

DISTRICT COURT, EL PASO COUNTY, COLORADO	
Court Address:	270 S. Tejon Street Colorado Springs, CO 80903
Phone Number:	(719) 452-5000
Plaintiff(s):	MARK E. CUSACK
v.	
Defendant(s):	DANIELA FRANCIS CUSACK a/k/a DANIELA F. CUSACK; THE CITY OF COLORADO SPRINGS, a municipal corporation; and ALL UNKNOWN PERSONS WHO CLAIM ANY INTEREST IN THE SUBJECT MATTER OF THIS ACTION
ARBITRATOR'S DECISION AND AWARD	

▲ COURT USE ONLY ▲

Case Number: 2013CV32158

Div. 20

The parties above named submitted this matter to me for the purpose of determining the appropriate terms and language of a final settlement agreement. Joseph W. Diver of Berniger, Berg & Diver, LLC, represented Plaintiff Mark E. Cusack ("Mark Cusack"). Paul L. Murphy and Howard Morrison represented Defendant Daniela Francis Cusack ("Daniela Cusack"). Michael K. Gendill, of the Office of the City Attorney for Colorado Springs, represented Defendant The City of Colorado Springs ("the City").

This case involves a parcel of unimproved real property located in Ute Pass near Cascade, Colorado (hereinafter "the Property"). The Property, identified as Parcel No. 83264-00-016 in the El Paso County Assessor's records, is roughly rectangular in shape, and contains 2.02 acres, more or less. The northern boundary of the Property is contiguous to the Colorado Department of Transportation ("CDOT") Right-of-Way for Colorado Highway 24. French Creek dissects a portion of the Property. Mark Cusack and Daniela Cusack each own two separate tracts of land that are adjacent to and roughly south of the Property.

As against Daniela Cusack, Plaintiff claimed title to the Property by means of the 18-year adverse possession statute (CRS 38-41-101, *et seq.*) or, alternatively, the 7-year payment-of-taxes statute (CRS 38-41-108 and/or 38-41-109). Mark Cusack asserted a claim against the City for declaratory relief adjudging the City's interest in the 50-foot strip through the Property to be an easement, rather than a fee interest. Both Defendants denied the substantive claims of Mark Cusack.

As a result of a mediation conducted before me on August 29, 2014, the parties entered into a "Mediated Settlement Agreement," which would have settled all claims in the above captioned case. The Mediated Settlement Agreement contemplated that the parties would draft and execute a more formal settlement agreement, and provided as follows:

Provided it is allowed by the regulations of the Colorado Springs Utilities, in the event any dispute arises regarding the Final Settlement Agreement, that dispute shall be submitted to David C. Mize, as arbitrator, to resolve any dispute by order binding on all parties.

The Mediated Settlement Agreement provided *inter alia* that Mark Cusack and Daniela Cusack would convey by quitclaim deeds their respective interests in the Property to the City, in return for which (1) the City would grant both Cusacks vehicular access over and across the Property from Highway 24 and allow them to use the Property for hiking and recreational purposes, and (2) the City would prohibit the use of the Property for public access and for park purposes. Sometime after the Mediated Settlement Agreement was executed, the parties discovered that CDOT would not allow access to the Property from Highway 24, thus requiring the parties to re-negotiate certain terms of the settlement.

Subsequently, Mark Cusack and the City reached an agreement on the terms and wording of a proposed final settlement agreement ("proposed agreement"). However, Daniela Cusack raised objections to the proposed agreement and declined to sign it. Thereafter, pursuant to a joint motion Mark Cusack and The City, the Court appointed me to act as arbitrator to determine the appropriate terms and wording of a final settlement agreement between the parties.

On June 20, 2016 Mark Cusack and the City jointly submitted to me their proposed final settlement agreement. Subsequently, Daniela Cusack requested that the proposed agreement contain a provision whereby Mark Cusack would release her from any and all claims that he might have relating to her two remaining properties. Mark Cusack agreed to the proposed revision, and the proposed agreement was revised and resubmitted to me. On July 6, 2016, Daniela Cusack submitted to me a suggested revision to the

proposed agreement whereby she would be allowed to utilize Mark Cusack's electrical poles for the purpose of bringing electrical service to her two remaining properties. The proposed revision would include the following additional language:

Mark Cusack grants Daniela Cusack an easement to utilize the electric poles he has caused to be erected, on either his property and/or the CSU service road, in order to bring electricity to her separate property.
("Daniela Cusack's Proposed Revision")

On July 12, 2016 Mark Cusack and the City submitted to me their comments regarding Daniela Cusack's Proposed Revision. Both Mark Cusack and the City acknowledged that there currently exists a disagreement over who owns the power poles and associated electrical equipment. Separately, Mark Cusack suggested that, if he does in fact own the power poles and associated electrical equipment, Daniela Cusack should reimburse him for some portion of his investment therein if she wishes to use the power poles to bring electrical service to her properties. On July 18, 2016, Daniela Cusack responded, stating that, if the power poles and associated electrical equipment are owned by Mark Cusack, it would be appropriate for her to reimburse him for some portion of his investment therein.


The parties have now resolved the issue regarding Daniela Cusack's use of the power poles and associated electrical equipment, and have submitted to me a revised proposed settlement agreement, a copy of which is attached to this Arbitrator's Decision and Award as Exhibit A.

Therefore, I hereby approve the proposed settlement agreement depicted in the attached Exhibit A, and I hereby direct the parties to sign and record the same, and to execute the appropriate deeds, license agreement and boundary agreement that are attached as exhibits to the proposed settlement agreement.

This Decision and Award resolves all issues presented in this arbitration.

Dated this 26th day of July, 2016.

DAVID C. MIZE


Arbitrator


APPROVED AS TO FORM:

BERNIGER, BERG & DIVER, LLC

By: _____
Joseph W. Diver, Reg. #6343
Attorneys for Plaintiff Mark E. Cusack

Michael K. Gendill, Senior Attorney, Reg. #35018
Attorney for Defendant City of Colorado Springs

Paul L. Murphy, Reg. #329
Attorney for Defendant Daniela Francis Cusack



Howard Morrison, Reg. #2161
Attorney for Defendant Daniela Francis Cusack

CERTIFICATE OF SERVICE

I hereby certify that on this _____ day of July, 2016, I served a true and correct copy of the above and foregoing **ARBITRATOR'S DECISION AND AWARD** on the below named recipients by email:

Recipients:

Joseph W. Diver, Esq.
P.O. Box 38335
Colorado Springs, CO 80937
jdiverlaw@gmail.com
Attorney for Plaintiff Mark E. Cusack

Michael K. Gendill, Esq., Senior Attorney
P.O. Box 1575, Mail Code 501
30 S. Nevada Avenue, Suite 501
Colorado Springs, CO 80901
mgendill@springsgov.com
Attorney for Defendant The City of Colorado Springs


APPROVED AS TO FORM:

BERNIGER, BERG & DIVER, LLC

By: _____
Joseph W. Diver, Reg. #6343
Attorneys for Plaintiff Mark E. Cusack



Michael K. Gendill, Senior Attorney, Reg. #35018
Attorney for Defendant City of Colorado Springs



Paul L. Murphy, Reg. #329
Attorney for Defendant Daniela Francis Cusack

Howard Morrison, Reg. #2161
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Colorado Springs, CO 80937
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Attorney for Plaintiff Mark E. Cusack

Michael K. Gendill, Esq., Senior Attorney
P.O. Box 1575, Mail Code 501
30 S. Nevada Avenue, Suite 501
Colorado Springs, CO 80901

APPROVED AS TO FORM:

BERNIGER, BERG & DIVER, LLC

By: 

Joseph W. Diver, Reg. #6343
Attorneys for Plaintiff Mark E. Cusack

Michael K. Gendill, Senior Attorney, Reg. #35018
Attorney for Defendant City of Colorado Springs



Paul L. Murphy, Reg. #329
Attorney for Defendant Daniela Francis Cusack

Howard Morrison, Reg. #2161
Attorney for Defendant Daniela Francis Cusack

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Recipients:

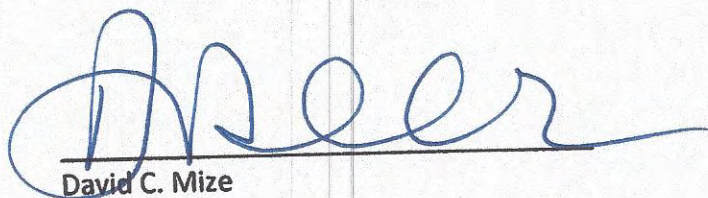
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David C. Mize

EXHIBIT A

SETTLEMENT AGREEMENT AND RELEASE

This Settlement Agreement and Release ("Agreement") is made and entered into as of July 1, 2016, by and between MARK E. CUSACK ("Mark Cusack"), DANIELA FRANCIS CUSACK a/k/a DANIELA F. CUSACK ("Daniela Cusack"), and THE CITY OF COLORADO SPRINGS, a municipal corporation ("the City"), and supersedes the Mediated Settlement Agreement entered into by and among the Parties on August 29, 2014. Hereinafter, Mark Cusack, Daniela Cusack and the City shall be referred to jointly as "the Parties" and individually as "Party". This Agreement and all deeds, licenses, and easements required herein shall become effective upon City Council's approval of the terms and the land acquisition of the property described in paragraphs B and 1.2 of this Agreement.

RECITALS

This Agreement is entered into with reference to the following facts:

A. Mark Cusack filed an action in the District Court of El Paso County, Colorado (1) for declaratory relief against the City, and (2) for a decree quieting title, as against Daniela Cusack, to a parcel of land located in the W½ of the SE¼ of Section 26, Township 13 South, Range 68 West, Sixth Principal Meridian, Colorado located in Ute Pass, west of Colorado Springs, Colorado, and near the town of Cascade, Colorado. The lawsuit title is: *Mark E. Cusack v. Daniela F. Cusack and the City of Colorado Springs, a Municipal Corporation*, El Paso County Dist. Court, Case No. 2013CV32158 ("the Lawsuit").

B. The property in dispute in the Lawsuit is an unimproved parcel containing 2.02 acres, more or less, and is legally described as follows:

A part of the W½ of the SE¼ of Section 26, T. 13 S., R. 68 W. of the 6th P. M., more particularly described as follows: Commencing at a point whence the NE corner of the NW¼ of the SE¼ of said Section 26 bears N. 47° 26' E. 1,029 ft. ; the point of beginning for the parcel of land to be hereby described. From the point of beginning; thence S. 4° 00' E. 470 feet to a point on the eastern boundary of the tract remaining in the possession of the Cascade Town Company as described in Book 893, Page 382; thence S. 86° 00' W. a distance of 225 feet to a point on the Western boundary of said tract; thence N. 4° 00' W. 450 feet more or less to the northwest corner of said tract; thence easterly 230 feet more or less to the point of beginning (hereinafter the "Property").

See separately executed Quit Claim Deeds of Mark Cusack and Daniela Cusack collectively attached as **Exhibit A**. Each deed, including its provisions, is attached hereto, incorporated herein, and made a part hereof by reference.

C. In the Lawsuit Mark Cusack claims title to the Property as against Daniela Cusack pursuant to C.R.S. §38-41-101, *et seq.* (Adverse Possession for 18 years) and/or C.R.S. §§38-41-108 and/or 38-41-109 (Payment of Taxes for Seven Years).

D. In the Lawsuit, Mark Cusack claims that, pursuant to a prior conveyance from Anne Cusack Johnson to the City, recorded July 31, 1973, in Book 2609 at Page 180, the City acquired only an easement, and not a fee interest, over and across the Property for the purpose of maintaining a water transmission line.

E. Daniela Cusack claims to be the legal owner of the Property, and denies that Mark Cusack acquired any interest in the Property by adverse possession or otherwise.

F. The City claims that, pursuant to a Warranty Deed from Anne Cusack Johnson, recorded July 31, 1973 in Book 2609 at Page 180, it acquired a fee interest in a 50-foot strip of land dissecting the Property (“the 50-foot strip”). The City denies Mark Cusack’s claim that the City acquired only an easement across the Property.

G. The City, on behalf of its enterprise, Colorado Springs Utilities, has a vested interest in protecting and maintaining its water sources and delivery systems.

H. Recognizing the uncertainties and expense of litigation, the Parties hereto desire to settle, adjust, and compromise the claims and disputes between them.

Agreement

NOW, THEREFORE, in consideration of the mutual promises and covenants herein contained, and the payment of the sums herein specified, the receipt and sufficiency of which is hereby acknowledged, the Parties agree, as follows:

1. **Settlement Terms.**

1.1 The Parties are the respective owners of the parcels of real property identified in the attached **Exhibit B**, the boundaries of which parcels came into dispute during the course of the Lawsuit. Therefore, in accordance with C.R.S. § 38-44-112, the Parties hereby engage Luke Johnson, a Colorado Professional Land Surveyor employed by and working on behalf of Colorado Springs Utilities, to establish the location of the common boundary lines between the Parties’ respective parcels, as depicted in an informal survey previously conducted by him. The Parties further direct that Luke Johnson shall prepare and file with the Clerk and Recorder of El Paso County, Colorado a formal survey depicting the permanently established common boundary lines between the Parties’ respective parcels in accordance with his informal, unrecorded survey.

The Parties hereby agree to accept the boundary lines so located by Luke Johnson as the permanently established, true common boundaries between their respective parcels and, contemporaneously with the execution of this Settlement Agreement, will execute the Boundary Agreement attached hereto as **Exhibit B** and cause the same to be recorded in the real property records of El Paso County, Colorado. The Parties and their heirs, executors, personal representatives and assigns shall thereafter respect the boundary lines so located to the end that each of the Parties will be able to plan and undertake improvements without notice to the other. Inasmuch as Luke Johnson is an employee of the City, the expenses of conducting and recording the survey shall be borne by the City.

The parties agree that by engaging Luke Johnson to establish the permanently established true boundary between their respective parcels, the Parties shall waive any claim of any kind or nature, for themselves, and on behalf of their employees, agents, trustees, heirs, successors and assigns, and fully and finally release and forever discharge Luke Johnson and the City, together with their employees, agents, attorneys, trustees, heirs, successors and assigns from all known or unknown claims, demands, actions, damages, injuries, costs, causes of action and liabilities, legal and equitable, which arise from, relate to or concern the survey and/or boundary agreement establishing the Parties' permanent common boundaries lines.

1.2 Mark Cusack and Daniela Cusack shall, by means of separately executed Quit Claim Deeds, convey to the City all of their rights, title, and interest in and to the Property described in the Recitals, paragraph B (including Exhibit A above) and incorporated herein. Mark Cusack and Daniela Cusack also agree that by conveyance of the Property by Quit Claim Deed, all rights, title, and interest merge with the City's rights, title, and interest in the 50-foot tract of land contained within the boundaries of the Property, as follows:

A strip shaped parcel of land bounded on the Easterly and Westerly ends by the Easterly and Westerly boundaries of that tract described in Book 1646 at Page 570 in the records of El Paso County, Colorado. Said strip of land also being contained between the Northerly boundary of said tract of record and the Southwesterly right-of-way line of U. S. Highway 24 as Constructed under Colorado State Highway project F-017-1(2). All being situated in the Southeast quarter of Section 26, Township 13 South, Range 68 West of the 6th Principal Meridian. Containing 0.16 Acre, more or less. A tract 50 feet in width providing 25 feet on each, and either side of the center line of an existing 30-inch diameter, domestic water transmission line over, under, across, and/or through that parcel of land as recorded in Book 1646 at Page 570 in the records of the County of El Paso in the State of

Colorado. All being a part of the W½ of the SE¼ of Sec. 26, T. 13 S., R. 68 W. of the 6th P. M., more particularly described as follows:

Commencing at a point whence the N. E. corner of the NW¼ of the SE¼ of said Section bears N. 47° 26' E. 1,029 feet; thence S. 4° 00' 00" E. a distance of 433.27 feet to the true point of beginning for the center line description of the pipe line right of way to hereby be described. From the point of beginning thence N. 37° 25' 02" W. a distance of 144.90 feet to the first angle point; thence N. 7° 05' 02" W. a distance of 237.81 feet to the second angle point; thence N. 17° 37' 17" W. a distance of 80.93 feet to the third angle point; thence N. 50° 02' 17" W. a distance of 30 feet to a point of intersection with the Southerly right-of-way fence line of U. S. Highway 24. Also a tract of land 50 feet in width, providing 25 feet on each and either side of the center line of said 12-inch flush line, the center line of said 12-inch flush line being described as follows: Beginning at said second angle point in the foregoing description; thence N. 71° 01' 38" E. for a distance of 80.00 feet, to the point of termination.

See **Exhibit A**, the conveyance of the 50-Foot strip of land (hereinafter "50-foot Strip"). Mark Cusack and Daniela Cusack agree that this 50-foot Strip shall be included in the Quit Claim Deeds executed by each party to this Agreement.

Included in each such Quit Claim Deed shall be a restrictive covenant that neither the Ute Pass Regional Trail nor any other hiking, equestrian or motorized trail shall be located within or on the Property, the 50-foot Strip or any City-owned property that is contiguous to properties owned by Mark Cusack or Daniela Cusack, located in the West ½ of the SE ¼ of Section 26, T.13 S, R.68 W of the 6th P.M. , subject to the following exception: The City may grant a license or other permission to construct an extension or segment of the Ute Pass Regional Trail on City-owned property near and roughly parallel to the easterly boundary of the Property and parcels of land currently owned by Daniela Cusack, identified by El Paso County Assessor's Schedule Nos 8326400006 and 8326400009. Such exception shall also include a twenty-five (25) foot wide strip of land located within, along and contiguous to the northern boundary of the Property where it abuts the CDOT right-of-way for Highway 24. The 25-foot strip shall run parallel to the common boundary between the Property and the CDOT right-of-way and shall run along the entire northern boundary of the Property. See **Exhibit C**, map depiction of the subject area (notice: the attached map, Exhibit C, is for general reference and assistance in clarifying the locations described herein. The map is not intended to be and does not provide the precise location of where the Ute Pass Regional Trail will be constructed or where any fencing will be located). Mark Cusack and Daniela Cusack, their heirs, successors and assigns, shall have pedestrian access over and across the Property, together with the unlimited right to access the Property for hiking and recreational use.

1.3 The City agrees to maintain, repair and construct, a six foot tall chain-link fence along the northern boundary of the Property to be placed twenty-five (25) feet in a southerly direction from the point where the CDOT parcel abuts the Property (as described in the above paragraph). Such fence shall begin at the west bank of the French Creek and continue westerly for approximately 125 feet, thence northerly back to the CDOT parcel boundary. If the additional twenty-five (25) foot wide section of the Property (as described in the exception provisions above) is needed to complete an extension or a segment of the Ute Pass Trail, then the City shall construct an addition to the six foot tall chain-link fence which runs the length of the remaining northern section of the Property at a distance of twenty-five (25) feet from the point where CDOT property abuts the Property. Mark Cusack and Daniela Cusack understand and agree that vehicle parking or use of any property not part of the City's Property described herein must be approved by CDOT or the proper owner of such other property. For its part, the City agrees to take reasonable steps to maintain the Property in its natural state, provided that the City may construct other utility lines, apparatus and utility related structures on the Property, so long as such apparatus and structures blend with the natural look of the Property and do not emit noise. The City agrees that under no circumstances shall the Property be used for a public park or public access for any purpose, including, but not limited to, hiking trails, equestrian trails and motorized trails.

1.4 By separate instrument, the City shall give to Mark Cusack and Daniela Cusack, their respective heirs, successors-in-interest and assigns a right-of-way across the existing Colorado Springs Utilities road to the extent it is located on City-owned property for the purpose of access, including vehicular access, to their respective adjacent properties. The existing Colorado Springs Utilities road over which such right-of-way is to be located is identified in the Revocable License and provisions incorporated herein by reference and attached as Exhibit C, as follows.

A portion of a parcel of land located in the $W\frac{1}{2}$ of the $SE\frac{1}{4}$ of Section 26, Township 13 South, Range 68 West, Sixth Principal Meridian, Colorado, as conveyed to The City of Colorado Springs by instrument recorded at Book 893 Page 381 and Book 915 Page 216, El Paso County Clerk and Recorder records, Colorado Springs, Colorado, more particularly described as follows:

Commencing at the Center $\frac{1}{4}$ Sec. Cor. of Sec. 26 (a found granite stone, 8" x 4", firmly set, projecting 14" above ground, chiseled "+" on top and "+" on South face), from which the $\frac{1}{4}$ Sec. Cor. of Secs. 26 and 35 (a found iron pipe, 1" diameter, firmly set, projecting 2" above a mound of stone, $3\frac{1}{2}'$ diameter, with a brass cap, $2\frac{1}{2}"$ diameter, marked as described in the official record of the dependent resurvey of T. 13 S., R. 68 W., accepted in 1941) bears S 1 degree 35 minutes 09 seconds W, 2,597.18 feet

distance, Thence, along the West line of said W½ of the SE¼ of Sec. 26, S 1 degree 35 minutes 09 seconds W, 747.39 feet distance, and the **Point of Beginning**;

Thence, departing said West line, S 58 degrees 02 minutes 46 seconds E, 72.61 feet distance; Thence, S 72 degrees 07 minutes 18 seconds E, 98.03 feet distance; Thence S 61 degrees 28 minutes 21 seconds E, 81.49 feet distance; Thence S 70 degrees 49 minutes 30 seconds E, 105.99 feet distance; Thence, along a curve to the right, having a radius of 55.00 feet and a central angle of 80 degrees 00 minutes 14 seconds, an arc distance of 76.80 feet; Thence S 9 degrees 10 minutes 44 seconds W, 124.66 feet distance; Thence, S 6 degrees 01 minutes 36 seconds W, 120.43 feet distance; Thence, S 15 degrees 18 minutes 20 seconds E, 60.87 feet distance; Thence, S 2 degrees 37 minutes 05 seconds W, 122.64 feet distance; Thence, S 10 degrees 22 minutes 19 seconds E, 71.13 feet distance; Thence, S 30 degrees 09 minutes 34 seconds E, 117.26 feet distance; Thence, S 16 degrees 07 minutes 31 seconds E, 40.31 feet distance; Thence, S 0 degrees 06 minutes 30 seconds E, 74.40 feet distance; Thence, S 8 degrees 30 minutes 26 seconds W, 155.54 feet distance; Thence, N 86 degrees 35 minutes 56 seconds E, to a point on the West line of a parcel of land as recorded at Book 2654 Page 917, El Paso County Clerk and Recorder records, Colorado Springs, Colorado, 52.56 feet distance; Thence, along said West line, S 3 degrees 24 minutes 25 seconds E, to the Southwest corner of said parcel, also being the most Westerly corner of a parcel of land as recorded at Book 2654 Page 918, El Paso County Clerk and Recorder records, Colorado Springs, Colorado, 39.75 feet distance; Thence, along the West line of said parcel, S 3 degrees 24 minutes 25 seconds E, to the Southwest corner of said parcel, 50.00 feet distance; Thence, S 86 degrees 35 minutes 56 seconds W, to the Southeast corner of a parcel of land as recorded at Book 2615 Page 128, El Paso County Clerk and Recorder records, Colorado Springs, Colorado, 100.86 feet distance; Thence, along the East line of said parcel, N 3 degrees 24 minutes 25 seconds W, 89.75 feet distance; Thence, departing said East line, N 86 degrees 35 minutes 56 seconds E, 17.64 feet distance; Thence, N 8 degrees 30 minutes 26 seconds E, 159.61 feet distance; Thence, N 18 degrees 24 minutes 28 seconds W, 11.23 feet distance; Thence, N 0 degrees 06 minutes 30 seconds W, 67.31 feet distance; Thence, S 34 degrees 07 minutes 51 seconds W, to a point on said East line, 84.62 feet distance; Thence, along said East line, N 3 degrees 24

minutes 25 seconds W, 49.24 feet distance; Thence, departing said East line, N 34 degrees 07 minutes 51 seconds E, 66.54 feet distance; Thence, N 30 degrees 09 minutes 34 seconds W, to a point on said East line, 90.07 feet distance; Thence, along said East line, N 3 degrees 24 minutes 25 seconds W, to the Northeast corner of said parcel, 27.73 feet distance; Thence, along the North line of said parcel, S 73 degrees 53 minutes 53 seconds W, 7.99 feet distance; Thence, departing said North line, N 10 degrees 22 minutes 19 seconds W, 65.82 feet distance; Thence, N 2 degrees 37 minutes 05 seconds E, 121.32 feet distance; Thence, N 15 degrees 18 minutes 20 seconds W, 61.79 feet distance; Thence, N 6 degrees 01 minutes 36 seconds E, 126.91 feet distance; Thence, N 9 degrees 10 minutes 44 seconds E, 125.48 feet distance; Thence, along a curve to the left, having a radius of 25.00 feet and a central angle of 80 degrees 00 minutes 14 seconds, an arc distance of 34.91 feet; Thence, N 70 degrees 49 minutes 30 seconds W, 108.45 feet distance; Thence, N 61 degrees 28 minutes 21 seconds W, 81.15 feet distance; Thence, N 72 degrees 07 minutes 18 seconds W, 98.93 feet distance; Thence, N 58 degrees 02 minutes 46 seconds W, to a point on said West line of said W½SE¼ Sec. 26, 58.73 feet distance; Thence, along said West line, N 1 degree 35 minutes 09 seconds E, 34.77 feet distance, to the **Point of Beginning**, and containing 50,209 square feet of land, more or less.

The direction of each line is with reference to the Colorado Coordinate System of 1983 Central Zone. The distances are reported as horizontal measurement at a mean ground elevation of 6,500 feet above sea level, U. S. survey foot.

See **Exhibit D** (hereinafter "License"). The City agrees that neither the Ute Pass Regional Trail nor any other public hiking, equestrian or motorized trail shall be located within or on the property described in this License to Daniela F. Cusack and Mark Cusack. Mark Cusack and Daniela Cusack, for themselves, their respective heirs, successors and assigns, agree that they shall not permit or allow the Ute Pass Trail or any other public hiking, equestrian or motorized trail to be located on their respective properties situated in the West ½ of the SE ¼ of Section 26, T.13 S, R.68 W of the 6th P.M.

1.5 The City and Daniela Cusack acknowledge that there presently exist electrical wires and poles ("electrical service") on and across the Property, which may include a separate parcel owned by Daniela Cusack, the purpose of which is to provide electricity to parcels owned by Mark Cusack. The electrical service was located and constructed for Mark Cusack by Colorado Springs Utilities. Colorado Springs Utilities agrees to provide electrical service via the

wires and poles described above to Mark Cusack's separately owned parcels. Colorado Springs Utilities will maintain the electrical wires and posts. If an easement from Daniela Cusack for the electrical wires and poles becomes necessary, Daniela Cusack will, by separate written instruments, grant an easement therefor to the City. The City retains the right, in the case of emergencies, to cut the electrical wires or take such other steps as may be necessary to resolve the emergency, in which case the City shall be responsible for the cost of restoring service up to Mark Cusack's meter.

A disagreement has arisen between Mark Cusack and the City as to who now owns the power poles and electrical equipment. If the City owns the power poles and associated electrical equipment, and continues to service the area at the time Daniela Cusack desires to bring electricity to her two properties, she will deal directly with the City. If, on the other hand, Mark Cusack owns the poles and associated electrical equipment, Daniela Cusack must reimburse him for a portion of his investment if she wishes to utilize his power poles and/or associated electrical equipment to bring electricity to her two properties. The amount of such reimbursement is to be determined by agreement between Mark Cusack and Daniela Cusack at some future date.

1.6 At some future date, the City may grant a license for the purpose of constructing an extension or segment of a trail system known as the Ute Pass Regional Trail ("the Trail") on City-owned property near and roughly parallel to the easterly boundary of the Property and parcels of land owned by Daniela Cusack. In the event the City grants such a license or other permission for the purpose of constructing the Trail, the City agrees to erect a 3-strand barbless wire fence with 6-foot metal T-posts ("Fence"), said Fence commencing at the northeast corner of the Property connecting to the existing barbed wire fence at the north end of the Property and running along the easterly property line of the Property, then continuing along the easterly property line of a parcel of property owned by Daniela Cusack (El Paso County Assessor's Schedule No. 8326400009) to the northwest corner of a parcel of property owned by Daniela Cusack (El Paso County Assessor's Schedule No. 8326400006), then along the northerly property line of said parcel to the northeast corner thereof, then along the easterly property line of said parcel to the southeast corner thereof, said Fence being approximately 1,260 feet in length (the "Fence"). The City agrees to erect the Fence within a reasonable time after the Trail is constructed and open for public recreational use by the general public. See **Exhibit C**, map depiction of the subject area (notice: the attached map, *Exhibit B*, is for general reference and assistance in clarifying the locations described herein. The map is not intended to be and does not provide the precise location of where the Trail will be constructed or where any fencing will be located).

The purpose of the Fence is to address Mark Cusack's concern that once the Trail is constructed patrons thereof could deviate from the designated Trail path and trespass onto his land. Thus, within a reasonable time after the Trail is constructed and open for public recreational use, the City agrees to install the Fence to deter potential trespassers from crossing onto Mark Cusack's property and/or Daniella Cusack's property. Once the Trail is constructed

and open for public recreational use and the Fence is constructed, the City agrees to maintain and repair the Fence, which responsibility the City may delegate to a third party as a condition for managing public use of the Trail. Such maintenance or repair shall be within reason, meaning the City or its delegatee shall repair or, if needed, replace damaged or broken sections, posts, or component parts which affect the structural integrity of the Fence that prevent it from serving its purpose. Although the City is agreeing to maintain or repair the Fence, the cost(s), including labor and materials, for such maintenance or repair shall be paid by Mark Cusack. The City, or its delegatee, has the option to utilize its internal resources/personnel to maintain or repair the Fence at fair market value for such services and materials or it may contract the work out to the lowest bidder (of not more than three bids). The City, or its delegatee, shall use best efforts, under the circumstances presented at the time, to obtain the most cost efficient method for maintenance or repair costs of the fence.

Mark Cusack may request that the City erect a better fence, in the same location as the Fence described above. This fence shall be erected at Mark Cusack's sole expense and subject to the City's written approval. The City shall not unreasonably withhold approval of a fence Mark Cusack wishes to erect so long as such fence: (1) is demonstrated to be necessary (i.e. people from the Trail are trespassing onto Mark Cusack's property and the requested improved fence is a reasonable means to reduce such trespass activity); (2) blends with the natural look of the area; (3) does not unreasonably interfere with the City's operations in the area; (4) does not result in any costs to the City; and (5) does not cause a substantial barrier that impedes fire, other emergency personnel/equipment, and/or City personnel/equipment from accessing the area. The City agrees to respond to Mark Cusack's request to erect a fence within sixty days.

If an improved fence is erected, the City shall maintain and repair the fence in a similar manner as described above. Such maintenance or repair shall be within reason, meaning the City shall repair or, if needed, replace damaged or broken sections, posts, or component parts which affect the structural integrity of the fence that prevent it from serving its purpose of deterring potential trespassers away from entering the mark Cusack's property or Daniella Cusack's property. Although the City is agreeing to maintain or repair the fence, the cost(s), including labor and materials, for such maintenance or repair shall be paid by Mark Cusack. The City has the option to utilize its internal resources/personnel to maintain or repair the fence at fair market value for such services and materials or it may contract the work out to the lowest bidder (of not more than three bids). The City shall use best efforts, under the circumstances presented at the time, to obtain the most cost efficient method for maintenance or repair costs of the fence.

1.7 Upon the execution of this Agreement, the Quit Claim Deeds referenced in Paragraph 1.2 above, the License for ingress and egress referenced in Paragraph 1.4 above, and, if necessary, the easement or license referenced in Paragraph 1.5-above, the Parties shall cause the Lawsuit to be dismissed with prejudice, each Party to pay its own attorney fees and costs incurred in connection with the Lawsuit.

2. **Release.** The Parties, for themselves, and on behalf of their employees, agents, trustees, heirs, successors and assigns, hereby fully and finally release and forever discharge each other, together with their employees, agents, attorneys, trustees, heirs, successors and assigns from all known or unknown claims, demands, actions, damages, injuries, costs, causes of action and liabilities, legal and equitable, which arise from, relate to or concern the claims asserted in the Lawsuit. The above release is expressly intended to and does waive, release, acquit, and forever discharge any and all subrogated interests, liens, or assignments, which might exist with regard to any claims, including counter claims, released herein.

In addition, Mark Cusack releases any claims for adverse possession or otherwise, that he may have against Daniela Cusack as they relate to any other real property owned by Daniela Cusack in El Paso County.

2.1. The Parties represent and warrant that, other than that which is set forth in the Recitals to this Agreement, they have not filed or caused to be filed or asserted any claim in or with any court or agency based on or related to the Lawsuit or claims and agree that they will not file any claim in or with any court or agency based on or related to the Lawsuit or claims against any Party to this Lawsuit.

2.2. The Parties hereby declare and represent that no other person, firm, or corporation has received any assignment, subrogation, lien, including but not limited to attorney lien, or other right of substitution to the claim or claims made or which could have been asserted, or that to the extent such assignment, subrogation, lien, or other right of substitution exists, the same has been waived, resolved, or otherwise disclosed.

3. **Different Facts.** The Parties, and each of them, acknowledge that they are fully familiar with the facts and assumptions giving rise to this Agreement, but agree that this Agreement shall remain fully effective and binding as to each of them even if the facts or assumptions turn out to be different from what they now believe them to be.

4. **No Admission.** The Parties acknowledge that this Agreement constitutes the settlement of disputed claims and that entering into this Agreement shall not constitute an admission of fault, wrongdoing, liability, or responsibility by a Party.

5. **Costs and Fees.** Each Party shall pay his, her or its own costs and attorneys' fees in connection with the dispute giving rise to this Agreement, the preparation and execution of this Agreement and any related documents.

6. **No Previous Assignment.** Each Party represents and warrants that it has not assigned or otherwise transferred, or purported to assign or otherwise transfer, to any party, directly or indirectly, voluntarily, involuntarily or by operation of law, any rights, claims or causes of action which it may have against the other Party, or any damages, liabilities, losses

and costs being released by this Agreement. The Parties each agree to indemnify and hold the other harmless from and against all claims, demands, actions, damages, injuries, costs, causes of action and liabilities of any nature suffered or incurred as a result or any assignment or transfer, or purported assignment or transfer, in breach of the representation and warranty contained in this paragraph. The Parties agree that the indemnification and hold harmless provisions of this paragraph apply to the City only to the extent permitted by law and subject to the limitations under the Colorado Constitution, the City Charter, and relevant statutes/ordinances.

7. **Entire Agreement.** This Agreement contains the entire agreement and understanding between the Parties as to the subject matter of the Agreement, and supersedes all prior agreements, representations, and discussions between the Parties concerning that subject matter. Each Party further declares and represents that, in entering into this Agreement, it has not relied on any promise, inducement, representation, warranty, agreement, or other statement not set forth in this Agreement. The parties further agree that the mediation agreement of August 29, 2014 is hereby voided and superseded by this Agreement.

8. **Nonwaiver.** None of the provisions of this Agreement shall be considered waived by a Party unless such waiver is given in writing. The failure of a Party to insist in any one or more instances upon strict performance of any of the provisions of this Agreement or to take advantage of any of its rights hereunder shall not be construed as a waiver of any such provisions or the relinquishment of any such rights for the future, but the same shall continue and remain in full force and effect.

9. **Effect of Subject Headings.** Subject headings in this Agreement are inserted for convenience only, and shall not be construed as interpretations of text.

10. **Gender.** Words used in this Agreement, regardless of the number and gender specifically used, shall be deemed and construed to include any other number, singular or plural, and any other gender, masculine, feminine or neuter, as the context requires.

11. **Governing Law.** This Agreement shall be interpreted, governed, and construed under the laws of the State of Colorado.

12. **Amendment.** This Agreement may not be altered or modified by either of the Parties except by an instrument in writing executed by each of them.

13. **Further Assurances.** The Parties agree to cooperate promptly and fully in providing and/or executing such additional documents and taking such other actions as may later be determined to be reasonably necessary to effectuate the provisions of this Agreement.

14. **Review of Agreement; Construction.** The Parties acknowledge that they have read and understood this Agreement and further acknowledge that, in entering into this

settlement, they have been advised by independent attorneys of their choice. Further, each Party has cooperated in the drafting and preparation of this Agreement. Hence, in any construction to be made of this Agreement, the same shall not be construed against either Party on the basis that the Party was the drafter.

15. **Attorneys' Fees and Costs.** In the event that any action, arbitration or proceeding is brought to enforce or interpret this Agreement, the prevailing party shall be entitled to recover its reasonable attorneys' fees, costs and expenses actually incurred in such action, arbitration or proceeding.

16. **Signature Clause.** Each Party represents and warrants that the person who signs below on behalf of that Party has been duly authorized to execute this Agreement on behalf of that Party without the further concurrence or approval of any person, entity or court. This Agreement and all deeds, licenses, and easements required herein shall become effective upon City Council's approval of the terms and the land acquisition of the property described in paragraphs B and 1.1 of this Agreement.

17. **Multiple Originals; Facsimiles.** This Agreement may be executed in multiple counterparts, each of which shall be deemed an original and all of which taken together shall constitute a single document binding on all the Parties hereto, notwithstanding that all such Parties are not signatories to the original or the same counterpart. This Agreement may be executed by facsimile signatures, which shall have the same force and effect as original signatures.

18. **Survivability.** Representations, obligations, remedies and warranties contained in this Agreement shall survive the Closing of this Agreement.

19. **Recording.** This Settlement Agreement and Release may be recorded in the Office of the Clerk & Recorder of El Paso County, Colorado.

IN WITNESS WHEREOF, the Parties have signed this Agreement as of the day and year set forth next to their respective signatures.

Mark E. Cusack

Dated: _____, 2016

STATE OF _____)
)ss.
COUNTY OF _____)

The foregoing instrument was acknowledged before me this _____ day of _____ 2016, by Mark E. Cusack.

Witness my hand and official seal

My commission expires: _____

Notary Public

Daniela F. Cusack

Dated: _____, 2016

STATE OF _____)
)ss.
COUNTY OF _____)

The foregoing instrument was acknowledged before me this _____ day of _____ 2016, by Daniela F. Cusack.

Witness my hand and official seal

My commission expires: _____

Notary Public

Dated: _____, 2016

City of Colorado Springs, on behalf of its enterprise,
Colorado Springs Utilities' representative

Print name and title

STATE OF COLORADO)
)ss.
COUNTY OF EL PASO)

The foregoing instrument was acknowledged before me this ____ day of _____
2016, by _____.

Witness my hand and official seal

My commission expires: _____

Notary Public

City of Colorado Springs

Print name and title

STATE OF COLORADO)
)ss.
COUNTY OF EL PASO)

The foregoing instrument was acknowledged before me this ____ day of _____
2016, by _____.

Witness my hand and official seal

My commission expires: _____

Notary Public

Approved as to form:

Attorney for Mark E. Cusack

Date: _____

Attorney for Daniela F. Cusack

Date: _____

City Attorney's Office

Date: _____