

77

LEASE OF GEOTHERMAL WATER

THIS LEASE, entered into between the Town of Pagosa Springs, P.O. Box 1859, Pagosa Springs, Colorado 81147-1859 (the "Town") and Pagosa Springs Resort Company, 165 Hot Springs Boulevard, Pagosa Springs, Colorado 81147 (the "Company") for the lease of geothermal water from the Town's geothermal wells P.S. 3 and P.S. 5 (the "Two Wells"), is effective on the date of the last party to sign ("Effective Date").

WHEREAS, the Town was decreed geothermal water rights for the Two Wells in Case 81CW160, Water Court, Water Division 7, decree date May 19, 1987. These rights were made absolute in Case No. 87CW35, decree date June 29, 1988.

WHEREAS, the Town previously entered into a lease with the Company, which has expired, for 200 gallons per minute ("GPM") of geothermal water released from the Two Wells after the Town has utilized the geothermal water from the Two Wells in its geothermal heating system.

WHEREAS, the Town believes that a new lease of geothermal water with the Company will provide a positive benefit to the Town's economy.

NOW, THEREFORE, in consideration of the terms and conditions set forth herein, the parties agree as follows:

1. AMOUNT OF WATER TO BE LEASED.

a. 200 GPM During Heating Season.

i. The Town hereby leases to the Company 200 GPM of geothermal water from the Two Wells released after the Town utilizes the geothermal water in its heating system (the "200 GPM").

ii. The Town leases the 200 GPM to the Company during the Town's annual heating season, generally from late September through the end of May each year. The commencement and duration of each heating season, however, will depend upon temperature, weather and other conditions each year.

iii. The Town will provide the Company with the 200 GPM during the heating season, except under circumstances beyond the reasonable control of the Town for which the Town is not responsible.

b. 200 GPM Outside the Heating Season: Since the Company's recreational use of geothermal water is a year round activity, the Company wishes to lease the 200 GPM on a year-round basis. The availability of the 200 GPM during the summer may depend upon the resolution of Case No. 89CW19, District Court, Water Division 7, the Water Court's interpretation of the

Town's Decree in Case No. 81CW160, and other obligations of the Town. The Town will work closely with the Company in order to forecast the summer availability of the 200 GPM.

i. The Town will notify the Company by January 15 of each year whether the 200 GPM is available for lease during the forthcoming summer (the "Summer GPM"). If the 200 GPM is available in the summer, the price shall be two times that of the 200 GPM for the heating season as set forth in paragraph 3.

ii. The Company will notify the Town in writing if it wishes to lease the 200 GPM in the summer for that year by January 30. The Company shall pay for such summer use, together with such notification.

c. To resolve the summer use issue, the Town, without waiving its right to produce 200 gpm in the summer under its current water rights, is willing to consider, at the Company's expense, applying for a new water right to produce 200 gpm in the summer from Wells PS-3 and PS-5.

d. Additional Geothermal Water: The Town may have additional geothermal water for lease released from the Two Wells or from the Town's Rumbaugh Ditch and Well after the Town has utilized the geothermal water in the Town's heating system or directly from the Rumbaugh Ditch and Well and other geothermal wells which may become available to the Town ("Additional GPM"). Such Additional GPM may be available during the heating season, the summer or year-round. The time during which the Additional GPM will be available will depend upon heating demand in the Town's geothermal heating system, the Water Court's interpretation of other geothermal decrees, and other obligations of the Town. The Town will work closely with the Company in order to forecast the availability of the Additional GPM.

i. The Town will notify the Company by January 15 of each year whether Additional GPM will be available for lease for the forthcoming summer and heating season and the price per 50 GPM.

ii. The Company will notify the Town in writing if it wishes to lease the Additional GPM for the forthcoming summer and/or heating season by January 30. The Company shall pay for the Additional GPM, together with such notification.

2. TERM OF LEASE.

a. The Lease will commence on the Effective Date and extend for fifteen (15) years, or until the end of the heating season in the next-to-the-last year of the Contract if the Contract would terminate prior to the end of the fifteenth heating season.

b. The Company has an option to enter into a new lease with the Town, upon mutually agreeable renegotiated terms, including but not limited to payment of an annual fee during

the first year of the renewal term of 1.5 times the amount paid during the last year of this lease plus the inflation adjuster.

c. To exercise this option, the Company shall give written notice to the Town no earlier than ten (10) years after the Effective Date of this Lease and no later than fourteen (14) years after the Effective Date of this Lease. If no new agreement is agreed upon within six months of the notice, the Company's option shall expire.

3. PAYMENT.

a. After the end of the first eighteen (18) months of this Lease or the completion of the construction of the pipeline by the Company to deliver 200 GPM across the San Juan River (the "Pipeline"), whichever occurs first. The Company will pay One Thousand Dollars (\$1,000.00) per each 100 gpm of the 200 GPM supplied during one heating season by August 31 of each year. The Company has the right to determine how much water it will take each year but the Company shall pay the Town not less than Two Thousand Dollars (\$2,000.00) per heating season for the 200 GPM.

b. Within one (1) year after the Company begins making payments to the Town:

1) the price for the 200 GPM and the Summer GPM shall increase annually based on the increase in the All Items Index, United States Bureau of Labor Statistics, Consumer Price Index for Denver-Boulder or such other inflation indicator as is mutually agreed upon by the parties ("Increased Lease Fee").

2) The Town shall notify the company of the Increased Lease Fee by July 31 of each year.

3) The Company shall pay the Increased Lease Fee to the Town by August 31 of each year.

4) The Company has the right to determine how much geothermal water it will take each year but the Company shall pay the Town not less than the Increased Lease Fee per heating season for the 200 GPM.

d. If the Town is required to adopt this Lease by ordinance, the Company shall pay all ordinance publication costs.

4. TEMPERATURE OF LEASED WATER.

a. The temperature of the 200 GPM and any other geothermal water leased to the Company from the Two Wells is approximately 120°F as released from the Town's Geothermal Heating Utility's Control Building ("Control Building") after use by the Town. The Town is not responsible for any lowering in the temperature of the 200 GPM.

b. The temperature of the Additional GPM may differ from that of the 200 GPM, depending on the source.

c. The temperature of all geothermal water under this Lease is "as is" at the point of delivery.

d. If the temperature of the 200 GPM falls below 115°F at the point of delivery for the majority of one heating season, the Town and the Company shall negotiate a mutually acceptable revision to the terms of this Lease or this Lease shall terminate.

5. LOCATION OF AVAILABILITY OF WATER.

a. The 200 GPM shall be available to the Company at the Control Building or at such other point as may be mutually agreed upon by the Town and the Company in writing.

b. If Additional GPM are available from wells other than the Two Wells, the point of delivery shall be as mutually agreed upon by the Town and the Company in writing.

c. The Company shall be responsible for any temperature loss after delivery of any geothermal water leased hereunder.

d. The Company shall be solely responsible for the cost and construction of any facilities (the "Facilities") required by the Company to deliver the geothermal water leased hereunder. The construction of the Facilities shall be to standards mutually agreed upon by the Company and the Town in writing. The Facilities shall include valves to allow geothermal water released by the Town but not leased by the Company to be otherwise used or discharged by the Town.

e. The Company shall be responsible for obtaining all easements required for the delivery of the geothermal water leased hereunder.

6. CONVEYANCE OF GEOTHERMAL WATER ACROSS THE SAN JUAN RIVER.

a. Within three (3) months of the Effective Date of this Lease, the Company shall enter into an agreement ("Pipeline Agreement") with the Town which specifies the construction specifications and the terms and conditions for the construction and operation of the Pipeline. The Pipeline Agreement shall allow the carriage in the Pipeline of the geothermal water of parties other than the Company, including the Town, upon payment of an equitable tap fee, taking into account the Company's investment in the Pipeline and lost income from that investment. Any tap fee for the Town will also take into consideration the Company's use of Town facilities for the Pipeline and the Company's income and income potential from use of the Pipeline.

b. Within eighteen (18) months of the Effective Date of this Lease, the Company shall construct the Pipeline from the Control Building to the opposite side of the San Juan River to

convey the geothermal water leased hereunder. The Company will use diligent efforts to have the line completed by Fall of 1997.

7. PERMITS.

a. The Company shall be responsible for any federal, state and other required permits for delivery of the geothermal water leased hereunder and its disposal after use by the Company.

b. The Company agrees that it will comply fully with all applicable federal laws, orders, and regulations, and the laws of the State of Colorado, as administered by appropriate authorities, concerning the pollution of streams, reservoirs, ground water, or water courses with respect to thermal pollution or discharge of the geothermal water or other pollutants.

c. Should any permitting requirements regarding the discharge of geothermal water after use by the Company be unduly onerous for the Company, as mutually agreed upon by the Town and the Company, the Town and the Company shall negotiate a mutually satisfactory agreement to remedy this issue or this Lease shall terminate.

8. PROPOSED USE.

a. The Company shall use the geothermal water leased hereunder for recreational and therapeutic uses at expanded pool facilities available to the public at locations owned by the Company between the San Juan River and Hot Springs Boulevard (the "Company Property"), and for heating buildings and floors at the Company Property (the "Company Uses"). The Company shall not use the geothermal water leased from the Town hereunder for any other purpose or at any other location.

b. The Company shall not lease or sell any geothermal water leased hereunder without the express written permission of the Town which the Town may grant in the Town's sole discretion.

9. AMENDMENTS. This Lease may be modified only by a writing approved by both parties.

10. WATER SHORTAGE.

a. The payments provided for herein shall be reduced proportionately if the full 200 gpm should become unavailable from the Town.

b. To the extent allowed by law, in the event there is a shortage of geothermal water to the Company caused by drought, inaccuracy in distribution, hostile diversion, prior or superior claims, or other causes not resulting from Town gross negligence, no liability shall accrue

against the Town, or any of its officers, agents, employees or members of the Town Board of Trustees (together "Pagosa Springs") for damages, direct or indirect, arising therefrom.

c. To the extent allowed by law, Pagosa Springs shall not be liable for damages sustained by the Company, and persons acting by, through or under the Company, by reason of the inability of the Town to deliver geothermal water to the Company's point of delivery occasioned by weather conditions, failure of or damage to Town facilities or otherwise.

d. The Town shall not be responsible for the control, carriage, handling, use, disposal, or distribution of the geothermal water delivered to the Company hereunder. The Company shall hold the Pagosa Springs harmless on account of damage or claim of damage of any nature whatsoever, including property damage, personal injury or death arising out of or connected with the control, carriage, handling, use, disposal, or distribution of geothermal water delivered to the Company.

e. The Town is under no obligation to construct or furnish any new facilities to maintain or better the temperature or quality of the geothermal water leased hereunder.

11. ACCOUNTING AND WATER SUPPLY RECORDS.

a. The Company shall maintain records and furnish to the Town annually records of the Company's geothermal water supply and the disposition thereof in a form agreed upon by the Company and the Town.

b. The Company shall prepare and furnish such reports on the Company's geothermal water use and related data as are required by the Town.

12. ASSIGNMENT LIMITED.

a. The Company may not assign its rights under this Lease or any interest herein except to a successor owner of the Company Property for the Company Uses without the express written permission of the Town, which the Town may grant in the Town's sole discretion, provided that the assignee agrees in writing to accept all of the Company's obligations hereunder. Sixty days prior to any permitted assignment hereunder, the Company shall notify the Town in writing.

b. The provisions of this Contract shall bind the successors and assigns of the parties hereto.

13. DEFAULT AND TERMINATION OF CONTRACT.

a. The occurrence of any of the following shall constitute an Event of Default.

i. The failure of the Company to pay any amounts due under the Contract when due and payable.

ii. The failure of the Company to perform its other obligations as set forth herein.

b. The waiver by the Town of any breach of any term or condition of this Contract shall not be deemed to be a waiver of any other term or condition herein contained. No term or condition of this Contract shall be deemed to have been waived by the Town unless express notice waiving such term or condition is in writing.

c. Upon a non-monetary Event of Default hereunder, the Town shall give written notice of such default. The Company shall have five (5) days thereafter within which to commence diligently curing the default. If the Event of Default is not cured within fifteen days, this Contract may be terminated at the option of the Town.

d. Upon a monetary Event of Default, this Lease may be terminated at the option of the Town.

14. NOTICES. All notices and communications under this Contract shall be mailed or hand-delivered to the parties at the addresses shown below:

Town of Pagosa Springs
P.O. Box 1859
Pagosa Springs, CO 81147-1859

Pagosa Springs Resort Company
165 Hot Springs Boulevard
Pagosa Springs, CO 81147

Written notices provided hereunder shall be sent to the addressee as shown above, prepaid, by U. S. Postal Service, Federal Express or United Parcel Service. Such notice shall be deemed to have been received on the third day after having been sent.

The designation of the address or the address may be changed by notice given in the same manner as provided in this article for other notices.

15. APPLICABLE LAW.

a. This Contract shall be governed by the laws of the State of Colorado.

b. Venue for any dispute arising as a result of this Contract shall be the District Court, Archuleta County, Colorado.

c. Should litigation be necessary to enforce any term or provision of this Contract, then all litigation expenses, witness fees and court costs, and attorney's fees shall be paid by the non-prevailing party.

16. COMPLETE AGREEMENT. This Contract represents the full agreement of the parties hereto with regard to the Company Project Supply. Any amendment to this Contract must be in writing signed by the parties.
paid by the non-prevailing party.

17. COUNTERPARTS AND FAXED SIGNATURES.

a. Counterparts: This Contract may be signed in counterparts, each to serve as an original document.

b. Faxed Signatures: In the execution of this Contract, faxed signatures of the parties to this Contract shall be considered original signatures, when original signatures are provided promptly thereafter.

TOWN OF PAGOSA SPRINGS

Ross Aragon
Ross Aragon, Mayor

1-28-97
Date

ATTEST:

Jacqueline K. Schick
Town Clerk

PAGOSA SPRINGS RESORT COMPANY

William G. Hanson
Title: secty - treas

Jan. 28, 1997
Date

ATTEST:

Matthew A. Huff
~~Secretary~~ PRESIDENT

H:\M\W\PSG\GEO\THR.WPD 1/24/97