



**COLORADO SPRINGS UTILITIES BOARD**  
 MS Teams  
 and Blue River Board Room  
 Plaza of the Rockies  
 121 S. Tejon Street  
 South Tower, 5<sup>th</sup> Floor

**AGENDA**  
**Wednesday, January 18, 2023**  
**1:00 p.m.**  
 Join on your computer or mobile app  
[Click here to join the meeting](#)  
 Or call in (audio only)  
[+1 719-733-3651,,36257580#](#)

<b>1:00 p.m.</b>	<b>1.</b> Call to Order	Chair Wayne Williams	
<b>1:05 p.m.</b>	<b>2.</b> Invocation and Pledge of Allegiance		
<b>1:10 p.m.</b>	<b>3.</b> Consent Calendar	Chair Wayne Williams	
	<b>These items will be acted upon as a whole, unless a specific item is called for discussion by a Board Member or a citizen wishing to address the Utilities Board. (Any items called up for separate consideration shall be acted upon following Compliance Reports.)</b>		
	3a. Approval of Utilities Board Meeting Minutes: December 12, 2022	Chair Wayne Williams	<b>Approval</b>
	3b. Approval of Utilities Board Special Meeting Minutes: January 4, 2023		
	3c. A Resolution Appointing Kim Gortz to the Homestake Steering Committee and the Board of Directors of the Aurora-Colorado Springs Joint Water Authority		
<b>1:20 p.m.</b>	<b>4.</b> Recognition: <ul style="list-style-type: none"> <li>• AdAmAn Alley</li> </ul>	Lisa Barbato, Systems Planning and Projects Officer	<b>Information</b>
<b>1:30 p.m.</b>	<b>5.</b> Customer Comments	Chair Wayne Williams	<b>Information</b>

- During the customer comment period, comments are accepted for any topic not on the agenda.
- Comments for specific agenda items will be taken following the presentation of the item and the Board’s discussion.
- Comments will be limited to three minutes per speaker.
- Following the comments from customers that have signed up to speak, an announcement will be made seeking additional comments and the Board will accept all those wishing to comment.

<b>1:40 p.m.</b>	<b>6.</b>	Compliance Reports:  I-6 Infrastructure  E-2 CEO Responsibilities <ul style="list-style-type: none"> <li>• Water Outlook</li> <li>• ECA/GCA</li> </ul>	Travas Deal, Acting Chief Executive Officer	<b>Monitoring</b>
<b>1:45 p.m.</b>	<b>7.</b>	Items Called Off Consent Calendar		
<b>1:50 p.m.</b>	<b>8.</b>	Lower Fountain Metropolitan Sewage Disposal District Service Agreement Amendment	Tara Kelley, Resource Recovery Facilities Manager  Bethany Burgess, Division Chief – Utilities, Office of the City Attorney	<b>Discussion</b>
<b>2:10 p.m.</b>	<b>9.</b>	Rail Served Industrial Park Trackage Agreement	Bethany Burgess, Division Chief – Utilities, Office of the City Attorney	<b>Discussion</b>
<b>2:30 p.m.</b>	<b>10.</b>	Acquisition of Real Property to be Used for the Central Substation Project	Jessica Davis, Information	<b>Discussion</b>

Technology  
Manager

**2:50  
p.m.**

**11.** Board Member Updates

Board of  
Directors

**Information**

**3:00  
p.m.**

**12.** Executive Session

*In accordance with City Charter art. III, § 3-60(d) and its incorporated Colorado Open Meetings Act, C.R.S. § 24-6-402(4)(b), (c), (e), (f), and (g) and Utilities Board Bylaw Rules 10(c)(2), (3), (5), (6), and (7), the Utilities Board, in Open Session, is to determine whether it will hold a Closed Executive Session. The issue to be discussed involves conferences with the City Attorney's Office for the purpose of receiving legal advice on specific legal questions, matters required to be kept confidential by federal or state law or rules and regulations, developing strategy for negotiations and instructing negotiators, a personnel matter, and consideration of documents protected by the mandatory nondisclosure provisions of part 2 of article 72 of title 24 of the Colorado Revised Statutes, all involving the Chief Executive Officer position.*

Bethany Burgess,  
Division Chief –  
Utilities, Office of  
the City Attorney

*The City Attorney's Office, on behalf of the Chair of the Utilities Board, shall poll the Utilities Board members, and, upon consent of two-thirds of the members present, may conduct a Closed Executive Session. In the event any Utilities Board member is participating electronically or telephonically in the Closed Executive Session, each Utilities Board member participating electronically or telephonically in the Closed Executive Session shall affirmatively state for the record that no other member of the public not authorized to participate in the electronic Closed Executive Session is present or able to hear the matters discussed as part of the Closed Executive Session. If consent to the Closed Executive Session is not given, the item may be discussed in Open Session or withdrawn from consideration.*

**4:30  
p.m.**

**13.** Adjournment

Chair Wayne  
Williams

**MINUTES**  
**Colorado Springs Utilities Board Meeting**  
**Monday, Dec. 12, 2022**

**Utilities Board members present via Microsoft Teams or Blue River Conference Room:**

Chair Wayne Williams, Vice Chair Mike O'Malley, Dave Donelson, Randy Helms, Bill Murray, Nancy Henjum, Tom Strand, and Yolanda Avila

**Utilities Board members excused:** Stephannie Fortune

**Staff members present via Microsoft Teams or Blue River Conference Room:** Travas Deal, Tristan Gearhart, Renee Adams, Mike Francolino, Bethany Schoemer, Natalie Watts, Andie Buhl, Abby Ortega, Joe Awad, Kim Gortz, Monica Indrebo, Andy Colosimo, Kalsoum Abbasi, Jonathan Liepe, Heather Harvey and Tyler Benton

**City of Colorado Springs staff members present via Microsoft Teams or Blue River Conference Room:** Mayor John Suthers, Ryan Trujillo, Bethany Burgess, Alex Ryden, Michael Montgomery, Michael Gustafson, Jacquie Rowland, and Tracy Lessig

**Citizens present via Microsoft Teams or Blue River Conference Room:** Chaplain Bob Swales, Kevin Walker, Mike Ruebenson, Don Gravette, and David Robbins

**1. Call to Order, Invocation and Pledge of Allegiance**

Chair Wayne Williams called the Utilities Board meeting to order at 2:13 p.m. Chaplain Bob Swales from the El Paso County Sheriff's Office delivered the invocation and Chair Williams led the Pledge of Allegiance.

**2. Roll Call and Executive Session**

Ms. Bethany Burgess, City Attorney – Division Chief, read the following language to enter Executive Session:

*In accordance with City Charter art. III, § 3-60(d) and its incorporated Colorado Open Meetings Act, C.R.S. § 24-6-402(4)(b) and Utilities Board Bylaw Rules 10(c)(2), the Utilities Board, in Open Session, is to determine whether it will hold a Closed Executive Session. The issue to be discussed involves consultation with the City Attorney and retained counsel for the purpose of receiving legal advice on a specific legal question related to a water law issue.*

*The City Attorney's Office, on behalf of the Chair of the Utilities Board, shall poll the Utilities Board members, and, upon consent of two-thirds of the members present, may conduct a Closed Executive Session. In the event any Utilities Board member is participating electronically or telephonically in the Closed Executive Session, each Utilities Board member participating electronically or telephonically in the Closed Executive Session shall affirmatively state for the record that no other member of the public not authorized to participate in the electronic Closed Executive Session is present or able to hear the matters discussed as part of the Closed Executive Session. If consent to the Closed Executive Session is not given, the item may be discussed in Open Session or withdrawn from consideration.*

Ms. Burgess called the roll and polled the Utilities Board. They voted unanimously to enter Executive Session at 2:18 p.m. They exited Executive Session and took a break at 3:54 p.m. They returned to Open Session at 4:03 p.m.

**3. Consent Calendar**

**3a. Approval of Minutes: November 16, 2022**

**3b. Resolution of Appointment for New UPAC Alternate Member Scott Smith**

**3c. (E-2.3) 2023 Policy Governance Monitoring Report Frequency and Method**

**3d. (P-1.2) 2023 Annual Board Agenda Planning Calendar**

**3e. (P-5.4) 2023 Committee Work Plans**

Board Member Strand moved approval of the Consent Calendar and Vice Chair O'Malley seconded the motion. The Consent Calendar was unanimously approved.

**4. Customer Comments**

There were none.

**5. Compliance Reports**

- (I-1) Pricing of Services: G-5, G-6
- E-2 CEO Responsibilities
  - Water Outlook

Chair Williams explained that compliance reports are on the agenda by exception and asked if there were any questions. There were none.

**6. Items Called Off Consent Calendar**

None

**7. (P-5.4) 2022 Utilities Board and Committee Accomplishments**

Chair Williams said this item is by exception and asked if there were any questions. There were none.

**8. Amendment to Water Rights Purchase and Sale Agreement**

Ms. Abby Ortega, General Manager of Resource Infrastructure Planning, explained how Colorado Springs Utilities entered into a Purchase and Sale Agreement to acquire 80 shares in the Fort Lyon Canal Company, which will yield an average of 80 acre-feet per year and the right to use an additional 105 shares 3 out of every 10 years from Mr. Thad Wertz and Mrs. Sierra Wertz, as well as water delivery easements on the property. City Council approved the acquisition on Oct. 11, 2022 through Resolution 150-22.

Ms. Ortega said the Wertz's have requested an amendment to the Purchase and Sale Agreement to remove the Water Sharing Shares from the transaction. Springs Utilities' staff is in support of the proposed amendment. If approved, the cost of the acquisition would be reduced to \$520,000, which is \$204,750 less than originally approved price of \$724,750 purchase price. She said a revised resolution will be brought to City Council in January 2023.

#### **9. An Ordinance Pertaining to the Extension of Water Service**

Ms. Ortega reviewed the current City Code and proposed language for the water ordinance. She said a clear process is needed for defining and evaluating available surplus water supplies – and that it is recommended an evaluation happens at the time of annexation.

Ms. Ortega defined “surplus” as it should not result in excess resource development, and development of new resources should not excessively exceed the forecasted need. She said it must balance timing of investments and cost recovery, and future acquisitions and infrastructure investments need to keep pace with growth/development. Ms. Ortega said the methodology is quantifying, a risk-based measure and based on margin of variability and estimated in-city growth. She said it is recommended that 130% of existing usage defined as five-year unrestricted average usage (weather normalized data).

Ms. Ortega explained the proposed language for the ordinance, as well as the arguments for and against the ordinance. Mr. Tristan Gearhart, Chief Planning & Finance Officer, explained the Water Resource Fee.

#### **Customer comment:**

Mr. Kevin Walker provided an update from the Housing & Building Association (HBA) about the water ordinance pertaining to its timeline and gathering information for the HBA's recommendation.

Mr. Mike Ruebenson, Chief Operating Officer of La Plata, asked the Utilities Board to grandfather-in the Amara development under the guidelines of the water ordinance, if passed.

Mr. Don Gravette expressed concerns about the water ordinance – specifically, regarding its numbers and guidelines.

Chair Williams concluded with a process review for the water ordinance.

The Utilities Board took a break at 5:12 p.m. and returned at 5:41 p.m.

#### **10. CEO Recruitment Update**

Ms. Renee Adams, Chief Administrative and Human Resources Officer, provided an update on the CEO recruitment process including an updated timeline.

Board Members discussed how and where public input should be integrated into the process. They agreed that public input should be integrated somewhere into the process but would revisit the topic as to when to seek it, at the January Utilities Board meeting.

#### **11. Board Member Updates**

Board Member Donelson thanked Springs Utilities for the tour of Kettle Creek natural gas project that he went on. Board Members Helms and echoed his statement.

#### **12. Executive Session**

Ms. Burgess read the following language to enter Executive Session:

*In accordance with City Charter art. III, § 3-60(d) and its incorporated Colorado Open Meetings Act, C.R.S. § 24-6-402(4)(b), (f), and (g) and Utilities Board Bylaw Rules 10(c)(2), (6), and (7), the Utilities Board, in Open Session, is to determine whether it will hold a Closed Executive Session. The issue to be discussed involves conferences with the City Attorney's Office for the purpose of receiving legal advice on specific legal questions, a personnel matter, and consideration of documents protected by the mandatory nondisclosure provisions of part 2 of article 72 of title 24 of the Colorado Revised Statutes, all involving the Chief Executive Officer position.*

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Ms. Burgess polled the Utilities Board and they voted unanimously to enter Executive Session at 6:25 p.m.

The Utilities Board returned to Open Session at 7:00 p.m. and Ms. Heather Harvey, Human Resources Manager, reviewed potential options for sharing the Pulse Survey results.

Board Member Donelson made a motion to share Pulse Survey results with employees and to theme the answers for the open-ended question. Board Member Helms seconded the motion. The motion carried unanimously.

**13. Adjournment**

The meeting adjourned at 7:08 p.m.

**MINUTES**  
**Colorado Springs Utilities Special Board Meeting**  
**Wednesday, Jan. 4, 2023**

**Utilities Board members present via Microsoft Teams or Blue River Conference Room:**

Chair Wayne Williams, Vice Chair Mike O'Malley, Dave Donelson, Randy Helms, Bill Murray, Nancy Henjum, Stephannie Fortune, Tom Strand, and Yolanda Avila

**Staff members present via Microsoft Teams or Blue River Conference Room:** Renee Adams, Bethany Schoemer, Natalie Watts, Andie Buhl, Jonathan Liepe, Heather Harvey, Al Wells and Monica Indrebo

**City of Colorado Springs staff members present via Microsoft Teams or Blue River Conference Room:** Bethany Burgess and Tracy Lessig

**1. Call to Order**

Chair Wayne Williams called the special Utilities Board meeting to order at 3:31 p.m. and Ms. Andie Buhl, Utilities Board Administrator, called the roll.

**2. Executive Session**

Ms. Bethany Burgess, City Attorney – Division Chief, read the following language to enter Executive Session:

*In accordance with City Charter art. III, § 3-60(d) and its incorporated Colorado Open Meetings Act, C.R.S. § 24-6-402(4)(b), (c), (f), and (g) and Utilities Board Bylaw Rules 10(c)(2), (3), (6), and (7), the Utilities Board, in Open Session, is to determine whether it will hold a Closed Executive Session. The issue to be discussed involves conferences with the City Attorney's Office for the purpose of receiving legal advice on specific legal questions, matters required to be kept confidential by federal or state law or rules and regulations, a personnel matter, and consideration of documents protected by the mandatory nondisclosure provisions of part 2 of article 72 of title 24 of the Colorado Revised Statutes, all involving the Chief Executive Officer position.*

*The City Attorney's Office, on behalf of the Chair of the Utilities Board, shall poll the Utilities Board members, and, upon consent of two-thirds of the members present, may conduct a Closed Executive Session. In the event any Utilities Board member is participating electronically or telephonically in the Closed Executive Session, each Utilities Board member participating electronically or telephonically in the Closed Executive Session shall affirmatively state for the record that no other member of the*

*public not authorized to participate in the electronic Closed Executive Session is present or able to hear the matters discussed as part of the Closed Executive Session. If consent to the Closed Executive Session is not given, the item may be discussed in Open Session or withdrawn from consideration.*

Ms. Burgess called the roll and polled the Utilities Board. They voted unanimously to enter Executive Session at 3:34 p.m. They exited Executive Session and took a break at 5:05 p.m. They returned to Open Session at 5:20 p.m.

**3. Adjournment**

The meeting adjourned at 7:10 p.m.

# Board Memo Agenda Item

## Staff Report

**Date:** Jan. 18, 2023  
**To:** Utilities Board  
**From:** Travas Deal, Acting Chief Executive Officer  
**Subject:** A Resolution Appointing Kim Gortz to the Homestake Steering Committee and the Board of Directors of the Aurora-Colorado Springs Joint Water Authority

### NARRATIVE:

**Desired Action:** Approval

**Executive Summary:** Pat Wells was recently a member of the Homestake Steering Committee, serving a three-year term effective Jan. 1, 2022 and expiring Dec. 31, 2024; and a member of the Board of Directors of the Aurora-Colorado Springs Joint Water Authority, effective Jan. 15, 2022 and expiring Jan. 14, 2025.

Pat Wells decided to pursue other opportunities in November 2022. Kim Gortz, Manager, Water Resources Management, has been selected to fill the remainder of the vacated three-year term as a member of the Homestake Steering Committee effective Jan. 18, 2023 and ending on Dec. 31, 2024; and as a member of the Board of Directors of the Aurora-Colorado Springs Joint Water Authority effective Jan. 18, 2023 and ending Jan. 14, 2025.

**Benefits:** Representation for Colorado Springs Utilities on the Homestake Steering Committee and the Board of Directors of the Aurora-Colorado Springs Joint Water Authority

**Board Policy:** UBA-4: Appoint directors and representatives to water authorities, partnerships, joint ventures, and similar entities in which Colorado Springs Utilities participates

**Cost/Budget:** N/A

**Affected Parties:** Colorado Springs Utilities and Aurora Water

**Alternatives:** N/A

**Submitter:** Debra Mazza

**Email address:** dmazza@csu.org

**Division/** System Planning & Projects/Water

**Phone number:** (719) 668-8016

**Department:** Resources Management

**Date submitted:** Dec. 16, 2022

**SPG Staff Use Only:** Consent Calendar  Yes

No

**ITEM NO. 3**

RESOLUTION NO. 23-01

A RESOLUTION OF THE COLORADO SPRINGS UTILITIES BOARD OF DIRECTORS APPOINTING KIM GORTZ TO FILL A VACATED TERM ON THE HOMESTAKE STEERING COMMITTEE AND THE BOARD OF DIRECTORS OF THE AURORA-COLORADO SPRINGS JOINT WATER AUTHORITY

WHEREAS, Pat Wells was recently a member of the Homestake Steering Committee effective January 1, 2022 and expiring on December 31, 2024; and as a member of the Board of Directors of the Aurora-Colorado Springs Joint Water Authority effective January 15, 2022 and expiring January 14, 2025.

WHEREAS, Pat Wells decided to pursue other opportunities in November 2022.

WHEREAS, Kim Gortz has been selected to fill the remainder of the vacated three-year terms on the Homestake Steering Committee and the Board of Directors of the Aurora-Colorado Springs Joint Water Authority.

**NOW, THEREFORE, BE IT RESOLVED BY THE BOARD OF DIRECTORS OF COLORADO SPRINGS UTILITIES:**

Kim Gortz is appointed as a member of the Homestake Steering Committee effective January 18, 2023 and ending on December 31, 2024; and as a member of the Board of Directors of the Aurora-Colorado Springs Joint Water Authority effective January 18, 2023 and ending January 14, 2025.

DATED at Colorado Springs, Colorado, this 18<sup>th</sup> day of January 2023.

\_\_\_\_\_  
Wayne Williams, Utilities Board Chair

ATTEST:

\_\_\_\_\_  
Travas Deal, Acting Secretary

# Board Memo Agenda Item

## Staff Report

**Date:** Jan. 18, 2023  
**To:** Utilities Board  
**From:** Travas Deal, Acting Chief Executive Officer  
**Subject:** Recognition: AdAmAn Alley

### NARRATIVE:

**Desired Action:** Information

### Executive Summary:

On Sep. 26, 2022, the City of Colorado Springs and Colorado Springs Utilities completed a unique six-utility collaborative project in support of the AdAmAn Alley transformation.

The \$1.2 million utilities project consisted of rehabilitation, replacement and installation of new gas, electric, water, storm water, wastewater and telecommunications infrastructure all located within the narrow alleyway. Repaving and grading of the alley were also included.

**Benefits:** These upgrades will increase service reliability, safety, and quality to our downtown businesses, customers and partners.

**Board Policy:** N/A

**Cost/Budget:** \$1.2 million

**Affected Parties:** Downtown Partnerships, AdAmAn Alley Beautification Project, City of Colorado Springs and downtown businesses

**Alternatives:** N/A

<b>Submitter</b> Tara McGowan	<b>Email address:</b> tmcgowan@csu.org
<b>Division/ Department:</b> Systems Planning & Projects/ Engineering & Design Department	<b>Phone number:</b> (719) 491-2717
	<b>Date submitted:</b> Jan. 6, 2023

**SPG Staff Use Only:** Consent Calendar

Yes

**X**

No

**ITEM NO. 4**



**Date:** Jan. 18, 2023

**To:** Utilities Board

**From:** Travas Deal, Acting Chief Executive Officer

**Subject:** **Excellence in Governance Compliance Report Infrastructure (I-6)**

**Desired Action:** Monitoring

**Compliance:** The CEO reports compliance with the instructions.

INSTRUCTIONS			
Category:	<b>Utilities Board Instructions to the Chief Executive Officer</b>	Reporting Timeframe:	<b>July 1, 2022 – January 1, 2023</b>
Policy Title (Number):	<b>Infrastructure (I-6)</b>	Reviewing Committee:	<b>Strategic Planning</b>
Monitoring Type:	<b>Internal</b>		
Monitoring Frequency:	<b>Semi-Annual</b>		
Guidelines:	<b>Urban Planning Area Utility Infrastructure Master Plan (G-12)</b>		

**The Chief Executive Officer shall direct that annual, five-year and twenty-year infrastructure plans are developed for each utility service. Accordingly, the CEO shall:**

- 1. Use a reasonable planning period to meet obligation to serve requirements for current and future customers.*

Customer needs, operational and regulatory requirements specific to each service and system define plans with a variety of planning horizons and update frequencies for each plan, detailed in the following table of this report. The Annual Operating and Financial Plan (AOFPP) allocates resources to fund the work required to accomplish strategic initiatives and meet strategic objectives.

- 2. Base plans on operational and regulatory requirements to provide safety, system reliability and security.*

Colorado Springs Utilities manages all resource and infrastructure planning based on accepted professional and industry practices, regulatory requirements and prudent planning requirements associated by developing a system plan for each service. This includes integrated resource plans, facility plans and program plans. Integrated resource

plans are evaluated annually. Replacement and program plans are also updated annually. Facility plans are updated every five years.

- 3. Maintain an organization-wide long-range infrastructure plan that considers the annual impact to the typical customer bill, maintains strong financial metrics, and sequences infrastructure projects to the extent operationally and financially practical.*

Long-range plans have a minimum of 20 years for a planning horizon and address organizational, operational and financial requirements to maintain a competitive position in each of the Board's strategic focus areas of rates, reliability and relationships. Projects will be sequenced to moderate the impact on the total four-service bill and maintain infrastructure reliability across all four services.

- 4. Plan for replacement of aging infrastructure, information and operational technology upgrades, utility relocations for public works and road projects, life extension of existing systems and services to approved contract customers.*

The Annual Operating Financial Plan funds projects for the renewal and replacement of aging infrastructure, life extension of systems and services. These projects require coordination with the City, if required, and approved contract customers as appropriate. Informational and technology upgrades are also addressed in the Annual Operating and Financial Plan as well as the 5- and 20-year capital plans.

- 5. Coordinate infrastructure planning with the Municipal Government's Strategic Plan, Comprehensive Plan and Annexation Policy and other governmental agency plans.*

Colorado Springs Utilities coordinates planning efforts in conjunction with the Municipal Government's Strategic Plan, Comprehensive Plan, Annexation Policy as well as other governmental agency plans.

Additionally, Colorado Springs Utilities representatives participate throughout the Municipal Government's land development review process to ensure coordination of activities, compliance with regulations and pursue opportunities to improve the delivery of services.

Staff actively supports the Municipal Government's Annexation Steering Committee, the Municipal Governments' Land Development Technical Committee, Special District Committee, Rapid Response Team and other committees related to utility infrastructure standards. Staff does this to coordinate and support community development activities to provide expedited response levels to stakeholders and economic development prospects.

In addition to coordinating with the Municipal Government, staff also works with the Housing and Building Association of Colorado Springs (HBA), Affiliated Commercial Construction Association (ACCA), the Pikes Peak Regional Building Department (PPRBD) and other development community stakeholders to identify and implement improvements to the land development review process and Line Extension and Service Standards.

#### **G-12 Guideline: Urban Planning Area Utility Infrastructure Master Plan**

- 1. Develop and maintain an Urban Planning Area Utility Infrastructure Master Plan which identifies objectives, strategies, and principles for urban planning area redevelopment.*

- 2. The Master Plan will align with Colorado Springs Utilities' Strategic Plan, Integrated Resource Plans, PlanCOS and other City master plans.*

The Urban Planning Area Utility Infrastructure Master Plan team analyzed future population and utility load growth in areas with existing utility infrastructure. The analysis identified the need to upgrade electric, gas, water and wastewater infrastructure to improve the reliability of utility systems and support future growth.

Per Springs Utilities' leadership, the Utilities Reliability Program (URP) was established to proactively and holistically address existing infrastructure within developed urban areas. The aim of the program is to identify, assess, prioritize, and coordinate concurrent operating and maintenance (O&M), and capital construction projects across all Springs Utilities' services. The program provides benefits to Springs Utilities and its customers by maximizing project budgets through economy of scale opportunities, improving the reliability of existing infrastructure, and priming the utility systems for future city growth. The program began in January 2021.



**Date:** Jan. 18, 2023

**To:** Utilities Board

**From:** Travas Deal, Acting Chief Executive Officer

**Subject:** **Excellence in Governance Monitoring Report**  
**Utilities Board/Chief Executive Officer Partnership Expectations (E-2)**

**Desired Action:** Monitoring

EXPECTATIONS	
Category:	<b>Utilities Board/Chief Executive Officer Partnership Expectations</b>
Policy Number:	<b>E: 2 (Chief Executive Officer Responsibilities)</b>

**January 2023 Water Outlook using data as of December 31, 2022**

Locally, temperatures were below average, and precipitation was above average in December. Demands were more than last year at this time.

**2022 Demands:** December use averaged 44.2 million gallons per day (MGD), which was about 6.8% more than last December. 2022 demand averaged 64.7 MGD, which is 2.1% more than last year. Temperatures in December were below the 30-year average at 31.0 degrees Fahrenheit, which is 1.0 degree below normal. 2022 temperatures averaged 51.5 degrees Fahrenheit, which is 0.9 of a degree above normal. Total precipitation for December was 0.50 inches, which is 217% of normal. 2022 precipitation was 13.55 inches, which is 85% of normal.

**Current Reservoir Levels:** Local storage is currently at about 42,550 acre-feet (61% of capacity). The 1991-2020 average is 67% of capacity. Rampart Reservoir is at 63% of capacity, and Pikes Peak storage is at 57% of capacity. System wide, total storage is about 185,300 acre-feet (72% of capacity). Last year at this time, total system wide storage was 73% of capacity. It was about 72% at this same time in 2020, about 81% of capacity in 2019, about 74% of capacity in 2018, about 84% of capacity in 2017, about 78% of capacity in 2016, about 81% of capacity in 2015, about 78% of capacity in 2014, and about 56% in 2013. The 1991-2021 average system wide storage for the end of December is 73% of capacity.

**Water Supply Outlook:** Snowpack is above average in northern and western Colorado, and below average in the Arkansas River Basin. The three-month climate outlook predicts higher chances of above-average temperatures and higher chances of below-average precipitation

across Colorado. We continue to monitor snowpack, demand, and storage to maximize available water supply.

**Operational Notes:** Total system storage is at 72% of capacity and holds about 2.6 years of demand, which is slightly below average for the end of December. Local storage contains about 206 days of demand.

#### Electric Cost Adjustment (ECA)

On Nov. 22, 2022, City Council approved the ECA rate of \$0.0391 per kWh effective Dec. 1, 2022. As of Dec. 31, 2022, the ECA over collection balance was \$1.1 million. The balance changed by \$4.1 million from the \$3.0 million under collection balance reported last month. Colorado Springs Utilities continues to provide regular updates to the Utilities Board and will propose adjustments as appropriate.

#### Gas Cost Adjustment (GCA)

On Nov. 22, 2022, City Council approved the GCA rate of \$0.6008 per Ccf effective Dec. 1, 2022. As of Dec. 31, 2022, the GCA over collection balance was \$5.3 million. The balance changed by \$1.8 million from the \$3.5 million over collection balance reported last month. Colorado Springs Utilities continues to provide regular updates to the Utilities Board and will propose adjustments as appropriate.



Colorado Springs Utilities  
*It's how we're all connected*

# Water Outlook

Justin Zeisler, P.E.

Water Resource Engineer, Water Conveyance

January 1, 2023

# Local Weather Conditions as of December 31, 2022

## Precipitation (Inches of Moisture)

- December 2022 – 0.50 in. (217% of normal)
- 2022 YTD Total – 13.55 in. (85% of normal)

## Average Temperature (Degrees F)

- December 2022 – 31 Deg. (1.0 deg. below normal)
- 2022 YTD Average – 51.5 Deg. (0.9 deg. above normal)

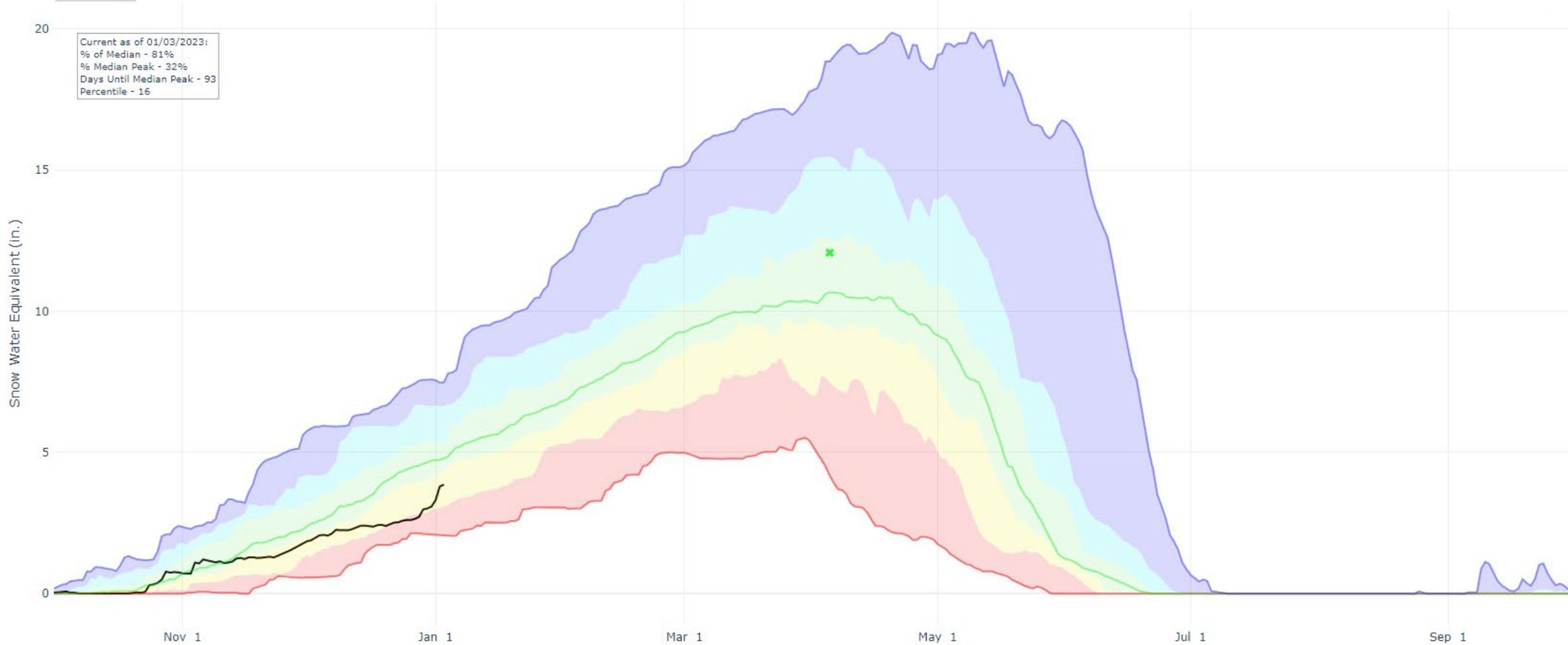


SNOW WATER EQUIVALENT IN UPPER ARKANSAS

**Snowpack in the Arkansas River Basin is 81% of normal**

Reset Range

Current as of 01/03/2023:  
% of Median - 81%  
% Median Peak - 32%  
Days Until Median Peak - 93  
Percentile - 16

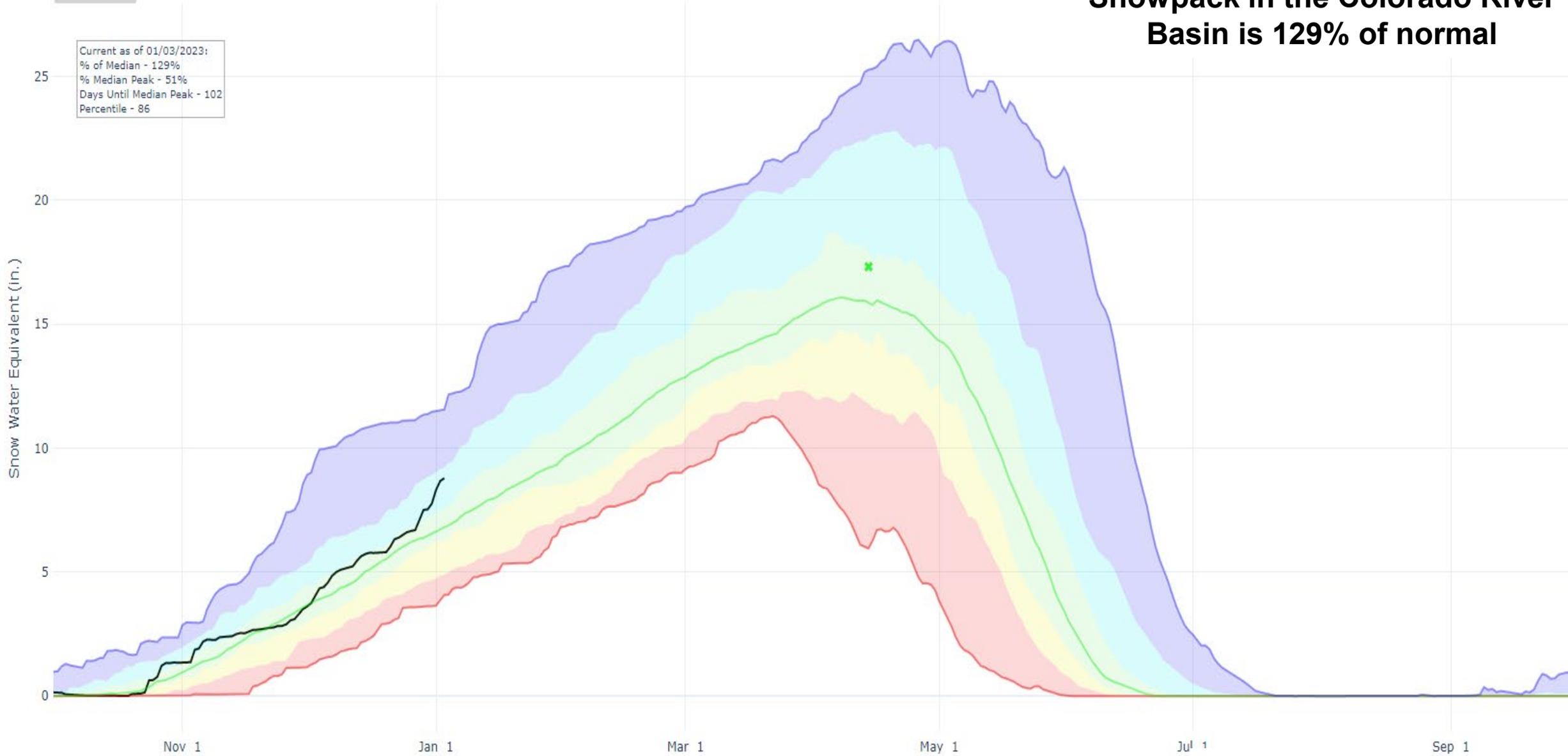


# SNOW WATER EQUIVALENT IN COLORADO HEADWATERS

Reset Range

Current as of 01/03/2023:  
% of Median - 129%  
% Median Peak - 51%  
Days Until Median Peak - 102  
Percentile - 86

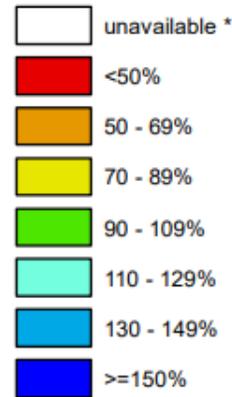
## Snowpack in the Colorado River Basin is 129% of normal



# Colorado SNOTEL Current Snow Water Equivalent (SWE) % of Normal

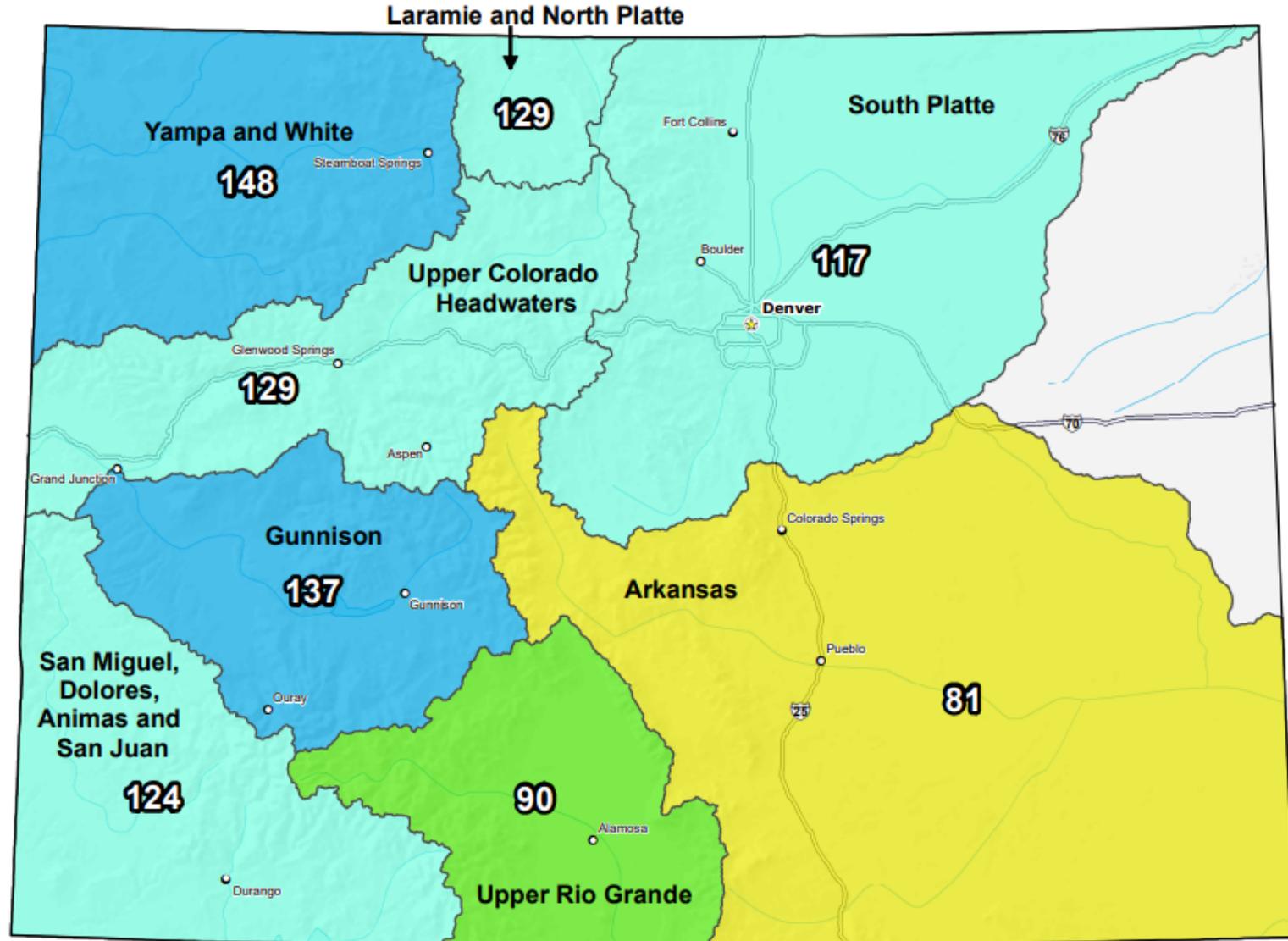
Jan 03, 2023

Current Snow Water Equivalent (SWE) Basin-wide Percent of 1991-2020 Median



\* Data unavailable at time of posting or measurement is not representative at this time of year

**Provisional Data  
Subject to Revision**



The snow water equivalent percent of normal represents the current snow water equivalent found at selected SNOTEL sites in or near the basin compared to the average value for those sites in this basin. Data based on the first reading of the day (typically 00:00).

Prepared by:  
USDA/NRCS National Water and Climate Center  
Portland, Oregon  
<https://www.nrcs.usda.gov/wps/portal/wcc/home/>

# 2022 Demands

## December

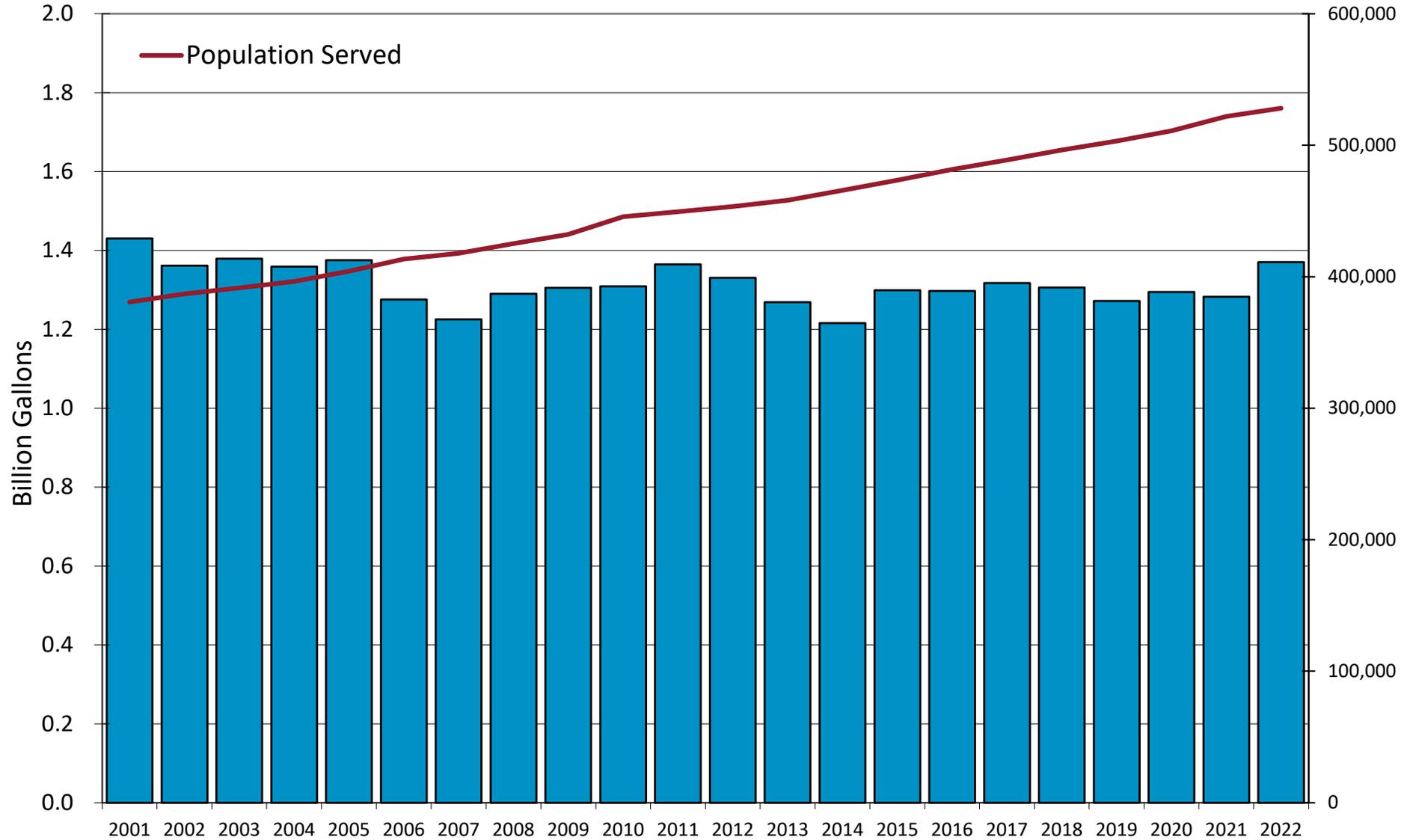
- Averaged 44.2 MGD
- 6.8% more than December 2021

## 2022 Year to Date

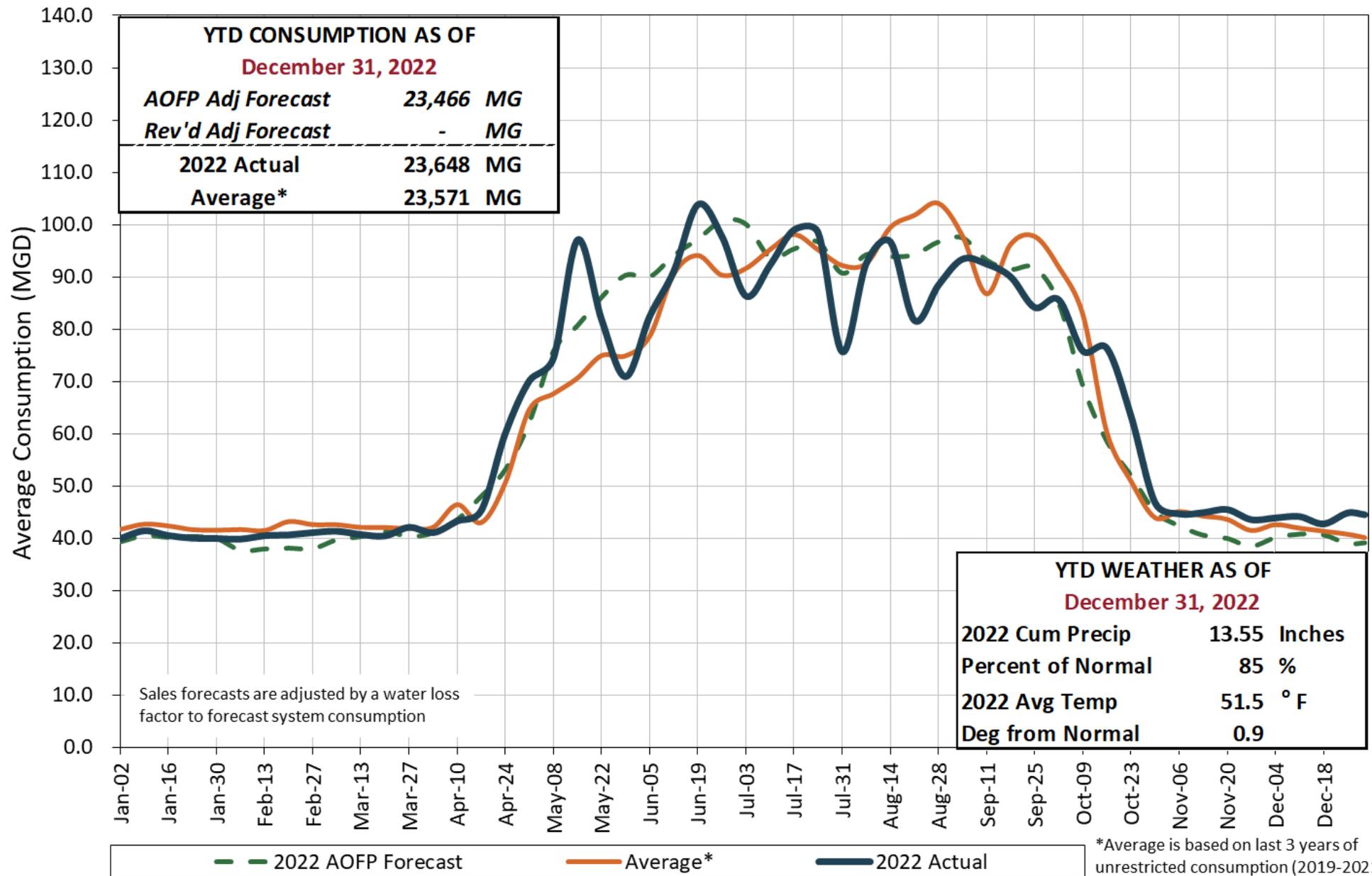
- Averaging 64.7 MGD, 23.6 BG total
  - 2.1% more than 2021
  - 0.475 Billion Gallons more than 2021



# Monthly Water Use for December



## 2022 Actual Consumption (Weekly Data)



# Reservoir Levels

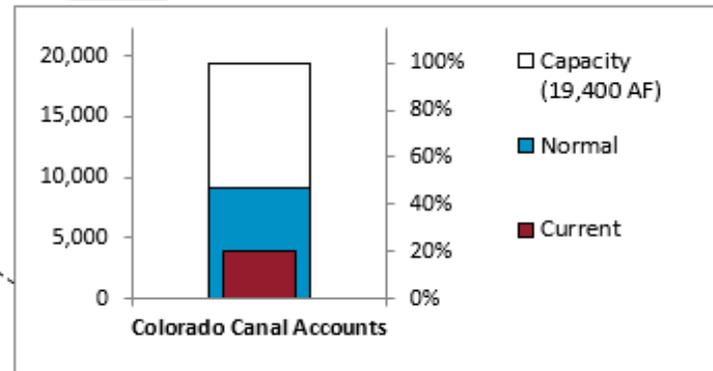
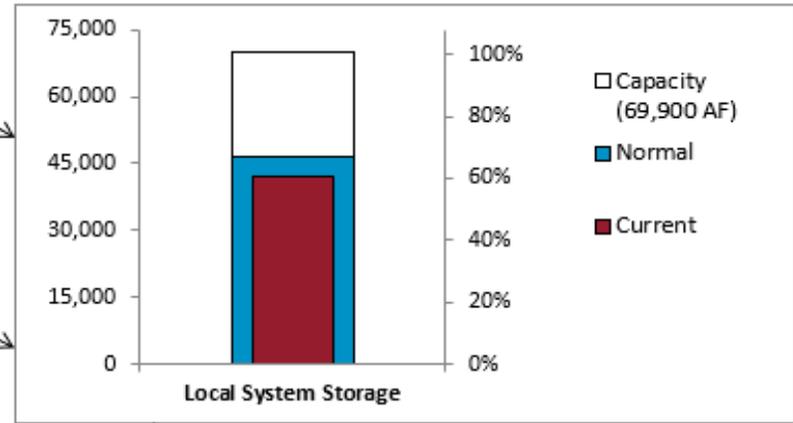
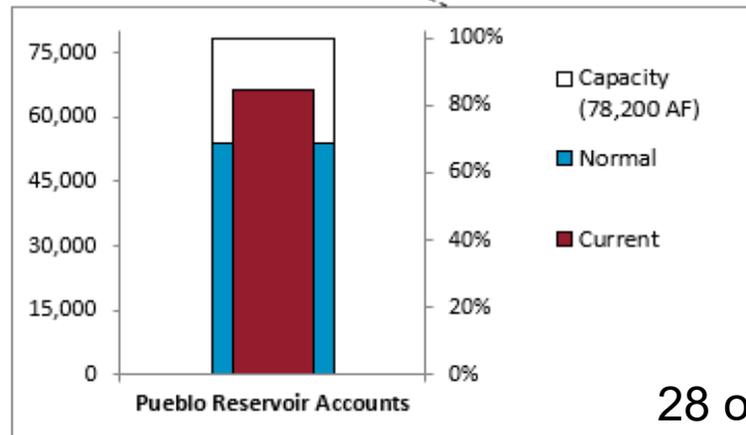
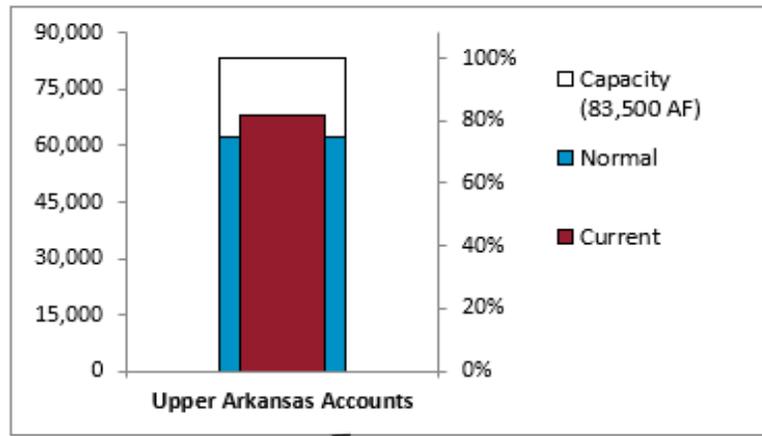
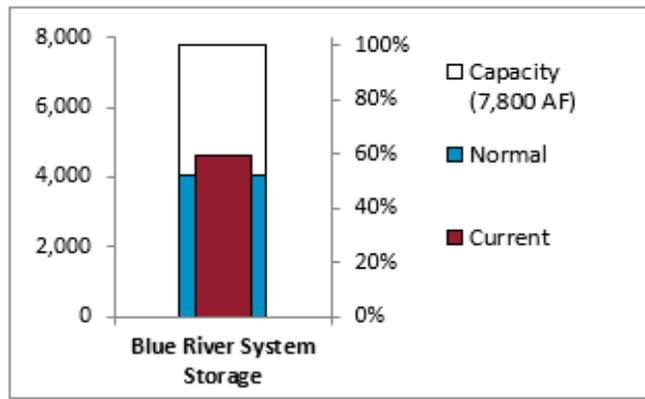
December 31, 2022

- Pikes Peak 57 %
  - 91-20 Avg. 63 %
- Rampart 63 %
  - 91-20 Avg. 72 %
- Local Total 60 %
  - 91-20 Avg. 68 %
- System Total 72 %
  - 91-20 Avg. 73 %



### Colorado Springs' System Wide Storage:

<b>December 31, 2022</b>	<b>185,300 af</b>	<b>71.6 %</b>
<b>2001-2021 avg</b>	<b>176,000 af</b>	<b>68.0 %</b>
<b>Average YTD Demand</b>	<b>64.6 MGD</b>	

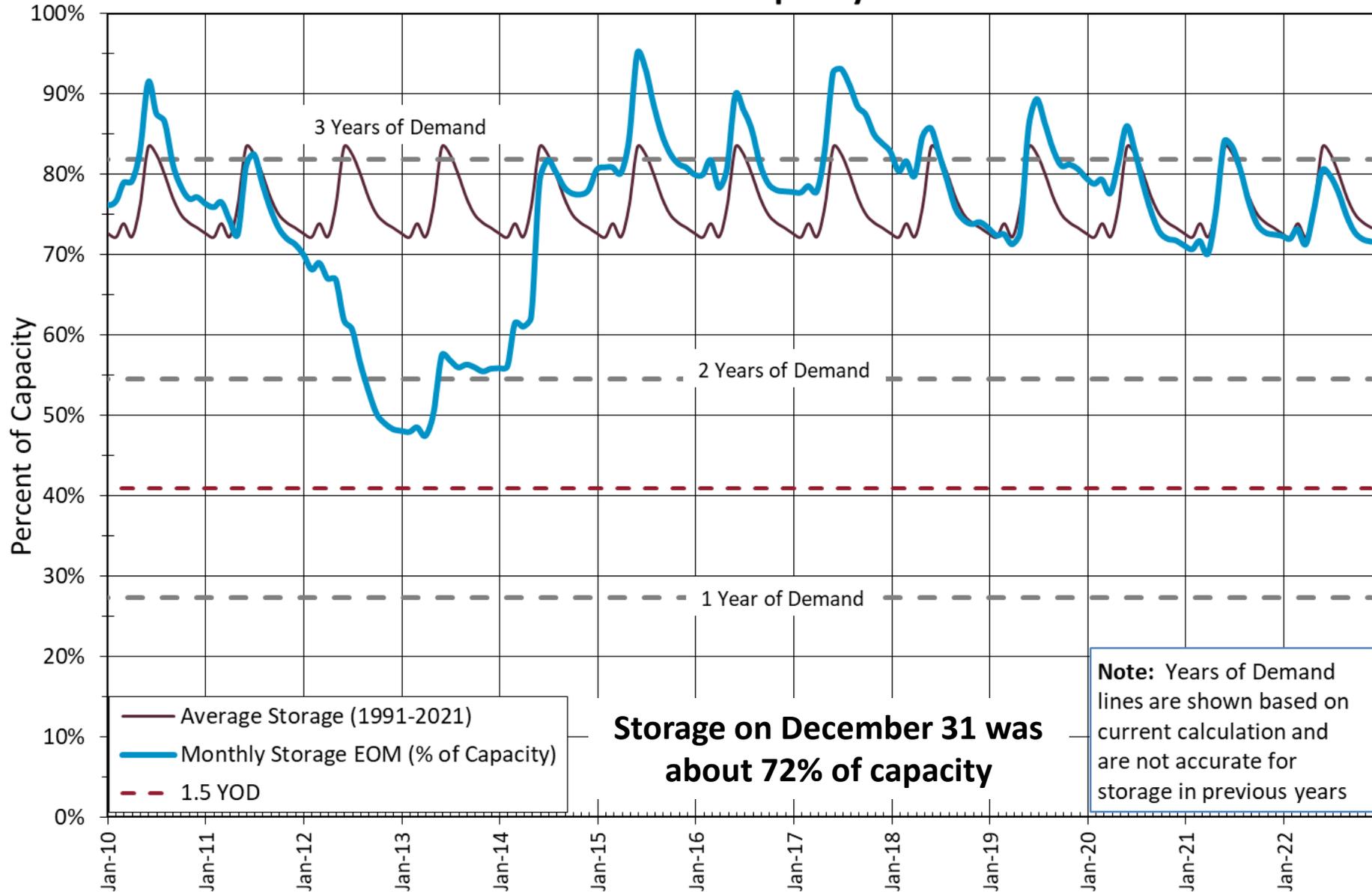


MAX. 20 MGD

MAX. 68 MGD



# Monthly Storage Percent of Capacity



# 2022 Regional Water Contracts

## Donala Water & Sanitation District

- Through December 31, 2022: Conveyed 130.5 AF for \$506,360
- Premium to Municipal Government: \$84,393

## Security Water District

- Through December 31, 2022: Conveyed 17.0 AF for \$93,621
- Premium to Municipal Government: \$15,603

## Outside Service Area Augmentation Leases - PF, LLC (Seven Falls), Emerald Valley Ranch

- Through December 31, 2022: Leased 4.0 AF for \$2,196
- Premium to Municipal Government: \$366

**Total 2022 YTD Revenue from Regional Contracts: \$602,176**



# Water Outlook

- Situation Outlook Summary
  - System-wide storage at 72% of capacity, slightly below our long term average
  - About 2.6 years of demand in storage, based on the past 3 years of demand
  - Have 206 days of demand in local storage
- Three-month outlook predicts
  - Higher chances of above-average temperatures across Colorado
  - Higher chances of below-average precipitation across Colorado
- We continue to monitor snowpack, demand and storage to maximize available water supply



Colorado Springs Utilities<sup>®</sup>

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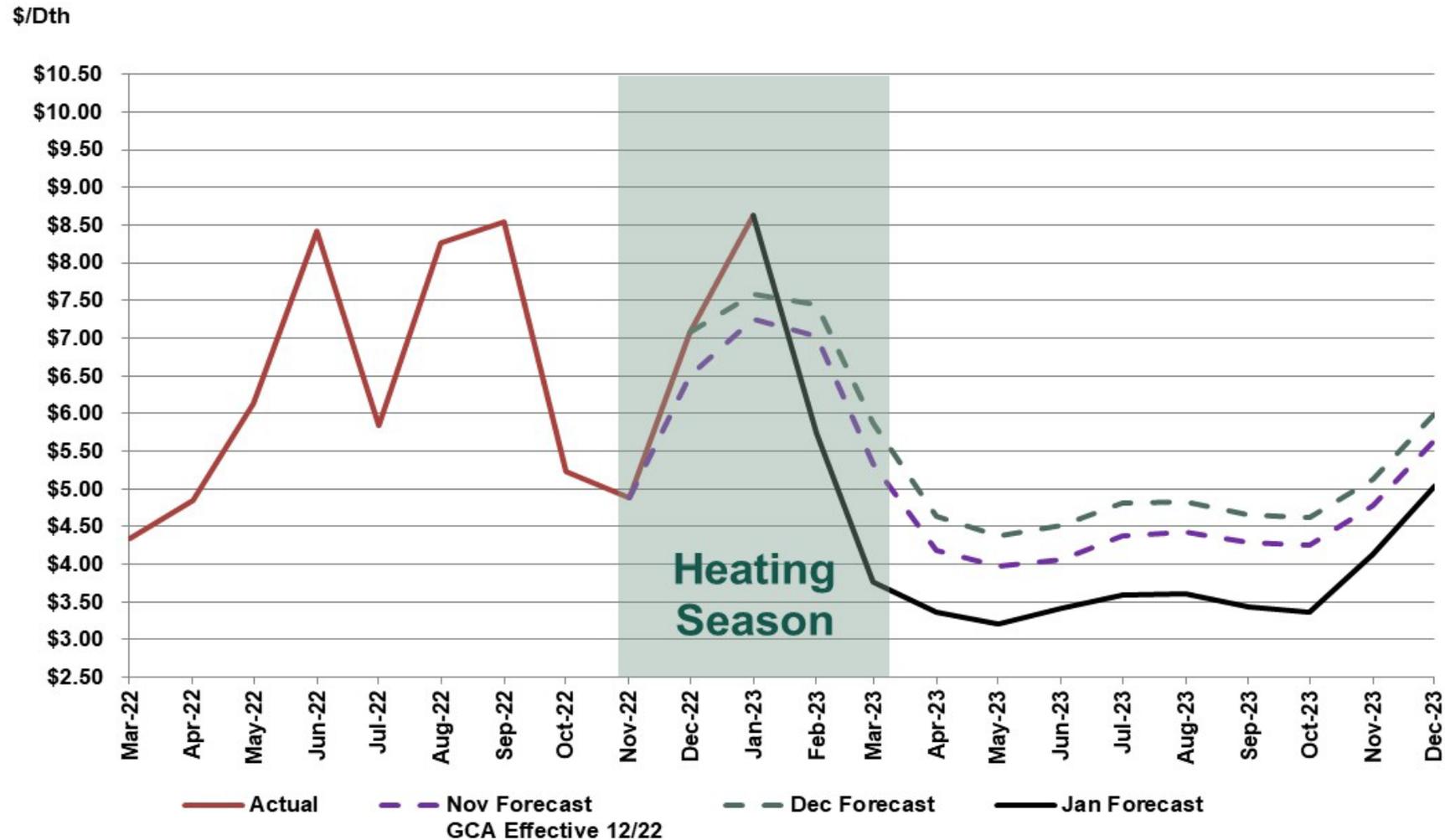
Colorado Springs Utilities  
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# **Electric Cost Adjustment Gas Cost Adjustment**

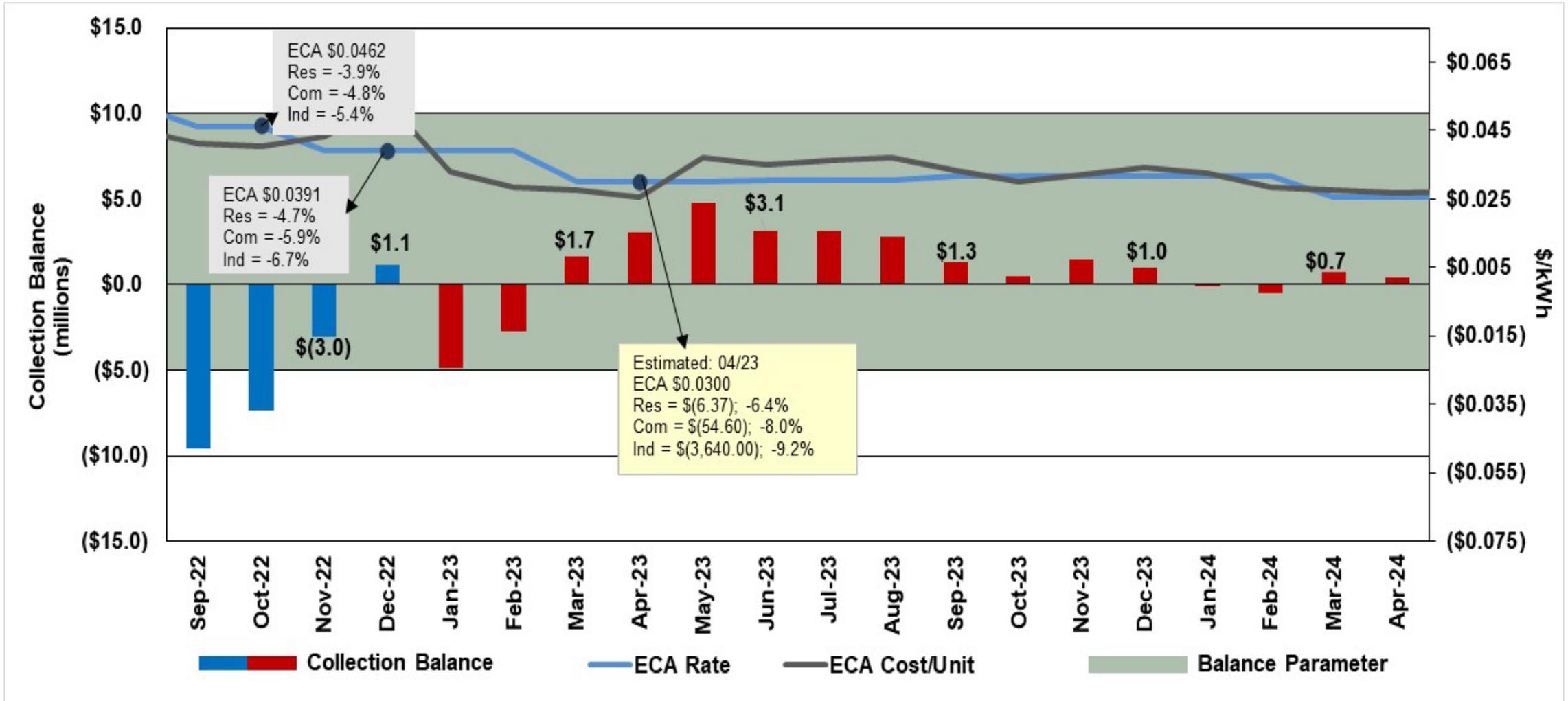
Scott Shirola, Pricing and Rates Manager

January 18, 2023

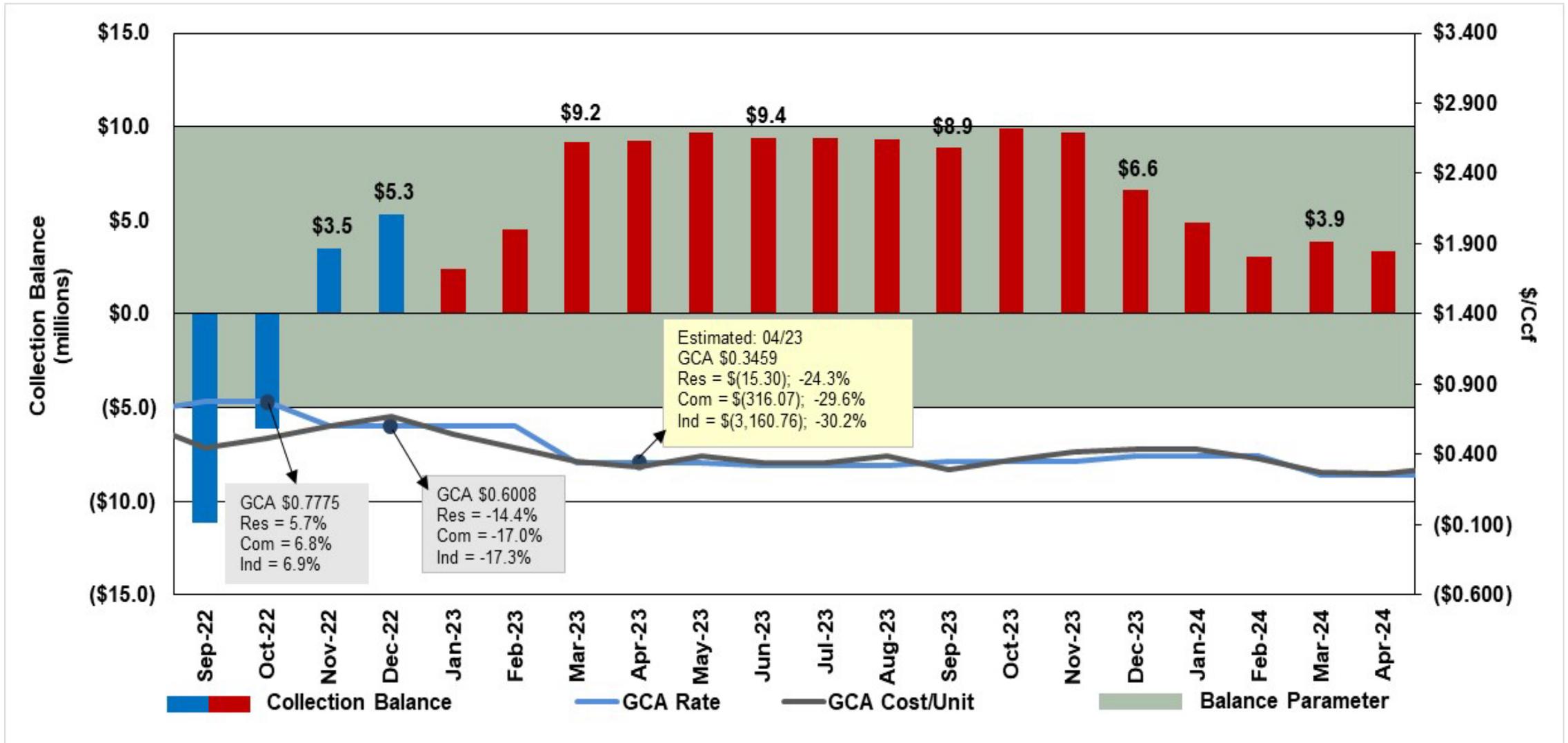
# Natural Gas Prices as of January 4, 2023



# ECA Projections January 2023



# GCA Projections January 2023





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# Board Memo Agenda Item

## Staff Report

**Date:** Jan. 18, 2023  
**To:** Utilities Board  
**From:** Travas Deal, Acting Chief Executive Officer  
**Subject:** Lower Fountain Metropolitan Sewage Disposal District Service Agreement Amendment

### NARRATIVE:

**Desired Action:** Discussion

**Executive Summary:** The Lower Fountain Metropolitan Sewage Disposal District (LFMSDD) was established in 1985 for purposes of providing regional wastewater treatment service to its members (originally, Fountain Sanitation District and Colorado Centre Metropolitan District). In 2016, the City of Colorado Springs became a member of LFMSDD and a party to the then-current Service Agreement, which was approved by the Colorado Springs City Council along with the inclusion by ordinance on behalf of Colorado Springs Utilities for the portion of the City of Colorado Springs within Banning Lewis Ranch located south of Drennan Road.

LFMSDD and its members have proposed updates to the Service Agreement to provide clarity on the inclusion area and to update capacity allocations and other miscellaneous definitions and provisions.

**Benefits:** Supports regional wastewater service and the amendments add clarity to the Agreement.

**Board Policy:** N/A

**Cost/Budget:** N/A

**Affected Parties:** Members and connecting entities of the LFMSDD as well as Colorado Springs Utilities' ratepayers.

**Alternatives:** N/A

**Submitter:** Tara Kelley

**Email address:** tkelley@csu.org

**Division/** Operations Division/Plants

**Phone number:** 719-668-4477

**Department:** Department

**Date submitted:** Jan. 3, 2023

**SPG Staff Use Only:** Consent Calendar

Yes

X

No

**ITEM NO. 8**



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# **Lower Fountain Metropolitan Sewage Disposal District**

## **2022 Sewage Treatment and Disposal Agreement Amendment**

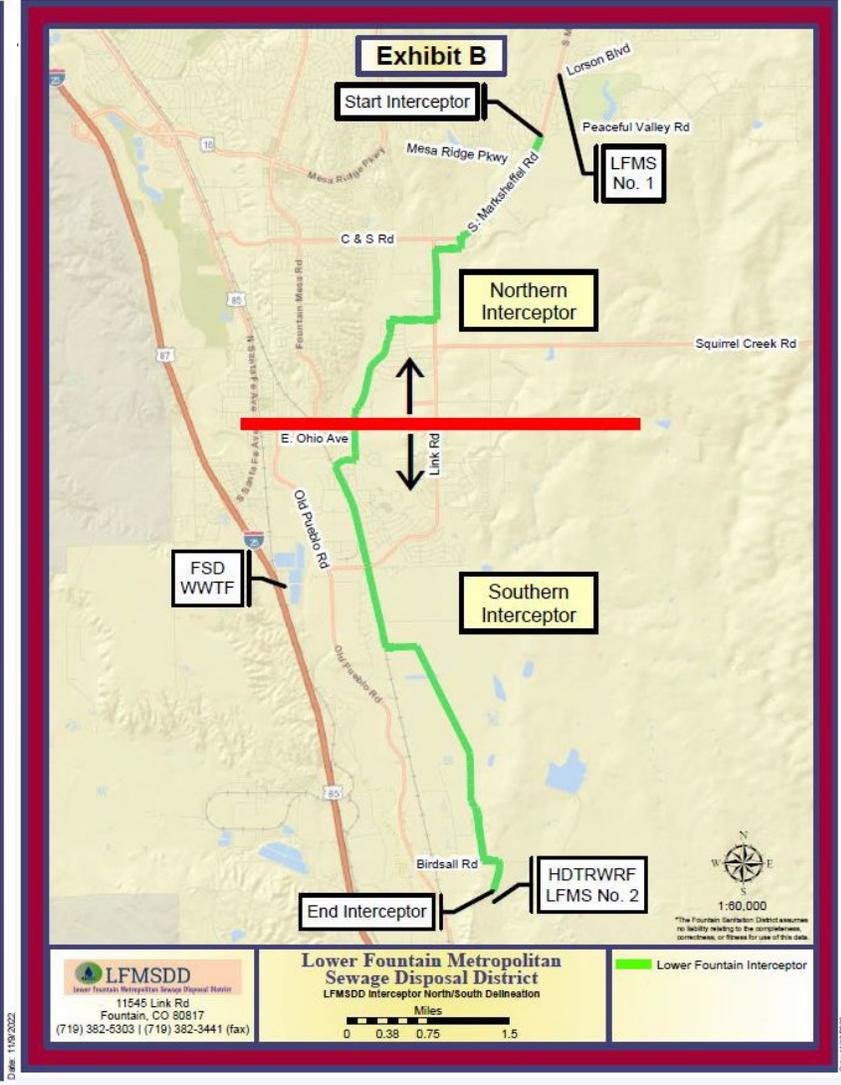
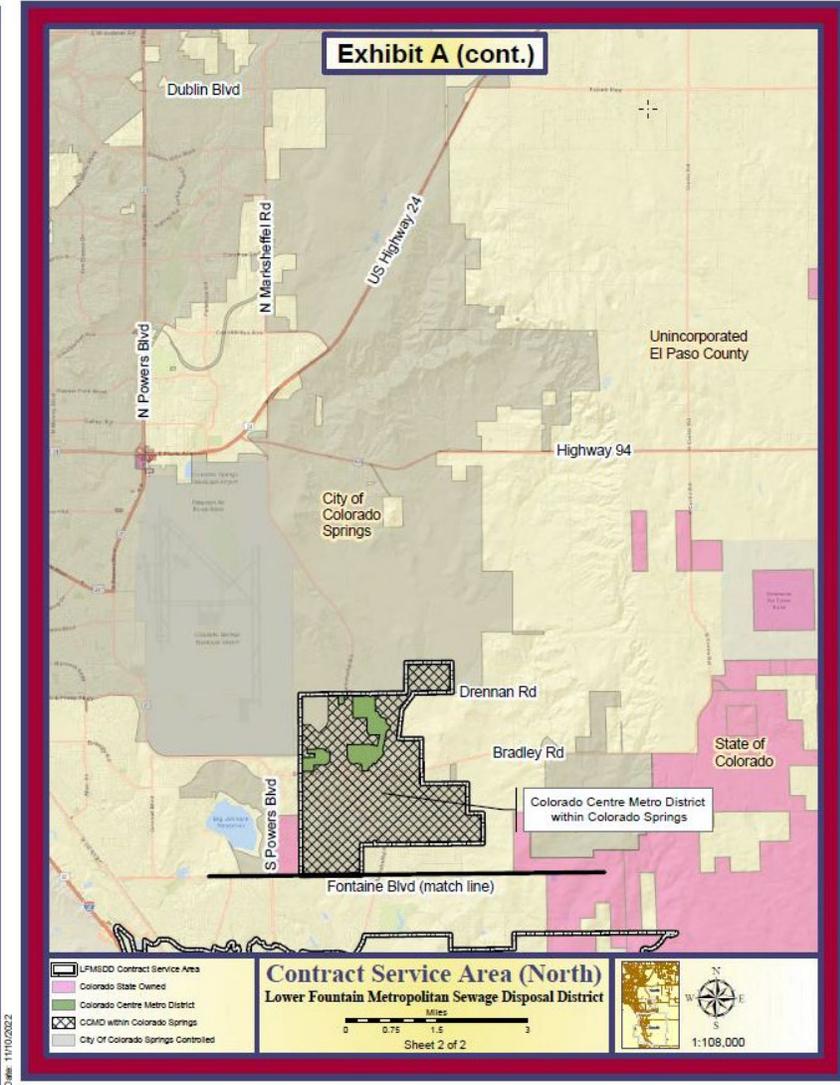
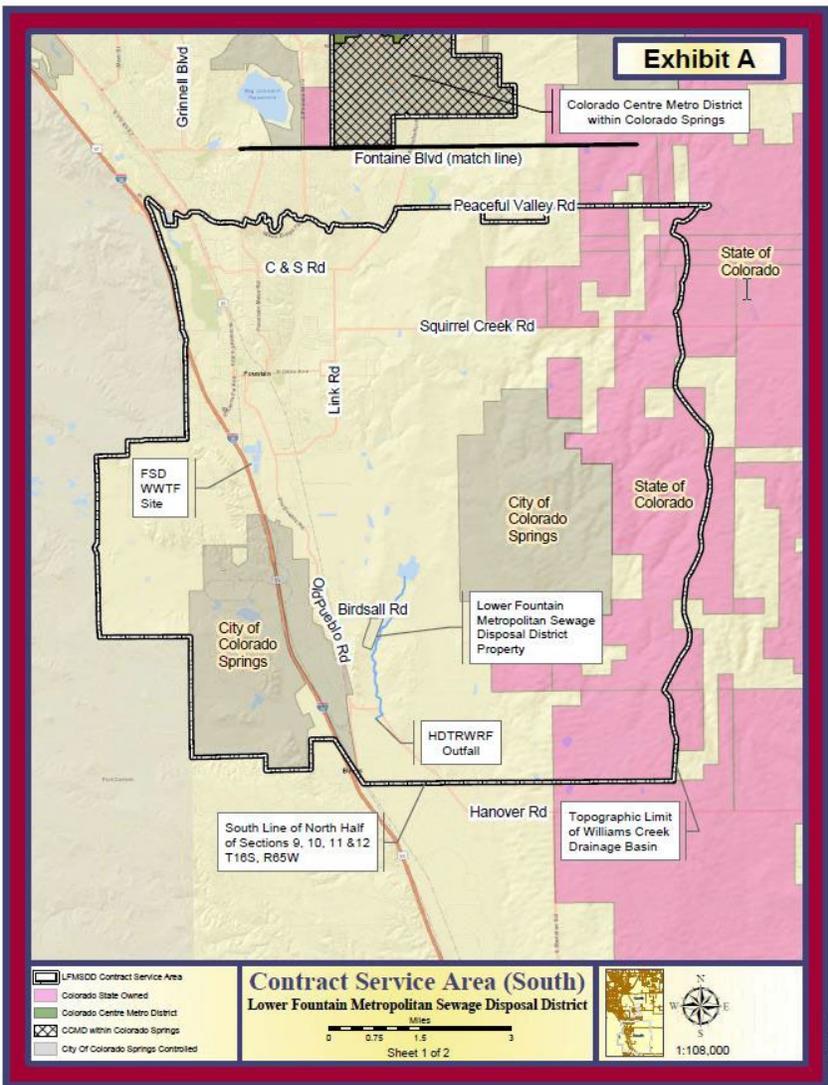
Tara Kelley, Resource Recovery Facilities Manager

Bethany Burgess, Utilities Division Chief

# Background

- The Lower Fountain Metropolitan Sewage Disposal District was established in 1985 to provide present and future regional wastewater collection and treatment service
- Original Members: Fountain Sanitation District, Colorado Centre Metropolitan District

# Inclusion Area



# Summary of Changes

- Clarification of:
  - Contract service area boundaries
  - Capacity allocations for members/connecting entities (e.g., interceptor/pipe capacity based on peak hourly flow) and obligations related to capacity expansions
  - No obligation to serve areas outside of inclusion area through the Lower Fountain Metropolitan Sewage Disposal District and that such service requires the District's approval
  - Penalties for exceeding allocated capacity
  - Miscellaneous definitions and provisions

# Next Steps

- Consideration of Resolution by City Council on February 14, 2023
  - Request to be placed on Consent Calendar



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RESOLUTION NO. 23-\_\_\_\_\_

A RESOLUTION APPROVING THE SEWAGE TREATMENT AND DISPOSAL AGREEMENT, AS AMENDED, BY AND BETWEEN THE LOWER FOUNTAIN METROPOLITAN SEWAGE DISPOSAL DISTRICT AND, IN ADDITION TO OTHERS, THE CITY OF COLORADO SPRINGS, COLORADO, ON BEHALF OF ITS ENTERPRISE COLORADO SPRINGS UTILITIES.

WHEREAS, the City Council of the City of Colorado Springs, Colorado, ("City Council") is authorized pursuant to § 32-4-513, C.R.S., to include all or a portion of the City of Colorado Springs ("City") within a metropolitan sewage disposal district for purposes of providing wastewater collection and treatment services to the area included; and

WHEREAS, pursuant to Ordinance No. 16-107, the City Council previously determined that inclusion of a portion of the City within the Lower Fountain Metropolitan Sewage Disposal District ("Lower Fountain") is in the best interests of the City of Colorado Springs, on behalf of Colorado Springs Utilities ("Utilities"), and Utilities' ratepayers; and

WHEREAS, pursuant to Ordinance No. 16-107, the City Council previously further determined that inclusion of a portion of the City within Lower Fountain is necessary for the public health, safety, and general welfare; and

WHEREAS, pursuant to Ordinance No. 16-107, the City Council previously approved and authorized the President of City Council to execute on behalf of the City and Utilities, the Lower Fountain Sewage Treatment and Disposal Agreement ("2016 Agreement"); and

WHEREAS, all parties to the 2016 Agreement, specifically Lower Fountain, Fountain Sanitation District, Colorado Centre Metropolitan District, Utilities, and Vintage Development Company, desire to amend the Agreement ("2022 Amended Agreement") to provide clarity on the inclusion area and to update capacity allocations and other miscellaneous definitions and provisions; and

WHEREAS, City Council has determined that it is in the best interests of the City and Utilities to approve the 2022 Amended Agreement, attached hereto and incorporated herein by reference.

**NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF COLORADO SPRINGS:**

Section 1. City Council hereby finds on behalf of Colorado Springs Utilities that the approval of the 2022 Amended Agreement is in the best interests of the City of Colorado Springs, on behalf of Colorado Springs Utilities, and Colorado Springs Utilities' ratepayers and hereby approves the 2022 Amended Agreement.

Section 2. City Council authorizes the Chief Executive Officer of Utilities or his designee to execute on behalf of the City and Utilities, the 2022 Amended Agreement, attached hereto as Exhibit "A".

DATED at Colorado Springs, Colorado, this \_\_\_\_\_ day of \_\_\_\_\_, 2023.

ATTEST:

\_\_\_\_\_  
Council President

\_\_\_\_\_  
Sarah B. Johnson, City Clerk

# SEWAGE TREATMENT AND DISPOSAL AGREEMENT

by and between the

## **LOWER FOUNTAIN METROPOLITAN SEWAGE DISPOSAL DISTRICT**

organized pursuant to C.R.S., 32-4-501 *et seq.*

and the

## **FOUNTAIN SANITATION DISTRICT,**

and the

## **COLORADO CENTRE METROPOLITAN DISTRICT,**

and the

**CITY OF COLORADO SPRINGS on behalf of  
COLORADO SPRINGS UTILITIES,  
~~an Associated~~ Connecting Municipality,**

and

**VINTAGE DEVELOPMENT COMPANY,  
a ~~Colorado corporation~~ Connecting Corporation.**

Approved: January 15, 2009

Re- Published: October 2015

As Amended through: February 10, 2016

As Amended through: December 14, 2022

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~~The Service Contact was executed on January 15, 2009, by the Lower Fountain Metropolitan Sewage Disposal District Board of Directors. This republished version includes proposed refinements and amendments for the Board of Directors approval consideration. It is intended to be a working copy and not a legal and binding copy.~~

## RECITALS

**WHEREAS**, the District, located in El Paso County, Colorado, was organized on May 13, 1986, in accordance with C.R.S §32-4-501 et seq., and its officers have been duly chosen and qualified; and

**WHEREAS**, in the public interest ~~demands~~ the construction and operation of a sewage disposal system (the “**System**”) by the District ~~as was~~ authorized by Colorado law; and

**WHEREAS**, the District has prepared ~~and is revising plans and specifications for the District’s System,~~ its costs and rate schedules for the District’s System; and

**WHEREAS**, the District has the power:

- (1) To fix and adjust charges to the Connecting Entities for connection with or use of the District’s System including minimum charges and service availability charges; and
- (2) To pledge District Revenues for the repayment of District Securities; and
- (3) To borrow money, to issue Securities to evidence the amounts so borrowed, and to secure their repayment by a pledge of the District’s Revenues; and

**WHEREAS**, the Board will conduct a public hearing after notice thereof at a meeting in El Paso County, Colorado, within the District, concerning the means of determining Service Charges, at which hearing any representative of any Connecting Entity or any other interested Person may appear and be heard; and

**WHEREAS**, after said hearing and meeting, the Board will adopt a Rate Schedule by resolution; and

**WHEREAS**, as authorized by C.R.S. §31-35-401 *et seq.*, the District may issue Securities for construction of a portion or all of the District’s System pursuant to a Resolution to be later adopted by its Board; and

~~**WHEREAS**, the District has acquired the necessary lands for the Project; and~~

**WHEREAS**, the District also has the power to enter into and perform, without an election, contracts for any term not exceeding fifty (50) years with any Municipality or Person concerning sewage facilities, their financing, planning, acquisition, construction, operation, maintenance and disposal, and the periodic payment of amounts to compensate the District for the costs of providing, operating and maintaining the sewage facilities; and

**WHEREAS**, each other party hereto has the power to contract with the District; and

**WHEREAS**, the District cannot finance the acquisition, operation and maintenance of the System, unless the District treats and disposes of the Sewage from the Contract Service Area shown on Exhibit A, and unless each Connecting Entity is legally bound to accept and pay for such service ~~from the time the District’s System begins operation~~; and

**WHEREAS**, the District, through its Connecting Entities ~~and Associated Municipalities~~, desires to provide for financing the District’s monetary and budget requirements from time to time by providing for annual charges (herein referred to as “**Annual Charges**”) to be paid by each Connecting Entity ~~and Associated Municipality~~ as herein provided, in addition to Service Charges unilaterally fixed, charged, and collected by the District from the Connecting Entities independent of any such Annual Charges, and otherwise

appertaining to the District's Sewage Disposal System and to the Sewage System of a Connecting Entity;  
and

**WHEREAS**, the District, and the Connecting Entities ~~and the Associated Municipalities~~ have determined to enter into this agreement (herein referred to as this "**Service Contract**" or this "**Agreement**") for the aforesaid purpose; and

**WHEREAS**, the above parties, and including all future signatories, to this Agreement commit and agree that each shall financially support the District through payments of ~~membership fees and Annual Charges, Operations and Maintenance Expenses, also referred to as Service Charges~~, pro-rated contributions and operation costs in return for District services provided prior to and after construction of the System; and

**WHEREAS**, the parties have determined to enter into this Agreement for these purposes.

**NOW, THEREFORE**, in consideration of the promises, mutual covenants and agreements herein contained and the performance thereof by the parties, and in order to secure the payment of the District's expenses and the payment of the principal of and the interest on any District's Securities, **THE PARTIES AGREE** as follows:

# Table of Contents

<b>ARTICLE I</b> .....	6
<b>Title, Definitions and Interpretations</b> .....	6
Section 101. Title .....	6
Section 102. Meanings and Construction .....	6
Section 103. Successors .....	10
Section 104. Interested Parties.....	10
<b>ARTICLE II</b> .....	12
<b>System Acquisition and Operation</b> .....	12
Section 201. Purpose.....	12
Section 202. Extensions and Alterations .....	12
Section 203. Interceptor Easements.....	12
Section 204. System Operation and Maintenance .....	12
Section 205. Rules, Regulations, and Other Details .....	12
Section 206. Payment of Lawful Governmental Charges.....	13
Section 207. Insurance and Reconstruction .....	13
Section 208. Alienating System .....	13
Section 209. Records, Accounts and Audits .....	14
Section 210. Contract Service Area.....	14
<b>ARTICLE III</b> .....	15
<b>General Sewage System Provisions</b> .....	15
Section 301. Tributary Sewer Systems.....	15
Section 302. Connections to System.....	15
Section 303. Service by District and Connecting Entities .....	16
Section 304. Competing System .....	16
Section 305. [Reserved].....	16
Section 306. Limitations Upon Consent.....	16
Section 307. New Connections.....	17
Section 308. Water Rights .....	17
Section 309. Water Quality .....	17
<b>ARTICLE IV</b> .....	18
<b>Sewage Discharge to the System</b> .....	157
Section 401. Discharge Requirements .....	18
Section 402. Special Waste Requirements .....	18
Section 403. Industrial Sewage .....	18
Section 404. Determination of Sewage Characteristics .....	19
Section 405. Infiltration and Inflow Control .....	19
Section 406. Discharge Prohibitions.....	19
Section 407. Discharge Limits and Capacity Reallocation .....	20
<b>ARTICLE V</b> .....	20
<b>District Budget and Charges</b> .....	20
Section 501. Annual Budget .....	22
Section 502. Basis for Incurring and Allocating Costs .....	22
<b>ARTICLE VI</b> .....	26
<b>Payments by Connecting Entities</b> .....	23
Section 601. Payment of Charges .....	26
Section 602. Timing of Payments .....	26
Section 603. Estimated Charges .....	26
Section 604. Preliminaries to Payment by Connecting Entities .....	26
Section 605. Adjustment of Charges .....	27
Section 606. Reserved.....	27
Section 607. Time of Adjustments to Estimated Charges .....	27
Section 608. Payment to Balance Adjustments.....	27
Section 609. Limitations Upon Adjustment of Charges .....	27

Section 610. Enforcement .....	27
Section 611. Character of Obligations .....	27
<b>ARTICLE VII</b> .....	<b>29</b>
<b>Abandonment of Sewer System Facilities</b> .....	<b>29</b>
Section 701. Abandonment Permitted .....	29
Section 702. Notice of Abandonment .....	29
<b>ARTICLE VIII</b> .....	<b>297</b>
<b>Additional Municipalities and Connecting Corporations</b> .....	<b>27</b>
Section 801. Conditions of Inclusion.....	30
Section 802. Party to This Agreement.....	30
Section 803. Voting Rights of Member Municipalities .....	30
<b>ARTICLE IX</b> .....	<b>299</b>
<b>Miscellaneous</b> .....	<b>29</b>
Section 901. Effective Date .....	32
Section 902. Terms of Agreement .....	32
Section 903. Securities of District .....	32
Section 904. Absence of Representations .....	32
Section 905. Conformance with Law .....	32
Section 906. Force Majeure.....	32
Section 907. Non-Assignability .....	32
Section 908. Severability .....	33
Section 909. Execution of Documents .....	33
Section 910. Waiver .....	33
Section 911. Remedies.....	33
Section 912. Entirety .....	33
Section 913. No Partnership Implied .....	33
Section 914. Amendments.....	33
Section 915. Effect of Headings, Type Faces and Recitals .....	33
Section 916. Regional Cooperation .....	33

## ARTICLE I

### TITLE, DEFINITIONS AND INTERPRETATIONS

#### Section 101. Title

This Agreement may be referred to as the “**Service Contract**” or the “**Agreement**”.

#### Section 102. Meanings and Construction

- A. Except as more specifically defined herein, the definitions listed in C.R.S. §32-4-502 are incorporated into this Agreement by this reference.
- B. When used in this Agreement, the terms defined in Section 102 C. or the Act are capitalized to indicate that they are specifically defined. If a term is capitalized and is not specifically defined in Section 102 C. of this Agreement, it shall have the meaning set forth in the Act.
- C. As used in this Agreement, unless the context otherwise requires:
1. “**Act**” means C.R.S. §32-4-501 *et seq.*, as amended from time to time.
  2. “**Annual Budget**” means the budget or the amended budget for a Fiscal Year and adopted by the District or in effect pursuant to Section 501 of this Agreement.
  3. “**Annual Charges**” means the sums paid or payable to the District pursuant to this Agreement, other than Service Charges.
  4. “**Associated Municipality**” means a Member Municipality, as herein defined, which is not a Connecting Municipality, ~~as herein defined. The Associated Municipality presently is the City of Colorado Springs on behalf of Colorado Springs Utilities.~~
  5. “**Average Day Flow**” means the average calendar-day discharge of Sewage during a rolling one-year period, including all forms of flow entering the District’s System.
  6. “**Board**” means the Board of directors of the District, pursuant to C.R.S. §32-4-509.
  7. “**Charges**” means the Annual Charges and the Service Charges payable to the District by the Connecting Entities ~~and the Associated Municipalities~~ pursuant to this Agreement.
  8. “**Connecting Corporation**” means a corporation which is a party to this Agreement and whose sewer system is or is to be connected, in whole or in part, to the District’s System. A Connecting Corporation is not within the boundaries of the District, but it owns or has an interest in land located, in whole or in part, within the Contract Service Area. The Connecting Corporation on the effective date of this Agreement is Vintage Development Company.
  9. “**Connecting Entities**” means all Connecting Corporations and Connecting Municipalities, collectively.
  10. “**Connecting Municipality**” means a Member Municipality, as herein defined, -all or any part of whose sewer system is connected in whole or in part to the District’s System,

whether through the Interceptor or otherwise. The Connecting Municipalities on the effective date of this Agreement are City of Colorado Springs on behalf of Colorado Springs Utilities, Colorado Centre Metropolitan District and Fountain Sanitation District.

11. **“Connection Point(s)”** refers to the point or points at which Sewage from a Connecting Entity enters the District’s System.
12. **“Contract Service Area”** means the land served by the Connecting Entities and the land designated by the Associated Connecting Municipalities, if any, having specific boundaries which have been or will be recorded with the District, in which the Connecting Entities or the Associated Connecting Municipalities have either the right or the obligation to provide sewer service, and areas outside of the Connecting Entities in which Connecting Entities or the District have an obligation to provide such Service, as such area is set forth in the attached *Exhibit A*.
13. **“District”** means the Lower Fountain Metropolitan Sewage Disposal District formed pursuant to C.R.S. §32-4-501, *et seq.* or as changed from time to time. The District’s boundaries are composed of the Contract Service Area.
14. **“District Manager” or “Manager”** shall mean the Person or Entity retained by the District Board to handle all administrative and management responsibilities associated with District operations. Such Person or Entity shall serve at the pleasure of the District Board, and may retain outside contractors or consultants to assist in carrying out the District Manager’s responsibilities.
15. **“Engineer”** has the meaning given such term in the Act.
16. **“Extend” or “Extension”** means the installation of any new interceptor or other sewer main which is not part of the Project existing System, which installation extends the System to a Connecting Entity which hereafter is included in the District or to an area hereafter annexed to a Connecting Entity now in the District or an area otherwise hereafter served by the District.
17. **“Fiscal Year”** means the twelve (12) months commencing on the first day of January of any year and ending on the last day of December of the same year.
18. **“General Fund”** means the “Lower Fountain Metropolitan Sewage Disposal District, ~~Colorado~~, General Fund,” as maintained by the District.
19. **“Independent Accountant”** means any Certified Public Accountant or any firm of such Accountants, appointed and paid by the District:
  - (a) Who is, in fact, independent and not under the dominion of the District or any party to this Agreement, *and*
  - (b) Who does not have any substantial interest, direct or indirect, with the District or any party to this Agreement, *and*
  - (c) Who is not an officer or employee of the District or any party to this Agreement but who may be regularly retained to make periodic audits of the District’s books and records of the District.

20. **“Improve”** or **“Improvement”** means the capital extension, alteration, betterment, reconstruction, replacement, repair, or other improvement (or any combination thereof) of facilities, other property, any project, or an interest therein, as authorized by the Act.
21. **“Infiltration”** is water entering a sewer system from the ground through means such as defective pipe, pipe joints, connections, or manhole walls. Infiltration does not include ~~and is distinguished from~~ Inflow.
22. **“Inflow”** consists of water discharged into a sewer system (including service connections) from sources such as roof leaders; cellar, basement, crawl space, yard and area drains; foundation drains; cooling water discharges; drains from springs and swampy areas; manhole covers, cross-connections from storm sewers and combined sewers; catch basins; storm water surface run-off; street wash waters; and drainage.
23. **“Interceptor”** means such sewers and appurtenances thereto as may be necessary to intercept and transport the ~~outfalls~~sewage from the Sewage Systems of the Connecting Entities ~~and as further defined below:~~
- i. “Northern Interceptor” located north of MH# LFW77 (formerly referred to as,” the manhole approx. 314 ft north of Ohio Ave.) to 100-feet north of MH# JCC41 (formerly referred to as,” interceptor sewer constructed by CCMD located approx. 190 ft south of the intersection of Marksheffel and Peaceful Valley Road).
  - ii. “Southern Interceptor” located from MH# LFW77 south to the Harold D. Thompson Regional Water Reclamation Facility (HDTRWRF.)
  - iii. The graphical representation for the Interceptor North/South delineation is further specified in Exhibit B.

The manholes referenced are in the same locations used in previous agreements; however, the alphanumeric references are from the LFMSDD and FSD GIS with appropriate assigned attributes better defining specific locations.

24. **“Member Municipality”** means any city, city and county, incorporated town, sanitation district, water and sanitation district, or any other political subdivision or public entity heretofore or hereafter created under the laws of the State of Colorado (other than a metropolitan sewage disposal district), having specific boundaries ~~within~~ which it is authorized or empowered to provide sewer service for the area within its boundaries, and being a component and comprising a part of the District. A Member Municipality may be either an Associated Municipality, as herein defined, or a Connecting Municipality, as herein defined. The Associated Municipalities in the District on the effective date of this Agreement are:

- ~~(a) City of Colorado Springs on behalf of Colorado Springs Utilities~~
- ~~(a) None~~

and the Connecting Municipalities in the District on the effective date hereof are:

- (a) Colorado Centre Metropolitan District, ~~and~~
- ~~(b)~~ (b) City of Colorado Springs on behalf of Colorado Springs Utilities, and

(c)          Fountain Sanitation District.

25. **“Operation and Maintenance Expenses”** means all reasonable and necessary current expenses of the District, paid or accrued, of operating, maintaining, and repairing the District’s System, including the establishment and funding of a reserve account not to exceed ten percent (10%) of the District’s then-current annual budget. The term does not include:

- (a) Any depreciation allowance or any capital improvement reserves;
- (b) Working capital reserves related to cash flow requirements for grant administration or other capital improvement costs;
- (c) Any allowance for the redemption of any note, bond or other obligation evidencing a loan or the payment of any interest thereon; *or*
- (d) The costs of any Improvements or Extensions.

26. **“Organic Loading”** means the mass of BOD<sub>5</sub> or CBOD<sub>5</sub> associated with a given volume of sewage.

26:27. **“Peak Hour Flow”** means the ~~maximum instantaneous discharge of Sewage which consists of the sum~~ greatest volume of all forms of flow entering sewage flows through a sewage meter, during an hour in a 24-hour period. Peak volume to be determined by monitoring hardware and software at the District’s System meter location.

27:28. **“Person”** means any individual, association, corporation, or the federal government, or any public body other than a Municipality, and excluding the District.

28:29. **“Project”** means the future or existing construction, installation and other acquisition of the District’s System ~~to consist of a 2.5 million gallon per day treatment plan and an Interceptor line, all as described in the District’s Site Application,~~ and such other, associated improvements as the District may authorize.

29:30. **“Rate Schedule”** refers to the schedule of and methods for determining Charges to be assessed by the District for its operations and for the provision of Services to the Connecting Entities, together with the current calculation of rates and Charges for the current Year.

30:31. **“Revenue”** means all moneys derived by the District from Charges made for Services provided by the District to the Connecting Entities ~~and Associated Municipalities.~~

31:32. **“Service”** or **“Services”** mean (i) in connection with the District’s System and any Extension or Improvement, the planning, financing, construction, completion, repair, property acquisition, employment of personnel and agents, and provision for insurance and financial records of the District’s System or for such Extension or Improvement, and (ii) otherwise, the provision of sewage transportation, treatment and disposal services.

32:33. **“Service Charges”** means rents, rates, fees, tolls, and other charges for direct or indirect connection with or the use of Services of the ~~Sewage Disposal~~ District’s System, including, without limiting the generality of the foregoing, Operation and Maintenance Expenses,

minimum charges and charges for the availability of service, which Service Charges the District is or may be authorized to fix, charge, and collect from any Connecting Entity, independent of this or any other service contract, pursuant to Subsection (m) of Section 32-4-510 and to Section 32-4-522 of the Act.

~~33.~~34. **“Sewage Disposal System”, “District’s System” or “District’s Interceptor System”** means the District’s sewage disposal system and includes anyone or all or any combination of the following: Any sewage treatment plant, sewage treatment works, sewage disposal facilities, connections and outfalls, intercepting sewers, outfall sewers, force mains, conduits, pipelines, water lines, pumping and ventilating plants or stations, compensating reservoirs, other plants, structures, facilities, equipment, and appurtenances useful or convenient for the interception, transportation, treatment, purification or disposal of sewage, liquid wastes, solid wastes, night soil, and industrial wastes along with all necessary lands, interest in lands, easements and water rights.

~~35.~~ **“Sewage” means the raw waste matter that passes through the interceptor to the treatment facility for proper treatment and disposal.**

~~34.~~36. **“Sewage Meter”** means any continuously recording device used to measure Sewage flow and or volume.

~~37.~~ **“Sewage Strength” means the concentration of dissolved and suspended matter in the Sewage.**

~~35.~~38. **“Sewage System of a Connecting Entity”** means a system provided by a Connecting Entity to provide sewer service to inhabitants within or without its jurisdiction, which is connected with the District’s System at the Connection Point(s).

~~36.~~39. **“Substantially Injurious”** means any discharge that, upon reaching the District’s System, requires the District-~~staff~~ to initiate any emergency or non-standard operating procedures in the District’s operation and maintenance documents or rules and regulations.

~~37.~~40. **“User”** means any Person who discharges, causes or permits the discharge of wastewater into the Sewage System of a Connecting Entity.

~~38.~~41. **“Year”** means a calendar year.

D. Unless the context otherwise requires, these definitions shall include both singular and plural and apply to both genders.

### **Section 103. Successors**

Whenever the District, a Connecting Corporation, or any Member Municipality is named or is referred to, such provision shall be deemed to include its successors or assigns.

### **Section 104. Interested Parties**

All of the covenants, stipulations, promises and agreements set forth herein shall be for the sole and exclusive benefit of the parties hereto, any trustee for, and any holder of any Security of the District, and shall not be construed to confer upon or give to any other Person any right, remedy or claim, nor to create for the benefit of any other Person any covenant, condition or stipulation.



## ARTICLE II

### System Acquisition and Operation

#### Section 201. ~~Acquisition and Purpose~~

~~The District will prepare and complete plans for the Project and its financing. Upon completion of such financing or the making of arrangements therefore satisfactory to the District, it will complete the Project and place the District's Sewage Disposal System in operation. The District will thereafter~~The District will operate, maintain and enlarge the System so as to receive, treat and dispose of Sewage delivered into it by any Connecting Entity in accordance with Article IV.

Before undertaking any future System construction, the District will submit ~~the~~ plans and specifications for the proposed Project to the Colorado Department of Public Health and Environment and any other entity required for approval. The District will obtain all necessary permits and approvals to construct and operate the proposed Project.

#### Section 202. Extensions and Alterations

Through agreement with interested Member Municipalities or Connecting Corporations, the District may at any time enlarge or modify the District's System or renew or replace any part thereof and may construct or otherwise acquire any Extension, Improvement or alteration, as may be feasible and then be permitted by law and will not obligate any member of the District not a party to such agreement, except for any Charges assessed pursuant to Article V hereof.

#### Section 203. Interceptor Easements

Each party through whose Contract Service Area the District's Interceptor must pass shall furnish the District a perpetual easement a minimum of 50 feet in width for Interceptor right-of-way, construction and maintenance without charge to the District. If a Connecting Entity is unable to acquire the necessary easement, the District shall condemn the required easement at the expense of the Connecting Entity which is obligated to provide the easement. The District shall provide all services required to locate, describe, convey and record these easements. To the maximum extent practicable, the Connecting Entities shall work cooperatively toward locating the Interceptor and its easement to greatest advantage.

#### Section 204. System Operation and Maintenance

The District shall at all times operate the District's System properly and in a sound and economical manner. The District shall maintain, preserve, and keep the District's System, or cause the same to be, properly maintained, reserved, and kept, with the appurtenances and every part and parcel in good repair, order, and condition, and shall from time to time make or cause to be made all necessary and proper repairs, replacements, and renewals so that at all times the operation of the District's System may be properly and advantageously conducted.

#### Section 205. Rules, Regulations, and Other Details

The District shall establish and enforce reasonable rules and regulations governing the operation, use and Services of the District's System. The District's rules and regulations shall, except for special waste and industrial pretreatment requirements, be applicable solely to the District's ~~Sewage Disposal~~ System and not to the Sewage Systems of the Connecting Entities. All compensation, salaries, fees, and wages paid by the District for maintenance, repair, and operation of the District's System shall be reasonable and

comparable to payments by other corporations, municipalities, or public bodies for similar services. The District shall comply with all valid laws, rules, regulations, orders, and directions of anybody having jurisdiction over the District's System or the District.

### **Section 206. Payment of Lawful Governmental Charges**

The District shall pay all taxes, assessments or other charges lawfully levied or assessed upon the District's System, or any part thereof, when the same shall become due. The District shall not create or allow any lien or charge upon the District's System or any part thereof, or any Revenues therefrom, except the pledge and lien created by any resolution for the payment of the principal of, premium (if any), and interest on District Securities.

The District shall pay or shall cause to be discharged or will make adequate provision to satisfy and to discharge, within sixty (60) days after the same shall become payable, all lawful claims and demands for labor, materials, supplies, or other objects which if unpaid might by law become a lien upon the System or the revenues there from. Nothing shall require the District to pay or to cause to be discharged or to make provision for any such lien or charge so long as the validity thereof shall be contested in good faith, so long as failure to pay will not result in a material adverse impact to the District.

### **Section 207. Insurance and Reconstruction**

- A. **Insurance.** The District shall maintain such insurance as is customarily maintained for ~~seweragesewage~~ systems of like character. Such insurance shall protect the parties to this Service Contract against loss of or damage to the District's System, against loss of Revenues, and against public and other liability to the extent reasonably necessary to protect the interests of the District.
- B. **Limited Liabilities.** Any liability incurred by the District as a result of the operation of the District's ~~Sewage Disposal~~ System shall be its sole liability, and any liability incurred by any Connecting Entity as a result of the operation of a Sewage System of a Connecting Entity shall be the Connecting Entity's sole liability. An Associated Municipality shall have no liability arising from operation of the District's System or a Sewage System of a Connecting Entity. Section 401 of this Agreement contains special provisions for industrial discharges. To the extent permitted by the Colorado Constitution and consistent with the Colorado Governmental Immunity Act, the District shall indemnify and hold each Connecting Entity harmless from any loss, damages, costs or expenses arising directly or indirectly out of the District's failure to treat or dispose of the Sewage of a Connecting Entity properly, providing such Connecting Entity has complied with the District's rules and regulations with regard to the incident(s) in question.
- C. **Reconstruction.** If any useful part of the District's System is damaged or destroyed, the District shall expeditiously repair or replace the damaged property. The District shall apply any applicable insurance proceeds (except for proceeds of use and occupancy insurance) to the costs of such repair and replacement. The District shall deposit any excess insurance proceeds, together with proceeds of any use and occupancy insurance, as Revenues of the System. If the costs of repairing or replacing the damaged property exceed the insurance proceeds, money in the emergency capital reserve fund as provided in Section 502.D shall be used as necessary for such purposes.

### **Section 208. Alienating System**

No component required to construct, reconstruct or operate the District's System shall be sold, leased, mortgaged, pledged, encumbered, or otherwise disposed of or alienated, until all Securities of the District have been paid in full or redeemed. In addition to a sale or lease of capacity in the District's System

between Connecting Entities as provided in Section 407.D, any sale or lease of capacity may be made only by the Connecting Entity that owns such capacity. Written notice of any such sale or lease shall be provided to the District as soon as practicable.

### **Section 209. Records, Accounts and Audits**

The District shall keep proper books of record and account (separate from all other records and accounts), in which complete and correct entries shall be made of its transactions relating to the System. The District shall also keep a list of the insurance policies in force at the end of the Fiscal Year, setting out as to each policy the amount of the policy, the risks covered, the name of the insurer, and the expiration date of the policy. All books and papers of the District shall be subject to inspection by any member of the Board and any officer of a Connecting Entity ~~or an Associated Municipality~~ at all reasonable times. The District shall cause its books and accounts to be audited annually by an Independent Accountant selected by the District. Each audit shall at a minimum include the following:

- A. A detailed statement of the income and expenses of the District's System for the Year, including a classified statement of gross Revenue received, of net Revenues, and of the amount of any capital expenditures pertaining to the District's System for the Year, and a statement of the profit or loss for the Year.
- B. A balance sheet as of the end of the Year showing the assets and liabilities in each of the District's accounts.
- C. The Independent Accountant's comments regarding: (1) the District's methods of operation and accounting practice; (2) the manner in which the District has carried out the requirements of each resolution and any other proceedings authorizing the issuance of outstanding bonds or other obligations; and (3) the Independent Accountant's recommendations for changes or improvements as the Independent Accountant deems appropriate.
- D. A recapitulation of each account into which are deposited funds derived from the operation of the District's System or from the sale of District Securities. Such analysis shall show the balance in each account at the beginning of the Year, the deposits and withdrawals during the Year, and the balance at the end of the Year.

### **Section 210. Contract Service Area**

In the event that a portion of any Connecting Entity ~~or Associated Municipality~~ is excluded from the District pursuant to C.R.S. §32-4-515, the attached *Exhibit-A* shall be updated to reflect such exclusion.

— Within forty-five (45) calendar days of the District's request, each party to this Agreement shall file with the District a map or legal description depicting the boundaries of and land included within its Contract Service Area.

## ARTICLE III

### General Sewage System Provisions

#### Section 301. Tributary Sewer Systems

Connections to the District's System shall be made only at Connection Points approved by the District. Service shall be limited to the Sewage Systems of the Connecting Entities owned, operated, or controlled by the respective Connecting Entities. Sewage from the Connecting Entities shall be metered.

The Connecting Entity will install at its expense metering, Supervisory Control and Data Acquisition (SCADA) systems with connectivity to the District's System, and sampling facilities at each Connection Point. ~~Any new Connection Points shall include metering and sampling facilities, all of which shall be paid for by the Connecting Entity concerned not currently established.~~ Subject to the provisions of Section 405, only Sewage from separate Connecting Entity systems shall be discharged into the District's System. For any new Connection Point(s) a Connecting Entity may desire, a written request must be made to the District and formally approved by the ~~District~~ District's Governing Board. No individual home or business shall be allowed a Connection Point(s) onto the District's System.

~~The District will make provision at each point of metered connection listed in Schedule A hereof for measurement of quantity and for quality sampling at the District's own cost and expense.~~

#### Monitoring Stations and Use in Billing for Services.

In lieu of the Fountain Sanitation District's (FSD's) obligations contained within the Service Agreement with respect to the construction and maintenance of Flow Monitoring Stations (the "Monitoring Stations") at discrete locations (see Exhibit B), the Parties agree as follows:

(a) One Monitoring Station will be located at the Southwest corner of Lorson Blvd. and Marksheffel Road; said Monitoring Station being referred to herein as LFMS No. 1;

(b) A second Monitoring Station, referred to herein as LFMS No. 2, located at the point of entry to the Harold D. Thompson Regional Water Reclamation Facility (HDTRWRF); said LFMS No. 2 will measure all wastewater influent to the HDTRWRF and will satisfy FSD's meter station obligation.

(c) Billing to Colorado Centre Metropolitan District (CCMD) by the District will be based on the total flow and or volume and Organic Loading measured as the contribution from LFMS No. 1.

(d) Billing to FSD by the District will be based on the total flow and or volume as measured at LFMS No. 2 after subtracting the contribution or proportional flow and Organic Loading measured at LFMS No. 1.

(e) A Connecting Entity receiving service from the District may provide service to another Connecting Entity. Charges and billing shall be determined between the entities by separate instrument.

#### Section 302. Connections to System

Each Connecting Entity shall construct, install and operate at its own expense each Connection Point to the District's Sewage Disposal System. This shall include any extension of a Connecting Entity's

sewer system ~~or outfalls~~ required to deliver its sewage to the Connection Point(s). However, the District shall maintain and repair as part of its operations LFMS No. 1.

### **Section 303. Service by District and Connecting Entities**

The District shall be the exclusive agency for ~~the Acquisition~~acquisition and operation of ~~a Sewage Disposal~~the District's System within and for the District, except as otherwise authorized in this Agreement or the Act. Each Connecting Entity shall retain its authority to provide sewer service to its inhabitants including ~~the Acquisition, Improvement~~acquisition, improvement, operation, and maintenance of ~~Sewage~~sewage collection, treatment and disposal facilities, including any existing facilities or system, subject to Section ~~304 hereof and to C.R.S. §32-4-538.~~ 304 hereof and to C.R.S. §32-4-538. In the event a Connecting Entity desires to extend sewer service to areas not currently within the Contract Service Area as set forth in Exhibit A, the Connecting Entity will obtain approval of the District Board in advance of such extension.

### **Section 304. Competing System**

The District shall not grant any franchise or license to a competing system, nor shall it permit (except as it may legally be required so to do) the acquisition or improvement by any Connecting Entity of sewage treatment or disposal facilities which increases the capacity thereof. This section shall not affect ~~existing~~ facilities of the Member Municipalities and Connecting Corporations which do not serve lands within the District's Contract Service Area. For purposes of this section and except as otherwise allowed by this Agreement, a competing system is any wastewater treatment system that serves an area that is capable of receiving service from the District but not currently included within the District's service area.

Subject to Sections 303 and 307 herein, the District may consent to Acquisition or Improvement of a competing system and may approve the plans and specifications therefor if the Board determines in writing that:

- A. it is not economically feasible for the District to furnish the desired treatment or disposal, *and*
- B. the Acquisition or Improvement of such facilities or system by the Member Municipality or Connecting Corporation or by any other Person within its boundaries will not materially impair the security for payment of District Securities or other obligations, *and*
- C. it is not inequitable or unreasonable for the District to grant such consent and approval, pursuant to §§32-4-506, 32-4-513, 32-4-516, and 32-4-538 of the Act, *and*
- D. the plans and specifications for the proposed competing system are acceptable to the District.

### **Section 305. [Reserved]**

### **Section 306. Limitations Upon Consent**

Whenever under the terms of this Agreement the District is authorized to give its written consent, the District in its discretion may give or may refuse such written consent and if given, may restrict, limit, or condition such consent in such manner as it shall deem advisable. Acceptance by the District of Sewage from a Connecting Entity into the ~~Sewage Disposal~~District's System in a volume or with characteristics exceeding or violating any limit or restriction provided for by or pursuant to this Agreement, in one or more

instances or under one or more circumstances, shall not constitute a waiver of such limit or restriction or of any of the provisions of this Agreement, and such acceptance shall not in any way obligate the District thereafter to accept or to make provision for Sewage delivered and discharged into the District's System in a volume or with characteristics exceeding or violating any such limit or restriction in any other instance or under any other circumstances.

### **Section 307. New Connections**

It is the policy of the District that the Connecting Entities shall require that all new construction conform to current wastewater engineering standards.

In general, new connections to the District's Interceptor System will be allowed only from major sewer mains, and other interceptor sewers, which for purposes of this Agreement shall mean a main or sewer greater than ten inches (10") in diameter. The connection of minor collector lines or individual service lines to a District's Interceptor will be considered on a case-by-case basis where no other alternative is feasible. The District may also consider any other factors in the best interest(s) of the District. Only lines which are the property of and/or under the complete control of the Connecting Entity will be allowed to be connected to the District's Interceptor System.

The number of connections to the District's Interceptor System authorized for each Connecting Entity shall be kept to a minimum. Wherever feasible, flows from newly developed areas shall enter the District's Interceptor System at existing points of connection. The Connecting Entities should not consider the District's Interceptors to be a replacement for portions of their collection system but rather for the purpose of intercepting the Flow from their collection systems.

New connections shall be made in such a manner that the quantity and quality of Flow at a point downstream from each Connecting Entity shall be measured as stipulated in the District Rules and Regulations, for the purpose of determining Service Charges and ensuring needed hydraulic capacity.

### **Section 308. Water Rights**

The District makes no claim to the ownership of the water rights of the Connecting Entities stemming from their Sewage contributions to the System. The District will return its treated discharge flow to Fountain Creek downstream of the District's treatment plant at the location specified on Exhibit A. Each Connecting Entity shall provide for this point of discharge in its water rights as appropriate. If any Connecting Entity requires its return flow to be conveyed to a location other than the System's District's System at the Fountain Creek discharge location, the Connecting Entity shall be solely responsible for all costs associated with delivering its return flow to an alternate location. Any structure proposed to withdraw a portion of the District's ~~wastewater treatment plant's~~ treated discharge shall be subject to District approval. This section does not limit the District's authority to acquire water rights to be used as determined by the District.

### **Section 309. Water Quality**

The District will treat the Sewage sufficient to comply with the District's effluent permit limitations. Any additional treatment desired and or required by a Connecting Entity shall be the responsibility of the Connecting Entity.

## ARTICLE IV

### Sewage Discharge to the System

#### Section 401. Discharge Requirements

- A. **Users to Comply.** All Connecting Entities will ensure that their Sewage discharges to the District's System comply with the rules and regulations ~~issued~~adopted by the District. The District shall have final authority concerning methods, standards, criteria, significance, evaluation, and interpretation of technical or scientific analyses and methods used to determine compliance.
- B. **Non-Complying Discharges.** Immediately upon discovery of a non-complying discharge to the District's System, a Connecting Entity shall notify the District in writing of the non-complying discharge stating the nature, time and place of the violation. The Connecting Entity shall promptly bring the discharge into compliance or disconnect the connection(s) causing the violation. The District may take enforcement action, as defined in its adopted rules and regulations, against any Person discharging Sewage in violation of District regulations into a Connecting Entity's sewer system.
- C. **Compliance Determinations.** The District may determine in accordance with Section 404 herein whether Sewage discharged into the District's System by any Connecting Entity complies with the District's requirements. The District shall promptly notify a Connecting Entity in writing of any discharge which the District determines violates its requirements. Unless objected to in writing within thirty (30) calendar days, the District's determination shall be deemed correct. If an objection is filed with the District, the District Engineer shall review the matter and attempt to resolve the matter informally.

#### Section 402. Special Waste Requirements

The District may, through its rules and regulations, prohibit or regulate the discharge into the District's ~~Sewage Disposal~~ System of any substances which are or may be Substantially Injurious to the System or its efficient operation.

#### Section 403. Industrial Sewage

The Connecting Entities shall require any potential User ~~whose~~whose Sewage would not conform to the District's rules and regulations to provide pretreatment, flow-~~equalizing~~equalization or other facilities required to bring that User's discharge into compliance at the point at which it enters the Connecting Entity's sewer system. The Connecting Entities will require such Users to construct, operate and maintain pretreatment facilities in a safe and effective operating condition.

The Connecting Entities will comply with the District's requirements concerning industrial sewage contained in the District's rules and regulations. The Connecting Entities agree to support and enforce the District's requirement that significant new industrial users obtain a discharge permit from the Colorado Department of Public Health and Environment prior to discharging sewage to the Connecting Entity's sewer system.

#### Section 404. Determination of Sewage Characteristics

- A. **Reports.** The District, ~~at the expense of each Connecting Entity,~~ shall prepare and submit reports to each respective Connecting Entity concerning the volume ~~and strength~~ of Sewage delivered at the Connection Point(s) on a monthly basis. ~~At the sole expense of the Connecting Entity, the District may request a Connecting Entity to submit a Sewage meter calibration report(s) on such schedule as the District may require but not less than annually. The~~ If needed, the District shall also perform at its expense a meter calibration at all Connection Point(s) not less than annually. Volume shall be monitored continuously by Sewage Meters and SCADA systems and the Sewage strength shall be periodically monitored as determined by ~~periodi~~the District and will be by composite sampling. The District's monthly billings to the Connecting Entities shall state the actual volume and strength; when monitored, of flow from each Connecting Entity. The District's billings shall be deemed correct within thirty (30) days thereafter if no objection is filed with the District by the Connecting Entity.
- B. **Objections.** In the event that an objection is filed, the Connecting Entity shall be afforded an opportunity to review the analytical and or laboratory records and to observe the Sewage Meters and sampling equipment and to obtain duplicate samples for determination of Sewage strength at its expense. The District may use an Engineer to review all relevant data and attempt to arrive at a satisfactory resolution.
- C. **Inspections.** In order to determine the characteristics of Sewage discharged into the District's System, the District's officers, agents and employees may at all reasonable times enter, inspect and sample the Sewer Systems of the Connecting Entities, any industrial or commercial installations connected thereto, or any other connections which contribute Sewage or wastes to the local sewer system.
- D. **Sewage Meter Calibration.** The ~~Connecting Entity~~District shall calibrate the Sewage Meters and appurtenances not less than annually and shall submit to the ~~District~~Connecting Entities a report of results each time the Sewage Meters and appurtenances are calibrated certifying that the Sewage Meters and appurtenances have been checked and calibrated by a qualified inspector for proper operation and accuracy. ~~The District may, if it so chooses, witness such calibration procedures by the Connecting Entity, and the Connecting Entity shall give the District reasonable advance notice of when such calibration activities will be performed.~~ In addition, any Connecting Entity may, at any time and at its sole expense, request the District to perform ~~the~~a calibration of Sewage Meters and appurtenances by a qualified inspector for proper operation and accuracy. Such calibration shall be performed by the District within a reasonable time period after receipt of the request.

#### Section 405. Infiltration and Inflow Control

No Connecting Entity shall make or permit any new connection to or extension of the Sewage System of a Connecting Entity which is designed to permit entrance directly or indirectly into the District's ~~Sewage Disposal~~ System of storm water drainage from ground surface, roof leaders, catch basins or any other source. Each Connecting Entity shall make reasonable efforts to limit Infiltration and Inflow into the Sewage System of the Connecting Entity.

#### Section 406. Discharge Prohibitions

The Connecting Entities shall not discharge Sewage into the District's System which:

- A. impairs the hydraulic capacity of the District's System, normal and reasonable wear and usage

excepted;

- B. impairs the strength or the durability of the District's sewer structures, equipment or treatment works, either by chemical or mechanical action;
- C. creates flammable or explosive conditions in the District's System; or
- D. violates the Act or any rule, ordinance or regulation of the District.

Notwithstanding anything in this Agreement to the contrary, acceptance of Sewage by the District into its System in a volume or with characteristics exceeding or violating any limit or restriction provided for by or pursuant to this Agreement, in one or more instances or under one or more circumstances, shall not constitute a waiver of such limit or restriction or of the provisions of this Agreement, and such acceptance shall not in any way obligate the District thereafter to accept or to make provision for Sewage delivered and discharged into the District's System in a volume or with characteristics exceeding or violating any such limit or restriction in any other instance or under any other circumstances.

#### **Section 407. Discharge Limits and Capacity Reallocation**

- A. ***Interceptor.*** No Connecting Entity may exceed its allocated Peak Hourly Flow within any increment of the Interceptor without prior District approval. No parties other than the Connecting Entities which have executed this Agreement may use the Interceptor.

Notwithstanding the above, ~~any Connecting Entity may, with advance notice to but without the approval of the District, annex or otherwise agree to serve parties or property outside the Contract Service Area as it presently or then exists. In~~ the event that a Connecting Entity agrees to serve parties or property outside the Contract Service Area, the Interceptor and Treatment Plant allocations of said Connecting Entity will not be altered without the approval of the District and said Connecting Entity shall remain responsible for compliance with this Agreement and the District's rules and regulations in the provision of service to said parties or property.

- B. ~~Plant~~ ***Treatment Facility.*** No Connecting Entity may exceed its Average Day Flow reserve capacity for more than ten (10) consecutive days without District approval. No parties other than Connecting Entities which have executed this Agreement may use the District's wastewater treatment plant without District approval. The terms of subsection A. above as concerning new Connecting Entities shall apply to the District for any additional or new facilities, or expansion of then-existing wastewater treatment capacity, required for such Connecting Entities to use the wastewater treatment plant.

- C. ***Penalties.*** When the District observes any Connecting Entity has reached 85% of its owned capacity allocation(s), the District will provide written notice of warning within 48-hours. This may be by email, regular mail, or both. A Connecting Entity will be charged \$5,000 per day per violation for exceeding their Interceptor or Treatment Facility as listed above and flow capacities as allocated to them. If said violations continue for more than 30 days in a rolling one-year period, the penalty will increase to \$15,000 per day per violation.

- ~~E.D.~~ ***Reallocation.*** No Connecting Entity's allocation of capacity in the District's System, including but not limited to the wastewater treatment ~~plant~~ facility and Interceptor, shall be changed without the consent of the affected Connecting Entities.

D.E. ***Lease of Capacity.*** Any Connecting Entity may lease, sell or otherwise transfer any or all of its capacity in the District's System to another Connecting Entity upon approval of the Board, subject to Section 306. No such lease or other transfer shall affect the financial obligations of any Connecting Entity to the District or of the District to the holders of its Securities.

## ARTICLE V

### District Budget and Charges

#### Section 501. Annual Budget

The District is governed by the “Local Government Budget Law of Colorado”, C.R.S. §29-1-101, *et seq.* for the purposes of adopting and amending its annual budgets. The District shall comply with all procedures, notification requirements and filing requirements of said law. In addition, the District shall prepare and submit to each Member Municipality and Connecting Corporation a proposed budget for the ensuing Year at least ninety (90) days prior to the final adoption by the District of the budget for the ensuing Year.

#### Section 502. Basis for Incurring and Allocating Costs

##### A. *Generally*

The District shall ~~build~~, operate and maintain the ~~Project~~District System efficiently and shall not incur costs inconsistent with sound management. The parties agree that the Annual Charges to Connecting Entities ~~and Associated Municipalities~~ under the Rate Schedule shall apply in a uniform manner regardless of a Connecting Entity’s proportionate use level ~~and~~, irrespective of ~~an Associated Municipality’s~~ use or non-use. Any cost or expense incurred by the District that is not considered a capital cost or a Service Charge (including any Operation and Maintenance Expenses) shall be deemed an Annual Charge.

##### B. *Operation and Maintenance Expenses*

1. Each Connecting Entity shall pay Operation and Maintenance Expenses in proportion to its use of the District’s System as more specifically described in the Rate Schedule ~~to be~~ adopted annually by the District. Such charges shall be based upon the amount and quality of Sewage delivered into the District’s ~~Sewage Disposal~~ System.
2. The District shall estimate the amount of ~~the Charges required for the purposes of this Agreement and, while the System is in operation, shall estimate the~~ total volume and ~~strength of~~ Sewage Strength anticipated from each Connecting Entity and shall determine the total Charges due thereon, all not later than September 1 of the Year preceding that to which the Charges shall apply. The District shall certify ~~these Charges~~ delivery of the succeeding year’s budget to each Connecting Entity ~~in writing within five business days thereafter~~. Each Connecting Entity shall provide for the payment of said Charges by including provisions therefor in its budget in the following Year and shall make appropriations therefor if required by law.

##### C. *Project Wastewater Treatment and Conveyance*

1. ~~In the event the District dissolves, the proceeds from such dissolution shall be distributed as follows: (a) District administrative expenses, as such expenses are described in the annual budget adopted by the Board annually, shall be reimbursed fully to the extent funds are available and in the amounts paid by the Connecting Entities and the Associated Municipalities, and if sufficient funds are unavailable to fully reimburse the parties then the available funds shall be distributed among the Connecting Entities and the Associated Municipalities in proportion to the amounts paid by the Connecting Entities and the~~

~~Associated Municipalities for District administrative expenses; and (b) any remaining balance shall be distributed to Fountain Sanitation District and Colorado Centre Metropolitan District as follows: 75% to Fountain Sanitation District and 25% to Colorado Centre Metropolitan District. The District and Connecting Entities have provided for construction and operation of the Harold D. Thompson Regional Water Reclamation Facility (HDTRWRF) and an interceptor sewer to provide Service to Connecting Entities.~~

2. ~~**Wastewater Treatment Plant Construction Facility.**~~ The capacity of the wastewater treatment facility ~~was constructed and~~ has been allocated to the Connecting Entities on the basis of their ~~projected needs. The costs associated with construction of the treatment plant facilities was allocated~~ needs or in accordance with agreements between Connecting Entities. ~~Any future capacity needs will be paid for on a~~ pro-rata share, based upon the ~~additional~~ capacity allocated to each Connecting Entity; ~~participating in the capacity expansion.~~ Notwithstanding the foregoing, the parties agree that Vintage Development Company (“Vintage”) ~~and any future Connecting Entity~~ shall not be required to incur or pay any direct costs related to Project construction ~~when such costs are incurred initially. To the extent Vintage or another future Connecting Entity exercises this option, Vintage or the future Connecting Entity shall set tap fees in an amount sufficient to pay Vintage’s or the future Connecting Entity’s pro-rata portion of Project costs. Additionally, if the~~. The parties agree that the FSD will provide service to the Vintage property, known as JV Ranches, ~~is included within the Fountain Sanitation District service area at the time Vintage or its successors exercises this option, Fountain Sanitation District shall recover from the District such costs advanced on behalf of Vintage or its successors~~ LLC and Giovenca LLC properties. FSD will use its prorated capacity allocation in the District’s System to provide such service and will collect such tap fees, charges, and assessments in accordance with the FSD’s rules, regulations, policies and procedures as compensation for providing such service.

3. ~~3. —~~ **Overall Project Participation, Capacity Ownership and Allocation.** The parties acknowledge that, based on agreements reached among themselves regarding past financial contributions toward the ~~Project, Fountain Sanitation District and Colorado Centre Metropolitan District~~ District’s System, FSD and CCMD funded the entire initial Project construction, which includes construction of the Interceptor through the JV Ranches property. ~~As of the effective date of this Agreement: (i) Fountain Sanitation District owns 75% (1.875 MGD) Presented and agreed by the Board, Colorado Centre Metropolitan District owns 25% (.625 MGD) of the total 2.5 MGD~~ sold a proportionate share of its ownership to City of Colorado Springs on behalf of Colorado Springs Utilities. As of the effective date of this Agreement, the following capacity ~~within the District’s wastewater treatment plant, and (ii) Colorado Centre Metropolitan District owns 1 MGD~~ allocations have been established:

Capacity and Treatment Allocations			
Connecting Entity	HDTRWRF	Northern Interceptor	Southern Interceptor
	ADF (MGD)	PHF (MGD)	PHF (MGD)
Colorado Center MD	0.427	0.500	1.000
Colorado Springs Utilities	0.198	0.500	0.500
Fountain Sanitation District	1.875	Remaining flow within the max. 75% pipe depth	Remaining flow within the max. 75% pipe depth
ADF = Average Daily Flow			
PHF = Peak Hourly Flow			
MGD = Million Gallons per Day			
HDTRWRF = Harold D. Thompson Regional Water Reclamation Facility			

Interceptor pipes were designed for maximum daily flow of 16.81% of at a depth no greater than 75% of pipe diameter (75% pipe depth), with a 0.013 Manning's roughness coefficient, and the total capacity within accompanying segment slope. Per invoice records, CCMD originally paid 12.52% of the Southern Interceptor and Fountain Sanitation District owns the remaining FSD paid for 87.48%. Based on current flow capacity ownership agreements; CCMD owns 8.39% and 83.19% the City of Colorado Springs on behalf of Colorado Springs Utilities owns 4.13% of the Southern Interceptor with FSD still owning 87.48%. The hydraulic capacity within analysis of the Interceptor. Northern Interceptor Peak Hourly Flows, and agreement between the parties CCMD and CSU each own 9.12% (see Exhibit C) and FSD owns 81.76% (see Exhibit D). Subject to Sections 208 and 407. DE of this Agreement concerning the sale or lease of a party's allocated capacity, any Connecting Entity desiring wastewater treatment service shall be responsible for all costs associated with increasing the capacity of the Interceptor or the wastewater treatment plant, or both to serve that Connecting Entity.

4. Interceptor Construction. Initial. Interceptor capacity has been allocated between Fountain Sanitation District FSD, CCMD, and the City of Colorado Centre Metropolitan District Springs on behalf of Colorado Springs Utilities based upon the respective ownership interests described in Section 502.C.3 above. For any Extension or Improvement of the initial Interceptor or construction of a new Interceptor that is requested or required to provide Service to other areas within the Contract Service Area, each Connecting Entity (or Associated participating in the Extension or Improvement or construction of a new Interceptor (or Connecting Municipality or other Person that will be a Connecting Entity as a result of such Extension or Improvement of the initial Interceptor or construction of a new Interceptor) shall be responsible for the percentage its pro rata share of the actual cost of such Extension, Improvement or construction of a new Interceptor. All existing Entities will keep their original capacities within the Interceptor that results from (a) such Connecting Entity's (or Associated Municipality's or other Person's) share of the increased Interceptor capacity, divided by (b) the total increased Interceptor capacity, and multiplied by (c) 100 prior to the date of the Extension or Improvement or construction of a new Interceptor.

D. ***Emergency Capital Reserve Fund***

A capital reserve fund is hereby established under this Agreement. The initial reserve fund account shall be funded as permitted under the Act, and shall be replenished as determined by the District in accordance with the Act. This fund may be used for any unbudgeted, emergency capital expenditure, and any funds expended shall be replaced (in addition to any other payments required to fund this reserve fund) in the immediately following Year. Unless otherwise agreed, the parties shall contribute to the emergency capital reserve fund *pro rata* in the same proportion as their capital contributions existing at the time of funding such contributions to the emergency capital reserve fund.

**E. Dissolution of the District**

In the event the District dissolves, the proceeds from such dissolution shall be distributed as follows: (a) District administrative expenses, as such expenses are described in the annual budget adopted by the Board annually, shall be reimbursed fully to the extent funds are available and in the amounts paid by the Connecting Entities, and if sufficient funds are unavailable to fully reimburse the parties then the available funds shall be distributed among the Connecting Entities in proportion to the amounts paid by the Connecting Entities for District administrative expenses; and (b) any remaining balance shall be distributed to each Connecting Entity based on its then-current interest in the District's System.

## ARTICLE VI

### Payments by Connecting Entities

#### Section 601. Payment of Charges

Each Connecting Entity ~~and Associated Municipality~~ will budget and appropriate funds for ~~annual~~Annual Charges and other costs for each Fiscal Year as provided in Sections 502 and 604 hereof and deposit such funds with the District ~~upon request~~as invoiced. Otherwise, each party shall promptly pay the Annual Charges and other costs then due to the District pursuant to this Service Contract or as may otherwise be imposed, including contributions to support District Services. This Section does not prohibit any Connecting Entity ~~or Associated Municipality~~ from committing any other funds for the purpose of meeting its obligations hereunder and paying Annual Charges and other costs due the District.

Each Connecting Entity's ~~and each Associated Municipality's~~ obligations to pay the Annual Charges and other costs pursuant to this Service Contract shall not constitute a debt within the meaning of Colorado law and are not general obligations but shall constitute special and limited obligations as apportioned to them. Default by a Connecting Entity ~~or Associated Municipality~~ shall not constitute a liability of the non-defaulting parties. The District shall seek recourse against any defaulting party as provided for herein and otherwise allowed by law. Nothing herein prohibits a non-defaulting party from paying the obligations of a defaulting party to the District and either treating such payments as a loan to the defaulting party or, subject to Section 407.D, purchasing the defaulting party's allocation of capacity in the District's System.

Each Connecting Entity ~~and Associated Municipality~~ shall be liable for and shall render prompt payment of all Annual Charges and costs payable hereunder and provided for herein, at such place and in such manner as the District may reasonably prescribe. Nothing shall prevent any party from fixing and collecting fees necessary for the operation, maintenance and improvement of its own sewer system.

#### Section 602. Timing of Payments

~~Each Connecting Entity and Associated Municipality shall pay one twelfth (1/12) of the estimated Annual Charges for the current Fiscal Year plus one twelfth (1/12) of the adjustments from the prior Fiscal Year not later than the fifteenth (15th) day of each calendar month, and shall be considered delinquent thereafter.~~ Service Charges and any additional fees, costs and other special Charges shall be due and payable monthly within thirty (30) days of their assessment by the District and shall become delinquent thirty (30) days thereafter.

#### Section 603. ~~Certification of~~ Estimated Charges

Pursuant to Section 502.B.2 of this Agreement, the District shall ~~deliver to each Connecting Entity and Associated Municipality the District's certificate stating~~determine the estimated amount of the following Fiscal Year's Charges. Such Charges in the aggregate shall be sufficient to pay the amounts estimated to be needed by the District in the following Fiscal Year as shown in the Annual Budget. ~~Any such certificate~~Upon notice to the Connecting Entities the Board may adjust for the current Fiscal Year ~~in which that certificate is rendered, for~~ the estimated Charges previously ~~certified~~expected. Each adjustment shall be based upon revised estimates resulting from the operation and maintenance of the System by the District for a portion of the current Fiscal Year prior to the date of any such adjusted estimate.

#### Section 604. Preliminaries to Payment by Connecting Entities

After receipt of the District's ~~certificate of~~ estimated Charges, each Connecting Entity ~~and Associated Municipality~~ shall make all budgetary appropriations necessary to provide for and authorize payment to the District of the Charges for the following Fiscal Year as the Charges become due and payable.

#### **Section 605. ~~Final~~ Adjustment of Charges**

The Charges fixed or imposed against any Connecting Entity ~~or Associated Municipality~~ may be adjusted for any Fiscal Year. ~~This final adjustment shall be made on or before the last day of March next following that Fiscal Year.~~

#### **Section 606. ~~Hearing on and Notice of Final Payment~~ Reserved**

~~Prior to making any final adjustment of any Charge for any Fiscal Year, as provided in Section 605 hereof, the District shall hold at its regular meeting in March next following that Fiscal Year a hearing on the proposed final adjustment. At the hearing any Connecting Entity or Associated Municipality may appear and present objections to the final adjustment of the Charges for that Fiscal Year. The District may make a final adjustment after the hearing, but in any event on or before the last day of March.~~

#### **Section 607. Time of Adjustments to Estimated Charges**

The District in its absolute discretion may adjust the estimated Charges for any Fiscal Year and may certify any resulting debits and credits to the Connecting Entities ~~and the Associated Municipalities~~ at any time ~~prior to the final adjustment~~, whenever the Board determines that such adjustment is necessary or desirable.

#### **Section 608. Payment to Balance Adjustments**

Any Connecting Entity ~~or Associated Municipality~~ to which the District certifies a supplemental Charge resulting from any adjustment shall provide for its payment, along with payment of the estimated charge, in its next Annual Budget unless the Connecting Entity ~~or Associated Municipality~~ determines to pay the supplemental Charge prior thereto.

Any Connecting Entity ~~or Associated Municipality~~ to which the District certifies a credit resulting from any adjustment shall so provide in its next annual budget and shall thereby reduce the amount of the estimated Charge payable in the Fiscal Year for which that Annual Budget is prepared, unless the District remits the amount of the credit to the Connecting Entity ~~or Associated Municipality~~ prior to the payment of the estimated Charge.

#### **Section 609. Limitations Upon Adjustment of Charges**

Whenever the District adjusts the Charges for any Fiscal Year, ~~non-final~~ supplemental adjustments shall be based upon estimates of the amount and quality of Sewage to be delivered into the District's System, direct or indirect connections with or use of the System, and the other costs and expenses of the District. ~~Final adjustments~~ Adjustments shall be based upon these same characteristics as actually measured pursuant to Section 404 and such costs and expenses as actually incurred by the District. In addition, the District may adjust the Charges to include minimum or Service availability charges and delinquency penalties including interest, collection costs and actual attorney's fees.

#### **Section 610. Enforcement**

If any amount due the District from any party hereto shall remain unpaid following its due date, the delinquent party shall be charged and pay to the District interest on the unpaid amount from its due date until paid at the rate of ~~ten~~ percent (+10%) per month or fraction thereof.

Every obligation assumed by or imposed upon any party by this Agreement shall be enforceable by the District by appropriate action, suit, or proceeding at law or in equity. The District may pursue any and all remedies provided by law for the enforcement of such obligation, including the remedies and processes provided by the Act with respect to Charges or other obligations, and the District shall be awarded all actual fees and costs, including reasonable attorney's fees, incurred in pursuing such remedies.

### **Section 611. Character of Obligations**

Failure by any party hereto to perform fully any obligation assumed by or imposed upon it by this Agreement shall not make the District liable in damages to any other party hereto nor relieve a Connecting Entity ~~or Associated Municipality~~ from making any payment to the District or from fully performing any other obligation required of it under this Agreement. -Any Connecting Entity ~~or Associated Municipality~~ may pursue any and all other remedies provided by law for compelling performance by the defaulting party.

## ARTICLE VII

### Abandonment of Sewer System Facilities

#### Section 701. Abandonment Permitted

Any Connecting Entity may in its sole discretion at any time abandon or, in the alternative, continue to operate, maintain, and repair all or any part of those sewage treatment or disposal facilities constituting at the time of the date of this Agreement a part of the Sewage System of a Connecting Entity, subject to the provisions of Sections 303, 304, and 305 hereof.

#### Section 702. Notice of Abandonment

At least thirty (30) calendar days prior to abandoning any sewage treatment or disposal facilities, which abandonment will substantially increase the Sewage received from its sewer system ~~by the District in its Sewage Disposal System~~, any Connecting Entity shall file written notice with the District's secretary of the Connecting Entity's intent to abandon the designated facilities on the date stated in the notice.

## ARTICLE VIII

### Additional Municipalities and Connecting Corporations

#### Section 801. Conditions of Inclusion

Any Municipality not comprising a part of the District on the date of this Agreement, or any part of such Municipality may be included in the District as provided in §32-4-513 of the Act upon such terms and conditions as may be determined by the Board and upon its determination that such Municipality may feasibly be served by the District's System as provided by resolution approved by a majority of the Board. Any corporation not under contract to be connected to the District's System on the date of this Agreement may be served by the District upon such terms and conditions as may be determined by the Board and upon its determination that such corporation may feasibly be served by the District's System as provided by resolution approved by a majority of the Board. As consideration for the District's agreement to provide service, a corporation or any private party shall either form a new special district or wastewater district or incorporate into a Municipality.

#### Section 802. Party to This Agreement

No Municipality shall be included in the District, or a Connecting Corporation served by the District after the date hereof unless, among any other conditions and terms so determined by the Board, the Municipality or Connecting Corporation shall consent to become a party to this Agreement, as amended, on the date of such inclusion or addition as a Connecting Corporation, as applicable. Any such Municipality or Connecting Corporation shall execute a written instrument to that effect, filed with the District's secretary. In the case of a Municipality, the instrument shall be executed prior to or simultaneously with the transmittal to the Division of Local Government in the Department of Local Affairs of a certified copy of the resolution to the Board including the Municipality within the District, pursuant to §32-4-513 of the Act.

Upon the issuance of the certificate of the Division of Local Government reciting that the Municipality or the portion thereof designated in the certificate has been duly included within the boundaries of the District, the inclusion of the Municipality or the designated territory shall be effective, and the Municipality shall simultaneously be deemed to have become a party to this Service Contract without further action by the District or by any other Municipality. A corporation shall be a Connecting Corporation upon the execution of this Service Contract, as amended, and by resolution approved by a majority of the Board.

Any other party or property located outside the Contract Service Area desiring to receive service through or ~~independently independent~~ of a Connecting Entity must execute and agree to be bound by the terms of this Agreement and pay any fees then in effect. Upon signing this Agreement and payment of the prevailing fees, such other party or property shall be deemed either a Connecting Entity ~~or an Associated Municipality.~~ Any new Connecting Entity ~~or Associated Municipality~~ shall be solely responsible for the construction and installation costs for all associated facilities necessary for such Connecting Entity ~~or Associated Municipality~~ to receive service, and such new facilities shall be constructed and installed so as to not affect service to the existing Connecting Entities.

#### Section 803. Voting Rights of Member Municipalities

For purposes of determining the composition of the Board pursuant to §32-4-509 of the Act and in accordance with *Crestview Water and Sanitation District v. Board of Directors of Metropolitan Denver Sewage Disposal District No. 1*, 640 P.2d 265 (Colo. App. 1981), the total District population shall be the

population within the LFMSDD Contract Service Area, and each Member Municipality's respective population shall be the population of that Member Municipality residing within the LFMSDD Contract Service Area. If a person resides within the boundaries of more than one Member Municipalities, such person shall be counted as part of the population of the Connecting Municipality within which such person resides.

## ARTICLE IX

### Miscellaneous

#### Section 901. Effective Date

This Agreement shall become effective and be legally binding upon the parties upon its execution and delivery by each of the parties.

#### Section 902. Terms of Agreement

This Agreement shall be in full force and effect and shall be binding upon execution of the parties hereto for a period of twenty-five (25) years ~~from December 31, 2015~~ or until the first day of January next following the last outstanding bond or note issued by the District. Thereafter this Agreement shall continue as a binding contract to the extent permitted by law from year to year until a District, Municipal or Corporate officer files with the Secretary or Clerk of each of the parties hereto a notice that thirty (30) days after the last such filing or on any date designated in the notice following the expiration of such thirty (30) days' period this Agreement shall then be terminated.

#### Section 903. Securities of District

All bonds, notes or other obligations of the District referred to in this Agreement or to be issued by the District shall for all purposes of this Agreement be the sole obligation of the District and shall not in any way be deemed a debt or a liability of any Member Municipality or Connecting Corporation.

#### Section 904. Absence of Representations

No party makes any representation concerning the use of property, building permits required or not required, zoning regulations of anybodyany body, corporate and politic, or concerning exemption from licenses, permits, or taxes.

#### Section 905. Conformance with Law

Each party agrees to abide by and to conform to all applicable laws of the United States, the State of Colorado, and any other body corporate and politic having any jurisdiction in the premises. Nothing shall require any party to comply with any law the validity or applicability of which shall be contested in good faith in a court of law or administrative tribunal.

#### Section 906. Force Majeure

No party shall be responsible or liable in any way for Acts of God or any other act or acts or omissions beyond the control of such party which may in any way cause an interruption or a discontinuance of service appertaining to the District's Sewage Disposal System or to any Sewage System of a Connecting Entity.

#### Section 907. Non-Assignability

No party to this Agreement may assign any interest herein to any Person without the consent of the Board, and the terms of this Agreement shall inure to the benefit of and be binding upon the respective representatives and successors of each party hereto. Nothing herein contained, however, shall be construed to prevent the reorganization of any party hereto nor as preventing any other body corporate and politic

succeeding to the rights, privileges, powers, immunities, liabilities, disabilities, and duties of a party hereto, as may be authorized by law, in the absence of any prejudicial impairment of any obligation of contract hereby imposed.

#### **Section 908. Severability**

If any provision of this Agreement shall for any reason be held invalid or unenforceable, the disability of such provision shall not affect any of the remaining provisions of this Agreement.

#### **Section 909. Execution of Documents**

This Agreement may be executed in several counterparts, which shall be regarded for all purposes as one original. Each party agrees that it will execute any and all deeds, instruments, documents, resolutions or ordinances necessary to give effect to this Agreement.

#### **Section 910. Waiver**

No waiver by either party of any term or condition of this Agreement shall be deemed or construed as a waiver of any other term or condition, nor shall a waiver of any breach be deemed to constitute a waiver of any subsequent breach, whether of the same or of a different provision of this Agreement.

#### **Section 911. Remedies**

In addition to the remedies provided by law, this Agreement shall be specifically enforceable by any party.

#### **Section 912. Entirety**

This Agreement amends, restates, merges and supersedes all prior negotiations, representations, and agreements between the parties hereto relating to the subject matter hereof and constitutes the entire contract between the parties concerning the operation of the District and the conveyance, treatment and disposal of Sewage by the Connecting Entities and Associated Municipalities and the acceptance of such Sewage for disposal by the District. ~~Nothing herein contained shall be construed as superseding or otherwise modifying any other agreement to which any Connecting Entity or Associated Municipality is party but to which the District is not a party.~~

#### **Section 913. No Partnership Implied**

The approval of this Agreement does not create on behalf of the District any exclusive privileges or property rights in any Member Municipality or Connecting Corporation, neither by such approval does any Member Municipality or Connecting Corporation acquire any ownership interest of any sort whatever in the District's Sewage Disposal System nor is any joint venture, partnership, cooperative or other legal relationship created hereby.

#### **Section 914. Amendments**

This Agreement may be amended by writing, duly authorized and signed by representatives of all of the parties.

#### **Section 915. Effect of Headings, Type Faces and Recitals**

The headings and bold and italic type faces in this Agreement are inserted only for convenient reference and do not define, limit or prescribe the scope of this Agreement. The Recitals of this Agreement are included as an aid to interpretation, but do not themselves create, limit or define any rights or obligations of the parties.

**Section 916. Regional Cooperation**

The District ~~shall~~may work with such other wastewater service providers on a larger, regional scale as such opportunities may arise from time to time.

**LOWER FOUNTAIN METROPOLITAN SEWAGE DISPOSAL DISTRICT**

~~Bobby Phillips~~Charles Durbin, President

ATTEST:

~~Michael Cantin~~James Heckman, Secretary

**ACKNOWLEDGEMENT**

The foregoing instrument was acknowledged before me this \_\_\_\_ day of \_\_\_\_\_, ~~2016~~2022 by ~~Bobby Phillips~~Charles Durbin, President of the Board of Directors, Lower Fountain Metropolitan Sewage Disposal District.

Witness my hand and official seal.

My commission expires\_\_\_\_\_.

\_\_\_\_\_  
Notary Public

[SEAL]

**FOUNTAIN SANITATION DISTRICT**

\_\_\_\_\_  
~~Bobby Phillips~~Carl Christian, Chairman/President

ATTEST:

\_\_\_\_\_  
~~Carl Christian~~Charles Durbin Vice-Chairman/Director

**ACKNOWLEDGEMENT**

The foregoing instrument was acknowledged before me this \_\_\_\_ day of \_\_\_\_\_,  
~~2016~~2022 by ~~Bobby Phillips~~Carl Christian, Chairman/President, on behalf of the Fountain Sanitation District.

Witness my hand and official seal.

My commission expires\_\_\_\_\_.

\_\_\_\_\_  
Notary Public

[SEAL]

**COLORADO CENTRE METROPOLITAN DISTRICT**

\_\_\_\_\_  
~~Michael Cantin~~Jackie McClintock, Chair

ATTEST:

\_\_\_\_\_  
~~Shawn Eccles~~Norman Wodell, Secretary

**ACKNOWLEDGEMENT**

The foregoing instrument was acknowledged before me this \_\_\_\_ day of \_\_\_\_\_, ~~2016~~2022 by ~~Michael Cantin~~Jackie McClintock, Chair of the Board of Directors, Colorado Centre Metropolitan District.

Witness my hand and official seal.

My commission expires \_\_\_\_\_.

\_\_\_\_\_  
Notary Public

[SEAL]



**CITY OF COLORADO SPRINGS on behalf of COLORADO SPRINGS UTILITIES**

Merv Bennett, Council President, City of Travas Deal, Acting Chief Executive Officer, Colorado Springs  
Utilities

**ATTEST:**

\_\_\_\_\_  
Secretary  
Approved as to Form:

\_\_\_\_\_  
Colorado Springs City Attorney – Utilities Division

**ACKNOWLEDGEMENT**

The foregoing instrument was acknowledged before me this \_\_\_\_ day of \_\_\_\_\_,  
2016~~2022~~ by ~~Merv Bennett, President of the City Council, City of~~ \_\_\_\_\_, Chief  
Executive Officer, Colorado Springs Utilities.

Witness my hand and official seal.

My commission expires \_\_\_\_\_.

\_\_\_\_\_  
Notary Public

[SEAL]

**SCHEDULE A**

**LIST OF CONNECTING, METERING, AND SAMPLING POINTS**

Connecting Municipality

Location of Points

**EXHIBIT ATTACHMENTS**

**EXHIBIT A:** LFMSDD SOUTH CONTRACT SERVICE AREA

**EXHIBIT A CONTINUED:** LFMSDD NORTH CONTRACT SERVICE AREA

**EXHIBIT B:** LFMSDD INTERCEPTOR NORTH/SOUTH DELINEATION

**EXHIBIT C:** CCMD AND CSU NORTH INTERCEPTOR CAPACITY  
OWNERSHIP AT 1 MGD PEAK HOURLY FLOW

**EXHIBIT D:** NORTH/SOUTH FOUNTAIN SANITATION DISTRICT  
INTERCEPTOR PEAK HOURLY FLOW ALLOCATIONS

# Exhibit A

Colorado Centre Metro District within Colorado Springs

Fontaine Blvd (match line)

Peaceful Valley Rd

C & S Rd

Squirrel Creek Rd

State of Colorado

Link Rd

FSD WWTF Site

City of Colorado Springs

State of Colorado

Lower Fountain Metropolitan Sewage Disposal District Property

City of Colorado Springs

Opueblo Rd

Birdsall Rd

HDRWRF Outfall

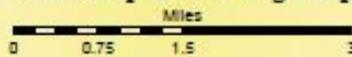
Hanover Rd

Topographic Limit of Williams Creek Drainage Basin

South Line of North Half of Sections 9, 10, 11 & 12 T16S, R65W

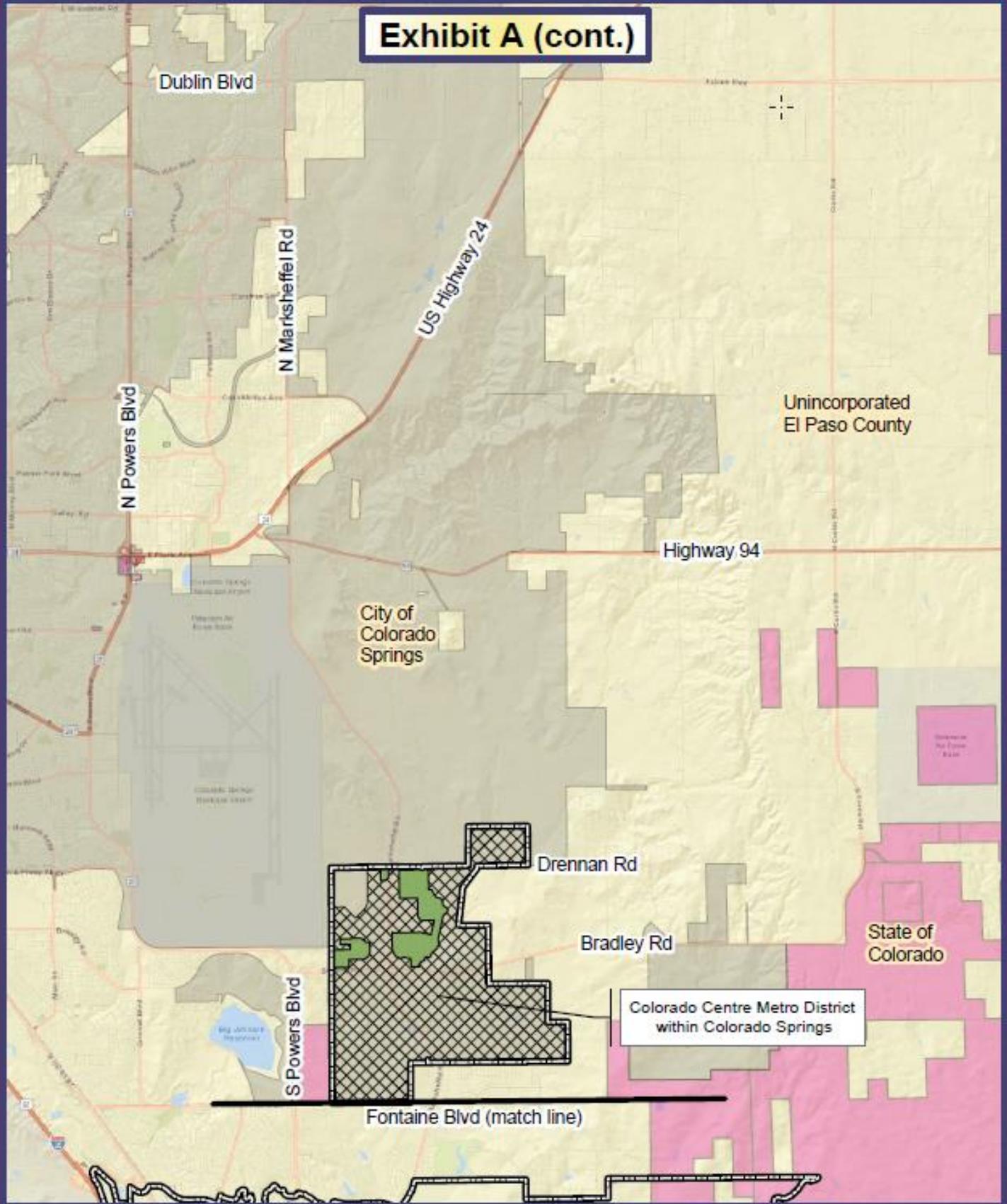
- LFMSDD Contract Service Area
- Colorado State Owned
- Colorado Centre Metro District
- CCMD within Colorado Springs
- City of Colorado Springs Controlled

## Contract Service Area (South) Lower Fountain Metropolitan Sewage Disposal District



1:108,000

# Exhibit A (cont.)



-  LFMSDD Contract Service Area
-  Colorado State Owned
-  Colorado Centre Metro District
-  CCMD within Colorado Springs
-  City Of Colorado Springs Controlled

**Contract Service Area (North)**  
**Lower Fountain Metropolitan Sewage Disposal District**

Miles  
 0 0.75 1.5 3

Sheet 2 of 2





1:108,000

# Exhibit B

Start Interceptor

LFMS No. 1

Northern Interceptor

FSD WWTF

Southern Interceptor

HDTRWRF  
LFMS No. 2

End Interceptor



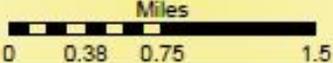
1:60,000

\*The Fountain Sanitation District assumes no liability relating to the completeness, correctness, or fitness for use of this data.



**LFMSDD**  
Lower Fountain Metropolitan Sewage Disposal District  
11545 Link Rd  
Fountain, CO 80817  
(719) 382-5303 | (719) 382-3441 (fax)

## Lower Fountain Metropolitan Sewage Disposal District LFMSDD Interceptor North/South Delineation



 Lower Fountain Interceptor

# Exhibit C

## Colorado Centre Metropolitan District (CCMD) and Colorado Springs Utilities (CSU) Northern Interceptor Percent Ownership

### Northern Interceptor Phase 3 - LFMSDD

					Pipe Capacity (MGD PHF) w/ roughness Coef. =0.013	At 1MGD % Ownership	(Pipe Length) * (% Ownership)	
From MH*	To MH*	Length	Pipe Dia.	Slope	Flow at 75% Full			Notes
CCMD Ex. MH	MH40	2006.6	18"	0.76%	5.40	18.52%	371.59	At CCMD's Manhole
MH40	MH35	2000	18"	0.92%	5.94	16.84%	336.70	
MH35	MH26	3126.7	18"	0.50%	4.38	22.83%	713.86	
MH26	MH25	314.1	18"	0.54%	4.55	21.98%	69.03	
MH25	MH23	630	18"	0.57%	4.67	21.41%	134.90	
MH23	MH22 (JCC18)	315	18"	2.46%	9.71	10.30%	32.44	
MH22 (JCC18)	MH17 (JCC13)	1665.8	18"	0.32%	3.5	28.57%	475.94	Along Link Road, south of Elect. Sub-station.
MH17 (JCC13)	MH16	400	18"	3.18%	11.04	9.06%	36.23	
MH16	MH15	400	20"	0.32%	4.64	21.55%	86.21	Goes under JC Creek; HDPE
MH15	MH14	183.7	21"	0.32%	5.28	18.94%	34.79	
MH14	MH12	800	24"	0.32%	7.54	13.26%	106.10	
MH12	MH11	185.4	24"	0.50%	9.43	10.60%	19.66	
MH11	MH6	1760	24"	0.32%	7.54	13.26%	233.42	
MH6	MH5	320.2	21"	0.95%	9.1	10.99%	35.19	
MH5	MH1 (CG62)	811.3	21"	0.50%	6.6	15.15%	122.92	MH is at Jimmy Camp & Treehouse Terrace
Total =		14918.8					2809.00	

\* MH#'s from Phase 3 Interceptor Sewer CD's, by GMS; () = FSD GIS

### Northern Interceptor Phase 2 - LFMSDD

					Pipe Capacity (MGD PHF) w/ roughness Coef. =0.013	At 1MGD % Ownership	(Pipe Length) * (% Ownership)	
From MH*	To MH*	Length	Pipe Dia.	Slope	Flow at 75% Full			Notes
CG62	CG33	1100.5	21	0.50%	6.6	15.15%	166.74	MH is at Jimmy Camp & Treehouse Terrace
CG33	CG9A	1265.74	21	0.25%	4.67	21.41%	271.04	
CG9A	CG9	310	21	1.00%	9.34	10.71%	33.19	
CG9	CG8	400	21	0.56%	6.99	14.31%	57.22	
CG8	JC32A	932.2	21	0.71%	7.87	12.71%	118.45	
JC32A	JC31B	329.37	24	0.17%	5.5	18.18%	59.89	Jimmy Camp Road to south of Drawbridge Road
JC31B	JC31A	12.71	24	0.87%	12.44	8.04%	1.02	
JC31A	MH77 (LFW77)	34.99	24	0.91%	12.72	7.86%	2.75	
Totals =		4385.51					710.30	

\* MH#'s from FSD GIS

**CCMD & CSU Total Ownership = 18.23% 9.12% Per Entity**

MGD = Million Gallons per Day

PHF = Peak Hourly Flow

Flow at 75% Full is based on Bentley FlowMaster Program

P:\LFMSDD\[CCMD & CSU % Ownership for Northern Interceptor.xlsx]CCMD Northern % Owshp

# Exhibit D

## Fountain Sanitation District Peak Hourly Flows (PHF) Allocation

### Northern Interceptor Phase 3 - LFMSDD

					Pipe Capacity (MGD PHF) w/ roughness Coef. =0.013	FSD PHF	
From MH*	To MH*	Length	Pipe Dia.	Slope	Flow at 75% (MGD)	- 1.0 PHF CCMD	Notes
CCMD Ex. MH	MH40	2,006.60	18"	0.76%	5.40	4.40	At CCMD's Manhole
MH40	MH35	2,000.00	18"	0.92%	5.94	4.94	
MH35	MH26	3,126.70	18"	0.50%	4.38	3.38	
MH26	MH25	314.10	18"	0.54%	4.55	3.55	
MH25	MH23	630.00	18"	0.57%	4.67	3.67	
MH23	MH22 (JCC18)	315.00	18"	2.46%	9.71	8.71	
MH22 (JCC18)	MH17 (JCC13)	1,665.80	18"	0.32%	3.50	2.50	Along Link Road, south of Elect. Sub-station.
MH17 (JCC13)	MH16	400.00	18"	3.18%	11.04	10.04	
MH16	MH15	400.00	20"	0.32%	4.64	3.64	Goes under JC Creek; HDPE
MH15	MH14	183.70	21"	0.32%	5.28	4.28	
MH14	MH12	800.00	24"	0.32%	7.54	6.54	
MH12	MH11	185.40	24"	0.50%	9.43	8.43	
MH11	MH6	1,760.00	24"	0.32%	7.54	6.54	
MH6	MH5	320.20	21"	0.95%	9.10	8.10	
MH5	MH1 (CG62)	811.30	21"	0.50%	6.60	5.60	MH is at Jimmy Camp & Treehouse Terrace

\* MH#'s from Phase 3 Interceptor Sewer CD's, by GMS; () = FSD GIS

### Northern Interceptor Phase 2 - LFMSDD

					Pipe Capacity (MGD PHF) w/ roughness Coef. =0.013	FSD PHF	
From MH*	To MH*	Length	Pipe Dia.	Slope	Flow at 75%	- 1.0 PHF CCMD	Notes
CG62	CG33	1,100.50	21	0.50%	6.6	5.6	MH is at Jimmy Camp & Treehouse Terrace
CG33	CG9A	1,265.74	21	0.25%	4.67	3.67	
CG9A	CG9	310.00	21	1.00%	9.34	8.34	
CG9	CG8	400.00	21	0.56%	6.99	5.99	
CG8	JC32A	932.20	21	0.71%	7.87	6.87	
JC32A	JC31B	329.37	24	0.17%	5.5	4.5	Jimmy Camp Road to south of Drawbridge Road
JC31B	JC31A	12.71	24	0.87%	12.44	11.44	
JC31A	MH77 (LFW77)	34.99	24	0.91%	12.72	11.72	

\* MH#'s from FSD GIS

### Southern Interceptor Phase 1 - LFMSDD

From MH*	To MH*	Length	Pipe Dia.	Slope	Flow at 75%	FSD PHF	Notes
						- 1.5 PHF CCMD	
MH77 (LFW77)	MH76	202.44	24"	0.86%	14.58	13.08	Just north of Ohio Ave.
MH76	MH75	309.52	24"	1.34%	18.21	16.71	
MH75	MH61	3,727.36	24"	0.20%	5.96	4.46	Along Railroad to Ohio Ave.
MH61	MH60	400.75	24"	0.23%	6.39	4.89	Along Railroad
MH60	MH57	1,202.63	24"	0.40%	8.43	6.93	
MH57	MH45	3,510.00	24"	0.67%	10.91	9.41	
MH45	MH37	3,185.85	24"	0.30%	7.3	5.8	Gould/Orleans to south of Wilson
MH37	MH23	5,214.62	30"	0.50%	17.09	15.59	Kane Ranch flows would enter MH33
MH23	MH18	1,778.72	30"	0.35%	14.3	12.8	
MH18	Plant	7,964.13	30"	0.14%	9.04	7.54	There is a parallel 30" pipe

MGD = Million Gallons per Day

PHF = Peak Hourly Flow

P:\LFMSDD\[Pipe flow Capacity based on CD's and Flowmaster.xlsx]FSD Interc. PHF

# Board Memo Agenda Item

## Staff Report

**Date:** Jan. 18, 2023  
**To:** Utilities Board  
**From:** Travas Deal, Acting Chief Executive Officer  
**Subject:** Rail Served Industrial Park Trackage Agreement

### NARRATIVE:

**Desired Action:** Discussion

**Executive Summary:** In 2017, Colorado Springs Utilities began discussions with the City of Colorado Springs, the City of Fountain, El Paso County, the Colorado Springs Chamber of Commerce and Economic Development Corporation, and representatives of a proposed rail served industrial park being proposed for construction to the West of Springs Utilities' Clear Springs Ranch regarding the possible shared use and expansion of Springs Utilities' existing rail spur. With support from the Utilities Board at that time, Springs Utilities provided a Letter of Conditional Support for the project articulating Springs Utilities' overall support for the project so long as there were no adverse impacts to Springs Utilities' operations or ratepayers.

The proposed trackage agreement establishes the framework for the shared use and expansion of the existing rail, grants necessary easements, and establishes responsibilities for costs.

**Benefits:** Supports economic development and military operations for the region.

**Board Policy:** N/A

**Cost/Budget:** N/A

**Affected Parties:** N/A

**Alternatives:** N/A

**Submitter:** Bethany Burgess

**Email address:** [bethany.burgess@coloradosprings.gov](mailto:bethany.burgess@coloradosprings.gov)

**Division/ Department:** City Attorney's Office

**Phone number:** (719) 385-5909

**Date submitted:** Jan. 4, 2023

**SPG Staff Use Only:** Consent Calendar

Yes

No

**ITEM NO. 9**



Colorado Springs Utilities  
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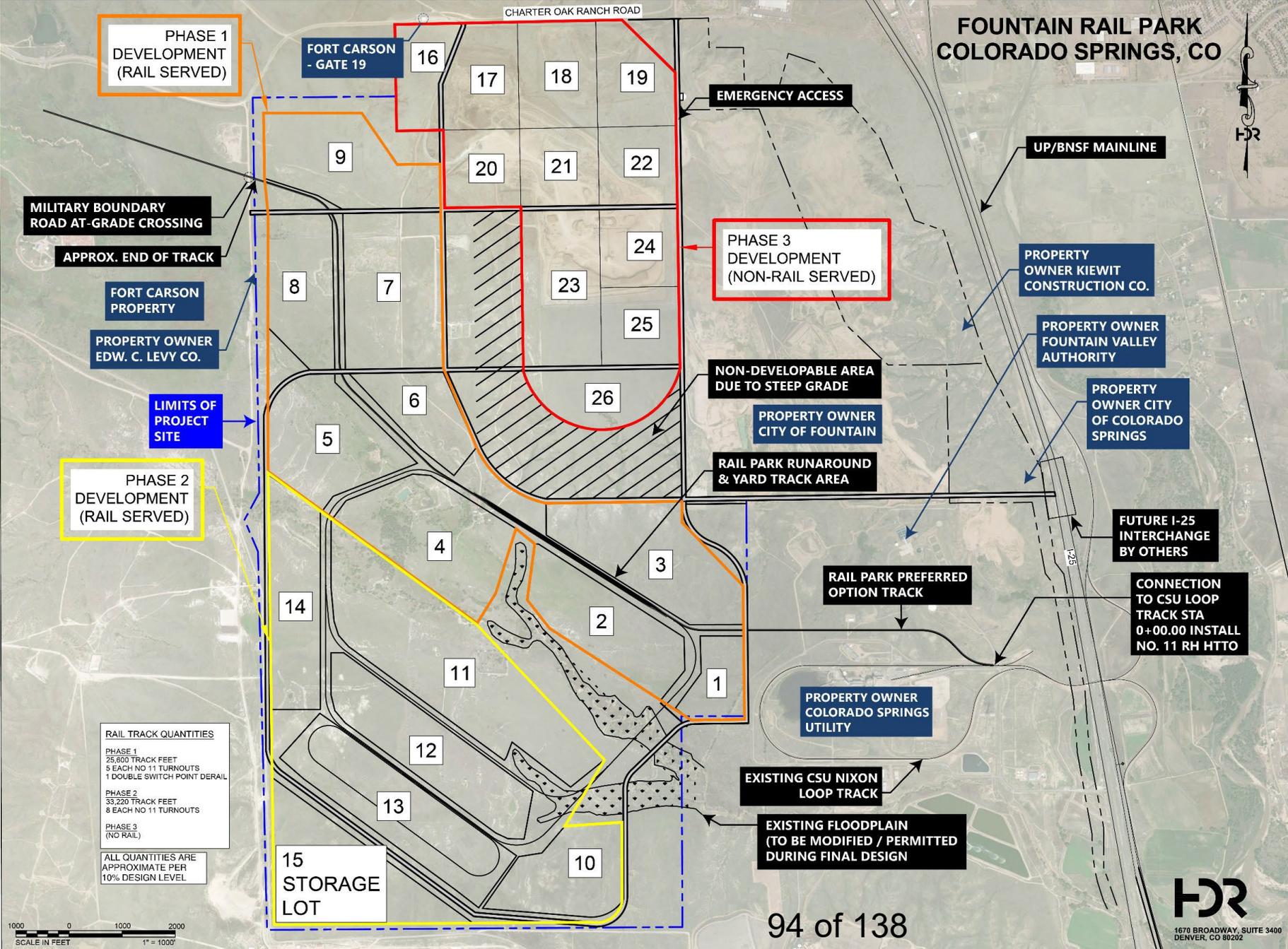
# **Rail Served Industrial Park Trackage and Development Agreement**

Bethany Burgess, Utilities Division Chief

January 18, 2023

# FOUNTAIN RAIL PARK COLORADO SPRINGS, CO

CHARTER OAK RANCH ROAD



**RAIL TRACK QUANTITIES**

PHASE 1  
25,800 TRACK FEET  
5 EACH NO 11 TURNOUTS  
1 DOUBLE SWITCH POINT DERAIL

PHASE 2  
33,220 TRACK FEET  
8 EACH NO 11 TURNOUTS

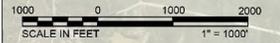
PHASE 3  
(NO RAIL)

ALL QUANTITIES ARE APPROXIMATE PER 10% DESIGN LEVEL

15 STORAGE LOT



PARCEL NUMBER	USE TYPE	ACREAGE (AC)	DEVELOPMENT PHASE	POTENTIAL PRODUCT
1	Industrial Yard	37	1	Steel Products
2	Industrial Yard	92	1	Forest Products
3	Heavy Industrial	119	1	Manufacturing
4	Light Industrial	119	1	Warehouse / Rail Served
5	Light Industrial	100	1	Warehouse / Rail Served
6	Heavy Industrial	54	1	Manufacturing
7	Heavy Industrial	125	1	Manufacturing
8	Light Industrial	76	1	Manufacturing
9	Light Industrial	102	1	Warehouse / Rail Served
<b>Phase 1 Total Acreage:</b>		<b>824</b>	<b>acres</b>	
10	Heavy Industrial	75	2	Concrete / Asphalt Plant
11	Industrial Yard	210	2	Aggregate Products
12	Light Industrial	108	2	Manufacturing
13	Light Industrial	126	2	Warehouse / Rail Served
14	Light Industrial	89	2	Manufacturing
15	Light Industrial	120	2	Warehouse / Rail Served
<b>Phase 2 Total Acreage:</b>		<b>728</b>	<b>acres</b>	
16	Commercial	43	3	Retail
17	Commercial	60	3	Retail
18	Commercial	68	3	Office
19	Industrial / Warehousing	57	3	Warehouse / Through Dock
20	Industrial / Warehousing	48	3	Warehouse / Through Dock
21	Heavy Industrial	50	3	Biomass Technology
22	Industrial / Warehousing	50	3	Warehouse / Through Dock
23	Industrial / Warehousing	100	3	Warehouse / Through Dock
24	Light Industrial	50	3	Warehouse / Through Dock
25	Light Industrial	50	3	Warehouse / Through Dock
26	Light Industrial	57	3	Manufacturing
<b>Phase 3 Total Acreage:</b>		<b>633</b>	<b>acres</b>	
<b>Phase 1,2 &amp; 3 Total:</b>		<b>2,185</b>	<b>acres</b>	



# Background

- Project is intended to establish dual rail served industrial park to promote industrial manufacturing in the Colorado Springs region; also will support Fort Carson operations
- Utilities began working with other community stakeholders and project representatives in 2017 to evaluate feasibility of sharing existing rail spur and spur extension
- Utilities provided Letter of Condition Support in October 2017, to acknowledge Utilities' willingness to support project subject to ensuring operations and ratepayers were not adversely impacted

# Trackage and Development Agreement Terms

- Grants easements subject to the City Charter for construction of new rail spur extension off of Utilities' existing spur
- Grants easements subject to the City Charter for use of existing spur
- Requires project to pay fair market value for all interests conveyed under the agreement as calculated at the time of construction
- Requires coordination of use to ensure Utilities' operations are not impaired by rail park train traffic

# Trackage and Development Agreement Terms

- Provides for enhanced security at rail park's expense
- Requires cost sharing for future operations and maintenance costs based on use
- Requires parties to work in good faith to identify a location and grant an easement for a road near the northern boundary of the main property line for Clear Springs Ranch in the future to provide secondary access to the rail park
- Requires rail park to fund and construct improvements to Utilities' existing rail spur loop to allow for more efficient train operations
- Requires rail park to fund, construct, and obtain approvals for all required crossings of spur extension.

# Next Steps

- Consideration by City Council on February 14, 2023



Colorado Springs Utilities<sup>®</sup>

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RESOLUTION NO. 23-\_\_\_\_\_

A RESOLUTION APPROVING A TRACKAGE AND DEVELOPMENT AGREEMENT FOR A RAIL SERVED INDUSTRIAL PARK PROJECT.

WHEREAS, the Edward C. Levy Company, doing business locally as the Schmidt Construction Company, owns property located to the West of Colorado Springs Utilities (“Utilities”) Clear Springs Ranch site on which it desires to construct a rail served industrial park (the “Project”); and

WHEREAS, the Project has support from multiple community stakeholders, including, but not limited to, the City of Colorado Springs, the City of Fountain, El Paso County, and the Colorado Springs Chamber of Commerce and Economic Development Corporation and is expected to bring significant new economic development opportunities and jobs to the region and support the operations of the Fort Carson Military Reservation; and

WHEREAS, the Project requires use of Utilities’ existing rail spur into Clear Springs Ranch and construction of an extension from that rail spur onto the property located to the west of Clear Springs Ranch if it is to develop; and

WHEREAS, with support of the Colorado Springs Utilities (“Utilities”) Board of Directors, the Utilities Chief Executive Officer submitted a Letter of Conditional Support for a proposed Rail Served Industrial Park in October of 2017 (the “Letter of Support”); and

WHEREAS, the Letter of Support provided, in summary, that Utilities could support the development of the Project through use of Utilities’ existing rail spur and construction of a rail spur extension within Clear Springs Ranch so long as Utilities’ operations and ratepayers were not adversely impacted; and

WHEREAS; Utilities has negotiated a Trackage and Development Agreement, attached hereto and incorporated herein by reference as Exhibit A, which protects Utilities’ operations and ensures Utilities’ ratepayers are not adversely impacted; and

WHEREAS, the Trackage and Development Agreement grants and conveys certain easements and other interests subject to the Colorado Springs Charter; and

WHEREAS, the Trackage and Development Agreement is not contemplated under *The Colorado Springs Procedure Manual for the Acquisition and Disposition of Real Property* and, therefore, requires City Council approval; and

WHEREAS, the Mayor, or his designee, is responsible for executing documents involving the transfer or conveyance of interests in real property and the Utilities’ Chief Executive Officer and his designees have operational responsibility for activities at Utilities’ Clear Springs Ranch site; and

WHEREAS, City Council finds that the approval of the Trackage and Development Agreement is in the best interests of the City of Colorado Springs and will promote economic development opportunities and job creation within the region.

**NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF COLORADO SPRINGS:**

Section 1. City Council, on behalf of the City of Colorado Springs and Colorado Springs Utilities, hereby approves the Trackage and Development Agreement attached hereto as Exhibit A.

Section 2. City Council authorizes the Mayor of the City of Colorado Springs and the Chief Executive Officer of Utilities or their designees to execute the Trackage and Development Agreement.

DATED at Colorado Springs, Colorado, this \_\_\_\_\_ day of \_\_\_\_\_, 2023.

ATTEST:

\_\_\_\_\_  
Council President

\_\_\_\_\_  
Sarah B. Johnson, City Clerk

## EXHIBIT A

### TRACKAGE AND DEVELOPMENT AGREEMENT

This Trackage and Development Agreement (this "Agreement") dated as of \_\_\_\_\_, 2023 (the "Effective Date"), is entered into among \_\_\_\_\_, a \_\_\_\_\_, which is an affiliate of **Edw. C. Levy Co.**, a Michigan corporation d/b/a Schmidt Construction Company ("Schmidt"), whose address is 9300 Dix Avenue, Detroit, MI 48120, and the **City of Colorado Springs**, a home rule city and Colorado municipal corporation ("City") for and on behalf of its enterprise **Colorado Springs Utilities**, whose address is 121 S. Tejon Street, MC 950, Colorado Springs, Colorado 80903 ("Utilities") (Schmidt, the City and Utilities are each hereinafter sometimes referred to as a "Party" and collectively as the "Parties").

#### RECITALS

A. The City, for and on behalf of Utilities, is the owner in fee simple of certain real property located at 14020 Ray Nixon Road, Fountain, Colorado 80817 known as Utilities' Clear Springs Ranch ("CSR"), which property is described on **Exhibit A** attached hereto (referred to hereinafter as "Utilities' Property").

B. Utilities' Property is currently served by a rail line and receives service from Union Pacific ("UP"), but also has the capability to receive dual rail service from both UP and from Burlington Northern Santa Fe Railroad ("BNSF") subject to appropriate agreements with UP and BNSF.

C. Schmidt represents that it owns approximately \_\_\_ acres of real property described on **Exhibit B** attached hereto ("Schmidt's Property") which is located adjacent to Utilities' Property and is also adjacent to the Fort Carson Military Reservation ("Fort Carson").

D. As a result of a Memorandum of Understanding Regarding Rail Served Economic Development Initiative dated May 3, 2018 (the "MOU"), among Schmidt, the City, the City of Fountain, El Paso County and the Colorado Springs Chamber of Commerce and Economic Development Corporation, by which the parties to the MOU sought to enhance job creation in the area and simultaneously assist Fort Carson with a much needed second rail access and service to Fort Carson, a feasibility study was completed by HDR Engineering, Inc. ("HDR") which determined that Schmidt's Property could be developed as an industrial rail park and also provide a needed second rail access and service to Fort Carson (the "Feasibility Study").

E. Utilities provided a Letter of Conditional Support for the Proposed Rail-Served Industrial Park dated October 23, 2017, to the MOU and the Parties are seeking to address the conditions articulated in the Letter in part through this Agreement.

F. Subject to the conditions and requirements of this Agreement, the Parties now desire to facilitate the development of Schmidt's Property as an industrial rail served business center and provide a second rail access and service to Fort Carson (collectively, the "Project") in furtherance of the MOU.

G. The Project contemplates that rail access be extended through Utilities' Property to Schmidt's Property, and thereafter to Fort Carson, with Schmidt sharing use of a portion of the

existing rail facilities located on Utilities' Property, and Schmidt extending a new rail line through a portion of Utilities' Property, all generally as contemplated by preliminary engineering studies and plans prepared by HDR and preliminarily reviewed by Utilities, but subject to final review and approval by Utilities in accordance with this Agreement prior to commencement of any construction activities.

H. In order to extend rail access through Utilities' Property to Schmidt's Property, the Project requires the right to use a portion of the Utilities' Property, which Utilities agrees to grant (and which such rights may be subject to relocation under certain circumstances as hereinafter set forth) over, under, upon, across or through Utilities' Property, as may be reasonably necessary to or desirable for the Project and for the construction and operation of the Project by Schmidt, as more specifically set forth herein.

I. Schmidt represents that the Project would not be economically feasible without this Agreement.

J. It is the desire of the Parties through the provisions of this Agreement to (i) grant to and establish easements and other rights for Schmidt for the conditional use of portions of Utilities' Property for the Project as described herein; (ii) apportion between Utilities and Schmidt, and subsequent grantees of part or all of the rights established under this Agreement, the costs of the maintenance, repair and operation of the easement areas and (iii) provide for certain other matters and things, all as set forth in this Agreement. It is also Schmidt's intent to commit to grant an easement to Utilities for a utility corridor through Schmidt's Property to the boundary of Fort Carson for utility purposes as needed or desired by Utilities.

## **AGREEMENTS**

NOW THEREFORE, in consideration of the foregoing recitals, which are incorporated herein, the mutual covenants and agreements contained herein, and other good and valuable consideration, the receipt and adequacy of which are hereby acknowledged, the Parties agree as follows:

### **ARTICLE I DEFINITIONS**

For purposes of this Agreement, except where the context otherwise requires, the following capitalized terms have the following meanings:

"Benefitted Area" means the dominant real estate interest for and appurtenant to which, or for the Owners or Occupants of which, a particular easement over, under, upon, across or through a Burdened Area is granted or exists.

"Burdened Area" means the servient real estate interest over, under, upon, across or through which an easement in favor of a Benefitted Area runs.

"Casualty Damage" shall have the meaning ascribed to such term in Section 9.1.

"City" shall have the meaning ascribed to such term in the Recitals of this Agreement.

"City Charter" means the Charter of the City of Colorado Springs, Colorado.

“City Code” means the Code of the City of Colorado Springs 2001, as amended.

"Easements" means the portions of Burdened Areas, including the land areas thereof, over, under, upon, across or through which there exists an easement created by this Agreement.

"Facilities" means all equipment and facilities utilized in connection with the Easements.

"Financing Party" means any person (including any affiliate) providing debt or equity financing, or refinancing of any debt or equity financing obtained in connection with development, construction, ownership, leasing, operation or maintenance of the Project.

"Hazardous Substances" means any pollutant, contaminant, chemical, industrial, toxic, hazardous or noxious substance or waste that is now or hereafter regulated by any federal, state or local government, including but not limited to any "hazardous substance" as defined by the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (42 U.S.C. §§9601, et seq.) ("CERCLA"), as amended, and rules and regulations promulgated thereunder, and shall also include any materials which are prohibited from entering CSR under any applicable federal or State law, including under the applicable regulations of the Department of Homeland Security.

"Law" means all laws (whether statutory or otherwise), ordinances, rules, regulations and applicable orders and decrees of all governmental, judicial, legislative, executive, administrative or regulatory authorities (federal, state, municipal, departmental, foreign or otherwise), including without limitation the City Charter and the City Code.

"Loss" means any loss, damage, liability, payment, obligation or expense (including, without limitation, reasonable fees and expenses of legal counsel, but excluding any consequential or indirect loss or special or punitive damages).

"Occupants" means Owners and any lessees or sublessees of any portion of Schmidt's Property and all licensees, permittees, invitees, employees or agents thereof.

"Owners" means Schmidt, the City or Utilities, as applicable, and their respective successors and assigns.

"O&M Agreement" means the Operations and Maintenance Agreement between Utilities and Schmidt to be entered into pursuant to Article 3.3 below.

"Permanent Lender" means any lender making a loan which may be secured by a mortgage or deed of trust on all or a portion of Schmidt's Property.

"Person" means and includes an individual, a partnership, a corporation, a limited liability company, a joint stock company, a metropolitan district, an unincorporated association, a joint venture, a trust or other entity or any governmental entity.

"Project" is as defined in Recital F, above, including the rail line extensions, road extensions, and all associated utilities, facilities, fixtures, equipment, plant and machinery, structures and apparatus necessary, required or helpful for the operation and success of the Project, which is to be constructed on Utilities' Property or Schmidt's Property (as defined above) in accordance with BNSF and UP standards and guidelines for industry track projects.

"Project Financing" shall have the meaning ascribed to such term in Section 10.10.

"Release" shall have the meaning ascribed to such term in CERCLA, as amended, 42 U.S.C. §9601(22) and the regulations promulgated thereunder.

"Repair" means the restoring, replacing, repairing or rebuilding of a damaged or destroyed Easement or Facility as nearly as possible to the condition, quality and class such Easement or Facility was in immediately prior to such damage or destruction, including Casualty Damage, to the extent that doing so is reasonably necessary to allow the exercise of Easement rights therein created by this Agreement.

"Schmidt" is defined in the introductory paragraph of this Agreement and includes its successors and assigns.

"Schmidt's Property" is defined in Recital C.

"Survey" means the graphic representation of a portion of Utilities' Property and Schmidt's Property attached hereto as **Exhibit C**, which illustrates the general locations of the Benefitted Areas, Burdened Areas, Easements and Facilities.

"Utilities" is defined in the introductory paragraph of this Agreement.

"Utilities' Property" is defined in Recital A of this Agreement.

## **ARTICLE II EASEMENTS - GENERAL TERMS AND CONDITIONS**

Section 2.1 Declaration. Upon and subject to the terms and conditions set forth herein, the City and Utilities do hereby declare and establish that the portions of Utilities' Property described herein as burdened by the Easements shall be held, transferred, sold, conveyed, encumbered, leased and occupied subject to the covenants, easements, restrictions and rights hereinafter set forth. With regard to the Shared and Reciprocal Railroad Access and Use Easement provided for in Article III below, that Shared Railroad Access Area will be used by both Schmidt and Utilities, and Utilities' rights to use the Shared Railroad Access Area for Utilities' operations will at all times be granted priority of use over Schmidt's use.

Section 2.2 Future Modification of Easements. The Parties are executing this Agreement prior to completion of the detailed engineering design for the Project, and, accordingly, it is anticipated that the descriptions of the various easements granted herein may be reasonably modified and refined as that detailed engineering for the Project is completed from time-to-time. The Parties agree to grant all easements contemplated by this Agreement, however, the Parties recognize that no easement shall materially alter the terms and conditions of this Agreement. Utilities has the exclusive right, in its sole discretion, to agree to any proposed relocation of an easement granted herein and to designate the locations of future easements or other rights to be granted on, under, over, through or across Utilities' Property under this Agreement to further support and enhance the Project.

Section 2.3 Duration of Easements. The Easements, restrictions, benefits and obligations hereunder are subject to the City Charter and shall be deemed to create mutual and reciprocal benefits and servitudes upon the Benefitted and Burdened Areas, which run with the land unless

terminated in accordance with the provisions of this Agreement or the City Charter, at which time such Easements will revert to the City and this Agreement shall terminate.

Section 2.4 Reservation. Except for the specific rights granted herein, Schmidt does not have any legal, beneficial, or equitable rights in Utilities' Property, and Utilities does not have any legal, beneficial or equitable rights in Schmidt's Property, and Utilities reserves all rights inherent in the City's ownership of the Utilities' Property that are not inconsistent with the rights expressly granted to Schmidt hereunder. Further, Schmidt shall respect Utilities' use and operation of Utilities' Property and the City or Utilities may at any time and from time to time, change or expand Utilities' Property, modify, remodel, or reconstruct the improvements on Utilities' Property and change or expand an existing use of Utilities' Property.

Section 2.5 Right of Relocation. The Owner of a Burdened Area may at any time and from time to time and at the Owner's expense, relocate, in whole or in part, any Easements and Facilities relating to any Easement created by this Agreement provided that such relocation does not materially diminish or unreasonably impair the rights or services of the Owner of the Benefitted Area with respect to such Easement or Facility or materially increase the costs to be incurred by such Owner of the Benefitted Area.

Section 2.6 No Dedication. Nothing contained herein shall be deemed to vest in any party other than the City, Utilities or Schmidt and their respective successors and assigns any legal rights in Utilities' Property or Schmidt's Property or any right to enforce the terms of this Agreement. Nothing herein is intended to dedicate or reserve to the general public or the public at large, or to permit any member of the public to acquire any right, by adverse possession, prescription, grant, dedication or otherwise, to possess, use or occupy Utilities' Property, or Schmidt's Property, or any portion thereof, said grant, dedication, reservation, or prescriptive rights being expressly denied.

Section 2.7 Use of Easements. Schmidt's (and Utilities') use of the Easements shall be in compliance with all applicable Laws. In addition, notwithstanding any provision in this Agreement to the contrary, it is expressly understood that all Easements may be used by either Party for the purposes provided herein as may be reasonably necessary to, or desirable for the ongoing use of, Utilities' Property or the ongoing use of Schmidt's Property for the Project and for the construction and operation of the Project.

Section 2.8 Compensation. Schmidt agrees to pay to the City compensation for each Easement equal to the fair market value of each such interest as determined by an independent appraisal conducted in accordance with the City's Real Estate Procedure Manual for the Acquisition and Disposition of Real Property Interests. Schmidt shall pay for all required appraisals. The value for all Easements shall be as of the date construction of the Project is initiated and payment shall be due and payable to the City within sixty (60) days of the initiation of such construction.

Section 2.9 Deadline for Project Initiation. If Schmidt fails to initiate substantial construction of the Project within ten (10) years from the date of this Agreement, Utilities shall be entitled to unilaterally terminate this Agreement at any time after that ten (10) year period. In the event of the termination of this Agreement pursuant to this Section 2.9, Utilities may record a written statement of termination in such form as Utilities shall determine. For purposes of this

Section 2.9, substantial construction will not be deemed initiated unless and until Schmidt actually takes possession of and makes substantial alterations in furtherance of the Project upon one or more of the Easements, in accordance with this Agreement.

### **ARTICLE III SHARED AND RECIPROCAL RAILROAD ACCESS AND USE EASEMENT**

Section 3.1 Shared and Reciprocal Railroad Access and Use of Existing Railroad Bridge and Lines. The existing railroad access to CSR is over the portion of Utilities' Property on which the existing railroad tracks are currently located, including the railroad bridge, with that portion of Utilities' Property on which the railroad tracks currently exist being described and depicted on **Exhibit D** attached hereto (the "Shared Railroad Access Area"). Subject to any required consents of, and compliance with any lawful conditions imposed by, UP and BNSF, and to any restrictions on use imposed by this Agreement or any agreement arising hereunder, the City and Utilities, for the benefit of Schmidt, hereby grant and convey to Schmidt a non-exclusive, reciprocal easement and right to use the existing rail, located upon the Shared Railroad Access Area, for access to Schmidt's Property and potentially to Fort Carson for the Owners, employees, contractors, agents, representatives, invitees, successors and assigns of Schmidt and otherwise for ingress and egress to and from Schmidt's Property, Fort Carson, the Easements and Facilities. The right to use the Shared Railroad Access Area granted hereby shall be subordinate to Utilities' use of such Shared Railroad Access Area and the existing rail located therein. Schmidt's right to use the Shared Railroad Access Area includes the right to use the existing railroad tracks for access to and in support of the Project, including for granting a railroad access to Fort Carson. The City and Utilities hereby reserve, for the benefit of the City and Utilities, its paramount and priority ownership and rights in, to, on, across, through, under and over the Shared Railroad Access Area for the employees, contractors, agents, representatives, licensees (other than Schmidt), and invitees of the City and Utilities and any other person authorized by the City or Utilities for ingress and egress to and from Utilities' Property and to CSR. The right to use the Shared Railroad Access Area hereby reserved by the City and Utilities includes the paramount right of the City and Utilities to continue use of the existing railroad tracks to access and serve Utilities' Property and CSR and for any other existing or future use, and to receive priority when scheduling use of the Shared Railroad Access Area. The Parties acknowledge and agree that the City and Utilities' rights to the Shared Railroad Access Area may be subject to agreements between the City and UP and BNSF ("Railroad Agreements"). Such Railroad Agreements may require that the City obtain the consent of UP and BNSF, respectively, before the City may assign any of its interest in or allow third-party use of the rail in the Shared Railroad Access Area. As such, the City agrees to seek such approvals of UP and BNSF, at Schmidt's expense and with Schmidt's cooperation. Schmidt agrees that, if such consents are provided, the rights granted by this Section will be subject to any conditions imposed as part of the consents of UP and BNSF. In the event UP and/or BNSF refuses to provide the required consents and objects to the rights contemplated in this Section within forty-eight (48) months of the date of this Agreement and Utilities has made reasonable efforts to obtain such consents, Utilities shall have the right to terminate this Agreement by providing written notice to Schmidt.

Section 3.2 Coordination of Use. The rail and bridge in the Shared Railroad Access Area shall be for the shared use of the Parties, including Schmidt's use for the Project. The Parties agree that Schmidt's use of the rail line in this area shall be coordinated with Utilities to ensure

the smooth, efficient and safe operation of the railroad and industry traffic using the rail in the Shared Railroad Access Easement Area and to ensure that Utilities' use for its mission is protected and that Utilities' operations are not impaired or otherwise adversely impacted by Schmidt's use of the rail line. In that regard, Schmidt currently contemplates that it may be helpful to utilize a Class III railroad to coordinate the future train traffic for the Project, and the City and Utilities consent to such use provided that (i) the use of a Class III railroad is at no cost to the City or Utilities; (ii) first priority is given to scheduling any deliveries needed or desired by Utilities; (iii) Utilities has the right to impose reasonable rules and regulations on the coordination efforts; and (iv) Utilities has the right to approve Schmidt's selection of any Class III railroad in Utilities' reasonable discretion.

Section 3.3 Costs. The costs of maintenance, operation, replacement, servicing and repair of the rail, bridge and appurtenant facilities in the Shared Railroad Access Area described in Section 3.1 shall be shared between Utilities and Schmidt on a pro rata basis based on the number of train cars accessing Utilities' Property for service to Utilities compared to the number of train cars accessing Schmidt's Property for service to Schmidt' Property or Fort Carson on a monthly basis, provided that in the event any rail cars or loads transported by or on behalf of Schmidt create the need for special maintenance or operations, the same shall be at the expense of Schmidt and not the City or Utilities. The Parties agree to negotiate in good faith and execute an O&M Agreement to more completely address cost sharing and coordination of maintenance, provided, however, that all costs attributable to Schmidt's construction activities on Utilities' Property shall be borne exclusively by Schmidt or its successors or assigns. In March of each year, the Parties will agree on an annual update to the O&M Agreement and a budget for shared expenses for the following year. Utilities agrees to include its share of the proposed shared expenses in its proposed budget that is submitted to the City Council for approval. In the event Schmidt transfers ownership or responsibility of the Project to a governmental entity, Schmidt agrees to include as a condition or requirement of such transfer that the governmental entity will take all steps to include all proposed shared expenses in the entity's annual budget. For any shared maintenance costs which are actually incurred and which were part of the agreed-upon budget, such costs and expenses shall be paid pursuant to an invoice within thirty (30) days from the receipt of the invoice. Except in the case of an emergency, Schmidt will obtain Utilities' written consent prior to incurring any shared maintenance expenses that are not included in the agreed-upon budget.

#### **ARTICLE IV RAILROAD SPUR EASEMENT**

Section 4.1 Rail Spur. To support the Project and minimize interference with Utilities' operations at CSR, Schmidt will need to construct a new railroad line coming off the existing railroad line as shown on **Exhibit E**. The City and Utilities, for the benefit of Schmidt, Schmidt's Property and the Project, hereby grant and convey to Schmidt an easement in, to, on, across, through, under and over the railroad spur ("Railroad Spur Easement") located on Utilities' Property as more particularly depicted on **Exhibit E** attached hereto (the "Railroad Spur Easement Area"). The Railroad Spur Easement is granted for use by Schmidt in support of the Project to construct, operate, maintain, repair and replace from time-to-time a railroad spur extension from Utilities' existing railroad spur to Schmidt's Property and possibly on to Fort Carson. The City and Utilities will continue to have the right to use the Railroad Spur Easement Area as necessary in the operation of the Utilities' Property and CSR, provided that such use does not unreasonably interfere with

Schmidt's use of the Railroad Spur Easement and any railroad line constructed thereon. Schmidt agrees that any costs incurred by the City or Utilities related to creating crossings of the Railroad Spur Easement and/or any railroad lines constructed thereon shall be borne solely by Schmidt. The City and Utilities agree that they will not grant any other party the right to use the Railroad Spur Easement or any railroad line constructed thereon, except that the City and Utilities reserve the right to grant other parties the right to cross the Railroad Spur Easement or any railroad line constructed thereon as part of any development, use, or operation of the Utilities' Property provided that such rights do not unreasonably interfere with Schmidt's rights granted hereunder. Schmidt expressly acknowledges that there are certain pre-existing rights to cross the Railroad Spur Easement Area, including, but not limited to, those held by Fountain Valley Authority and the United States Bureau of Reclamation.

Section 4.2 Costs. The costs of construction, railroad permits and insurance, maintenance, operation, replacement, servicing and repair of the Facilities described in Section 4.1 shall be borne exclusively by Schmidt provided, however, that damages to the Railroad Spur Easement Area or Facilities located therein caused by Utilities' use of the Railroad Spur Easement, if any, shall be repaired or restored by Utilities.

## **ARTICLE V UTILITY EASEMENTS AND SHARED FACILITIES**

Section 5.1 Grant. The City and Utilities, for the benefit of Schmidt and Schmidt's Property, hereby grant and convey to Schmidt a non-exclusive easement in, to, on, across, through, under and over Railroad Spur Easement Area, for the purposes of installation, maintenance, operation, replacement, servicing, repair, and use of facilities for extension of utilities to Schmidt's Property, including, but not limited to, the following utilities to serve Schmidt's Property and the Project:

- (a) Electric. Facilities for the transmission of electric power to and from the Schmidt Property, including customary electric lines, transmission lines, transformers, cables and related electric equipment and facilities.
- (b) Water and Sewer. Facilities for the transmission of water and sewer service to and from the Schmidt Property, including customary water and sewer lines, and any needed lift stations and related equipment and facilities.
- (c) Telephone and Cable. Facilities providing for telephone, cable, and fiber optic services to Schmidt's Property and for the benefit of Schmidt's Property and for the Project.
- (d) Natural Gas. Facilities for providing natural gas to Schmidt's Property and for the Project.
- (e) Signage. Temporary and permanent external identification and directional signs, all in locations, sizes and form to be mutually agreed upon by the Parties hereto, and, with regard to external signs, subject to the prior approval of such signs by all applicable jurisdictions having control thereof.

- (f) Other Services. Nothing herein contained shall be construed to prohibit Schmidt from contracting with any utility, telephone, cable, or fiber optic provider, whether or not such provider is servicing Utilities' Property.
- (g) Utility and Signage Plan Approval. Prior to the installation of any of the utilities or the signage contemplated by this Section 5.1, Utilities must have a reasonable opportunity to review and approve the utility plans and signage plans for Schmidt's Property, and any amendments thereto. All utilities and signage must be installed consistent with the utility plans and signage plans approved by Utilities. In the event, Utilities approves utility plans that include utilities in areas of the Utilities' Property other than the Railroad Spur Easement, Schmidt is hereby granted a non-exclusive easement through, under, over, in and to the other areas of Utilities' Property consistent with the Utilities-approved utility plans in order to connect to existing utility connections on or off Utilities' Property, for the purpose of installation, maintenance, operation, replacement, servicing, repair and use of facilities providing for utility service, including for water, sanitary sewer, telephone cable, or fiber optic service to Schmidt's Property from any such provider as is reasonably necessary therefor, provided, however, that those connections and the easements contemplated hereby do not unreasonably interfere with Utilities' existing operations or other easements previously granted to or by Utilities. The locations of any such easements will be documented by an amendment to this Agreement in accordance with Article XIII of this Agreement. Any work in such easements must be approved by and coordinated with Utilities prior to the commencement of any such work.

Section 5.2 Costs. The cost of construction, rail permits and insurance, maintenance, operation, replacement, servicing, and repair of the facilities described in Section 5.1 above shall be borne by Schmidt.

Section 5.3 Drainage Easement. If Schmidt should require any easements to address drainage for the Project or for Utilities' Property, Utilities agrees to cooperate in good faith with Schmidt to identify and grant, consistent with the City Charter, such drainage easements as may reasonably be required to address the drainage issues related to the Project or Utilities' Property; provided that (i) Utilities must have a reasonable opportunity to review and approve drainage plans for Schmidt's Property, and any amendments thereto, (ii) all drainage improvements must be installed consistent with the drainage plans approved by Utilities, (iii) Utilities shall have no obligation to grant any drainage easement that impairs or interferes with Utilities' use of or the use of any third party conducting activity on Utilities' Property at the time of execution of this Agreement, and (iv) Schmidt agrees to be responsible for all costs associated with any maintenance required for such drainage improvements to be operated in accordance with stormwater best management practices and/or Schmidt's proportionate share of any costs associated with operation and maintenance of any shared drainage improvements. Schmidt agrees to cooperate and work in good faith with Utilities to ensure that the drainage plans for Schmidt's Property improve the drainage of both Utilities' Property and Schmidt's Property.

## ARTICLE VI VEHICULAR ACCESS EASEMENT

Section 6.1 Grant. To support the Project and the manufacturing and other businesses to be located within the Project, Schmidt would like to construct a second road access to the Project, with the location of that second access currently contemplated to be north of the northern boundary of the Fountain Valley Authority property in a location to be determined by and acceptable to Utilities. The City and Utilities, for the benefit of Schmidt, Schmidt's Property and the Project, upon a more specific written request from Schmidt, hereby agree to work in good faith to identify and thereafter grant and convey to Schmidt an easement in, to, on, across, through, under and over a portion of Utilities' Property, in the location ultimately determined by Utilities (the "Road Easement Area"). The Road Easement Area will be subject to review and final approval by Utilities in its discretion, but is intended to be sufficient to house a four-lane major collector road of adequate size to carry the contemplated traffic and meet land use requirements. This access road will be used by Schmidt for the location, construction, maintenance, repair and replacement of road and related improvements needed to provide for the ingress and egress of vehicular traffic to access the Project (the "Road Access Easement"). The Road Access Easement Area may also be used by Schmidt for the location and support of utility infrastructure as is customary. The City and Utilities will be entitled to use the Road Access Area to provide additional access to Utilities' Property. Utilities retains the right to use the Road Access Area as necessary or desired in the operation of Utilities' Property and CSR. Schmidt agrees that any costs incurred by the City or Utilities related to creating crossings of the Road Access Easement and/or any road constructed thereon shall be borne solely by Schmidt.

Section 6.2 Costs. The costs of construction, permits, insurance, maintenance, operation, replacement, servicing and repair of the Road Access Easement described in Section 6.1 shall be borne exclusively by Schmidt provided, however, that damages to the Road Access Easement or Facilities located therein caused by Utilities' use of the Road Access Easement, if any, shall be repaired or restored by Utilities.

Section 6.3 Security. For security purposes, Schmidt will be required to fence off the Road Access Area from the remainder of Utilities' Property, with such fencing to be subject to the review and approval of Utilities in its reasonable discretion, including satisfying any regulatory requirements imposed on Utilities by governmental authorities.

## **ARTICLE VII OPERATIONS AND SECURITY EASEMENT**

Section 7.1 Grant. Maintaining adequate security of Utilities' Property, including measures that may be needed to comply with federal requirements, such as standards that may be imposed by the Department of Homeland Security, NERC, FERC or other applicable federal or state agencies, is a priority of the Project. As such, the Parties agree that prior to any trains (other than trains which are serving Utilities) being permitted to traverse any of the Easements granted herein or in any way enter the Utilities' Property for the benefit of Schmidt or Schmidt's Property, the Parties will negotiate in good faith and execute a Security and Access Agreement. At a minimum, the Security and Access Agreement will require that all security measures will comply with all of Utilities' security rules, procedures and protocols, as those may change from time to time to comply with all state and federal regulations applicable to the site and other security measures reasonably adopted by Utilities. The Parties agree that Utilities Security Department shall have oversight over the security measures to be implemented and shall have the right in good faith to

modify or terminate any security procedures or practices that are inconsistent with the procedures, protocols, rules or regulations related to the Utilities' Property and CSR. There exists an approximately two-mile length of railroad track on Utilities' Property which lies east of I-25 as shown on **Exhibit F** (the "Security Area"). The Parties currently contemplate that they will identify a specific location within this Security Area that will be used for a security scanning area for trains to ensure that the trains are safe and do not contain items which might be prohibited from entering the restricted CSR area. Subject to this Section and the Security and Access Agreement, the City and Utilities, for the benefit of Schmidt and Schmidt's Property, hereby grant and convey to Schmidt an easement for the purpose of locating, using, securing, maintaining, replacing and repairing temporary and permanent security systems within the Security Area to provide additional security measures for trains intending to enter Utilities' Property or Schmidt's Property (the "Security Easement"). The Security Easement shall include the right of Schmidt to control train traffic (other than Utilities' trains) through the Security Area and entering into the Nixon Power Plant, including using the Security Area for staging of train traffic and installation of such improvements, such as scanners, and shall also include the installation and use of identification, directional and operational signs on and within the Security Area, all in locations, sizes and form as may be helpful to provide security to Utilities' Property, Schmidt's Property or the Project. The Security Easement shall be subject to the terms and conditions of the Security and Access Agreement.

Section 7.2 Costs. The initial cost to install any equipment or facilities within the Security Area shall be a cost borne solely by the Project. The costs of installing, maintaining and operating any such security measures that are in excess of those that Utilities would otherwise institute had it not entered into this Agreement shall be borne solely by Schmidt; all other costs of installing, maintaining and operating any such security measures shall be equitably apportioned between Utilities and Schmidt in accordance with Section 3.3, above, unless otherwise agreed between Utilities and Schmidt.

Section 7.3 Physical Security. As part of the planning and design of the Project, Schmidt agrees, as an expense of the Project, to provide fencing or other boundary security along its common border with Utilities' Property to mitigate threats and provide reasonable security to CSR from operations on Schmidt's Property. In addition, Schmidt shall establish a protective berm in the Railroad Spur Easement on both sides of the railroad track constructed thereon. The design of the protective berm must be approved by Utilities in its reasonable judgment prior to construction.

## **ARTICLE VIII CONSTRUCTION ACTIVITIES EASEMENT**

Section 8.1 Grant. The City and Utilities, for the benefit of Schmidt and Schmidt's Property, hereby grant and convey to Schmidt a non-exclusive easement for ingress and egress for all construction employees or contractors of Schmidt to enter upon, cross over and access so much of and those portions of Utilities' Property as is consistent with the approved construction plans to complete the construction of the rail spur and any other Facilities that will be installed on the Utilities' Property (the "Construction Easement"). Utilities shall have a reasonable opportunity to review and approve the construction plans, including the work plans and safety plans, for all proposed construction within the Easements on Utilities' Property, and all such construction must be consistent with plans approved by Utilities. Utilities reserves the right to monitor all

construction activities on Utilities' Property and to modify or terminate any such construction activities that are not consistent with the approved plans. All construction activities must comply with Utilities' contractor minimum safety and security requirements and Utilities' contractor access policy. All construction activities will be coordinated with Utilities so as not to unreasonably interfere with Utilities operations on the Utilities' Property. The Construction Easement shall expire within thirty-six (36) months of the initiation of construction.

Section 8.2 Standards of Conduct. During construction, Schmidt covenants and agrees at Schmidt's expense (a) to maintain its construction site on Utilities' Property in an orderly fashion consistent with the construction plans, including the approved work plans and safety plan, and the prevailing best practices of the construction industry, (b) to repair any damage to Utilities' Property which is caused by such construction, (c) to use all efforts to minimize interference to the operations on, and users of, Utilities' Property resulting from construction noise or other construction activities, and, in connection therewith, to regularly coordinate with Utilities designated representative. All of Schmidt's construction activities must adhere to the construction plans, including the safety plan; Utilities' standards, policies and procedures; any standards imposed by UP and/or BNSF and the railroad industry generally; and the prevailing best practices of the construction industry. Schmidt represents and warrants that all of its construction activities will be performed with the same degree of care, skill and diligence as is ordinarily possessed and exercised in similar construction projects under similar circumstances and Schmidt shall ensure that its contractors and subcontractors, if any, have the level of skill in the area commensurate with the requirements of the work to be performed.

Section 8.3 Consultation. Prior to commencement of and during any construction activities, Schmidt agrees to coordinate and consult with Utilities in order to avoid any unnecessary disruption of Utilities' operations and to consider how the construction activities will affect Utilities' operations and other activities on Utilities' Property and how other matters provided in this Agreement will or may be affected. Schmidt will have regular, scheduled meetings with Utilities during the construction process at intervals acceptable to Utilities in order to provide Utilities updates as to the status of Schmidt's construction activities on Utilities' Property.

## **ARTICLE IX CASUALTY DAMAGE - MAINTENANCE**

Section 9.1 Casualty Damage and Repairs. In case of damage to or destruction of any or all of the Easements and or Facilities by fire or any other cause similar or dissimilar, insured or uninsured ("Casualty Damage"), it shall be the obligation of Schmidt or the current Owner of those Facilities, although located on Utilities' Property, to promptly, and in a prudent manner, repair the portion of the Easements and Facilities so damaged or destroyed, provided, however, that if the improvements located within the Shared Railroad Access Area are damaged or destroyed, the costs for the repair or replacement of those improvements shall be shared between Schmidt and Utilities in accordance with the manner that maintenance costs have been shared in the year immediately prior to the year of the damage or destruction. Any such Repair work to be completed on Utilities' Property or within an Easement on Utilities' Property must follow the same procedures as in Article VIII.

Section 9.2 Maintenance and Repairs. Unless otherwise specified in this Agreement, it shall be the responsibility of Schmidt to maintain, operate, repair and keep the Easements and Facilities provided for herein so that they are suitable for utilization as contemplated by this Agreement;

provided that any such maintenance that would require Schmidt to enter the Utilities' Property, outside of the Easements, must be completed in accordance with the procedures in Article VIII. All reasonable and documented costs and expenses associated with the services provided in the preceding sentence shall be borne by Schmidt or the then Owner of the Easements granted in this Agreement. Notwithstanding the foregoing, the Parties agree that maintenance of the Shared Railroad Access Area shall be shared in accordance with the cost sharing allocation established under Section 3.3 of this Agreement, and the costs related to the Security Easement shall be shared in accordance with Section 7.2 of this Agreement.

## ARTICLE X CONSTRUCTION AND OTHER COVENANTS

A. Schmidt's Covenant's and Obligations. The following are specific obligations of Schmidt which Schmidt agrees to perform as a condition to Utilities' obligations under this Agreement, subject, however, to Section 10.10 below:

Section 10.1 Utilities Rail Loop Extension. The existing rail loop that services Utilities' Property and accommodates the delivery of trains to CSR is not long enough to accommodate a unit train and requires the train to extend outside the gate and over the bridge during unloading operations. This blocks other train access during unloading operations because a portion of the train remains outside the gate of CSR. Schmidt has designed a solution to that deficiency which involves extending a new spur from the loop and constructing new track as shown on **Exhibit G** attached hereto (the "Spur Extension"). Utilities has approved the concept and general design for the Spur Extension and Schmidt has determined the Spur Extension is needed if the Project is to go forward. Subject to the conditions in Section 10.10 below, Schmidt agrees to construct the Spur Extension, at Schmidt's expense, as an initial component of the Project. Schmidt agrees that no trains other than trains servicing CSR may be allowed to enter CSR until the Spur Extension is completed, unless otherwise agreed to by Utilities.

Section 10.2 Relocation of Bad Order Track and Maintenance Building. It may be advantageous to the Project to relocate the existing bad order track and the related maintenance building at the end thereof to the location shown on **Exhibit H**. Utilities hereby agrees that upon receipt of Utilities' express written approval of the design and construction, Schmidt may, and solely at Schmidt's expense, relocate the existing maintenance building and the bad order track in accordance with the conceptual plans shown on **Exhibit H**.

Section 10.3 Road and Water Line Crossings. The Railroad Spur Easement provided for in Article IV will cross existing roads and water lines used by Utilities and other entities. Schmidt, at Schmidt's expense, will provide for at-grade crossings of the Railroad Spur Easement, and culverts, steel protective casing and other needed improvements acceptable to Utilities to accommodate the existing roads and water line crossings, including needed drainage improvements. In addition, Schmidt acknowledges that the Easements granted hereunder bisect the Utilities' Property and impair Utilities' ability to change or modify its use of the Utilities' Property in the future. As such, Schmidt agrees to provide, at Schmidt's expense, for all at-grade crossings of the Railroad Spur Easement resulting from any changes or modifications to the use of Utilities' Property, including any costs associated with obtaining approvals of such crossings. Furthermore, Schmidt expressly acknowledges and agrees that in the event any approvals for such at-grade crossings are required by the Colorado Public Utilities Commission, Schmidt shall be solely responsible for any and all costs associated with obtaining such approvals, and unless

otherwise required by law, shall also be responsible for all applications or other written materials prepared for purposes of obtaining such approvals, subject to Utilities' approval of any such applications or other written materials.

Section 10.4 Security. Maintaining adequate security for CSR and Utilities' Property generally is a major priority and is an objective of the Project. Schmidt, as part of the Project, agrees to plan and fund the additional security improvements needed for CSR and Utilities' Property, with those additional security improvements to be subject to Utilities' review and approval in its reasonable discretion. As provided for in Article VI, above, it is currently contemplated that security will be provided by scanning trains within the Security Easement. Utilities conceptually agrees to the use of those Scanning Facilities and to the use of that Security Easement for the installation, maintenance, repair and replacement of that portion of the track and those future Scanning Facilities and for security operations. The cost of the Scanning Facilities shall initially be the sole expense of Schmidt. Responsibility for the future operational and maintenance costs for the Scanning Facilities and Security Easement shall be as set forth in Article VII of this Agreement.

10.5 Bridge Inspections. Utilities agrees to obtain and provide to Schmidt periodic inspections of the railroad bridge that serves Utilities' Property prepared by a qualified structural engineer in such intervals as may be customary and prudent in the industry. The cost for the inspections shall be shared in accordance with Section 3.3 of this Agreement. Any future maintenance, repair or replacement expenses for the railroad bridge will be shared in accordance with Section 3.3 of this Agreement.

10.6 Reciprocal Utility Corridor. If it may be advantageous in the future for Utilities to obtain an easement across Schmidt's Property to extend utilities to the Project or Fort Carson, Schmidt agrees that it will provide the reasonably needed or desired right-of-way over, under, along, across and through Schmidt's Property connecting to the boundary of Fort Carson, without any cost to Utilities. Should Utilities desire such an easement, it agrees to notify Schmidt thereof in writing. Schmidt and Utilities agree to work together to find a mutually acceptable location on the Schmidt Property for such Easement. The costs for installation, maintenance, repair and replacement of any utility lines and improvements installed by Utilities within that easement would be at Utilities' or Utilities' customer's expense, and the easement therefor would be subject to the general terms and conditions of this Agreement.

B. Utilities' Covenants and Obligations. The following are specific covenants of Utilities:

10.7 Obligations Upon Any Sale or Transfer. Should Utilities transfer any portion of Utilities' Property upon which any of the Facilities are located which are the subject of any of the Easements granted to Schmidt in this Agreement, Utilities agrees to (1) use good faith efforts to provide Schmidt with the opportunity to acquire those Facilities and the land thereunder, if feasible, subject to the City's then-current ordinances, rules, regulations, policies, and procedures, and (2) in any event, make any transfer of that property subject to the then-existing obligations of Utilities under this Agreement, including each of the Easements granted to Schmidt pursuant to this Agreement.

10.8 Cooperation with Railroads. The Parties contemplate that the Project may need to have trackage agreements with UP and BNSF. City and Utilities currently hold a trackage agreement with UP and may hold a trackage agreement with BNSF. The City and Utilities agree,

provided that there is no resulting cost to the City or Utilities, to cooperate with Schmidt in efforts to obtain trackage agreements with UP and BNSF. Additionally, the City and Utilities agree, upon request from Schmidt and the consent of UP and BNSF, to partially assign to Schmidt (or allow Schmidt to exercise) appropriate rights that Utilities has under its trackage agreements with UP and BNSF (if any), provided, however that such assignments or permissions are either permitted under those trackage agreements or UP and BNSF, respectively, consent to those assignments. It is possible that Utilities may in the future discontinue rail service to CSR and no longer desire to maintain the trackage agreements with UP and BNSF. Should that occur, Utilities will first give notice to Schmidt of that decision and agree thereafter to cooperate in good faith with Schmidt to allow Schmidt to assume and perform those trackage agreements (or otherwise allow Schmidt to exercise Utilities' rights) with UP and BNSF should Schmidt request to do so and should UP and BNSF allow Schmidt to do so. Upon any assignment of rights under the trackage agreements from Utilities to Schmidt, Schmidt agrees to assume and be responsible for, and hold the City and Utilities harmless from, any resulting costs or obligations under those trackage agreements resulting from the exercise or continuation of those rights by Schmidt.

C. Mutual Obligations. The following covenants are undertaken by both Schmidt and Utilities:

10.9 Cooperation in Good Faith. The Parties are executing this Agreement prior to completion of all engineering that will be needed to construct the Project. Additionally, Utilities' future use of Utilities' Property may change. Accordingly, the Parties agree that they will each work in good faith with the other as that planning continues and circumstances change to insure that (i) the Project does not unreasonably interfere with Utilities' use and operation of Utilities' Property and the potential expansion of operations of Utilities thereon and (ii) that the Project can be completed and operated in a commercially reasonable manner to achieve the anticipated benefits. In that regard, the Parties agree to work cooperatively and execute such other and further documents, including, but not limited to, refinements of the Easements herein granted, as may be reasonably requested by a Party to further the Project and the intent of this Agreement.

10.10 Diligence and Financing Contingency. The Parties acknowledge that Schmidt is in the process of completing its due diligence regarding the Project and whether it can be constructed and operated successfully ("Schmidt's Due Diligence"). The Parties also acknowledge that the Project (i) will require Schmidt to obtain other governmental permits and approvals, and (ii) will require, and Schmidt intends to obtain, periodic financing for construction of the Project, which may come from one or more sources, including grants, conventional financing, and financing provided by one or more special districts or authorities established in accordance with Colorado Law ("Project Financing"). The Parties acknowledge that Schmidt may form one or more special metropolitan districts or authorities to assist with the financing of the Project and Schmidt's obligations hereunder. The City and Utilities agree that Schmidt's obligations under this Agreement are contingent on Schmidt (i) completing its Due Diligence and concluding, in its sole discretion, that the Project can be successfully constructed and operated, and (ii) obtaining Project Financing on terms and conditions acceptable to Schmidt in its sole discretion. Schmidt will provide Utilities with written notice once the two conditions above have been satisfied. If Schmidt does not provide such notice within seven (7) years of the Effective Date of this Agreement, Utilities may unilaterally terminate this Agreement and record a notice of termination in the records of the El Paso County Clerk and Recorder. The City and Utilities acknowledge that Project Financing for the initial construction of the Improved Loop and the rail spur through Utilities' Property and to the boundary with Fort Carson (the "Initial Phase") will likely

require a collateral assignment of Schmidt's rights under this Agreement and the right to exercise the Easements granted herein following any uncured default under Project Financing.

## **ARTICLE XI TAXES**

At the date of this Agreement, there are no ad valorem taxes and assessments separately assessed or attributable to the Easements and Facilities because the City and Utilities are currently exempt from ad valorem taxes and assessments. If at any time in the future taxes and assessments for the Easements are assessed, Schmidt or the Owner of Schmidt's Property shall be responsible for those new taxes and assessments, unless the increase in taxes is due to the change of ownership of Utilities' Property from a tax-exempt to a taxable entity or due to other activities by Utilities on Utilities' Property. In the event Utilities' Property should be transferred to a taxable entity in the future, the Parties agree to allocate such taxes and assessments among themselves in a manner which will reasonably and fairly apportion such costs. Schmidt shall be authorized to contest in any manner it sees fit any Notice of Assessed Valuation or ad valorem tax bill submitted which includes any of the Easements, but to the extent that the particular statement or bill includes any part of Utilities' Property, Schmidt shall first notify Utilities of its intention to contest the statement or bill and shall take all efforts to prevent a tax lien from attaching to the Utilities' Property up to and including the amount in dispute under protest. Any costs and expenses incurred by Schmidt in pursuing any such contest shall be Schmidt's sole expense.

## **ARTICLE XII CONDEMNATION**

Section 12.1 Damage Awards. If any portion of one or more Easements and Facilities is taken in condemnation proceedings or by any right of eminent domain (including a deed or other transfer in lieu of eminent domain), that portion of the total aggregate award for said taking, including severance damages, attributable to the value of the Easement and Facilities so taken shall be payable to the then Owners in proportion to their ownership interests.

Section 12.2 Collateral Claims. The provisions of Section 12.1 above shall not prohibit the Owners of a Benefitted Area which benefitted from the Easements and Facilities so taken from filing collateral claims with the condemning authority, for recovery over and above the value of the Easement and Facilities so taken, to the extent of any damage suffered by the Owners of such Benefitted Area resulting from the taking of the Easement and Facilities; provided that such claim or recovery does not reduce or diminish the amount of the award which the Owners of the condemned parcel would otherwise receive.

Section 12.3 Substitute Easements. To the extent that doing so is reasonably necessary following such taking to allow the exercise of Easement rights created by this Agreement, the City or Utilities, as applicable, shall, if reasonably feasible without interfering with the existing or future anticipated uses of Utilities' Property, provide a substitute Easement to Schmidt or to the then Owner of Schmidt's Property, as applicable, in which case Schmidt or the then Owner of Schmidt's Property shall be entitled to rebuild and restore the Facilities on the replaced Easement, to the extent that the award from such taking is sufficient to pay for such repairs and restoration, or Schmidt or such Owner of Schmidt's Property elects to fund the balance of the costs of such repairs in excess of the award. If the taking is such that only a portion of the Easement and

Facilities thereon are taken, Schmidt, or the then Owner of Schmidt's Property, as applicable, shall be entitled, at its sole expense, to repair and restore the then remaining portion thereof as nearly as practicable to the condition it was in immediately prior to such condemnation.

### **ARTICLE XIII AMENDMENT OR TERMINATION**

Section 13.1 Amendment. Subject to Section 10.9 above, and except as otherwise provided in this Agreement, the provisions of this Agreement may be abrogated, modified, amended, rescinded or terminated in whole or in part only with the consent of Utilities and Schmidt, or their successors or assignees respectively and each of the Permanent Lenders, by a writing executed and acknowledged by all of said parties, and duly recorded in the office of the Clerk and Recorder of El Paso County, State of Colorado.

Section 13.2 Clarifications. This Agreement may be amended or supplemented by Utilities with the written consent of Schmidt, in its reasonable discretion, if such amendment is for the purpose of adding an additional easement right for the benefit of Schmidt, clarifying an existing Easement, or relocating an existing Easement pursuant to Section 2.5 or more specifically locating an easement at such time as the precise location of the Easements created hereby, or some of them, become known, or for such other similar purpose as may reasonably be required.

### **ARTICLE XIV REMEDIES ON DEFAULT**

Section 14.1 Notice and Cure. In the event of the failure of Utilities or Schmidt to perform its obligations under this Agreement, including, without limitation, the obligations to maintain Easements or access, or its obligations to pay or share costs or expenses, after notice of such failure from Schmidt to Utilities or from Utilities to Schmidt, and if that breach is not cured within thirty (30) days from the date of written notice of that breach from the then non-breaching Party, or if the nature of the breach is such that it cannot reasonably be cured within such thirty (30) days, then within such additional time as may be reasonably required to cure the breach provided that the Party in breach commences the cure within that thirty (30) day period and diligently prosecutes the cure to completion thereafter, then the non-defaulting Party shall be entitled to any and all remedies, legal or equitable, which may be available for a breach of this contract.

Section 14.2 Interference with Utilities' Operations. The Parties acknowledge and agree that the Utilities' Property and all facilities located on the Utilities' Property are critical to Utilities' operations and that any material interference therewith by Schmidt, including without limitation any activities that may result in an enforcement action by a state or federal regulatory agency against Utilities or a slowdown or shut down of Utilities ability to operate CSR, would be a material breach of this Agreement and that money damages would not be a sufficient remedy for such a material breach. If at any time, Schmidt or the Owner of the Schmidt's Property materially breaches this Agreement, fails to comply with an applicable Law, rule or regulation, or in any way jeopardizes Utilities' Property, Utilities' operations, or any of the facilities located on the Utilities' Property, and that breach is not cured within ten (10) days from the date of written notice of that breach from Utilities, or if the nature of the breach is such that it cannot reasonably be cured within such ten (10) days, then within such additional time as may be reasonably required to cure the breach provided that Schmidt commences the cure within that ten (10) day period and diligently prosecutes the cure to completion thereafter, then Utilities may, in its sole discretion, terminate this Agreement, including the Easements and other rights granted Schmidt in this Agreement, and seek

and obtain damages to compensate Utilities for its losses, provided however, that in the event of a breach by Schmidt causing an emergency situation, Utilities may (i) immediately and temporarily block, modify, or suspend Schmidt's access to the Easements; and (ii) seek and obtain immediate and sustained equitable relief from a Court of competent jurisdiction.

Section 14.3 Colorado Governmental Immunity Act. In no event shall the obligations of the City and/or Utilities hereunder be construed or determined to waive otherwise applicable provisions of the Colorado Constitution, Colorado Governmental Immunity Act or the City Charter, including without limitation Sections 7-50 and 7-60 thereof.

## **ARTICLE XV ASSIGNMENT**

Section 15.1 General. No assignment or transfer by the City, Utilities or Schmidt of this Agreement or either Party's rights or obligations hereunder shall be effective without the prior written consent of the other Parties, which consent shall not be unreasonably withheld, conditioned or delayed; provided that the City and Utilities may assign their rights and obligations hereunder as part of a transfer or conveyance of the Utilities' Property without the consent of Schmidt. The City and Utilities also agree that Schmidt can assign its rights and interests in this Agreement without the City's prior consent to any subsidiary or affiliate of Schmidt or special metropolitan district or authority or public-private partnership entity created to own or operate the Project, provided that Schmidt executes and delivers to City and Utilities an unconditional written guaranty of the performance of this Agreement by any such assignee. No assignment of this Agreement by Schmidt will relieve Schmidt of its obligations under this Agreement without the City's and Utilities' written consent.

Section 15.2 Assignment as Security. Notwithstanding the provisions of Section 15.1, for the purpose of Project Financing of the Initial Phase, Schmidt may assign to, or create a security interest in favor of, any Financing Party, in Schmidt's rights and interests in, under or pursuant to this Agreement, and the Financing Party for the Initial Phase may further assign this Agreement in the exercise of its remedies under documents governing the Project Financing.

## **ARTICLE XVI INDEMNIFICATION**

Section 16.1 Limitation on Liability. Except as required in Section 16.2 and to the extent permitted by applicable Law, Utilities shall not be liable to Schmidt for any indirect, consequential, incidental, special or punitive damages. This provision is not intended to constitute a waiver of any rights of Schmidt against Utilities with regard to matters unrelated to this Agreement or any activity not contemplated by this Agreement.

Section 16.2 Indemnification.

(a) Schmidt. Schmidt hereby agrees to indemnify and defend the City, Utilities, the City Council of the City of Colorado Springs, the Utilities Board of Directors and their respective officers, enterprises, employees, contractors, attorneys, agents and representatives (the "Affiliated Persons") against, and hold the City and Utilities and their Affiliated Persons harmless from, at all times after the date hereof, any and all Losses incurred, suffered, sustained or required to be paid,

directly or indirectly by, or sought to be imposed upon, the City, Utilities or their Affiliated Persons: (i) for personal injury or death to Persons or damage to property arising solely out of or resulting solely from the construction, operation, maintenance or repair of the Project or arising from any negligent or intentional act or omission by Schmidt in connection with the performance of its obligations under this Agreement; (ii) for any liability or alleged liability which may at any time be imposed upon, incurred by or asserted or awarded against the City or Utilities or their respective Affiliated Persons relating to, resulting from or arising out of any Release of any Hazardous Substances by Schmidt on, at, under or from Schmidt's Property or from the Easements or Facilities granted to Schmidt hereunder, or any environmental condition or contamination caused by Schmidt; (iii) on account of a breach by Schmidt of its obligations under this Agreement; or (iv) on account of a breach by Schmidt of any representation, warranty or covenant made by Schmidt under this Agreement.

(b) Survival. Except for indemnification with respect to third-party claims (which shall survive for the period prescribed by the applicable statute of limitations), the indemnification obligations contained in this Section 16.2 shall apply to any Losses incurred, suffered, sustained or required to be paid and of which the indemnifying Party receives notice from the indemnified Party within two (2) years following the expiration of this Agreement.

Section 16.3 Indemnification for Fines and Penalties. Any fines or other penalties incurred by the City and/or Utilities for a violation, alleged violation or non-compliance with applicable Laws shall be reimbursed by Schmidt to the extent such violation, alleged violation or non-compliance was a result of the acts or omissions of Schmidt or any of its Affiliated Persons.

Section 16.4 Notice of Claims. The City and/or Utilities shall promptly notify Schmidt in writing of any Loss, claim or proceeding in respect of which it is or may be entitled to indemnification under Section 16.2. Such notice shall be given as soon as reasonably practicable after the City and/or Utilities becomes aware of any Loss, claim or proceeding.

Section 16.5 Defense of Third-Party Claims.

(a) Schmidt shall be entitled, at its option and expense and with counsel of its selection, in its reasonable judgment, to assume and control the defense of any third-party claim, action, suit or proceeding that is subject to the indemnity provided in Section 16.2, provided that (i) Schmidt gives prompt notice of its intention to do so to the City and/or Utilities, (ii) reimburses them for the reasonable costs and expenses they incurred prior to the assumption by Schmidt of such defense and (iii) Schmidt shall not have authority to agree to any settlement or compromise that agrees to any acceptance of fault or responsibility on the part of the City and/or Utilities without the City's and/or Utilities' express consent in writing.

(b) Notwithstanding the provisions of Section 16.5(a), unless and until Schmidt acknowledges in writing its obligation (with a reservation of rights if necessary) to indemnify the City and/or Utilities and assumes control of the defense of a claim, suit, action or proceeding in accordance with Section 16.5(a), the City and/or Utilities shall have the right, but not the obligation, to contest, defend and litigate, with counsel of its own selection, any claim, action, suit or proceeding by any third party alleged or asserted against the City and/or Utilities in respect of, resulting from, related to or arising out of any matter for which it is entitled to be indemnified hereunder, and the reasonable costs and expense thereof shall be subject to the indemnification

obligations, if any, of the indemnifying Party hereunder.

(c) Upon assumption by Schmidt of the control of the defense of a claim, suit, action or proceeding, Schmidt shall reimburse the City and/or Utilities for the reasonable out-of-pocket costs and expenses it incurred in the defense of the claim, suit, action or proceeding prior to Schmidt's acknowledgment of the indemnification and assumption of the defense, unless the indemnifying Party's acknowledgement is with a reservation of rights.

## **ARTICLE XVII MISCELLANEOUS**

Section 17.1 Notice. Any notice or demand to be given or to be served upon the City, Utilities or Schmidt in connection with this Agreement shall be deemed to have been sufficiently given and served for all purposes by being in writing and being personally served on such Party or sent by Registered U.S. Mail, postage prepaid, return receipt requested, addressed to such Party at its address hereinafter specified or at such other address as such Party may from time to time designate by notice to such other Party and any such notice or demand shall be deemed conclusively to have been given or served on the date of such personal service or on the fifth day following the date of such mailing. Until further notice, notice to Utilities shall be addressed as follows:

If intended for Utilities:  
Colorado Springs Utilities  
Ray Nixon Power Plant  
14020 Ray Nixon Road  
Fountain, CO 80817  
Attn. Plant Manager  
Telephone: (719) 668-8982

With a copy to:  
Colorado Springs Utilities  
121 S. Tejon Street  
P.O. Box 1103, MC 950  
Colorado Springs, CO 80903  
Attn. Land Resource Manager  
Telephone: (719) 668-7581

And a copy to:  
Office of the City Attorney, Utilities Division Chief  
City of Colorado Springs  
30 S. Nevada Avenue  
5<sup>th</sup> Floor, Mail Code 510  
Colorado Springs, CO 80903  
Attn: Division Chief  
Telephone: (719) 385-5909

If intended for Schmidt:

L. Steven Weiner  
Vice President  
Edw. C. Levy Co.  
8800 Dix Avenue  
Detroit, MI 48209  
Phone: 313-429-2600  
Email: sweiner@edwclevy.net

with a copy to:

Patrick Duerr, Esq.  
Vice President and General Counsel  
Edw. C. Levy Co.  
9300 Dix Avenue  
Detroit, MI 48120  
Phone: 313-429-2423  
Email: pduerr@edwclevy.net

and with a copy to:

Steven K. Mulliken, Esq.  
Mulliken Weiner Berg & Jolivet, P.C.  
102 South Tejon Street, Suite 900  
Colorado Springs, CO 80903  
Phone: 719-635-8750 x 216  
Email: mulliken@mullikenlaw.com

Section 17.2 Counterparts. This Agreement may be executed in any number of counterparts, each of which shall constitute an original as against the Party whose signature appears thereon, and all of which taken together shall constitute one and the same instrument. This Agreement shall become binding when one or more counterparts, individually or taken together, shall bear the signature of all Parties to this Agreement.

Section 17.3 Section Headings. The Section headings herein are inserted only for convenience and reference and shall in no way define, limit, or prescribe the scope or intent of any provisions of this Agreement.

Section 17.4 Unenforceable Terms. If any term or provision of this Agreement or the application thereof to any person or circumstance shall, to any extent, be invalid or unenforceable, the remainder of this Agreement or the application of such term or provision to persons or circumstances other than those as to which it is held invalid or unenforceable, shall not be affected thereby, and each term and provision of this Agreement shall be valid and be enforced to the fullest extent permitted by law.

Section 17.5 Relationship of Parties. This Agreement is not intended to create a joint venture, partnership or agency relationship between the City, Utilities and Schmidt with respect to

Utilities' Property or the Project.

Section 17.6 Applicable Law and Venue. This Agreement shall be governed by and construed in accordance with the laws of the State of Colorado. In the event of litigation arising out of this Agreement exclusive venue and jurisdiction shall be in the District Court for the Fourth Judicial District in El Paso County, Colorado.

Section 17.7 Waiver. No failure to exercise any power given by this Agreement or to insist upon strict compliance with obligations required hereunder, and no custom or practice at variance with the terms of this Agreement shall constitute a waiver of the right to demand exact compliance with the terms hereof.

Section 17.8 Delegation. The performance of any obligation or requirement imposed by this Agreement upon the City, Utilities or Schmidt may be delegated by the City, Utilities or Schmidt to a project manager (or a successor or assign to Schmidt in accordance with Article XV, above) and the enjoyment of any right or benefit granted by this Agreement to the City, Utilities or Schmidt may be transferred to licensees, permittees, invitees, employees and agents of such Party.

Section 17.9 Successors and Assigns. The covenants, agreements and conditions herein contained shall bind and inure to the benefit of the Parties hereto, and their respective legal representatives, and permitted successors and assigns, except as otherwise provided herein.

Section 17.10 Appropriation of Funds. This Agreement is expressly made subject to the limitations of the Charter of the City of Colorado Springs. Nothing herein shall constitute, nor be deemed to constitute, the creation of a debt or multi-year fiscal obligation or an obligation of future appropriations by the City Council of Colorado Springs or any other constitutional, statutory, or charter debt limitation. Notwithstanding any other provision of this Agreement, with respect to any financial obligations of Utilities which may arise under this Agreement in any fiscal year after the year of execution, in the event the budget or other means of appropriation for any such year fails to provide funds in sufficient amounts to discharge such obligation, such failure (i) shall act to terminate the City's and Utilities' obligations to provide any funding or expend any monies otherwise required by this Agreement at such time as the then-existing and available appropriations are depleted and until there is a new appropriation for such expenses, and (ii) neither such failure nor termination shall constitute a default or breach of this Agreement, including any sub-agreement, attachment, schedule, or exhibit thereto, by Colorado Springs Utilities, provided that such failure of appropriation will not alter, reduce or terminate Schmidt's rights to the Easements granted herein.

[SIGNATURES ON FOLLOWING PAGE]

The City of Colorado Springs

By: \_\_\_\_\_

Its: \_\_\_\_\_

STATE OF COLORADO )  
 ) ss.  
COUNTY OF EL PASO )

The foregoing instrument was acknowledged before me this \_\_\_\_\_ day of \_\_\_\_\_ 2023, by \_\_\_\_\_, as \_\_\_\_\_ of the City of Colorado Springs, a Colorado home rule city and municipal corporation.

Witness my hand and official seal.

My Commission Expires: \_\_\_\_\_

(SEAL)

\_\_\_\_\_  
Notary Public

Colorado Springs Utilities

By: \_\_\_\_\_

Its: \_\_\_\_\_

STATE OF COLORADO )  
 ) ss.  
COUNTY OF EL PASO )

The foregoing instrument was acknowledged before me this \_\_\_\_\_ day of \_\_\_\_\_ 2023, by \_\_\_\_\_, as \_\_\_\_\_, Colorado Springs Utilities.

Witness my hand and official seal.

My Commission Expires: \_\_\_\_\_

(SEAL)

\_\_\_\_\_  
Notary Public

Approved as to form:

By: \_\_\_\_\_ Date: \_\_\_\_\_  
City Attorney's Office – Utilities Division

DRAFT



LISTING OF EXHIBITS

EXHIBIT A – UTILITIES’ PROPERTY

EXHIBIT B – SCHMIDT’S PROPERTY

EXHIBIT C – SURVEY

EXHIBIT D – SHARED RAILROAD ACCESS EASEMENT AREA

EXHIBIT E – RAILROAD SPUR EASEMENT AREA

EXHIBIT F – SECURITY AREA

EXHIBIT G – REVISED LOOP AND SPUR EXTENSION

EXHIBIT H – BUILDING AND BAD ORDER TRACK RELOCATION

DRAFT

# Board Memo Agenda Item

## Staff Report

**Date:** Jan. 18, 2023  
**To:** Utilities Board  
**From:** Travas Deal, Acting Chief Executive Officer  
**Subject:** Acquisition of Real Property to be Used for the Central Substation Project

### NARRATIVE:

**Desired Action:** Discussion

**Executive Summary:** Colorado Springs Utilities has identified three substations that are severely space constrained and no longer located at ideal points on the grid to accommodate future demand. The Central Substation Project will replace these three aging substations with one facility to improve system reliability, resiliency and efficiency. Additionally, it will provide for long-term operation and maintenance savings.

As part of the project, Springs Utilities has identified a site for the new substation. There are seven parcels that need to be acquired to accommodate the new substation. Springs Utilities is requesting that the Utilities Board forward a resolution to City Council to request approval to purchase 4002 Goldenrod Drive and 2918 Austin Bluffs Parkway.

To date, Springs Utilities has purchased one parcel and there are four remaining parcels that staff is continuing to negotiate with the property owners of those properties.

**Benefits:** Utilities is modernizing the electric grid for sustainability and system resiliency and reliability.

**Board Policy:** N/A

**Cost/Budget:** The total acquisition amount of \$497,000 for 4002 Goldenrod Drive and \$1,300,000 for 2918 Austin Bluffs Parkway, for an aggregate total of \$1,797,000.

**Affected Parties:** Neighbors who live near where the new Central Substation will be built.

**Alternatives:** N/A

**Submitter:** Jessica Davis

**Email address:** jedavis@csu.org

**Division/** Systems Planning & Projects/

**Phone number:** (719) 668-7581

**Department:** Technology & Facility Management

**Date submitted:** Jan. 4, 2023

**SPG Staff Use Only:** Consent Calendar

Yes

**X**

No

**ITEM NO. 10**



Colorado Springs Utilities  
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# A RESOLUTION AUTHORIZING THE ACQUISITION OF REAL PROPERTY BE USED FOR THE CENTRAL SUBSTATION RELOCATION PROJECT

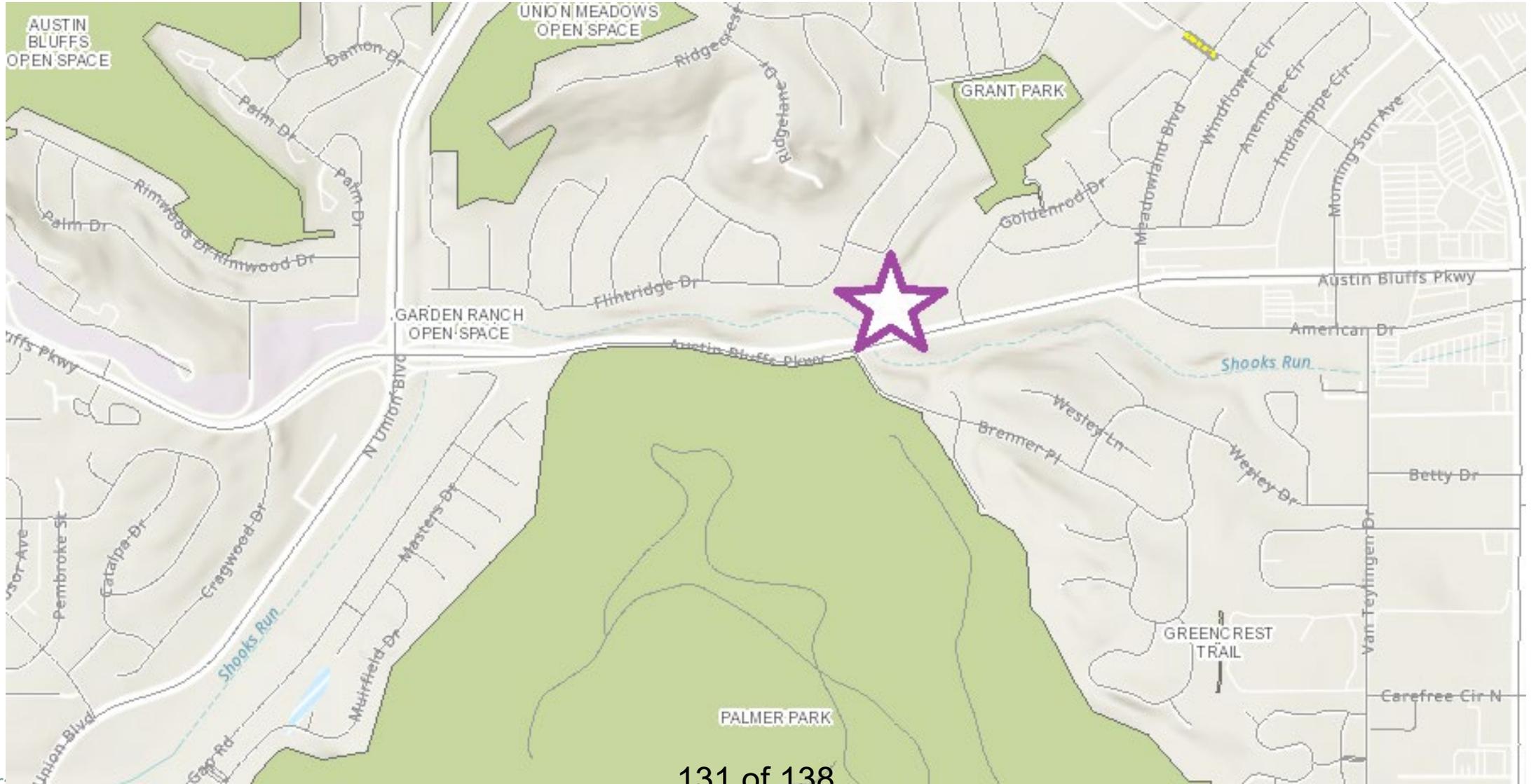
Jessica Davis  
Land Resource Manager  
January 18, 2023

# Central Substation Project

- Replacement of 3 aging substations
- Long-term O&M savings
- Ensure reliability of system
- Safety upgrades



# Vicinity Map



# Central Substation Site

- 7 Properties
  - Commercial
    - 2910 Austin Bluffs Pkwy
    - 2914 Austin Bluffs Pkwy
    - **2918 Austin Bluff Pkwy**
    - 2930 Austin Bluffs Pkwy
  - Residential
    - **4002 Goldenrod Drive**
    - **4006 Goldenrod Drive**
  - Vacant
    - 2922 Austin Bluffs Pkwy



# Property – 4002 Goldenrod Drive

- TSN: 6327206046
- Owner: Troy Miller
- Appraisal: \$482,000
- Request approval for purchase price of \$497,000
- Relocation will be in accordance with the Uniform Relocation Act

# Property – 2918 Austin Bluffs Parkway

- TSN: 6327206054
- Owner: 2918 Austin Bluffs Parkway LLC
- Appraisal: \$1,200,000
- Request approval for purchase price of \$1,300,000
- Relocation of businesses will be in accordance with the Uniform Relocation Act

# Action Requested

- Request to item to be added to February 14, 2023, formal City Council agenda for a vote.



Colorado Springs Utilities<sup>®</sup>

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RESOLUTION NO. \_\_\_\_\_ - 23

A RESOLUTION AUTHORIZING THE ACQUISITION OF REAL PROPERTY OWNED BY 2918 AUSTIN BLUFFS PARKWAY LLC AND REAL PROPERTY OWNED BY TROY MILLER TO BE USED FOR THE CENTRAL SUBSTATION PROJECT

WHEREAS, certain real property owned by 2918 Austin Bluffs Parkway LLC (the "LLC") which is located at 2918 Austin Bluffs Parkway, Colorado Springs, Colorado, also known as El Paso County Tax Schedule Number 6327206054, in the records of the El Paso County Clerk and Recorder, El Paso County, Colorado, (the "2918 Property"), has been identified as necessary for the Central Substation Relocation Project ("Project"); and

WHEREAS, the City of Colorado Springs on behalf of Colorado Springs Utilities ("Utilities") desires to purchase and the LLC desires to sell the 2918 Property to the City for a purchase price of \$1,300,000; and

WHEREAS, the \$1,300,000 purchase price for the 2918 Property is supported by a real estate appraisal conducted by an independent real estate appraiser; and

WHEREAS, certain real property owned by Troy Miller ("Miller") which is located at 4002 Goldenrod Drive, Colorado Springs, Colorado, also known as El Paso County Tax Schedule Number 6327206046, in the records of the El Paso County Clerk and Recorder, El Paso County, Colorado, (the "Goldenrod Property"), has been identified as necessary for the Project; and

WHEREAS, the City of Colorado Springs on behalf of Colorado Springs Utilities desires to purchase and Miller desires to sell the Goldenrod Property to the City for a purchase price of \$497,000; and

WHEREAS, the \$497,000 purchase price for the Goldenrod Property is supported by a real estate appraisal conducted by an independent real estate appraiser; and

WHEREAS, the acquisition of the 2918 Property and the Goldenrod Property is in the public interest and is necessary for the Project; and

WHEREAS, pursuant to sections 4.1 and 9.6 of *The City of Colorado Springs Procedure Manual for the Acquisition and Disposition of Real Property Interests* ("Real Estate Manual"), City Council approval is required for acquisition of real property interests if the purchase price exceeds \$100,000; and

WHEREAS, Utilities requests the approval of City Council to purchase the 2918 Property from the LLC for a purchase price of \$1,300,000; and

WHEREAS, Utilities requests the approval of City Council to purchase the Goldenrod Property from Miller for a purchase price of \$497,000.

**NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF COLORADO SPRINGS:**

Section 1. That the City Council finds the acquisition of the 2918 Property and the Goldenrod Property to be in compliance with the Real Estate Manual, the City Charter, City Code, and all other applicable laws.

Section 2. That in accord with the Real Estate Manual, the City Council hereby authorizes the acquisition of the 2918 Property from the LLC for the purchase price of \$1,300,000.

Section 3. That in accord with the Real Estate Manual, the City Council hereby authorizes the acquisition of the Goldenrod Property from Miller for the purchase price of \$497,000.

Section 4. That the City's Real Estate Services Manager is authorized to execute all documents necessary to complete the acquisition of the Property as contemplated herein.

DATED at Colorado Springs, Colorado, this \_\_\_\_\_ day of \_\_\_\_\_, 2023.

ATTEST:

\_\_\_\_\_  
Council President

\_\_\_\_\_  
Sarah B. Johnson, City Clerk