

RESOLUTION 2019-079
OF THE COUNCIL OF THE CITY OF FORT COLLINS
AUTHORIZING THE CITY MANAGER TO EXECUTE AN
AGREEMENT WITH NUMEROUS STAKEHOLDERS REGARDING
A JOINT STUDY OF THE BOXELDER CREEK WATERSHED DAMS

WHEREAS, the watershed of Boxelder Creek includes various lands in northern Larimer County, including lands in Fort Collins and its Grown Management Area; and

WHEREAS, Boxelder Creek flows from its headwaters in northern Larimer County generally to the south and southeast, though farmlands and along the developed and developing Interstate 25 corridor through various political boundaries towards its confluence with the Cache la Poudre River in eastern Fort Collins; and

WHEREAS, Boxelder Creek is prone to potential flood risks; and

WHEREAS, to help address these flood risks, there is a series of dams upstream of Fort Collins known as the Boxelder Creek Watershed Dams (commonly referred to as the "B Dams") which includes dams B-2, B-3, B-4, B-5, and B-6, which were constructed in or around the 1970s and 1980s, at a time when there was less development along Boxelder Creek downstream of the B Dams; and

WHEREAS, the Colorado Department of Water Resources, Dam Safety Division, has recently changed the classification of the B-2, B-3 and B-4 Dams from "significant" to "high" hazard due to the increase in development along Boxelder Creek below these B Dams, and the classification on the other dams, such as the B-5 and B-6 dams, may be changed in the future; and

WHEREAS, the change of the classification of some of the B Dams has prompted a regional conversation regarding the B Dams, including their operation and future; and

WHEREAS, the City, Larimer County, the North Poudre Irrigation Company, the Town of Timnath, and the Town of Wellington (collectively, the "Parties") each have significant interests related to the B Dams; and

WHEREAS, the Parties are interested in funding and performing a joint study ("Study") of the B Dams in order to, among other things, gather the data, facts, and analyses necessary to fully evaluate the B Dams and issues related to flood risks along Boxelder Creek; and

WHEREAS, the Parties intend to utilize the Study as a basis for subsequent discussions and potential agreements related to the B Dams and the associated capital improvements that are needed for these facilities; and


WHEREAS, the Parties have negotiated an agreement regarding the Study as set for the in the draft Agreement attached hereto as Exhibit "A", and incorporated herein by reference.

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 Manager is hereby authorized to execute an agreement substantially in the form of Exhibit "A", with such modifications and additional terms and conditions 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.

Passed and adopted at a regular meeting of the Council of the City of Fort Collins this 16th day of July, A.D. 2019.



Mayor

ATTEST:


City Clerk

**AGREEMENT BETWEEN NUMEROUS STAKEHOLDERS REGARDING A
JOINT STUDY OF THE BOXELDER CREEK WATERSHED DAMS**

This Agreement is entered into by and between the following Parties: the City of Fort Collins, Colorado, a municipal corporation (“Fort Collins”); Larimer County, Colorado, a political subdivision of the State of Colorado (“County”); the North Poudre Irrigation Company, a Colorado corporation (“North Poudre”); the Town of Timnath, Colorado, a municipal corporation (“Timnath”); and the Town of Wellington, Colorado, a municipal corporation (“Wellington”).

Fort Collins, North Poudre, Timnath, and Wellington are collectively referred to as the “Non-County Parties.” The County, Fort Collins, Timnath, and Wellington are collectively referred to as the “Governmental Parties.”

RECITALS

A. The watershed of Boxelder Creek includes various lands in northern Larimer County. From the headwaters, Boxelder Creek flows generally to the south and southeast, through farmlands and along the developed and developing Interstate 25 corridor through various political boundaries (including those of some of the Parties) towards its confluence with the Cache la Poudre River in eastern Fort Collins. Water from Boxelder Creek then flows down the Cache la Poudre River generally to the east through more farmlands, developed and developing lands, and additional political boundaries (including those of some of the Parties).

B. Like all streams, Boxelder Creek is prone to potential flood risks. To help address these risks, there is a series of dams known as the Boxelder Creek Watershed Dams, and commonly referred to as the “B Dams,” which includes dams B-2, B-3, B-4, B-5, and B-6. The B Dams were constructed in or around the 1970s and 1980s, at a time when there was less development along Boxelder Creek downstream of the B Dams.

C. The Colorado Department of Water Resources, Dam Safety Division, has recently changed the classification of the B-2, B-3 and B-4 Dams from “significant” to “high” hazard, due to the increase in development along Boxelder Creek below these B Dams. The classification on the other dams, such as the B-5 and B-6 dams, may be changed in the future, but at this time there is no intention of reclassifying the hazard classifications. See Office of the State Engineer Rules and Regulations for Dam Safety and Dam Construction, 2 CCR 402-1. This has prompted a wider, regional conversation regarding B Dams, including their operation and future.

D. Each of the Parties to this Agreement has significant interests related to the B Dams and is interested in performing a joint study of the B Dams in order to, among other things, gather the data, facts, and analyses necessary to fully evaluate the B Dams and issues related to flood risks along Boxelder Creek. The Parties therefore desire a joint study of the B Dams (“Study”) as set forth in detail below. The Study will primarily focus on the B-2, B-3, and B-4 Dams based on the recent modified classification and provide insight and guidance on the potential for additional classification changes to the other B Dams. The study will also consider if land use changes

downstream of B-5 and B-6 and upstream of B-2 could trigger potential upgrades to the B-5 and B-6 dams.

E. The County intends to utilize an engineering firm that the County already has under contract ("Consultant"), to perform the Study. The Non-County Parties will reimburse the County for their portion of the Study as described below.

F. The Parties intend to utilize the Study as a basis for subsequent discussions and potential agreements related to the B Dams and the associated capital improvements that are needed for these facilities. Options for the long-term operations and maintenance needs and responsibilities will also be considered, including potential reallocation of operation and maintenance responsibilities.

G. The Governmental Parties are authorized to enter into the following intergovernmental agreement pursuant to C.R.S. §29-1-203. As a corporation organized under Colorado law, North Poudre is authorized to enter into this Agreement.

AGREEMENT

1. **INCORPORATION OF RECITALS.** The foregoing recitals are hereby incorporated as if fully restated in their entirety.
2. **THE SCOPE.** The scope of the Study ("Scope") shall include:
 - Coordination of the relevant activities of the Parties and the United States Department of Agriculture, Natural Resources Conservation Service related to improvements and funding of capital improvements and maintenance needs for the B-2, B-3 and B-4 Dams required because of the classification change;
 - An analysis of potential cost-share approaches to future capital and operation and maintenance costs of the B-2, B-3, and B-4 Dams. The Consultant will review and update available cost estimates for the B-2 and B-3 dams and develop a cost estimate for the B-4 dam. The cost estimate for the B-4 dam will be a planning level estimate based on current data available;
 - Conduct an assessment of the potential reclassification of the B-5 and B-6 dams including a high-level risk and financial implications and make recommendation(s) for potential improvements needed.
 - An assessment of the B Dams, including the liabilities and risks associated with potential future reclassification and therefore needing future improvements.
 - The Parties will meet with the Consultant to further jointly develop and modify the Scope as may be necessary. Before the Consultant begins the Study, each of the Parties shall confirm in writing (such as by email or otherwise) that any modifications to the Scope are acceptable. The total costs of the Study shall be limited to \$250,000.
3. **OUTCOME OF PROJECT AND SCOPE OF WORK.** The intent of this scope of work is to gather data and facts to develop recommendations for a second phase agreement that will identify a methodology to fund the capital improvements of the appropriate dams. The scope

of work will also evaluate alternatives for meeting long-term operations and maintenance responsibilities between the Parties, to be part of a second phase agreement. The stakeholders will need to actively participate and shape recommendations for the second phase IGA, so that it can be supported for implementation.

4. COOPERATION WITH THE STUDY. The County shall be responsible for engaging the Consultant to conduct the study. The Non-County Parties agree to cooperate in good faith with the County and the Consultant for the Study, including: developing and modifying the Scope, as necessary; reviewing and providing comments on draft analyses and reports generated by the Consultant as part of the Study in its development and completion; and providing information needed to complete the Study to the Consultant, in a timely manner. The County agrees to work in good faith to ensure that the Non-County Parties have a meaningful opportunity to review and provide comments as discussed above, and to address comments.

5. OWNERSHIP OF THE STUDY. Each of the Parties will be an owner of the Study and all other deliverables provided by the Consultant on the Study (including, but not limited to, analyses, analytical tools, data, models, and reports and drafts thereof). The County shall provide the Non-County Parties with a copy of the draft and final reports, as well as the data, analytical tools, and all other information generated by the Consultant in association with the Study that are related to their systems within 14 days of the County's receipt of the same, subject to the terms and conditions of this Agreement.

6. REIMBURSEMENT TO THE COUNTY. Each of the Non-County Parties shall pay the County 1/5th of the total cost of the Study, up to a maximum of \$50,000, within 45 days of receiving an invoice from the County for the same. The County may withhold providing any of the documents identified in Paragraph 5 to any Non-County Party until payment has been made by that Non-County Party.

7. FISCAL CONTINGENCY. Notwithstanding any other provisions of this Agreement to the contrary, the obligations of the Governmental 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. The failure of a Governmental Part to appropriate such funds shall be grounds for termination of this Agreement as to such Party upon written notice pursuant to Paragraph 11.

8. REMEDIES. If any Party fails to comply with the provisions of this Agreement, the other Parties, after providing prompt written notification to the noncomplying Party, and upon the failure of the noncomplying Party to achieve compliance within 35 days following receipt of such notice, may seek all such remedies available under Colorado law.

9. NO THIRD-PARTY BENEFICIARIES. This Agreement is entered into between the Parties for the purposes set forth herein. It is the intent of the Parties that they are the only beneficiaries of this Agreement and the Parties are only benefitted to the extent provided under the express terms and conditions of this Agreement.

With copy to: Larimer County Attorney's Office
PO Box 1606
Fort Collins, CO 80522

With copy to: Larimer County Engineering Department
Attn: County Engineer
200 West Oak St., Suite 3000; PO Box 1190
Fort Collins, CO 80522-1190

To North Poudre: General Manager
Tad Moen
North Poudre Irrigation
3729 Cleveland Ave
Wellington, CO 80549

With copy to: John Justus, Shareholder
Hoskin Farina & Kampf
PO Box 40
Grand Junction, CO 81502

To Timnath: Timnath Town Manager
4750 Signal Tree
Timnath, CO 80547

With copy to: Town Attorney
White Bear Ankele Tanaka & Waldron
2154 East Commons Avenue, Suite 2000
Centennial, CO 80122

With copy to: Donald Taranto
748 Whalers Way, Suite 200
Fort Collins, CO 80525

To Wellington: Town Administrator
PO Box 127,
Wellington, CO 80549

With copy to: Wellington Public Works
Attn: Robert Gowing
PO Box 127,
Wellington, CO 80549
Email: gowingbj@wellingtoncolorado.gov

With copy to:

March Olive and Pharris, LLC
Attn: Brad March
1312 S College Ave
Fort Collins, CO 80524
Email: Bmarch@bmarchlaw.com

13. CONSTRUCTION. This Agreement shall be construed according to its fair meaning as it was prepared by the Parties. Headings in this Agreement are for convenience and reference only and shall in no way define, limit, or prescribe the scope or intent of any provision of this Agreement.

14. ENTIRE AGREEMENT. This Agreement constitutes the entire agreement of the Parties regarding the matters addressed herein. This Agreement binds and benefits the Parties and their respective successors. Covenants or representations not contained in this Agreement regarding the matters addressed herein shall not bind the Parties.

15. REPRESENTATIONS. Each Party represents to the other parties that it has the power and authority to enter into this Agreement and the individual signing below on behalf of that Party has the authority to execute this Agreement on its behalf and legally bind that Party.

16. ASSIGNMENT. No Party may assign any rights or delegate any duties under this Agreement without the written consent of all other Parties.

17. SEVERABILITY. If any provision of this Agreement shall prove to be illegal, invalid, unenforceable or impossible of performance, the remainder of this Agreement shall remain in full force and effect.

[Remainder of Page Intentionally Blank]

CITY OF FORT COLLINS, COLORADO, a municipal corporation

By: _____
Darin A. Atteberry, City Manager

Date: _____

ATTEST:

By: _____
City Clerk

APPROVED AS TO LEGAL FORM:

By: _____
City Attorney's Office

LARIMER COUNTY, COLORADO, a political subdivision of the State of Colorado

By: _____

Date: _____

NORTH Poudre IRRIGATION COMPANY, a Colorado corporation

By: _____

Date: _____

TOWN OF TIMNATH, COLORADO, a municipal corporation

By: _____

Date: _____

TOWN OF WELLINGTON, COLORADO, a municipal corporation

By: _____

Date: _____