AGREEMENT BETWEEN CARGILL, INC. AND THE CITY OF FORT COLLINS REGARDING EXCHANGING 11.5 ARTHUR IRRIGATION COMPANY SHARES FOR WATER SUPPLY REQUIREMENT CREDIT

This Agreement, dated _______________ ("Effective Date"), is entered into between the following Parties: Cargill, Incorporated, a Delaware corporation ("Cargill"); and the City of Fort Collins, Colorado, a municipal corporation (the "City").

RECITALS

A. **Cargill and Its Land and Operations.** Cargill owns approximately 19.92 acres of land in Fort Collins located at 2540 E. Drake Road[1] ("Cargill Land"). Cargill is a customer of the City water utility with several taps serving the Cargill Land. Cargill also irrigates portions of the Cargill Land with water ("Arthur Share Water") attributed to 11.5 Shares of the Arthur Irrigation Company, a Colorado mutual ditch company (the "Company"), represented by Stock Certificate No. 1950 for 10 shares, and Certificate No. 1988 for 1.5 shares ("11.5 Shares").

B. **Cargill Lateral.** The Arthur Share Water is delivered to the Cargill Land from the west via the Arthur Ditch, Sherwood Lateral, and an additional lateral ditch known as the "Cargill Lateral." The Cargill Lateral traverses the Bucking Horse Subdivision, which is located west of the Cargill Land.

C. **Piped Portion of the Cargill Lateral.** The Cargill Lateral has been piped through that subdivision since its development in the early 2000s.

D. **Separate Agreement Between Cargill and the HOA.** Cargill and the Sidehill Master Home Owner Association, Inc. ("HOA") have been exploring ways to abandon the Cargill Lateral through the Bucking Horse Subdivision. Such an agreement would require that Cargill is able to receive an alternative supply of water to offset the loss of the ability to deliver Arthur Share Water through the Cargill Lateral. To facilitate that separate agreement, Cargill and the HOA approached the City to see whether the City would be willing to accept the 11.5 Shares in exchange for WSR Credits (as defined below).

E. **Abandonment of Cargill Lateral.** The City acknowledges that Cargill's abandonment of the Cargill Lateral is to eliminate water flow into the Bucking Horse Subdivision. The City states that it has no current intention of reopening and using the Cargill Lateral as a water source for any reason.

F. **City Water Utility and the Water Supply Requirement.** The City owns and operates a water utility that provides treated water service to customers in its service area. City water utility customers must meet, among other things, a Water Supply Requirement ("WSR"), to receive treated water service from the City or to increase the amount of treated water the customer is

[1] Deed, signed April 1, 1968, recorded with the Larimer County Clerk and Recorder at Book 1383 Page 143 on April 11, 1968.

entitled to at a tap. *See* City Code Sections 26-147 through 26-149. Historically, the WSR could be met by transferring ditch company shares to the City, including shares in the Arthur Irrigation Company. Currently, the WSR may only be met with a payment of cash or City-issued water certificates or credits ("WSR Credits"). *See* City Code Section 26-150.

G. **This Agreement.** The City has evaluated the proposed exchange concept and determined that, in the unique circumstances of this situation, the City's acquisition of the 11.5 Shares in exchange for WSR Credits pursuant to the terms and conditions of this Agreement is beneficial to the City water utility and its ratepayers. This Agreement is authorized pursuant to City Council Ordinance No. _____.

AGREEMENT

1. **Incorporation of Recitals.** The foregoing recitals are hereby incorporated as if fully restated in their entirety.

2. **Related Agreement.** Cargill is concurrently negotiating and intending to execute a separate agreement with the HOA as described in Recital D (the "Related Agreement"). If the Related Agreement is not executed by all parties thereto, then Cargill may, before the Closing set forth in Paragraph 3.3, by written notice to the other Party, terminate this Agreement effective immediately. Upon such termination, neither Cargill nor any of its affiliates shall have any penalty, termination fee, or liability for damages arising out of or relating to such termination, and each Party shall bear its own costs incurred in connection with this Agreement.

3. **Cargill's Transfer of the 11.5 Shares to the City.**

3.1. **11.5 Shares.** Cargill agrees to transfer to the City, and the City agrees to acquire from Cargill the following: all right, title, interest, and obligation in and to the 11.5 Shares, being the 11.5 Shares of the capital stock of the Arthur Irrigation Company ("Company") represented by Stock Certificate No. 1950, dated _____, for 10 shares, and Stock Certificate No. 1988, for 1.5 shares, dated _____, which are in the name of Cargill. A copy of Stock Certificate No. 1950 and Stock Certificate No. 1988 are attached hereto as Exhibit A**.**

3.2. **Consideration.** The consideration for the transfer of the 11.5 Shares is the issuance of the WSR Credits pursuant to Paragraph 4. No earnest money deposit is required in connection with this transaction, the mutuality of the promises of the Parties hereto being deemed adequate consideration.

3.3. **Closing.**

3.3.1. The Parties agree to close the transfer of the 11.5 Shares on __________, , or at such other reasonable time or date as the Parties may mutually agree ("Closing"). The Closing will be conducted as an escrow-style closing consisting of an exchange of documents, without the need for any Party to attend in person. The Parties will coordinate the delivery and release of all required documents to complete the Closing. The Parties acknowledge that it is their intent to close this transaction at the earliest mutually agreeable date upon completion of all inspections, investigations, and reviews to which the City is entitled hereunder, and fulfillment of any contingencies for closing.

3.3.2. The City shall be responsible for costs associated with the Closing.

3.3.3. The City shall be responsible for any costs or fees imposed by the Company associated with the transfer of the 11.5 Shares to the City in the Company's records.

3.3.4. Cargill shall transfer the 11.5 Shares to the City at the time of the Closing by the City by delivering to the City:

(1) the original Stock Certificate No. 1950 and Stock Certificate No. 1988; and
(2) a share assignment in substantially the form attached hereto as Exhibit B.

3.4. **Cargill's Title.**

3.4.1. The City may seek to investigate ownership of the 11.5 Shares, perhaps including a share trace of the ownership history of the 11.5 Shares from the Company ("Share Trace"), together with copies of all documents of record related to the 11.5 Shares. The Share Trace and related investigations must show title to the 11.5 Shares in Cargill. The City is responsible for the cost of the Share Trace and any related investigations. Cargill agrees to provide the City with whatever authorization is required by the Company and any other entity to allow the City to complete the Share Trace and to make any such related investigations.

3.4.2. If the Share Trace or any related investigations discloses title defects unsatisfactory to the City, the City may give Cargill written notice of such defects as soon as practicable and Cargill must attempt in good faith to cure such defects prior to the date of the Closing, at their expense, without in any other manner affecting the terms of this Agreement.

3.4.3. If any instrument or deposit is necessary in order to correct a defect in or objection to title, the following apply:

(1) Any instrument will be in a form and contain terms and conditions the City and Cargill may reasonably require so as to be sufficiently satisfied and address such defects or objection.

(2) Cargill agrees to execute, acknowledge, and deliver any instrument reasonably required to correct such defect.

3.4.4. If Cargill is unable or unwilling to address any defect or objection prior to the Closing, then the City, at its election, has the right to:

(1) accept such title as Cargill is able to convey, without any modification of the consideration; or

(2) rescind this Agreement. Upon such rescission, this Agreement will be null and void and of no further effect, and all Parties to this Agreement will be released from all obligations hereunder.

3.4.5. If Cargill is unable to convey title as provided in this Paragraph 3.4 to the City due to an act or omission of Cargill or any of them, this Agreement shall automatically terminate, and neither Party shall have any further obligation to the other except for those obligations that expressly survive termination under this Agreement.

3.4.6. Notwithstanding the foregoing:

(1) any condition consisting of monetary liens, deeds of trust, or other financial or other encumbrances against the 11.5 Shares must be removed by Cargill at or prior to the Closing; and

(2) in the event Cargill fails to cause the removal of any monetary liens, deeds of trust, or other financial or other encumbrances against the 11.5 Shares prior to the Closing, the City has the right to pay amounts required to do so at such Closing, and to seek reimbursement from Cargill.

3.4.7. Cargill will provide to the City copies of any documentation related to the 11.5 Shares, including any documentation related to the historical use of the 11.5 Shares, that Cargill may be in possession of ("Water Documents"). If the Water Documents or any other investigations disclose or identify defects in or do not evidence Cargill's right, title, and interest in the 11.5 Shares to the City's satisfaction, the City may give Cargill written notice of such defects by the date 63 days after the Effective Date or the date 63 days after the City's receipt of the Water Documents, whichever is later. The City has the option to extend this period for an additional 28 days by providing written notice to Cargill. Cargill must attempt in good faith to cure such defects prior to the date of the Closing, at their expense, without in any other manner affecting the terms of this Agreement. If such defects are not due to an act or omission of Cargill, then the City, at its election, has the right to:

(1) accept such right, title, and interest in the 11.5 Shares as Cargill is able to convey, without any reduction of the consideration; or

(2) rescind this Agreement. Upon such rescission, this Agreement will be null and void and of no further effect, and all Parties to this Agreement will be released from all obligations hereunder.

3.5. **Maintenance of the Shares / Title.** Cargill must not cause or permit new liens, easements, or other encumbrances on the 11.5 Shares, except as expressly agreed by the City in writing.

3.6. **Representations of Cargill.** Cargill represents and warrant as of the Effective Date, to the extent applicable, as follows:

(1) To the best of Cargill's knowledge, there is no litigation proceeding, including but not limited to any eminent domain proceeding, pending (or to Cargill's knowledge threatened) against or relating to any part of the 11.5 Shares, nor does Cargill know of or have reasonable grounds to know of any basis for any such action.

(2) To the best of Cargill's knowledge, Cargill has not received notice of, and there are no violations of any laws, orders, regulations, or requirements of any governmental authority affecting the 11.5 Shares or any part thereof.

(3) Cargill has the unconditional right and power to execute and deliver this Agreement and to consummate the transaction(s) contemplated by this Agreement.

(4) To the best of Cargill's knowledge, Cargill has not received notice of default or breach by Cargill of any of the covenants, conditions, restrictions, affecting the 11.5 Shares; no default or breach now exists or will exist on the date of closing; and no event or condition has occurred and is continuing that, with or without notice and/or the passage of time, will constitute such a default or breach.

3.7. **Possession.** Cargill will deliver possession of the 11.5 Shares to the City at the Closing.

3.8. **Risk of Loss.** Cargill bears all risk of loss with respect to the 11.5 Shares up to the date title is transferred in accordance with this Agreement.

3.9. **Time is of the Essence.** It is agreed that time is of the essence of this Agreement and each and every provision of this Paragraph 3.

3.10. **Brokers.** The Seller and the City each represent and warrant to the other that such Party has not employed, retained or consulted any broker, agent or other real estate professional with respect to the 11.5 Shares. Cargill and, to the extent permitted by law, the City, each indemnify and hold the other harmless from and against all claims, demands, causes of action, debts, liabilities, judgments and damages, including, without limitation, any related litigation expenses, that may be asserted or recovered against the other on account of any breach of this representation and warranty.

4. **City's Issuance of WSR Credits to Cargill.**

4.1. **Contingency.** Cargill shall not be entitled to any WSR Credits unless and until the 11.5 Shares are transferred to the City pursuant to Paragraph 3.

4.2. **WSR Credits.**

4.2.1. Upon completion of the transfer of the 11.5 Shares to the City pursuant to Paragraph 3, Cargill shall have 7,494,583 gallons of WSR Credits ("Cargill WSR Credits").[2]

4.2.2. The Cargill WSR Credits may be used:

(1) To meet the WSR for any new water service for the Cargill Land; or

(2) To increase the annual allotment for any existing water service on the Cargill Land.

4.2.3. Use of the Cargill WSR Credits shall have no effect on other applicable fees related to any new water service or existing water service.

4.2.4. Nothing in this Agreement precludes or requires Cargill to seek a new water service for the Cargill Land.

5. **Additional Terms and Conditions.**

5.1. **Remedies.** If either Party fails to comply with the provisions of this Agreement, the complying Party shall provide prompt written notification to the noncomplying Party specifying the noncompliance If the identified noncompliance is not resolved within sixty (60) days, this Agreement shall automatically terminate unless extended in writing by both Parties. Upon termination pursuant to this paragraph, neither Party shall have any further obligation or liability to the other, except for those obligations expressly stated in this Agreement to survive termination. Each Party shall bear its own attorney's fees and costs, and no Party shall be entitled to consequential or punitive damages.

[2] For reference purposes only, the 7,494,583 gallons of WSR Credits is the equivalent of approximately 23 acre-feet of WSR Credits.

5.2. **No Third-Party Beneficiaries.** This Agreement is entered into between the Parties for the purposes set forth herein. It is the intent of the Parties that they are the only beneficiaries of this Agreement and the Parties are only benefitted to the extent provided under the express terms and conditions of this Agreement.

5.3. **Governing Law and Enforceability.** This Agreement shall be construed in accordance with the laws of the State of Colorado. The Parties recognize that the constitutions, statutes, and rules and regulations of the State of Colorado and of the United States, as well as the Parties' respective articles of incorporation, bylaws, city charters and codes, and rules and regulations, impose certain legal constraints on each Party and that the Parties intend to carry out the terms and conditions of this Agreement subject to those constraints. Whenever possible, each provision of this Agreement shall be interpreted in such a manner so as to be effective and valid under applicable law.

5.4. **Waiver.** A waiver of a default of any of the provisions of this Agreement shall not constitute a waiver of any subsequent default of the same or another provision of this Agreement. Nothing in this Agreement shall be construed as any waiver of governmental immunity of the Parties who are governments or any other governmental provisions of State law. Specifically, by entering into this Agreement, neither Party waives the monetary limitations on liability or any other rights, immunities, or protections provided by the Colorado Government Immunity Act, C.R.S. § 24-10-101, *et seq*., or any successor or similar statutes of the State of Colorado.

5.5. **Notices.** All notices or other communications hereunder shall be sufficiently given and shall be deemed given (i) when personally delivered; (ii) on the date and at the time of delivery or refusal of acceptance of delivery if delivered or attempted to be delivered by an overnight courier service to the party to whom notice is given at the address specified below; (iii) on the date and at the time shown on the electronic mail if sent by electronic transmission at the e-mail addresses set forth below and receipt of such electronic mail is acknowledged by the intended recipient thereof; or (iv) after the lapse of 7 days following mailing by certified mail-return receipt requested, postage prepaid, addressed as follows:

To Fort Collins:	Water Resources Manager 700 Wood Street; P.O. Box 580 Fort Collins, Colorado 80522-0580 Telephone: (970) 416-4214 E-mail: jdial@fcgov.com
With copy to:	Fort Collins City Attorney 300 LaPorte Avenue; P.O. Box 580 Fort Collins, Colorado 80522-0580 Telephone: (970) 416-2126 E-mail: epotyondy@fcgov.com

To Cargill:	Cargill, Incorporated Attn: Law Department - EONA 15407 McGinty Road W, MS24 Wayzata, MN 55391 law_re_notices@cargill.com (email)
With copy to:	Registered Agent on File with Colorado Secretary of State

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

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

5.8. **Representations.** Each Party represents to the other parties that it has the power and authority, pursuant to their respective governing policies and rules, to enter into this Agreement and the individual signing below on behalf of that Party has the authority to execute this Agreement on its behalf and legally bind that Party.

5.9. **Counterpart and Facsimile Signatures.** This Agreement may be executed in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same Agreement. This Agreement may also be executed electronically. Signatures may be delivered by facsimile copy.

5.10. **Assignment.** No Party may assign any rights or delegate any duties under this Agreement without the written consent of the other Party.

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

[Remainder of Page Intentionally Blank]

CARGILL, INCORPORATED, a Delaware corporation

Date: ____________________ By:___________________________________
_______________, ____________

STATE OF _______________________)
) ss
COUNTY OF _____________)

The foregoing instrument was acknowledged before me this _______ day of ________, ______, by ________________ as _________ of Cargill, Incorporated.

Witness my hand and official seal.

My Commission expires:
____
Notary Public

THE CITY OF FORT COLLINS, COLORADO,
a Municipal Corporation

By: ______________________________________
Kelly DiMartino, City Manager

ATTEST:

____
City Clerk

Printed Name: ____________________________

Title: ____________________________________

APPROVED AS TO FORM

____
Eric Potyondy, Senior Assistant City Attorney

Exhibit A to the
Agreement Between the City of Fort Collins and Cargill, Incorporated Regarding an Exchange of Water Supply Requirement Credit for 11.5 Shares of the Arthur Irrigation Company

[*TO BE PROVIDED LATER*]

**Exhibit B to the
Agreement Between the City of Fort Collins and Cargill, Incorporated Regarding an Exchange of Water Supply Requirement Credit for 11.5 Shares of the Arthur Irrigation Company**

**SHARE ASSIGNMENT AND STOCK POWER
(Arthur Irrigation Company)**

CARGILL, INCORPORATED, a Delaware corporation, the record and the assignors of certain shares of the stock of the Arthur Irrigation Company ("Company"), hereby irrevocably and unconditionally, assign, transfer, delegate, and sets over unto **THE CITY OF FORT COLLINS, COLORADO, a municipal corporation**, assignee, all of his right, title, interest, and obligation in and to 11.5 of the shares of the stock of the Company, free and clear of any liens or encumbrances, represented by Certificate No. 1950 (10 shares) and Stock Certificate No. 1988 (1.5 shares), which stock is standing in the name of the undersigned on the books and records of the Company, and hereby irrevocably constitutes and appoints the secretary of the Company or their designee, as attorney-in-fact to transfer the said stock on the books of the Company with full power of substitution in the premises.

DATED: ____________________

____
Cargill, Incorporated
__________, __________

STATE OF __________________)
) ss
COUNTY OF _____________)

The foregoing Share Assignment and Stock Power was acknowledged before me this _______ day of ___________, 20____ by __________ as __________ of Cargill, Incorporated

Witness my hand and official seal.

My Commission expires:

____
Notary Public