

RESOLUTION 2021-027
OF THE COUNCIL OF THE CITY OF FORT COLLINS
AUTHORIZING THE CITY MANAGER TO EXECUTE AN AGREEMENT WITH THE
UNITED STATES FISH AND WILDLIFE SERVICE TO FUND A
TEMPORARY POSITION TO WORK ON THE HALLIGAN WATER SUPPLY PROJECT

WHEREAS, the City is pursuing the Halligan Water Supply Project (“Halligan Project”), and is currently in a Clean Water Act Section 404 federal permitting process for that project under the Clean Water Act, the National Environmental Policy Act, and other federal laws, including the Endangered Species Act; and

WHEREAS, the United States Army Corps of Engineers (“Corps”) is the lead permitting agency in this federal permitting process; and

WHEREAS, the United States Fish and Wildlife Service (“FWS”) has regulatory authority over the conservation, protection, restoration, and management of fish, wildlife, native plants, and the habitat necessary for biologically sustainable populations of these species within the United States pursuant to the Endangered Species Act; and

WHEREAS, pursuant to Section 7 of the Endangered Species Act, the Corps is required to consult with the FWS on potential impacts to federally-listed species; and

WHEREAS, to facilitate a timely and successful consultation process, City staff and the FWS have negotiated an agreement, a copy of which is attached hereto as Exhibit “A” and incorporated herein by reference, pursuant to which a person acting as a liaison, who is employed and supervised by the FWS, but whose salary is fully funded by the City for up to three years, would work to coordinate meetings, communications, planning, technical assistance, and related activities between the FWS, the Corps, and the City; and

WHEREAS, City staff has recommended that the City execute this agreement to keep the Halligan Project’s federal permitting process moving forward towards a timely and successful completion.

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 on at a regular meeting of the Council of the City of Fort Collins this 2nd day of March, A.D. 2021.



Mayor

ATTEST:



City Clerk



INTERGOVERNMENTAL AGREEMENT
(City of Fort Collins - United States Fish and Wildlife Service)

THIS AGREEMENT ("Agreement") is made as of [insert date] ("Effective Date") by and between the UNITED STATES FISH AND WILDLIFE SERVICE ("Service") and THE CITY OF FORT COLLINS, COLORADO, a Colorado municipal corporation ("Fort Collins").

RECITALS

- A. Fort Collins is currently in the permitting process for a large water infrastructure project in the Cache la Poudre River Basin – the Halligan Water Supply Project ("Halligan Project"), which is regulated by § 404 of the Clean Water Act (33 U.S.C. § 1251), the National Environmental Policy Act (42 U.S.C. § 4321 *et seq.* ("NEPA")), and the Endangered Species Act (16 U.S.C. § 1531, *et seq.*).
- B. The U.S. Environmental Protection Agency ("USEPA") and U.S. Army Corps of Engineers ("USACE") have regulatory authority over waters of the United States pursuant to the federal Clean Water Act, 33 U.S.C. § 1251. *et seq.*
- C. The Service has regulatory authority over the conservation, protection, restoration, and management of fish, wildlife, native plants, and the habitat necessary for biologically sustainable populations of these species within the United States pursuant to the federal Endangered Species Act, 16 U.S.C. § 1531, *et seq.*, the Fish and Wildlife Coordination Act, 16 U.S.C. § 661-666(c), the Fish and Wildlife Act of 1956, 16 U.S.C. § 742(f), *et seq.*, and other provisions of federal law.
- D. The USACE is preparing an Environmental Impact Statement under NEPA as the lead agency for the proposed Halligan Project. Per section 7 of the Endangered Species Act, the USACE is required to consult with the Service on potential impacts to federally-listed species including, but not limited to, the Preble's Meadow Jumping Mouse (PMJM) and its habitat.
- E. The Service will provide formal consultation and technical assistance to the USACE for potential impacts caused by the Halligan Project to federally-protected species in accordance with the Endangered Species Act ("Consultation") and has agreed to provide oversight and technical analysis and guidance on the development of Fort Collins' mitigation plan to offset Halligan Project's potential impacts ("Planning Support").
- F. In order to facilitate a timely Consultation and comprehensive Planning Support, the Service and Fort Collins agree that a person acting as a liaison, who is employed and supervised by the Service, but whose salary is fully funded by Fort Collins pursuant to the terms and conditions of this Agreement, working to coordinate meetings, communications, planning, technical assistance, and related activities between the parties ("Liaison") would be a significant factor in the success of the Consultation and Planning Support.

G. Fort Collins is authorized to cooperate or contract with the Service pursuant to Resolution No. ___ and C.R.S. §29-1-203(1).

NOW, THEREFORE, in consideration of the mutual promises contained herein, the Service and Fort Collins hereby agree as follows:

AGREEMENT

1. Purpose. The purpose of this Agreement is to establish an understanding between the Service and Fort Collins as to responsibilities of the parties and to establish the role and duties of the Liaison.

2. Fort Collins' Agreement. Fort Collins agrees:

a. That the Liaison will be employed and supervised by the Service, but that the Liaison's position will be fully funded by Fort Collins pursuant to the terms and conditions of this Agreement.

b. That the annual payment for each year of this Agreement shall be \$120,000.00 ("Annual Payment"), subject to the terms of Paragraph 3.e and Fort Collins' rights to terminate under Paragraph 5. The Annual Payment for the first year of this Agreement shall be due within thirty (30) days of the Effective Date of this Agreement. The Annual Payments for the second and third year shall be due as described in Paragraph 3.e.

c. To cooperate in the exchange of nonprivileged and nonconfidential information between Fort Collins and the Service including that which involves information regarding potential Endangered Species Act ("ESA") violations;

d. To include the Liaison in all pertinent meetings, discussions, activities, site visits, etc., that the position might need to attend or participate in or to facilitate permitting, consultation, compliance, and/or decision-making;

e. To coordinate with the Liaison position to facilitate any threatened and endangered species or migratory bird procedures that normally would require direct contact or consultation with the Service;

f. That the work priorities of the Liaison position will be: first, the Halligan Project; second, the Poudre Hydrologic Unit Code, Species Conservation Team; and third, other projects as determined by the Service, in cooperation with the Fort Collins, based on overall need and urgency.

3. The Service's Agreement. The Service agrees:

a. To provide a federal vehicle for use by the Liaison;

- b. To provide a work location at the Service, office equipment, and telecommunications access to the Liaison.
- c. To provide supervision that will guide and direct daily tasks of the Liaison, including defining the Liaison's work schedule.
- d. To provide employment benefits to the Liaison.
- e. To review and respond to the Fort Collins submissions in a timely manner after receipt of complete project documentation.
- f. To submit an annual Notice of Payment Due to Fort Collins for the second and third years of this Agreement, to be sent between thirty (30) and sixty (60) days prior to the anniversary of the Effective Date of this Agreement. The Annual Payment for the second and third years of this Agreement shall be due within thirty (30) days of Fort Collins' receipt of the notice.

4. Joint Agreement. The Service and Fort Collins jointly agree:

- a. To consider the decisions made by the Liaison to be decisions made by an authority / employee of the Service;
- b. That the Liaison's duties will include, but are not limited to, providing Consultations under the Endangered Species Act; providing technical analysis and assistance to reduce the Halligan Project's potential impacts on federally protected species, including but not limited to PMJM; participating in field surveys of protected species where needed; participating in regular meetings with Fort Collins and USACE; reviewing NEPA documents for the Halligan Project; providing Planning Support; and coordinating with Fort Collins, federal, state, local agencies, stakeholder groups, and property owners to effectuate Fort Collins' conservation program and mitigation plan.
- c. That the Service will conduct the Liaison's performance reviews and ratings.
- d. That the parties to this Agreement will act in an independent capacity in the performance of their respective functions under this Agreement; and neither party shall be construed as the officer, agent, or employee of the other.

5. Term and Termination. Unless this Agreement is extended and/or amended by the parties in in writing, the term of this Agreement shall be for three (3) years from the Effective Date. Fort Collins may terminate this Agreement within thirty (30) days of receipt of the Notice of Payment Due under Paragraph 3.e. In addition, either party may terminate this Agreement for good cause at any additional time after providing sixty (60) days written notice to the other party. If Fort Collins terminates the Agreement, the Service may collect actual costs incurred prior to the notice of termination plus any reasonable termination costs the Service actually incurred. Any excess funds shall be refunded to Fort Collins.

6. Remedies. If either party fails to comply with the provisions of this Agreement, the other party, after providing prompt written notification to the noncomplying party, and upon the failure of the noncomplying party to achieve compliance within thirty (30) days following receipt of such notice, may seek all such remedies available under law, excluding exemplary and punitive damages.

7. Program Contingency. This Agreement is contingent upon the Service having the appropriate staffing/personnel to provide the service identified herein.

8. Fiscal Contingency. Pursuant to Colorado law, this Agreement is subject to the adequate appropriation of funds by Fort Collins in any given fiscal year. When funds are not appropriated or otherwise made available to support the continuation of the Liaison's performance under this Agreement in a subsequent fiscal period, Fort Collins shall provide the Service with a sixty (60) calendar day notice, specifying whether the termination date will either be the 60th day of notice or the anniversary of the Effective Date of this Agreement. If the termination date occurs after all funds allocated to the Service have been expended, the Service shall bill, and Fort Collins shall pay, the difference, if any, for any continued work by the Liaison under this Agreement up and through the date of termination. If the termination date occurs before all funds allocated to the Service have been expended, the Service shall refund Fort Collins all funds remaining after the date of termination.

9. Entire Agreement. This Agreement contains the entire understanding and agreement between the parties hereto with respect to its subject matter and supersedes any and all previous communications, negotiations, representations, proposals, and agreements, whether written or oral, respecting that subject matter.

10. Notice. Any notice, report or other communication required or provided for under this Agreement shall be personally delivered, sent by email (preferred), or delivered by United States mail, first class postage prepaid, to the following addresses or such other addresses as may be provided by notice to the other party:

U.S. Fish and Wildlife Service
Attn: Colorado Field Office Supervisor
P.O. Box 25486, DFC (65412)
Denver, Colorado 80225
Phone: 303 236-4773
Email address: ColoradoES@fws.gov

City of Fort Collins
Attn: Halligan Project Manager
Eileen Dornfest
PO Box 580
Fort Collins, CO 80522
Edornfest@fcgov.com and Halligan@fcgov.com

11. Governing Law. The validity and performance of this Agreement shall be governed

by and interpreted in accordance with the laws of the State of Colorado.

12. Assignment. This Agreement may not be assigned.
13. Modification. This Agreement may not be modified except in writing by the parties hereto.
14. Severability. If any provision of this Agreement is determined to be unenforceable for any reason, this Agreement shall be null and void.
15. Counterparts. This Agreement may be executed in two or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same document. The Agreement may be executed and delivered by electronic signature by any of the parties and all parties consent to the use of electronic signatures.

IN WITNESS WHEREOF, the undersigned have executed this Agreement on the date specified below.

**THE UNITED STATES FISH AND WILDLIFE
SERVICE**

Date: _____

By: _____
Stephen Small, Assistant Regional Director
Ecological Services, DOI Regions 5/7
Lakewood, Colorado

**THE CITY OF FORT COLLINS, COLORADO,
a Colorado municipal corporation,**

Date: _____

By: _____
Darin Atteberry, City Manager

ATTEST:

By: _____
City Clerk

Name: Delynn Coldiron

APPROVED AS TO LEGAL FORM:

By: _____
Eric Potyondy, Assistant City Attorney