Licensed Property. Licensor shall not be liable to Licensee for any damage to public or private property or installations located upon the Licensed Property. Nothing in this license shall be construed to deny or diminish the powers and privileges granted Licensor by the laws of the State of New Mexico.

SECTION 6. Existing Easements and Licenses: This license is subject to all existing easements, licenses, and rights of record.

SECTION 7. For "Individual Permits Only - Indemnification: Licensee (Indemnitor) its successors and assigns, shall indemnify and hold harmless Licensor (Indemnitee), and the directors, officers, employees, agents, successors and assigns, against and from any claim, demand, lawsuit or action of any kind for damages or loss, whether directly or indirectly arising out of (a) acts or omissions of Licensee, its agents, officers, directors, or employees, (b) Licensee's use or occupancy of the Licensed Property for the purposes contemplated by this license, including but not limited to claims by third parties who are invited or permitted onto the Licensed Property, either expressly or implied, by Licensee or by the nature of Licensee's development or other use pursuant to this license, or (c) Licensee's failure to comply with or fulfill its obligations established by this license or by law, and whether such damage or loss is to person or property. Such obligation to indemnify shall extend to and encompass all costs incurred by Licensor in defending against subject claims, demands, lawsuit, or actions, including though not limited to attorney, witness and expert witness fees, and any other litigation related expenses. Licensee shall have no obligation to indemnify Licensor against liability directly attributable to the negligence or willful action of the Licensor, its directors, officers, employees, agents, successors or assigns. The provisions of this section shall survive termination of this license.

For "Governmental Permits Only - Tort Claims Act: By entering into this Agreement, the District and its "public employees" as defined in the New Mexico Tort Claims Act and the Licensee and its public employees" as defined in the New Mexico Tort Claims Act, do not waive sovereign immunity, do not waive any defense(s) and/or do not waive any limitation(s) of liability pursuant to law. No provision in this Agreement modifies and/or waives any provision of the New Mexico Tort Claims Act. However, within the limitations above stated, each party shall be responsible for their own negligent acts. This Agreement is not intended by any of its provision to create in the public,

or any member thereof, a third party beneficiary or to authorize anyone not a party to this Agreement to maintain a suit(s) for wrongful death(s), bodily and/or personal injury(ies) to person(s), damage(s) to property(ies), and/or any other claim(s) whatsoever pursuant to the provisions of this Agreement. Effective June 3, 2004, a resolution was approved by the EBID Board of Directors placing a moratorium on the issuance of permits to governmental agencies. Therefore, special insurance protection may be required in the form of a Certificate of Indemnification which specifies EBID as the Certificate Holder.

SECTION 8. Insurance: Without limiting any liabilities or any other obligations or duty of Licensee/Permittee, EBID at its option may require insurance and proof of insurance as condition to this Permit. If the insurance is required, the Licensee/Permittee will be notified by letter, which letter shall specify the amount and type of insurance required by EBID.

SECTION 9. Construction:

9.1 Prior to making any installations on the Licensed Property, Licensee shall submit to Licensor for its approval a detailed plan showing the location of any such installations, and pay Licensor all review and inspection fees required by Licensor. All construction on the Licensed Property shall be performed in accordance with specifications approved by Licensor. At least ten (10) days prior to the beginning of any construction on the Licensed Property, Licensee shall provide Licensor notice of the date that construction will begin and a schedule of all construction activities and the dates when such construction activities will be performed. Licensee shall also provide Licensor written notice of all changes in the schedule and delays in construction. Licensor shall not be liable for any reasonably foreseeable change or delay in construction.

9.2 Licensee shall contact Licensor immediately 24 hours in advance of start of construction to obtain a construction clearance. **PHONE NUMBER: 505-223-6871. A CONSTRUCTION CLEARANCE DOES NOT ASSURE THAT THE CANALS, LATERALS AND DRAINS WILL BE WITHOUT WATER.**

9.3 Licensee's materials, facilities, improvements, and appurtenances constructed, installed, operated and maintained on the Licensed Property shall conform with Licensor's use of Licensor's existing and planned canals, laterals, ditches, dikes, and appurtenances.

9.4 Licensor may require the re-locating, re-arranging, or moving of any materials, facilities, improvements, appurtenances, or equipment, located on the Licensed Property relating to the construction, installation, operation, maintenance, upgrading, or paving and loading or re-locating of materials, facilities, improvements or appurtenances.

9.5 If the use of Licensee's materials, facilities, improvements or appurtenances is necessitated by Licensor's use of the Licensed Property for the construction of improvements by or on behalf of Licensor, Licensee shall bear the entire cost of re-locating said materials, facilities, improvements and appurtenances.

9.6 Licensee shall not exercise its right to require relocation of Licensee's facilities in an unreasonable or arbitrary manner.

SECTION 10. Permits, Statutes and Codes: Licensee shall comply with the applicable laws, rules, codes, acts, ordinances, regulations, codes, and standards of legally constituted authorities with jurisdiction. Licensee shall obtain or cause to be obtained all its permits, approvals and authorizations required by Licensee's actions pursuant to this license.

SECTION 11. Licensor's Right to Inspect:

11.1 Licensor may enter any part of the Licensed Property at all reasonable times to make an inspection thereof. During any construction by Licensee, Licensor may inspect all trenching, drilling and other related items and require conformance with all requirements and modifications established by Licensor.

11.2 Licensee shall release Licensor for all damages arising out of any delay, whether reasonable or unreasonable, or foreseeable or unforeseeable, by Licensor in permitting or inspecting any work on the Licensed Premises. The provisions of this section shall survive termination of this license.

SECTION 12. Service of Notice: All notices and demands required or permitted by this license shall be in writing and shall be deemed to have been given properly when (i) sent by certified mail (postage fully prepaid) to the respective address as furnished by either party to the other pursuant to this section, (ii) delivered personally to the parties hereto.

SECTION 13. WAIVER: No waiver by either party of any breach of any of the covenants or conditions of this license which are to be performed by the other party shall be construed as a waiver of any succeeding breach of the same or any other covenant or condition.

SECTION 14. Attorneys Fees upon Default: If Licensee defaults in the timely performance of its obligations under this license, the Licensor shall be entitled to recover court costs and reasonable attorney's fees, as determined by a court, in any suit or proceeding to enforce its rights under this license. This foregoing shall not in any way limit or restrict any right or remedy at law or equity which would otherwise be available to such party in default.

SECTION 15. Force Majeure: If either party is rendered unable, wholly or in part, by force majeure to carry out its obligations under this license, other than the obligation of Licensee to make payments of amounts due hereunder, then the obligations of both Licensee and Licensor, so far as they are affected by such force majeure, shall be suspended during the continuance of any inability so caused, but for no longer period, and such cause shall so far as possible be remedied within a reasonable time. The term "force majeure" as employed in this license shall mean acts of God, strikes, lockouts, or other industrial disturbances, acts of public enemies, wars, blockades, insurrections, riots, epidemics, landslides, lightning, earthquakes, fires, storms, floods, washouts, interruptions by government not due to the fault of the parties, civil disturbances, explosions, or unforeseeable action or nonaction by governmental bodies in approving the applications for approvals or permits or any material change in circumstances arising out of legislation, regulation or litigation. Nothing in this section shall require Licensor to settle a strike.

SECTION 16. Entire Agreement; Changes After Execution: This license, including its specified addenda and exhibits, if any, constitutes the entire agreement between the parties, and any amendment hereto must be in writing, signed by both parties.

SECTION 17. Water Damage: Licensor shall not be liable for any loss sustained by Licensee, its officers, employees, agents, successors or assigns on the Licensed Property because of water damage from any sources whatsoever, including but not limited to, flood, drainage, or run-off, irrespective of any prior knowledge by Licensor of the possibility of such flood, drainage, or run-off, or any act, omission or negligence of Licensor, members of its governing body, directors, officers, employees, agents or assigns, arising from operation or maintenance of any Rio Grande Project, canal, drain or other works.

EXHIBIT "C"
 EBID Permit/License Fee Schedule
 Board Approved "Proposed" Fees on October 12, 2005

	<u>Existing</u>	<u>Proposed</u>
1. Administrative Fee (non-farm uses)	minimum of \$300.00+	\$500.00+
<i>Administrative costs include, but are not limited to the following:</i>		
<ul style="list-style-type: none"> - Engineering review - Legal review - Reviews required by federal, state, or local agencies - Coordination with other agencies - Construction inspection - Document preparation - Rights-of-use assistance - Appraisals for right-of-use and right-of-way - Other applicable charges 		
<i>+Indexed by 30% for overhead.</i>		33% (actual)

2. **Re-assignment, modification, or amendment of license** \$ 50.00 \$ 50.00

3. **Land Use Fee:**

a. Base Indexed using the current published prime interest rate for the term of the license using the formula:

$$L_T = L_B \frac{(1 + R)^N - 1}{R}$$

Where

L_T = Total Land Use Fee

L_B = Base Land Use Fee

R = Index coefficient

N = Term of License (in years)

(1) <u>Crossing</u>	per linear foot	\$ 0.15	\$ 0.50
(2) <u>Parallel</u>	per linear foot	\$ 0.01	\$ 0.25
(3) <u>Area*</u>	per square foot	\$ 0.05	\$ 0.10

*Including uses such as Behive Placement, Temporary Use of ROW,

4. **Discharge Fee (non-farm uses)**

a. Annual Charge Based upon the acre-feet of water discharged.
The charge will be the same as the "Excess Water Charge" charged by EBID to its water users.

b. Carriage Charge per linear foot \$ 0.10 \$ 0.15
From the point of discharge to point leaving District facilities, per year, per term of license.

5. **Blanket Agreement** Fees shall be negotiated with Licensee prior to execution of the agreement.

6. **Removal of Dirt/Fill/Sediment** \$1.50 per cubic yard
Note: This fee was previously updated in 2005

7. **Application Fee** \$50.00