

**DELIVERY OF MUNICIPAL WATER SUPPLIES  
FROM PUEBLO RESERVOIR**

This Memorandum of Understanding is agreed to by and between the Board of Water Works of Pueblo, Colorado (“Board”) and Colorado Springs Utilities (“Utilities”), an enterprise owned and operated by the City of Colorado Springs, a Colorado home-rule city and municipal corporation, to provide the manner in which the Board and Utilities will cooperate in the use of Municipal Water Supply delivery facilities at Pueblo Reservoir in the normal course of their respective business operations.

**RECITALS**

A. Both the Board and Utilities (collectively “Parties”) are participants in and beneficiaries of the Fryingpan-Arkansas Project constructed by the United States Bureau of Reclamation (“Bureau”) pursuant to Congressional authorization (Public Law 87-490).

B. On July 11, 2000, the Board entered into Contract No. 009D6C0048 with the Bureau of Reclamation for delivery of municipal and industrial water through, and repayment for, the South Outlet Works of Pueblo Dam, a feature of the Fryingpan-Arkansas Project. The Board entered into a separate license with the Bureau to install a pipeline across Bureau lands, which the Board has now installed and uses to deliver raw water to its municipal water treatment plant(s).

C. Pursuant to an Intergovernmental Agreement signed on August 1, 2000, between the Board and Utilities (the “2000 IGA”), Utilities paid approximately \$3 million for the construction of the Board’s pipeline, in order to have the pipeline enlarged by approximately 68 million gallons per day (“mgd”) of capacity and to construct a tap off the Board’s pipeline, all with the intention of using the enlarged pipeline capacity and tap for providing additional water



delivery to the City of the Colorado Springs by a water supply pipeline, referred to as the Southern Delivery System (“SDS”).

D. Utilities is acting as the project manager charged with responsibility to oversee the construction and operation of SDS pursuant to the August 1, 2003 “Intergovernmental Agreement for Construction of the Southern Delivery System” (“2003 SDS IGA”) which has been amended from time to time so that the current parties are the City of Colorado Springs, Security Water District, City of Fountain, and Pueblo West Metropolitan District. All references to Utilities with regard to SDS shall be presumed to mean Utilities acting as project manager, unless the context requires a different interpretation.

E. The Board’s pipeline is connected to the South Outlet Works and Delivery Manifold (“SOW & DM”) of Pueblo Dam. The Pueblo West Metropolitan District (12 mgd) and the Fountain Valley Authority (20 mgd) have existing contracts with the Bureau and pipelines connected to the SOW & DM. The contracts of Pueblo West and Fountain Valley Authority are prior in time to SDS, and their rights to use the SOW & DM are not subject to this Memorandum.

F. As SDS project manager under the 2003 SDS IGA, Utilities currently intends to enter into a contract with the Bureau to connect a separate 96 mgd pipeline to Pueblo Dam. In connection with that effort, Utilities currently intends to seek modification of the North Outlet Works of Pueblo Dam (“NOW”) to permit the installation of the SDS pipeline in order to supply water for the SDS pipeline and to avoid potential operational conflicts with the Board that could arise from the use of the SOW & DM to supply the SDS pipeline.

G. The Board and Utilities will benefit by cooperating in the utilization of the Board's capacities in the SOW & DM and Utilities' capacity in the new delivery facilities to be installed by Utilities on the NOW to provide alternative means to supply water to the Board and Utilities through their respective pipelines. Currently, the Parties believe they will accomplish this goal by the construction of an inter-tie between their respective delivery pipelines.

## **OPERATIONAL UNDERSTANDINGS**

### **1. North Outlet Works Facilities.**

Utilities will seek to complete negotiations with the Bureau for a contract that authorizes Utilities to modify the NOW of Pueblo Dam in order to connect the SDS thereto.

Utilities will attempt to construct appropriate facilities on the NOW ("NOW facilities") to a reasonable size in order to provide the supplies necessary to serve the SDS up to 96 mgd, while at the same time providing the opportunity for other users to obtain capacity in the NOW, including up to 40 mgd for the Board's use. The amount of additional capacity that may be available for use by the Board and others and any associated costs will be determined at the time that Utilities completes its original engineering design of the NOW facilities.

Once the design is complete, Utilities shall provide the Board with separate engineering cost estimates for an additional 20 mgd and an additional 40 mgd of capacity for the Board in the NOW facilities. Within sixty days of presentation of the written estimate to the Board, the Board shall advise Utilities whether it wants to acquire, pay for, and utilize up to 40 mgd of capacity for the Board in the NOW facilities. If the Board declines to reserve any capacity for itself in the NOW facilities, it shall have no obligation to pay for any portion of the NOW facilities that would be needed for additional capacity for the Board. A decision by the Board not to acquire

additional capacity in the NOW facilities does not affect the Board's ability to utilize Utilities' unused capacity in the NOW facilities as detailed below.

**2. Intertie Pipeline.**

The Parties agree to cooperate toward the design and construction of an intertie pipeline between the Board's pipeline and the NOW facilities for the benefit of the Parties and, with the consent of the Board and Utilities, other participating parties. Allocation of costs shall be equitably distributed among the Parties and any other participating parties prior to construction.

**3. Utilities' Use of Board's Unused Allocated Capacity in the SOW & DM.**

The Board is currently allocated 180 mgd capacity in the SOW & DM through its contract with the Bureau. The Board shall have the first right to use this allocated capacity in the SOW & DM to meet its customers' demands. Subject to the terms of this Memorandum and upon payment of the appropriate costs and fees by Utilities as described herein, the Board approves Utilities' use of the unused portion of the Board's allocated capacity in the SOW & DM during any time when the Board's capacity is not needed by the Board to serve its customers. Such use by Utilities shall not vest any permanent right in Utilities to use any portion of the Board's allocated capacity in the SOW & DM.

Utilities acknowledges that the Board's contract with the Bureau for use of the SOW & DM requires the Board to repay the allocable construction costs and operation and maintenance expenses associated with the Board's 180 mgd capacity, whether or not that capacity is fully utilized by the Board. Utilities agrees to pay the Board a ratable share of actual costs for any use by Utilities of the Board's unused capacity in the SOW & DM. Utilities' ratable share of the actual costs shall be proportionate to the duration and portion of capacity involved in Utilities' use levied by the Bureau against the Board pursuant to the Board's Contract for repayment of the

actual annual reimbursable operation, maintenance, and replacement costs of the SOW & DM allocable to the Board, plus an administrative charge of 15% for water accounting and similar costs. The Parties recognize that the actual costs levied by the Bureau against the Board could increase to include future costs for remedial work on the SOW, which would increase the amount of Utilities' payments as a ratable share of such increased actual costs. The 15% administrative charge shall not apply once the NOW has been installed, is fully operational, and is being used by Utilities to deliver water to the SDS pipeline. The determination of when Utilities' use of the SOW & DM has resulted in Utilities relying upon capacity allocated pursuant to the Board's contract will be made in accordance with the method attached hereto as Exhibit A. If the NOW has not been installed and the Board is no longer obligated to make payments for annual reimbursable operation, maintenance, and replacement costs to the Bureau, then the 15% administrative fee charged by the Board for Utilities' use of the Board's unused capacity in the SOW & DM shall be renegotiated based on ongoing administrative expenses.

**4. Board's Use of Utilities' Unused Allocated Capacity in the NOW Facilities.**

If Utilities is not successful in obtaining authorization to construct the NOW facilities, Utilities shall have no further obligation to the Board with regard to the NOW facilities. However, if Utilities is successful in obtaining authorization to construct the NOW facilities, then Utilities shall give the Board the opportunity to connect to and utilize Utilities' unused capacity in the NOW facilities under the following terms, provided that in all matters related to the NOW facilities, Utilities shall have the first right to use its allocated capacity in the NOW to meet its customers' demands. Subject to the terms of this Memorandum and upon payment of the appropriate costs and fees as described herein, Utilities approves the Board's use of the

unused portion of Utilities' allocated capacity in the NOW during any time when Utilities' capacity is not needed by Utilities to serve its customers. Such use by the Board shall not vest any permanent right in the Board to use any portion of Utilities' allocated capacity in the NOW.

If Utilities is successful in negotiating a contract with the Bureau for the NOW and constructs the NOW, the Board acknowledges that Utilities' contract with the Bureau for use of the NOW may require Utilities to repay the construction costs and operation and maintenance expenses for the NOW facilities whether or not that capacity is fully utilized by Utilities. The Board agrees to pay Utilities a ratable share of actual costs for any use by the Board of Utilities' unused capacity in the NOW facilities. The Board's ratable share of the actual costs shall be proportionate to the duration and portion of capacity involved in the Board's use levied by the Bureau against Utilities pursuant to Utilities' contract for repayment of the actual annual reimbursable operation, maintenance, and replacement costs of the NOW facilities allocable to Utilities. The determination of when the Board's use of the NOW facilities has resulted in the Board relying upon capacity allocated pursuant to Utilities' contract will be made using a methodology similar to that described in Exhibit A, for the SOW & DM.

#### **5. Preservation of Operational Conditions.**

Utilities acknowledges that the Board has negotiated its contract with the Bureau based upon the premise that it will receive its water supplies at the Board's Whitlock Treatment Plant by gravity. If at any time the Board is unable to receive the quantity of water which it requires to serve its customers by gravity because Utilities is operating the SDS utilizing the SOW & DM, then Utilities will restrict its diversions to the SDS through the SOW & DM sufficiently to permit the Board to receive by gravity the supplies to which it is entitled. Utilities acknowledges that if it is using the SOW & DM it may become necessary to install additional facilities to

permit the Board to continue to receive the supplies to which it is entitled while at the same time allowing the SDS to operate. The decision whether to install such additional facilities in lieu of being obliged to restrict its diversions rests solely with Utilities. The Board shall provide Utilities with its prior year annual and peak water consumption by April 1 of each year. It shall be Utilities' sole responsibility to evaluate this information and determine whether it is at risk of having its use of the SOW & DM curtailed in the current year. The Board shall provide Utilities 48 hours notice that Utilities' use of the Board's capacity in the SOW & DM will be restricted or curtailed due to the Board's customer demand. The Board shall also provide an estimate of the duration of said restriction or curtailment.

The foregoing understanding is based upon the Parties' agreement that in order to invoke this provision the Board must provide Utilities with the Board's actual demand for water delivered through the SOW & DM and the Board's raw water pipeline for treatment and delivery to its customers for the past seven days and a projection of such demand for the upcoming seven days.

#### **6. Impacts Beyond the Parties' Control.**

The Parties recognize the presence of several "Invasive Species," including the Zebra mussel, Quagga mussel and other mollusks or shellfish, in Pueblo Reservoir. Their presence may change the ability of the reservoir facilities to deliver the quantities of raw water supply through the SOW & DM and/or the NOW to the Parties' respective facilities. The Parties commit to cooperate with one another to protect their respective abilities to take the quantity of flow each requires, notwithstanding the presence of Invasive Species. Both Parties understand and agree that the primary responsibility for controlling Invasive Species rests with the owner of the reservoir, the Bureau, and neither Party will owe a duty to the other with respect to their

contractual right to receive water from Pueblo Reservoir if the reason for the inability to obtain water supplies is the result of Bureau actions, or failure to act, to control Invasive Species. In addition, the Parties recognize that future hydrology together with the policies and operational decisions of the Bureau may result in impacts on the Parties' ability to obtain their full supplies from the SOW & DM and/or the NOW. Both Parties will cooperate to minimize these impacts but neither Party will be obligated to guarantee the others' supply in these instances.

**7. Allocation of Additional Capacity.**

If the Bureau determines that additional capacity is available in the SOW & DM above the 260 mgd rate currently projected, then the Parties shall cooperate in developing a fair and reasonable allocation of their respective shares of that additional capacity for purposes of this Memorandum.

**8. Annual Operations.**

The Board and Utilities shall each designate a representative to be the primary contact concerning SOW & DM and NOW facilities operations. The Board and Utilities will establish guidelines for communications on SOW & DM and NOW facilities operations, including all matters necessary for the safe and efficient operation of the facilities at Pueblo Dam for the benefit of both Parties.

**9. Ownership.**

The several connections to the SOW & DM or the NOW facilities as well as the respective pipelines and appurtenances shall be owned and maintained by the respective Parties; this Memorandum provides only for the Parties to render services to each other from such infrastructure, and does not alter or adjust ownership of any infrastructure or water rights.



**10. Transfer or Assignment of Capacity.**

Both Utilities and the Board shall have the right to assign or transfer their interest in this Memorandum provided that such assignment or transfer is to a political subdivision of the State of Colorado as defined in C.R.S. Section 29-1-202(2); provided, however, the Party seeking to effectuate such a transfer or assignment shall provide the other Party with written confirmation from the Bureau that any such conveyance is acceptable to the Bureau and not in violation of the Party's contracts or license agreements with the Bureau. Any such assignment shall not, without the consent of the affected Party, reduce any Party's opportunity to use the unused capacity of the other Party under this Agreement.

**11. General Reorganization of Municipal Government.**

The above provision on Transfer or Assignment of Capacity shall not apply to a general reorganization of the municipal government of either the City of Colorado Springs or the City of Pueblo that result in the transfer of title to another existing or newly-created entity of the same municipality charged with carrying out substantially the same responsibilities as its predecessor. Such transfers are expressly allowed hereunder.

**12. Continuing Obligations**

Any assignee/transferee of interests under paragraphs 10 and 11 shall be bound by the terms and conditions of this Memorandum. The original assignor/transferor shall remain liable for the obligations under this Memorandum to the extent such obligations are not fulfilled by its transferees and assignees.

**13. Termination of Participation in Memorandum.**

The Parties may terminate this Memorandum by mutual consent.

**14. Termination of the Bureau's Contract.**

In the event that the Bureau lawfully terminates the use of the SOW & DM and/or the NOW under the terms of a contract between the Bureau and either Utilities or the Board, such termination shall not be construed to adversely affect the contract rights of the remaining Party, including the right to continue to use the SOW & DM or the NOW to deliver water.

**15. Liability.**

The Board shall not be responsible for damage to the property of others caused by Utilities' use of the SOW & DM or the NOW or the NOW facilities and, to the extent permitted by law, Utilities will indemnify and hold the Board harmless for any such damages. Likewise, Utilities shall not be responsible for damage to the property of others caused by the Board's use of the SOW & DM or the NOW or the NOW facilities and, to the extent permitted by law, the Board will indemnify and hold Utilities harmless for any such damages. Neither Party waives any protection afforded to it by any part of the Colorado Governmental Immunity Act, C.R.S. Section 24-10-101 *et seq.*

**16. No Joint or Several Liability.**

Except as expressly provided in this Memorandum, no Party shall have any authority to act for or assume any obligations or responsibilities on behalf of any other Party. This Memorandum shall not be construed as creating a common law or statutory partnership or any other relationship under which a Party may be held liable for the acts or omissions of another Party. In every case of liability to a third party, the liability shall be several and individual, and not either joint or joint and several. Furthermore, nothing in this Memorandum shall ever be construed as a waiver of the limits on liability to third Parties afforded to the Board and Utilities under the Colorado Governmental Immunity Act, C.R.S. Section 24-10-101 *et seq.*

**17. Force Majeure.**

The obligations of this Memorandum are subject to force majeure. If a Party should be delayed in, or prevented from, performing any of the terms, covenants, or conditions of this Memorandum (other than the payment of money), by reason of fire, flood, earthquake, subsidence, ground collapse or landslide, interruption or delay in transportation or power, supply, strike, lockout, war, government law, order, regulation or interference, act of God or any other cause beyond such Party's reasonable control (excepting the effects of Invasive Species, which are otherwise dealt with above), then failure of such Party to so perform shall not be deemed to be a breach of this Memorandum and the time within which such Party is obliged to so perform shall be extended by the total period of all such delays. The affected Party shall use all reasonable diligence to remove the cause of delay or prevention as quickly as possible; provided, however, that it shall not be required to settle any strike, lockout, or other labor difficulty if it deems settlement to be inadvisable. The affected Party shall notify the other Party forthwith regarding each new cause of delay or prevention resulting in the provisions of this Paragraph 15 becoming operative, specifying the particulars of such cause and the day upon which the same arose, and shall give like notice forthwith following the date that such cause ceases to exist.

**18. No Amendment of Existing Agreements.**

This Memorandum is not intended to amend or modify any existing agreements or IGA's between the Board and Utilities, including, but not limited to, the 2000 IGA. In the event of a conflict between this Memorandum and the 2000 IGA, the 2000 IGA shall control the rights and obligations of the Parties with respect to the deliveries of water through the pipeline from the SOW & DM to the Parties' points of delivery on the pipeline, including the Whitlock Treatment Plant.

**19. Entire Agreement; Amendments.**

This Memorandum constitutes the entire agreement between the Parties relating to the subject matter hereof. All prior or contemporaneous agreements, whether written or oral, among themselves or their agents and representatives relating to the subject hereof are merged into this Memorandum. The Parties agree that this Memorandum shall not be amended or an addendum prepared thereto without the express written consent of both Parties. E-mail and all other electronic (including voice) communications from any Party in connection with this Memorandum are for informational purposes only. No such communication is intended by any Party to constitute either an electronic record or an electronic signature, or to constitute any agreement by any Party to conduct a transaction by electronic means. The Parties hereby expressly disclaim any such intention or agreement.

**20. Ratification.**

This Memorandum may be ratified by the governing bodies of each of the Parties by resolution. Each party represents that it has full power and authority to enter into this Memorandum as an obligation binding upon the Party without the ratification by the governing body.

**21. Captions.**

All captions contained in this Memorandum are for convenience only and shall not be deemed to be part of this Memorandum.

**22. Counterparts.**

This Memorandum may be executed in counterparts, each of which shall constitute an original and all of which, when taken together, shall constitute one agreement.

**23. Non-severability.**

Each paragraph of this Memorandum is intertwined with the other and is not severable unless by mutual consent of the Parties.

**24. Effect of Invalidity.**

If any portion of this Memorandum is held invalid or unenforceable for any reason by a court of competent jurisdiction as to either Party or both, the Parties will immediately negotiate valid alternatives portion(s) that as nearly as possible give effect to any stricken portion(s).

**25. Joint Draft.**

The Parties, with each having the opportunity to seek the advice of legal counsel and each having an equal opportunity to contribute to its content, drafted this Memorandum jointly.

**26. No Third Party Beneficiaries.**

This Memorandum is intended to describe the rights and responsibilities of and between the Parties and is not intended to, and shall not be deemed to confer any rights upon any persons or entities not named as Parties, nor to limit in any way the powers and responsibilities of the Parties or any other entity not a Party hereto.

**27. Dispute Resolution.**

If a dispute relating to this Memorandum arises between the Parties, the following procedure shall be followed:

- a. A joint management team, comprised of three (3) representatives of each of the Parties to this Memorandum, shall first consider any proposed decision item or disputed matter. If not resolved by agreement of the members of the joint

management team, the proposed decision item or disputed matter shall be referred to the Administrative Officers, as defined below. The Administrative Officers shall hold a meeting promptly, but in no event later than 20 calendar days from the referral of the dispute, attended by persons with decision-making authority regarding the dispute, to attempt in good faith to negotiate a resolution or cure of the dispute; provided, however, that no such meeting shall be deemed to vitiate or reduce the obligations and liabilities of the Parties or be deemed a waiver by a Party hereto of any remedies to which such Party would otherwise be entitled under this Memorandum unless otherwise agreed to by the Parties in writing. "Administrative Officers" collectively shall mean the Chief Executive Officer for Colorado Springs Utilities, and the Executive Director of the Board.

If, within 20 calendar days after such meeting, the Parties have not succeeded in negotiating a resolution of the dispute, they agree to submit the dispute to non-binding mediation and to bear equally the costs of the mediation.

- b. The Parties agree to participate in good faith in the mediation and related negotiations for a period of 30 calendar days. The substantive and procedural law of the State of Colorado shall apply to the proceedings. If the Parties are not successful in resolving the dispute through mediation, then the Parties shall be free to pursue any other legal remedy. The Parties agree to reasonably expedite any legal proceedings brought hereunder in order to obtain a prompt resolution.

**28. Costs and Attorney's Fees.**

If a Party shall commence any action or proceeding against another Party in order to enforce the provisions of this Memorandum or to recover damages as a result of the alleged breach of any of the provisions of this Memorandum, the prevailing Party shall be entitled to recover from the other Party all reasonable costs in connection therewith, including reasonable attorneys' fees.

**29. Governing Law.**

The laws of the State of Colorado, and to the extent necessary to establish their respective organizational formation and authority to act, the respective City Charters/Codes of the Parties, shall govern the interpretation and enforcement of the provisions of this Memorandum. This Memorandum provides for business services between the Parties only.

**30. Notices.**

Whenever in this Memorandum it shall be required or permitted that notice be given by either Party to the other, such notice must be in writing and must be given personally, or sent by certified mail addressed as follows:

To: Colorado Spring Utilities  
c/o Water Services Officer  
121 S. Tejon, Suite 550  
P.O. Box 1103, Mail Stop \_\_\_\_  
Colorado Springs, CO 80947

To: Board Water Works of Pueblo  
Colorado  
c/o Executive Director  
319 West Fourth  
P.O. Box 400  
Pueblo, CO 81002

Every notice under this Memorandum shall be deemed to have been given three (3) days after the time it is deposited in the United States mail. Notice of change in address for notice purposes shall be given in the manner provided in this paragraph.

DATED and effective \_\_\_\_\_, 2009.

**COLORADO SPRINGS UTILITIES**

**PUEBLO BOARD OF WATER WORKS**

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

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

Name: \_\_\_\_\_

Name: Alan C. Hamel

Title: \_\_\_\_\_

Title: Executive Director

Approved as to form:

\_\_\_\_\_

Colorado Springs City Attorney's Office

Utilities Division