

## ROAD USE AND MAINTENANCE AGREEMENT

THIS ROAD USE AND MAINTENANCE AGREEMENT ("Agreement") is entered into as of this ~~12th~~<sup>31st</sup> day of March, 2020 ("Effective Date") by and between the Board of County Commissioners of Bourbon County, Kansas (the "County"), a governmental entity in the State of Kansas, and Jayhawk Wind, LLC ("Developer"), a Delaware limited liability company", whose address is 310 4th St. NE, Charlottesville, VA 22902. County and Developer may each be referred to herein individually as a "Party", and collectively as the "Parties". For this Agreement, the term "Roads" means any County right-of-way, or other roads, alleys, or ways that are owned, operated, or maintained by the County, including, but in no way limited to, gravel, pavement, ditches, culverts, and bridges.

### RECITALS

WHEREAS, Developer is developing a wind turbine electrical generation facility (the "Project") with a total size of approximately 146 megawatts ("MWs") of installed capacity within the County, such turbines to be located on privately-owned land within that part of the County shown on the attached Exhibit A (the "Project Boundary"); and

WHEREAS, Developer intends to obtain the necessary approvals to build, operate and maintain the Project; and

WHEREAS, in connection with the construction, operation and maintenance of the Project, the Parties desire to address certain issues relating to Roads over which it will be necessary for Developer and its agents, employees, or servants to, among other things:

- i. Transport heavy equipment and materials which may be in excess of local design limits of certain of the Roads;
- ii. Transport materials, such as concrete and gravel, or other project-related material or equipment;
- iii. Make specific modifications and improvements (both temporary and permanent, including various associated culverts, bridges, road shoulders and other fixtures) to permit such equipment and materials to pass; and
- iv. Place electrical, electric transmission, signal, and communication cables and appurtenant components (collectively "Cables") for the Project adjacent to, along, above, under or across such Roads, and

WHEREAS, it is in the best interest of the public health, safety and welfare that Developer and the County reach an agreement to address possible issues pertaining to the Roads that will arise in, around, and near the Project; and

WHEREAS, Developer and the County wish to set forth their understanding and agreement relating to the use of Roads during construction and operation of the Project;

NOW, THEREFORE, in consideration of the mutual terms and conditions set forth in this Agreement, and for other good and valuable consideration, receipt and sufficiency of which is hereby acknowledged, the Parties agree as follows:

## TERMS AND CONDITIONS

**Section I. Developer Covenants.** Developer will use commercially reasonable efforts related to the following activities in accordance with the terms of this Agreement:

A. Within ten (10) days following the Effective Date of this Agreement, Developer will designate the name, address, email address and phone number of a company representative with authority to represent Developer;

B. At least ten (10) days prior to beginning construction of the Project, provide the County with a transportation route for the Project equipment, subject to amendment;

C. Provide plans to the County Road and Bridge Director for the widening of any corner radii necessary to facilitate the turning movements of the transport trucks used by Developer during construction of the Project, make any necessary improvements, and at the conclusion of construction, at County's election, either leave any improvements located on Roads in place in the condition required prior to Developer's initial use of the improvements, or remove any such improvements and restore the affected property;

D. Notify the County Road and Bridge Director, in writing, at least twenty-four (24) hours in advance of all oversize (as defined by the Kansas Department of Transportation) transportation and crane crossings over, across or along any Road;

E. Transport or cause to be transported the tower segments and other oversize loads in a manner reasonably calculated to minimize adverse impact on the local traffic;

F. Developer will provide no less than forty-eight (48) hours' notice to the County Road and Bridge Director when it is necessary for a Road to be closed due to a crane crossing or for any other reason relating to the construction of the Project, other than short-term closures to accommodate vehicle turns or ingress or egress from Roads or road closures that are already noted in the plans described in Section I(C). Notwithstanding the foregoing, Developer will provide all materials and personnel necessary to close the Road;

G. Provide signage of all Road closures and work zones in compliance with the most current manual on Uniform Traffic Control Devices adopted by the State of Kansas and as may be required by the County;

H. Purchase and deliver applicable road materials for repairs to Roads that are damaged by Developer and/or Developer agents, employees, or servants during the hauling of materials and/or construction of the Project and bear all costs to restore and repair any Roads that are damaged by Developer and/or Developer agents, employees, or servants during the hauling of materials and/or construction of the Project;

I. If Cables or other temporary or permanent lines, apparatus or fixtures must be buried under a Road, such Cables, lines, apparatus or fixtures will be buried at a minimum depth of forty-eight (48) inches below the lowest level of the adjoining drainage ditch and encased in high density polyethylene pipe and the crossing shall be restored promptly to its pre-construction condition. All Cables and other temporary or permanent lines, apparatus or fixtures crossing under County Roads must be set or established by boring under the

Road and not by trenching (unless otherwise agreed to in writing by the County Road and Bridge Director and Developer). Each Road crossing shall be restored promptly to its pre-construction condition, with vegetation restored as soon as practicable thereafter;

J. Prior to Commencement of Construction of the Project or as may be necessary from time to time, Developer will submit for review to the County Road and Bridge Director a list of materials (rock, sand, gravel, pipe and etc.) that will be used for road repairs, and will use similar or approved methods as those typically utilized by the County;

K. Developer will repair conditions that create a hazard to public travel within 24 hours of notice being provided by the County. Whether a condition creates a hazard to public travel shall be in the sole reasonable discretion of the County; and

L. Developer will provide final (IFC 100%) plans for the Roads to the County Road and Bridge Director for the County's records within a commercially reasonable time after the completion of such plans. Such plans will include details for widening of any corner radii necessary to facilitate the turning movements of the transport trucks used by Developer during construction of the Project, making any necessary improvements, and at the conclusion of construction shall show removing any such improvements and restoring the affected property as specified in this Agreement. Such plans will also include a description of: (i) oversized or overweight (as defined by the Kansas Department of Transportation) equipment which might be transported; (ii) materials, such as concrete and gravel, or other project-related material, to be transported; (iii) all specific proposed modifications and improvements to Roads (both temporary and permanent, including various associated culverts, bridges, road shoulders and other fixtures) to permit such equipment and materials to pass, and also to further accommodate any anticipated increased traffic or use of the Roads by employees or contractors and due to re-routing of other traffic.

M. Within forty-five (45) days following the Effective Date of this Agreement, Developer will pay to County a sum of Fifty Thousand Dollars (\$50,000) for the County to retain and utilize an outside engineer to assist the County in monitoring and verifying the performance of the Parties to this Agreement.

N. Developer will install, operate, and maintain in good working condition all Cables, collection lines, electrical or data transmission lines or other facilities or utilities located within a County right-of-way consistent with prudent electrical industry practice.

**Section 2. County Covenants.** The County, in accordance with the terms of the Agreement, agrees that it shall:

A. Within ten (10) days following the Effective Date of this Agreement, designate the name, address, email address and phone number of a County representative with authority to represent the County. Such representative will coordinate with and keep the County Board of County Commissioners apprised of material information pertaining to this Agreement.

B. Perform reasonable routine and regular maintenance of the Roads in accordance with

the County's usual maintenance practices and without unnecessarily hindering construction of the Project-related access points and Road crossings;

D. Within five (5) working days from the date they are submitted, review and approve plans (if applicable) for all Project-related utility encroachments on County Roads;

E. If applicable, Within five (5) working days issue master overweight and oversize permits for the Roads upon the filing of such applications by Developer and waive overweight permit fees for loads and axle weights of 28,000 pounds or less;

F. Authorize the designated County representative to agree on behalf of the County to revisions to any plans or schedules submitted by Developer as soon as practicable after revisions are submitted to the County by or on behalf of Developer.

### **Section 3. Road Use and Planning Inventory.**

A. Road Use. The County hereby grants to Developer and its Representatives a non-exclusive road right of way to enter upon and utilize any road within the County, including the Roads, with vehicles or combined vehicles less than 80,000 pounds, or to have any road within the County, including the Roads, utilized by third-party courier or delivery services ("Standard Road Use"). Unless expressly stated otherwise herein, Standard Road Use shall not be subject to the terms and conditions of this Agreement. County additionally hereby grants to Developer and its representatives, subject to the terms of this Agreement, a non-exclusive road right of way to enter upon and utilize the portion of the Roads identified on the attached Exhibit A with vehicles or combined vehicles equal to or greater than 80,000 pounds ("Heavy Haul Road Use"). Unless otherwise stated herein, the terms and conditions of this Agreement shall only apply to Heavy Haul Road Use.

#### A. Road Inventory.

1. Pre-Construction Inventory: At least fourteen (14) days prior to the Commencement of Construction, the Developer shall perform a survey to record the condition of the surface of all Roads which will be used in the transport of equipment, parts, and materials of the Project (the "Pre-Construction Inventory"), and shall promptly submit such Pre-Construction Inventory to the County Road and Bridge Director for review. Developer will notify the County Road and Bridge Director in advance of, and allow the County Road and Bridge Director to participate in, the Pre-Construction Inventory. During this survey, the entire length of the Roads shall be videotaped and photographs taken by Developer. In addition, the County will provide Developer, if available, with copies of any plans, cross-sections and specifications relevant to the existing Road's structure. Copies of all preconstruction documentation shall be provided to each of the Parties. Developer will reimburse the County for all reasonable, documented costs associated with the Pre-Construction Inventory. For the purposes of this Agreement, "Commencement of Construction" shall be the date that Developer provides notice to the County that a Notice to Proceed has been issued pursuant to

the primary engineering, procurement, and construction agreement (“EPC Agreement”) for the Project.

## 2. Post-Construction Inventory:

(a) Following Completion of Construction of the Project, the Developer will perform a post-construction inventory (the "Post-Construction Inventory"), and shall promptly submit such Post-Construction Inventory to the County Road and Bridge Director for review. Developer will notify the County Road and Bridge Director in advance of, and allow the County Road and Bridge Director to participate in, the Post-Construction Inventory. The method of the Post-Construction Inventory shall be similar to that of the Pre-Construction Inventory described above. The two (2) sets of pre- and post-construction data will be compared to identify wheel lane rutting, cracking or other damage in excess of the Pre-Construction Inventory, and the Developer will determine the extent and cost of the repairs or improvements needed to return the Roads to pre-construction condition. Developer will reimburse the County for all reasonable, documented costs associated with the Post-Construction Inventory. For the purposes of this Agreement, “Completion of Construction” shall be the first date that all of the following has occurred: (a) Developer provides notice to the County that the requirements for final completion have been satisfied pursuant to the EPC Agreement for the Project, and (b) all Developer use of Roads has concluded, except for Developer’s use of Roads with typical vehicles used to manage and operate a wind energy project, none of which will be oversized or overweight (as defined by the Kansas Department of Transportation).

(b) Developer will, and is obligated to, make any or all repairs of damage caused by Developer or Developer’s agents, employees, contractors, subcontractors, affiliates, and servants necessary to return the Roads to a pre-construction condition, at its sole cost and expense. Within twenty (20) calendar days following the completion of the Post-Construction Inventory, Developer shall provide written notice to the County of when it will make any such repairs. The notice shall specifically identify the methods and materials for repairs identified in the Post-Construction Inventory and the expected date by which such repairs shall be completed. All identified repairs are to be completed within ninety (90) calendar days after the Post-Construction Inventory subject to day-for-day extension in the event that repair activities are actually delayed as a result of events beyond the reasonable control of Developer that Developer could not have foreseen with reasonable diligence. In order to provide for the safety of those using Roads, at least forty-eight (48) hours prior to making any such repairs Developer shall notify the County Road and Bridge Director of the location of such repairs and the times when such repairs will be made. All such repairs shall be conducted in a manner reasonably calculated to minimize adverse impact on the local traffic.

(c) If Developer fails to provide the notice to the County described in Section 3(A)(2)(b) above within the time allotted or, after providing notice to County of its intention to undertake any such repairs, fails to complete the repairs within the period set forth in Section 3(A)(2)(b), and there is no ongoing dispute between

County and Developer regarding Developer's obligations hereunder, Developer shall be deemed to have waived its rights to make any such repairs and County may immediately undertake all repairs necessary to return the affected Roads to a preconstruction condition at Developer's sole cost and expense. Such expense may include the reasonable costs to purchase and deliver all road materials used by the County to restore Roads to a pre-construction condition, and costs incurred in obtaining the labor and equipment necessary to undertake and complete such repair in a timely and workmanlike manner. Developer further agrees that County may, in its sole but commercially reasonable discretion, enter into agreements with one or more third party contractors specifically for the repair of those Roads which suffer damage caused or contributed to by any of Developer's activities undertaken in the construction of the Project, and that Developer will bear all commercially reasonable costs incurred by County in the retention of any such third party contractor(s).

B. Routing and Access Approval. As soon as practical after execution of this Agreement and as necessary throughout the construction of the Project, Developer and County shall meet to discuss routing for the oversized and overweight (as defined by the Kansas Department of Transportation) transportation of equipment to the Project, Project-related access points, Road crossings and Cable locations and the County shall review and approve the same in accordance with Section 2.

#### **Section 4. Financial Instrument to be established by Developer.**

A. Prior to commencement of construction of the Project and its use of the Roads, Developer shall provide, from an agent selected by Developer and acceptable to County ("Agent"), a letter of credit or bond, or credit-worthy parent guaranty, securing payment of a sum of Two Hundred and Fifty Thousand Dollars (\$250,000.00), subject to the conditions set forth herein or as otherwise negotiated by the Parties (such instrument being referred to herein as the "Financial Instrument") to secure Developer's payment and performance obligations hereunder.

B. Within sixty (60) days following receipt of an invoice from the County, Developer shall reimburse County for all documented, reasonable amounts incurred by County in the purchase and delivery of all materials, and payment of the cost of labor, mileage and hourly machines costs, in connection with the repair and restoration of any Roads damaged as a result of the construction of the Project and not repaired by the Developer as provided herein.

C. All costs and expenses of maintaining the Financial Instrument, including the fees and expenses of the Agent, and the costs and expenses of making distributions pursuant to the Financial Instrument, shall be borne by Developer.

D. Term of the Financial Instrument: The Financial Instrument shall continue for a period of six (6) months after Completion of Construction. Upon delivery by Developer and County of notice certifying that the Project has been commercially operational for six (6) months after Completion of Construction, and the County has no outstanding claims for payments or reimbursements arising from Road repair and restoration necessitated by

construction of the Project, the Financial Instrument shall terminate. Additionally, in the event that any post-commercial operation activity during the life of the Project with a projected cost exceeding Fifty Thousand Dollars (\$50,000) requires i) delivery of oversize/overweight (as such terms are defined by the Kansas Department of Transportation) turbine components; ii) crane mobilization; or iii) repowering the Project (collectively "Post-Construction Activity"), prior to commencing such Post-Construction Activity, Developer shall re-establish the Financial Instrument in an amount to be determined by Developer and the County that is commensurate with the potential impact of the Post-Construction Activity on the Roads, but not to exceed the original Financial Instrument amount, and shall maintain such Financial Instrument for a period of six (6) months after both the Post-Construction Activity has completed, and all Developer use of Roads with oversized, overweight, or otherwise excessive construction traffic for Post-Construction activity has concluded. Upon delivery by Developer and County of notice certifying that the Post-Construction Activity have been completed for a period of six (6) months, cessation of use of Roads for Post-Construction Activity, and the County has no outstanding claims for payments or reimbursements arising from Road repair and restoration necessitated by Post-Construction Activity, the Financial Instrument shall terminate.

E. All other terms and conditions concerning the Financial Instrument, and the provisions for making claim against same, shall be negotiated in good faith between County and Developer, and shall form the basis of a separate agreement with Agent included as a necessary party thereof.

F. In lieu of a Financial Instrument, at Developer's election, Developer may provide a guaranty from any investment-grade (as determined by a nationally-recognized ratings agency) affiliate of Developer guaranteeing Developer's timely payment of its obligations hereunder.

#### **Section 5. Construction Cooperation.**

A. With Others: Prior to the commencement of construction of modifications or improvements to the Roads, Developer shall hold a meeting and shall invite the County Road and Bridge Director and any other applicable County public safety officials that the County may designate, to discuss plans for the construction of the Project. County shall compile a list of contact persons who will need to be notified of any temporary Road closures that may have an effect on the daily routine or functioning of these agencies and/or departments. A copy of this list shall be furnished by the County to Developer.

B. Between the County and Developer: During construction of the Project, the County and Developer shall meet regularly to discuss Project activities, including anticipated oversized and overweight (as defined by the Kansas Department of Transportation) material and equipment deliveries.

#### **Section 6. Mutual Indemnification/Hold Harmless and Liability Insurance Provisions.**

A. Indemnity. Each Party (the "Indemnifying Party") agrees to indemnify, defend and hold harmless the other Party and such party's mortgagees, lenders, officers, employees and

agents (the "Indemnified Party") against any and all losses, direct or indirect damages, claims expenses, and other liabilities resulting from or arising out of:

1. Any negligent act or negligent failure to act on the part of the Indemnifying Party or anyone else engaged in doing work for the Indemnifying Party, or
2. Any breach of this Agreement by the Indemnifying Party. This indemnification shall not apply to losses, damages, claims, expenses and other liabilities to the extent caused by any negligent or willful act or omission on the part of the Indemnified Party.

B. Limitation of Liability. In no event shall Developer or any of its members, officers, directors or employees or the County or any of its boards, elected officials, officers or employees be liable (in contract or in tort, involving negligence, strict liability, or otherwise) to any Party or their contractors, suppliers, employees, members and shareholders for indirect, incidental, consequential or punitive damages resulting from the performance, nonperformance or delay in performance under this Agreement.

C. Required Insurance. Developer shall, upon commencement of construction of the Project and for the period of construction of the Project, maintain in full force and effect, commercial general liability insurance, naming Bourbon County as additional insured, in the aggregate amount equal to Three Million Dollars (\$3,000,000.00). Developer may utilize any combination of primary and/or excess insurance to satisfy this requirement and may satisfy this requirement under existing insurance policies for the Project. Developer will annually provide a certificate of insurance evidencing the insurance limits and coverage to County upon written request by the County.

## **Section 7. Miscellaneous**

A. Use of County Right-of-Way. In addition to the surface use of the Roads, the County hereby grants to the Developer a non-exclusive license, interest, right and privilege to utilize any County rights-of-way for the maintenance and repair of the Project and the for the siting, installation, repair and maintenance of facilities that benefit the Project including, but not limited to, Cables, collection lines, electrical or data transmission lines or other facilities or utilities as may be beneficial for the operation of the Project.

B. Remedies and Enforcement. The Parties acknowledge that money damages would not be an adequate remedy for any breach or threatened breach of this Agreement. Each of the Parties hereto covenant and agree that in the event of default of any or the terms, provisions or conditions of this Agreement by any Party (the "Defaulting Party"), which default is not caused by the Party seeking to enforce said provisions (the "Non-Defaulting Party") and after notice and reasonable opportunity to cure has been provided to the Defaulting Party, then in such an event, the Non-Defaulting Party shall have the right to seek specific performance and/or injunctive relief or remedy or prevent any breach or threatened breach of this Agreement. The remedies of specific performance and/or injunctive relief shall be



exclusive of any other remedy available at law or equity. With respect to the opportunity to cure a default, if a Party has failed to perform a material obligation under this Agreement, the other Party shall be required to provide written notice of default. The defaulting Party shall have a right to cure the default within thirty (30) days after having received notice of the default. Notwithstanding the forgoing, so long as the defaulting Party has initiated and is diligently attempting to cure the default, the defaulting Party's cure period shall extend for a time period beyond thirty (30) days as reasonably sufficient for the default to be remedied. If the default is not cured, then the non-defaulting party shall have the right to pursue all remedies.

C. Due Authorization. Developer covenants, represents and warrants to County that: (a) Developer has full power and authority to execute, deliver and perform this Agreement and to take all actions necessary to carry out the transactions contemplated by this Agreement; and (b) this Agreement has been duly approved, executed and delivered on behalf of Developer. The County hereby represents and warrants that this Agreement has been duly authorized, executed and delivered on behalf of the County.

D. Severability. If any provision of this Agreement proves to be illegal, invalid or unenforceable, the remainder of this Agreement will not be affected by such finding, and in lieu of each provision of this Agreement that is illegal, invalid or unenforceable, a provision shall be deemed added as may be possible to accurately reflect the intentions of the parties and so as to make the unenforceable provision legal, valid and enforceable.

E. Amendments. This Agreement constitutes the entire agreement and undertaking of the Parties and supersedes all offers, negotiations and other agreements. There are no representations or undertakings of any kind not set forth herein. No amendment or modification to this Agreement or waiver of a Party's rights hereunder shall be binding unless it shall be in writing and signed by both Parties to this Agreement. Time is of the essence regarding every obligation hereunder.

F. Notices. All notices shall be in writing and sent (including via facsimile and email transmission) to the Parties hereto at their respective addresses, email addresses, or fax numbers (or to such other address, email addresses, or fax number as either such Party shall designate in writing to the other Party at any time).

Developer:

Apex Clean Energy, Inc.  
310 4th St. NE, Suite 200  
Charlottesville, VA 22902  
Attention: Deputy General Counsel  
Email: [legal@apexcleanenergy.com](mailto:legal@apexcleanenergy.com)

With a copy to:

Alan Claus Anderson  
Polsinelli PC, 900 W 48<sup>th</sup> Place, Suite 900  
Kansas City, MO 64112  
(816)572-4761

aanderson@polsinelli.com

County:

Bourbon County Counselor  
210 S. National Ave.  
Fort Scott, KS 66701  
Email: [jmeeks@bourboncountyks.org](mailto:jmeeks@bourboncountyks.org)

G. Assignment. This Agreement may be assigned only upon written consent of the Parties, except Developer may, upon notice to County, but without County's consent or approval, assign this Agreement to an affiliate or successor entity, or mortgage, charge, pledge, collaterally assign, or otherwise encumber and grant security interests in all or any part of its interest in this Agreement.

H. Counterparts. This Agreement may be executed in any number of counterparts, each of which shall be deemed an original, with the same effect as if the signatures thereto and hereto were upon the instrument. Delivery of an executed counterpart of a signature page of this Agreement by telecopy shall be as effective as delivery of an originally signed counterpart to this Agreement.

I. Governing law. This Agreement shall be governed by and interpreted in accordance with the laws of the State of Kansas, irrespective of any conflict of laws provisions. The Parties desire that the transactions contemplated hereby be in effect and carried out in a manner that is in compliance with all laws.

J. Successor and Assigns. This Agreement shall inure to the benefits of and shall be binding upon the Parties hereto, their respective: successors, assignees and legal representative.

K. Severance. If any term of this Agreement is found to be void or invalid, such invalidity shall not affect the remaining terms of this Agreement, which shall continue in full force and effect, and the Parties agree to take such additional action as may be beneficial to effectuate the intent of the Agreement.

L. No Waiver of Strict Liability. Failure of County or Developer to insist on strict performance of any of the conditions or provisions of this Agreement, or to exercise any of their rights hereunder, shall not waive such rights.

M. Venue and Waiver of Jury Trial. Each Party waives all right to trial by jury and specifically agrees that trial or suits or causes of action arising out of this Agreement shall be to the applicable court with jurisdiction in this matter.

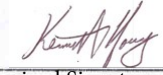
N. Further Assurances and Cooperation. Each Party will promptly, diligently and in good faith cooperate with the other Party during the Term, including without limitation delivering to such Party upon request proof of compliance with this Agreement, estoppel certificates, and further assurances, documents and reasonably-requested agreements.

[Remainder of page intentionally left blank]

IN WITNESS WHEREOF, the Parties have caused the Agreement to be executed in their respective names by their duly authorized representatives and dated their signatures as shown below, to be effective as of the Effective Date.

**DEVELOPER:**

Jayhawk Wind, LLC,  
a Delaware limited liability company

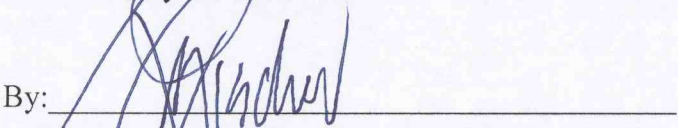
By:  3/16/2020  
COO and Authorized Signatory of Apex Clean Energy Holdings, LLC, in its capacity as Manager Date  
of Apex GBR, LLC, the Sole Member of Apex Clean Energy Finance, LLC, the Sole Member of  
Jayhawk Wind, LLC

**THE COUNTY:**

THE BOARD OF COUNTY COMMISSIONERS OF BOURBON COUNTY, KANSAS

By: 

Name: Lynn D. Charah  
County Commissioner

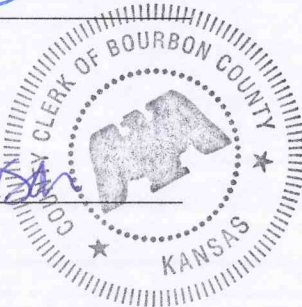
By: 

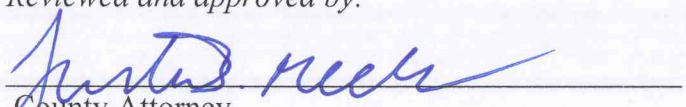
Name: JEFF FISCHER  
County Commissioner

By: 

Name: Dick Radel  
County Commissioner

ATTEST:   
By: Wendell Mason  
County Clerk



Reviewed and approved by:  
  
County Attorney