

## **ARKANSAS RIVER LOW FLOW PROGRAM**

This memorandum of understanding is agreed to by and between the Board of Water Works of Pueblo (“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 guide certain aspects of their water resource management activities occurring in the normal course of their respective business operations.

### **RECITALS**

I. On March 1, 2004, the City of Colorado Springs, on behalf of its Utility Enterprise known as Colorado Springs Utilities, the City of Pueblo, and the Board of Water Works of Pueblo entered into an Intergovernmental Agreement (“IGA”) to effectuate the “Arkansas River Flow Management Program,” among other topics.

II. The purpose of the Arkansas River Flow Management Program is to provide a reasonable level of protection for streamflows through the City of Pueblo’s Arkansas River Corridor Legacy Project.

III. In the IGA, Colorado Springs and the Board agreed to forego the exercise of certain exchanges of water rights and changes of water rights, collectively called the “Subject Exchanges,” in order to assist in providing both a year-round flow and recreational flows between the “Above Pueblo Location” and the “Combined Flow Location” as defined in the IGA.

IV. The City of Pueblo, the Board and the City of Colorado Springs subsequently participated in developing and executed a second IGA that includes the City of Aurora, the

Southeastern Colorado Water Conservancy District, and the City of Fountain to gain their cooperation and participation in the operation of the Flow Management Program (the “May 25, 2004 IGA”).

V. In the two IGAs the signatories agreed to cooperative efforts to achieve the following:

1. A year-round flow measured immediately below the fish hatchery located below Pueblo Dam (“Hatchery”) of 100 cubic feet per second (“c.f.s.”), being the sum of the flows at the existing Above Pueblo Gage and the Hatchery return flow (the “Above Pueblo Location”).
2. Recreational flows during the period March 16 – November 14 of each year varying from 150 c.f.s. to 500 c.f.s. as described in the March 1, 2004 IGA.

VI. After almost four years of experience with operating the Flow Management Program pursuant to the two IGAs, it has become apparent that storage operations at Pueblo Reservoir outside the control of the parties to the two IGAs, such as the operation of the Winter Water Storage Program or periods of very low natural streamflow into Pueblo Reservoir, result in flows through the Arkansas River Corridor Legacy Project occasionally falling well below the year-round flow objective of 100 c.f.s at the Above Pueblo Location.

VII. In order to assist in the maintenance of a minimum streamflow of 50 c.f.s. in the Arkansas River (“River”) at the Above Pueblo Location, the Board and Utilities have agreed to operate a program to provide supplemental streamflows in the River by releasing water each has in storage in Pueblo Reservoir.

## **PROGRAM DESCRIPTION**

In order to assist in promoting the biological health of the River and the continued viability and success of the Corridor Legacy Project, the Board and Utilities each intend to make available 1,500 acre-feet of water stored in Pueblo Reservoir to be released from the reservoir to supplement flows in the River during times when the flow in the River, but for the supplemental release, would be less than 50 c.f.s. at the Above Pueblo Location. This cooperative effort will be called the Low Flow Program.

## **PROGRAM ELEMENTS**

A. The Board and Utilities will each store up to 1,500 acre-feet of water annually in Pueblo Reservoir dedicated for use in the Low Flow Program during the term of this Agreement (“Stored Water”) subject to Paragraph F below. The Board and Utilities may either commit Stored Water in their existing contract space or they may seek additional excess capacity storage contracts from the Bureau of Reclamation in Pueblo Reservoir for the Low Flow Program.

B. Utilities and the Board will each be responsible for all payment obligations associated with their individual storage space in Pueblo Reservoir needed for this program.

C. Utilities and the Board will each designate an individual to be responsible for the operation of the Low Flow Program and the decisions of when and how to make releases of the Stored Water to provide the low flow protection contemplated herein. The designated individuals will meet to review and implement Low Flow Program operations as soon as practical when either Party reasonably believes that low flow conditions of less than 50 c.f.s. are imminent. Each Party shall release equal quantities of Stored Water in support of the Low Flow Program on an annual basis.

D. Utilities and the Board will release the Stored Water to supplement flows in the River to prevent flows at the Above Pueblo Location from falling below 50 c.f.s, or increase

flows to 50 c.f.s. at the Above Pueblo Location if flows are below 50 c.f.s. at that location. No releases of Stored Water will be made when the flows in the River at the Above Pueblo Location are at or above 50 c.f.s.

E. The Board and Utilities may provide Stored Water from their respective existing portfolio of water rights or from newly acquired water rights, and each Party will be responsible to insure that the water provided can be lawfully released for carriage through the Legacy Corridor Project area. The Parties shall have a full supply of Stored Water (1,500 acre-feet each, for a total of 3,000 acre-feet) upon commencement of the operation of the Southern Delivery System from Pueblo Reservoir. The goal of the program will be to refill the Stored Water back to a full supply, including the replacement of evaporative losses, on or before May 1 of each year subject to Paragraph F below.

F. The Parties will make reasonable efforts to refill their Stored Water in each and every year, however, refill of Stored Water will be mandatory only when all of the following conditions are satisfied:

1. The Board has annual surplus water supplies as evidenced by leasing raw water outside its then existing service area under annual surplus supply contracts. If the Board does not have annual surplus water supplies available to lease under annual surplus supply contracts in a given year, then neither Party will be required to refill its respective Stored Water in that year although they may opt to still do so. Leasing water under longer term, multi-year leases by the Board shall not be a factor in determining whether the Parties will replenish their Stored Water.
2. Utilities' total system storage level for all reservoirs relied upon by Utilities ("Utilities System Storage") is at or above at least 70% of capacity on

May 1. If Utilities System Storage is less than 70% on May 1, then neither Party will be required to refill its respective Stored Water in that year although they may opt to still do so.

3. The May 1 Natural Resources Conservation Service's Colorado Basin Water Supply Outlook Report "most probable" forecast (50% chance of exceedance) for flows on the River at Salida (May – September) is 100% or more. If the described forecast is below 100%, then neither Party will be required to refill its respective Stored Water in that year although they may opt to still do so. If the Natural Resources Conservation Service's Colorado Basin Water Supply Outlook Report ceases to be published, the Parties will promptly meet to identify a replacement streamflow forecast for implementing the conditions of this paragraph.

### **MISCELLANEOUS PROVISIONS**

G. Recognizing that the flow of the River at the Above Pueblo Location is dependent upon water management decisions made by the State and Division Engineers ("State"), the Board and Utilities will work cooperatively with the State and other basin water users to encourage management decisions for the Winter Water Storage Program in Pueblo Reservoir so that it does not cause flows to fall below 50 c.f.s. measured at the Above Pueblo Location.

H. If the Stored Water is stored in excess capacity space in Pueblo Reservoir and, therefore, is subject to spill, the Parties will work cooperatively to minimize the loss of this water by recapturing it in other facilities or participating in trades or exchanges with other water users.

I. The Parties will work cooperatively (1) to recapture Stored Water released for the Low Flow Program in downstream storage or to make downstream beneficial use of the Stored

Water; (2) in filing any applications with the water court necessary to ensure that the releases and the recapture of the Stored Water used in the Low Flow Program can occur lawfully during the term of the program; and (3) to operate the Low Flow Program with the goal that each Party releases an equal amount of Stored Water annually.

J. No release contemplated under this Low Flow Program shall be required unless it will result in an increase in flows in the Arkansas River at the Above Pueblo Location and the increased flow resulting from such releases is not being diverted by water rights with points of diversion above the Hatchery, including appropriative rights of exchange that operate through the reach of the River intended to be benefited by the Low Flow Program. The Board and Utilities agree to participate in pending and future water rights cases, in a coordinated manner, to protect from future appropriations the releases of Stored Water made for the Low Flow Program.

K. This Low Flow Program will operate for a term of 40 years and may be renewed upon the written approval of both the Board and Utilities.

L. The Low Flow Program is a part of the efforts by the Board and Utilities to cooperate, and Utilities' cooperation in the program is specifically dependent upon the completion and operation of the Southern Delivery System from Pueblo Reservoir. The Parties will not be obligated to either acquire or commit storage space or release any Stored Water for the Low Flow Program until the Southern Delivery System from Pueblo Reservoir is completed and placed into operation.

M. Nothing in this Memorandum is intended to conflict, modify, or amend the provisions of the March 1, 2004 IGA or the May 25, 2004 IGA. This Memorandum provides for the coordinated operations of the individual facilities of the Parties only, and is not intended to provide for any shared service, function or facility.

N. ***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.

O. ***Assignment.*** This Memorandum may not be assigned by any Party without the prior written consent of the other Party.

P. ***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. This Memorandum may be altered, amended, or revoked only by an instrument in writing signed by the 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.

Q. ***Applicable Law.*** This Memorandum shall be governed by and construed according to the laws of the State of Colorado.

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

S. ***Parties Bound by Agreement.*** This Memorandum is binding upon the parties hereto, and upon their respective legal representatives and successors.

T. **Construction.** All section, paragraph, and exhibit references used in this Memorandum are to this Memorandum unless otherwise specified. Any exhibits attached to this Memorandum constitute part of this Memorandum and are incorporated herein.

U. **Dispute Resolution.** If a dispute relating to this Memorandum arises between the Parties, the following procedure shall be followed:

1. 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.



2. 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.

DATED this \_\_\_ day of \_\_\_\_\_ 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