

RESOLUTION 2018-088
OF THE COUNCIL OF THE CITY OF FORT COLLINS
AUTHORIZING THE CITY MANAGER TO EXECUTE AN
AGREEMENT REGARDING THE USE OF CERTAIN WATER RIGHTS
OF THE CITY OF FORT COLLINS IN THE PLAN FOR AUGMENTATION FOR
INSTREAM FLOW PURPOSES ON THE CACHE LA POUDDRE RIVER

WHEREAS, the Cache la Poudre River ("Poudre River") flows through Fort Collins and is a significant amenity to the City, its citizens, and the region; and

WHEREAS, the Poudre River is the source of water supply for numerous water users, including the City, such that the majority of Poudre River flows are diverted into canals, ditches, pipelines, reservoirs, and other waterworks; and

WHEREAS, such diversions reduce the flows of water through Fort Collins, which has various ecological, environmental, recreational, sociological, and other impacts, some of which are adverse; and

WHEREAS, the City desires to enhance Poudre River flows through Fort Collins and in the region while working within the existing legal context, including the prior appropriation doctrine, which is confirmed in Sections 5 and 6 of Article XVI of the Colorado Constitution and the Water Right Determination and Administration Act of 1969, C.R.S. §§37-92-101 *et seq.*; and

WHEREAS, as discussed in Resolution 2016-022 and Resolution 2018-087, the City is pursuing a plan for augmentation for instream flow purposes ("Instream Flow Augmentation Plan") to enhance and protect additional flows in portions of the Poudre River without adversely impacting or injuring existing adjudicated water rights and existing exchanges; and

WHEREAS, the Instream Flow Augmentation Plan needs water rights to be included in it as a source of water to augment stream flows in the Poudre River; and

WHEREAS, the City owns the water rights represented by certain shares in the so-called "Southside Ditches" companies on the Poudre River (being the Arthur Irrigation Company, Larimer County Canal No. 2 Irrigating Company, New Mercer Ditch Company, and Warren Lake Reservoir Company) that have been judicially quantified and changed to include augmentation and other uses as set forth in the decrees entered by the District Court for Water Division 1 in Case No. 1992CW129 on April 13, 2005 and in Case No. 2005CW323 on April 23, 2015 (collectively, "Subject Water Rights"); and

WHEREAS, the City and the Colorado Water Conservation Board have negotiated an agreement regarding the use of the Subject Water Rights in the Instream Flow Augmentation Plan, which agreement is entitled *Agreement Regarding the Use of Certain Water Rights of the City of Fort Collins in the Poudre River Instream Flow Augmentation Plan (Changed "Southside Ditches" Water Rights)*, a copy of which is attached as Exhibit "A" ("Agreement"), and

WHEREAS, under the Agreement and as set forth therein, the City would retain ownership of the Subject Water Rights and would have the right, on a yearly basis, to determine whether to include some or all of them in the Instream Flow Augmentation Plan for that year; and

WHEREAS, authorizing the use of the Subject Water Rights in the Instream Flow Augmentation Plan pursuant to the Agreement is in the best interests of, and will benefit the City and its citizens because it will further the goal of preserving and improving the ecological, environmental, recreational, sociological, and other resources benefitted by Poudre River flows, and while imposing few, if any, costs on the City as discussed herein; and

WHEREAS, the Subject Water Rights are part of the City's Water Utility system, but their use under the Agreement will not materially impair the viability of the Water Utility system as a whole and will be for the benefit of the citizens of the City; and

WHEREAS, no compensation is to be paid to the City under the Agreement, but that the Agreement would serve a bona fide public purpose because:

- (1) The use to which the Subject Water Rights will be put under the Agreement promotes health, and general welfare and benefits a significant segment of the citizens of Fort Collins by improving Poudre River flows;
- (2) The use to which the Subject Water Rights will be put supports one or more of the City Council's goals, adopted policies, projects or plans, many of which seek the improvement of Poudre River flows;
- (3) The financial support provided by the City through the below-market disposition of the rights in the Subject Water Rights under the Agreement will be leveraged with other funding or assistance from the other participants in the Instream Flow Augmentation Plan, which are also providing water rights and monetary support;
- (4) The Agreement will not result in any direct financial benefit to any private person or entity, except to the extent such benefit is only an incidental consequence and is not substantial relative to the public purpose being served; and
- (5) The Agreement will not interfere with current City projects or work programs, hinder workload schedules or divert resources needed for primary City functions or responsibilities;

and

WHEREAS, the use of the Subject Water Rights under the Agreement will not impose any additional costs on the Water Utility and its ratepayers; and

WHEREAS, the City's execution of the Agreement for Phase II is not intended to express support for the proposed Northern Integrated Supply Project ("NISP") or to change the City's position with respect to NISP, and the City is not hereby altering or amending its comments on the NISP draft and supplemental draft environmental impact statements, which comments were submitted pursuant to Resolution 2008-082 and Resolution 2015-082; and

WHEREAS, the City's execution of the Agreement for Phase II is not intended to express support for any other project, including the proposed Thornton Pipeline Water Project and the proposed Seaman Water Supply Project, or to change the City's position with respect to those projects.

NOW, THEREFORE, BE IT RESOLVED BY THE COUNCIL OF THE CITY OF FORT COLLINS as follows:

Section 1. That the City Council hereby makes and adopts the determinations and findings contained in the recitals set forth above.

Section 2. That the City Council finds, pursuant to Section 23-111(a) of the City Code, that the disposition of certain rights associated with the Subject Water Rights pursuant to an agreement that is substantially similar to the attached Agreement is in the best interests of the City.


Section 3. That the City Council finds, pursuant to Section 23-111(b) of the City Code, that the disposition of certain rights associated with the Subject Water Rights pursuant to an agreement that is substantially similar to the attached Agreement will not materially impair the viability of the water utility system as a whole and that it will be for the benefit of the citizens of the City.

Section 4. That the City Council finds, pursuant to Section 23-114, that the disposition of certain rights associated with the Subject Water Rights pursuant to an agreement that is substantially similar to the attached Agreement may be for an amount less than market value, but that it would serve a bona fide public purpose for the reasons set forth above.

Section 5. That the City Manager is hereby authorized to execute an agreement substantially in the form of Exhibit "A", with such modifications and additional terms and conditions consistent with the terms of this Resolution as the City Manager, in consultation with the City Attorney, determines to be necessary and appropriate to protect the interests of the City or effectuate the purposes of this Resolution.

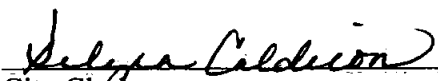
Section 6. That the City Manager is hereby authorized to execute amendments to such agreement as may be necessary to effectuate the purposes of this Resolution.

Passed and adopted on at a regular meeting of the Council of the City of Fort Collins this 18th day of September, A.D. 2018.



Mayor

ATTEST:



City Clerk



**AGREEMENT REGARDING THE USE OF
CERTAIN WATER RIGHTS OF THE CITY OF FORT COLLINS
IN THE POUÐRE RIVER INSTREAM FLOW AUGMENTATION PLAN
(Changed "Southside Ditches" Water Rights)**

This Agreement Regarding the Use of Certain Water Rights of the City of Fort Collins in the Poudre River Instream Flow Augmentation Plan ("Agreement") is effective on ____ of _____, 2018, and is entered into by and between the City of Fort Collins, Colorado, a Colorado municipal corporation ("Fort Collins"); and the Colorado Water Conservation Board, an agency of the State of Colorado ("CWCB").

RECITALS

A. CWCB, the Colorado Water Trust, and several water users on the Cache La Poudre River including Fort Collins, are seeking judicial approval of a plan for augmentation in order to, among other things, increase the supply of water to the Cache la Poudre River between the canyon mouth and its confluence with the South Platte River to preserve and/or improve the natural environment to a reasonable degree ("Poudre ISF Augmentation Plan"). The Poudre ISF Augmentation Plan will be administered pursuant to the decree approving the Poudre ISF Augmentation Plan and will be implemented and managed pursuant to various contractual arrangements among the CWCB and others. Collectively, the relevant agreements outline a program for the CWCB to protect water, water rights, and interests of water under a decreed plan for augmentation through stream reaches of the Cache La Poudre River from the canyon mouth to its confluence with the South Platte River.

B. CWCB is authorized by Section 37-92-102(3), C.R.S. (2017), to acquire from any person, such water, water rights, or interests in water as CWCB determines may be required for instream flows to preserve and/or improve the natural environmental to a reasonable degree, and to take actions to ensure such stream flows remain in the river.

C. Fort Collins owns the water rights represented by certain shares in the so-called "Southside Ditches" companies on the Cache la Poudre River (being the Arthur Irrigation Company, Larimer County Canal No. 2 Irrigating Company, New Mercer Ditch Company, and Warren Lake Reservoir Company) that have been judicially quantified and changed to include augmentation and other uses as set forth in the decree entered in Case No. 1992CW129 on April 13, 2005 ("92CW129 Decree") and the decree entered in Case No. 2005CW323 on April 23, 2015 ("05CW323 Decree") (collectively, "Water Rights").

D. CWCB desires to use, and Fort Collins desires to allow the CWCB to use, water attributable to the Water Rights for augmentation use in the Poudre ISF Augmentation Plan to increase the supply of water to the Cache la Poudre River to preserve and/or improve the natural environment to a reasonable degree, pursuant to the terms and conditions of this Agreement.

NOW THEREFORE, in consideration of the mutual and dependent covenants contained herein, the Parties agree as follows:

1. Term. The term of this Agreement is 20 years from the effective date. This Agreement will automatically renew for another 20 years unless terminated hereunder.

2. Available Shares. CWCB's use of water attributable to the Water Rights under this Agreement shall be limited to water attributable from the "Available Shares" that Fort Collins identifies on an annual basis as discussed herein. Fort Collins shall notify CWCB by April 15 of each year the following:

a. The number of shares of each of the Southside Ditches companies under the 92CW129 Decree and the 05CW323 Decree that will be used in that April 15 through April 14 year to generate water for use in the Poudre ISF Augmentation Plan under this Agreement ("Available Shares").

b. An estimation of the amount and timing of water that the Available Shares will generate for use in the Poudre ISF Augmentation Plan.

The number and identify of Available Shares shall be as determined under Fort Collins' sole discretion. CWCB acknowledges that the amount of water available under the Available Shares at any given time will depend on various factors, including hydrological conditions and the call(s) affecting the Water Rights, such that the actual amount of water available cannot be known for certain prior to the anticipated date of use. If the Available Shares are not needed for use in the Poudre ISF Augmentation Plan on any given day pursuant to the terms and conditions of the Poudre ISF Augmentation Plan decree or pursuant to various contractual arrangements among the CWCB and others, Fort Collins reserves the right to use the Available Shares for other uses under the 92CW129 Decree and/or the 05CW323 Decree. If Fort Collins does not identify any Available Shares, there shall be no Available Shares for that April 15 through April 14 year.

3. No Payment. No payment is owed to Fort Collins for the CWCB's use of water attributable to the Water Rights pursuant to the terms and conditions of this Agreement. However, nothing in this Agreement shall preclude amendments to this Agreement or subsequent agreements concerning the use of the Water Rights in the Poudre ISF Augmentation Plan that may involve payments to Fort Collins.

4. Use of Available Shares by CWCB. Fort Collins shall divert water under the Available Shares at their respective points of diversion (Arthur Ditch, Larimer County Canal No. 2, and the New Mercer Ditch),¹ measure, and return to the river

¹ As stated in the 92CW129 Decree and the 05CW323 Decree, the point of diversion of the Arthur Ditch is located 200 feet N and 440 feet E of the SW corner of Sec. 34, T8N, R69W, 6th P.M., Larimer County;

water attributable to the Available Shares. From that point or points of introduction downstream to the point of diversion of the Fossil Creek Reservoir Inlet Ditch ("FCRID")² (the "Reach"), CWCB shall use the Available Shares for augmentation use in the Poudre ISF Augmentation Plan to increase the supply of water to the Cache la Poudre River to preserve and/or improve the natural environment to a reasonable degree. At the point of diversion of the FCRID, CWCB shall cease using the Available Shares, and all dominion and control over the Available Shares shall return to Fort Collins.

5. Fort Collins' Emergency Use of Available Shares. In the rare event that there is a water supply emergency necessitating Fort Collins' use of the Available Shares to supply customers of Fort Collins' treated water system or other emergency purposes as determined by Fort Collins in its sole discretion, Fort Collins may use the Available Shares for such use and thereby no longer make the water available to the CWCB for use in the Poudre ISF Augmentation Plan, and Fort Collins will provide notice to CWCB as soon as practicable. For the purposes of this provision, a water supply emergency means an extraordinary drought condition or other emergency condition involving the loss of water to its municipal system as a result of catastrophic events (including the failure of conveyance or treatment facilities and natural disasters); provided however, that extraordinary drought conditions or emergency conditions shall be deemed to exist only if Fort Collins has implemented or is in anticipation of implementing a water supply shortage response pursuant to Fort Collins City Code³ and only if Fort Collins has maximized its diversions water under all direct flow water rights other than the Available Shares that are available for municipal use during such conditions.

6. Return Flows. Fort Collins shall be responsible for any return flow obligations under the 92CW129 Decree and/or the 05CW323 Decree.

7. Transit Losses. Fort Collins shall bear any transit losses imposed by the Division of Water Resources as a result of CWCB's use of the Water Rights within the Reach.

8. Administration. The Parties will coordinate on the administration of the Available Water through the Reach and installation of any measuring devices deemed necessary by the Division Engineer to administer this Agreement.

the point of diversion of the Larimer County Canal No. 2 (which is also used to fill Warren Lake) is located 70 feet N and 295 feet E of the SW corner of Sec. 29, T8N, R69W, 6th P.M., Larimer County; and the point of diversion of the New Mercer Ditch is located 70 feet N and 295 feet E of the SW corner of Sec. 29, T8N, R69W, 6th P.M., Larimer County.

² As stated in the 92CW129 Decree and the 05CW323 Decree, the point of diversion of the FCRID is located 85 feet W and 2600 feet N of the SE corner of Sec. 20, T7N, R68W, 6th P.M., Larimer County.

³ The current Fort Collins City Code provisions regarding water supply shortage response and emergency restrictions are set forth in the Fort Collins City Code, Chapter 26, Article III, Division 6 (Water Conservation), Sections 26-167 and 26-168.

9. Accounting/Reporting. The Parties agree to coordinate on accounting and reporting each year. Fort Collins shall be responsible for any accounting and reporting required under the 92CW129 Decree and/or the 05CW323 Decree. The responsibility for any accounting and reporting required under the decree approving the Poudre ISF Augmentation Plan shall be determined pursuant to the terms and conditions of the Poudre ISF Augmentation Plan decree or pursuant to various contractual arrangements among the CWCB and others.

10. Share Assessments. Fort Collins shall remain responsible for paying the assessments on all Available Shares, and any other shares representing the Water Rights. Except as expressly provided for herein, CWCB shall acquire no ownership interest in the Water Rights and Available Shares:

11. Termination. At the end of the 20-year term of this Agreement either Party may decide to not renew this Agreement for any reason, and the Agreement will terminate upon written notice to the other Party pursuant to Paragraph 12. Fort Collins may terminate this Agreement at any time it reasonably believes its Water Rights are at risk or if the District Court for Water Division 1 or the Colorado Supreme Court denies the issuance of a decree for the Poudre ISF Augmentation Plan, by providing written notice to CWCB pursuant to Paragraph 12. CWCB may terminate this Agreement if the Poudre ISF Augmentation Plan application is dismissed or withdrawn from Water Court or if the plan is not otherwise implemented or operated upon written notice to Fort Collins pursuant to Paragraph 12.

12. Notice. All notices or other communications hereunder shall be sufficiently given and shall be deemed given when personally delivered, sent by U.S. Mail, or via email, addressed as follows:

To Fort Collins: City Manager
City Hall West
300 LaPorte Avenue; P.O. Box 580
Fort Collins, Colorado 80522-0580

With copy to: Fort Collins City Attorney
300 LaPorte Avenue; P.O. Box 580
Fort Collins, Colorado 80522-0580
epotyondy@fcgov.com

and: Fort Collins Utilities
Attn: Water Resources Manager
700 Wood Street P.O. Box 580
Fort Collins, Colorado 80522-0580
ddustin@fcgov.com

and: Natural Areas Department

745 Hoffman Mill Road
Fort Collins, Colorado 80524
jstokes@fcgov.com; dfiggs@fcgov.com

To: CWCB

Chief, Stream and Lake Protection Section
Colorado Water Conservation Board
1313 Sherman Street, Room 718
Denver, CO 80203
DNR_CWCBISF@state.co.us

With copy to:

Office of the Attorney General
Water Conservation Unit
1300 Broadway, 7th Floor
Denver, CO 80220

The Parties may update the above contact information and addresses by providing notice of the new contact information and addresses pursuant to this paragraph.

13. Amendments. This Agreement may be amended only upon the execution by each Party of a written amendment to this Agreement.

14. Attorney's Fees. If a suit, action, or alternative dispute resolution is instituted in connection with any controversy arising out of this Agreement or to enforce any rights hereunder, the Parties shall bear their own costs and fees associated with such proceeding.

15. Governing Law. This Agreement shall be governed by and construed in accordance with the laws of the State of Colorado.

16. No Waiver of CGIA. No term or condition of this Agreement shall be construed or interpreted as a waiver, express or implied, of any of the immunities, rights, benefits, protections, or other provisions, of the Colorado Governmental Immunity Act, C.R.S. §24-10-101 et seq., as applicable now or hereafter amended.

17. No Third Party Beneficiaries. This Agreement does not and is not intended to confer any rights or remedies upon any person or entity other than the Parties.

18. Fiscal Contingency. Notwithstanding any other provisions of this Agreement to the contrary, the obligations of the Parties in fiscal years after the fiscal year of this Agreement shall be subject to appropriation of funds sufficient and intended therefor, with the Party having the sole discretion to determine whether the subject funds are sufficient and intended for use under this Agreement, and the failure

of the Party to appropriate such funds shall be grounds for the Party to terminate this Agreement with written notice pursuant to Paragraph 12.

19. No Waiver. Failure of either Party at any time to require performance of any provision of this Agreement does not limit such Party's right to enforce such provision, nor does any waiver of any breach of any provision this Lease constitute a waiver of any succeeding breach of such provision or a waiver of such provision itself.

20. Complete Agreement. This Agreement contains the entire agreement and understanding of the Parties and all prior negotiations, discussions, or agreements related thereto are merged herein.

21. Severability. If any term or provision of this Agreement is invalid, illegal or unenforceable, such invalidity, illegality or unenforceability does not affect any other term or provision of this Agreement or invalidate or render unenforceable such term or provision.

Executed as of the date first set forth above.

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CITY OF FORT COLLINS, COLORADO, a Colorado municipal corporation

By: _____
Darin A. Atteberry, City Manager

Date: _____

ATTEST:

By: _____
City Clerk's Office
Printed Name: _____
Title: _____

APPROVED AS TO LEGAL FORM:

By: _____
City Attorney's Office
Printed Name: Eric R. Potyondy
Title: Assistant City Attorney

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COLORADO WATER CONSERVATION BOARD, an agency of the STATE OF COLORADO

By: _____

ATTEST:

By: _____

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