

EXHIBIT A TO RESOLUTION 2024-031

**AGREEMENT REGARDING IMPLEMENTATION OF PORTIONS OF THE  
FISH AND WILDLIFE MITIGATION AND ENHANCEMENT PLAN  
FOR THE HALLIGAN WATER SUPPLY PROJECT  
(Cheat Grass and Big Horn Sheep Collaring)**

This Agreement, dated and effective [REDACTED], is entered into by the following Parties: the City of Fort Collins, a Colorado municipal corporation; and the State of Colorado, acting through the Department of Natural Resources, for benefit and use of the Colorado Division of Parks and Wildlife.

*\* See Paragraph 2 for a list of defined terms used in this Agreement \**

**RECITALS**

A. Fort Collins is pursuing the Halligan Project. The Halligan Project includes<sup>1</sup>: the enlargement of Halligan Reservoir, also known as North Poudre Reservoir No. 16, which primarily entails replacing or enlarging the Reservoir’s dam; and the replacement of the North Poudre Canal Diversion Structure.

B. The Halligan Project requires, among other things, a permit under Section 404 of the federal Clean Water Act. In consultation with CPW, pursuant to C.R.S. §37-60-122.2, Fort Collins has thus developed the Plan as a fish and wildlife mitigation and enhancement plan.

C. The Plan articulates various mitigation and enhancement measures Fort Collins intends to undertake with respect to the Halligan Project. CPW’s understanding of the planned measures, anticipated impacts and mitigation needs of the Project is based on the statements and commitments made in the Plan. The Plan is attached as **Exhibit 1** for reference purposes and the purposes described in Paragraph 6 below.

D. The Colorado Parks and Wildlife Commission approved the Plan and authorized CPW to enter into an intergovernmental agreement to implement portions on the Plan on June 23, 2023. CPW has authority to enter into intergovernmental cooperative agreements pursuant to CRS § 33-1-105(e). CWCB approved the Plan on July 19, 2023.

E. Fort Collins and CPW intend to enter into an agreement to implement portions of the Plan, including: certain consultation requirements; monetary commitments from Fort Collins to CPW; and certain easement transactions. That agreement is currently anticipated to be completed later in 2024 or 2025.

F. Because of timing requirements laid out in the Plan, Fort Collins and CPW desire to implement Plan Section 4.2.3.18 (Bighorn Sheep Habitat Improvements) and Plan Section 4.2.3.19 (Bighorn Sheep Collaring Study) before that agreement to implement other portions of the Plan is

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<sup>1</sup> In this Agreement, “include” signifies a list that is not necessarily exhaustive. *E.g., Lyman v. Town of Bow Mar*, 188 Colo. 216, 222, 533 P.2d 1129, 1133 (1975).

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finalized so that work related to those Plan sections can begin in spring/summer 2024. The implementation of those two sections is the purpose of this Agreement.

G. This Agreement has been approved by the Fort Collins City Council pursuant to Resolution No. 2024-031.

H. In consideration of the mutual promises contained herein, and other good and valuable consideration, the receipt and adequacy of which is hereby acknowledged, the Parties agree as follows.

### **AGREEMENT**

1. **INCORPORATION OF RECITALS.** The foregoing recitals are hereby incorporated as if fully restated in their entirety.
2. **DEFINED TERMS.** The terms used in this Agreement are as defined in this Paragraph 2, with certain additional terms defined in Paragraph 11, and are otherwise given their ordinary meaning.
  - 2.1. “CPW” is the Colorado Division of Parks and Wildlife, an agency of the State of Colorado within the Department of Natural Resources. CPW is also referred to herein as a Party to this Agreement.
  - 2.2. “Fort Collins” is the City of Fort Collins, a Colorado municipal corporation. Fort Collins is also referred to herein as a Party to this Agreement.
  - 2.3. “Halligan Project” is the Halligan Water Supply Project.
  - 2.4. “North Fork” is the North Fork of the Cache la Poudre River.
  - 2.5. “North Poudre Canal Diversion Structure” is the diversion structure for the North Poudre Canal on the North Fork, which is owned and operated by the North Poudre Irrigation Company. It is located in the North Fork in the SE1/4 of Section 12, Township 10 North, Range 71 West of the 6th P.M.
  - 2.6. “Party” and “Parties” refer to Fort Collins and/or CPW.
  - 2.7. “Plan” is the Fish and Wildlife Mitigation and Enhancement Plan for the Halligan Water Supply Project, dated June 7, 2023.
  - 2.8. “Reservoir” is Halligan Reservoir as it now exists and will be enlarged. It is an on-channel reservoir located on the North Fork, in portions of Sections 29, 32, 33, and 34, Township 11 North, Range 71 West of the 6th P.M. The enlarged Reservoir will also extend into portions of Sections 27 and 28, Township 11 North, Range 71 West of the 6th P.M. The Reservoir’s dam (for the current Reservoir and the

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enlargement) is located in the NE1/4 of the SW1/4 of Section 34, Township 11 North, Range 71 West of the 6<sup>th</sup> P.M.

2.9. “State Wildlife Area” is the Cherokee State Wildlife Area.

3. **PURPOSE.** The purpose of this Agreement is to implement Section 4.2.3.18 (Bighorn Sheep Habitat Improvements) and Section 4.2.3.19 (Bighorn Sheep Collaring Study) of the Plan, under which 1) Fort Collins intends to transfer funds to CPW; and 2) habitat treatments and bighorn sheep monitoring are to be started at least two years in advance of construction. Based on Fort Collins’ expected construction schedule, the Parties desire to begin implementing those Plan sections early in 2024 before a full agreement related to the Plan is expected to be completed.

4. **EFFECTIVE DATE.** This Agreement is effective as of the date that all Parties have executed this Agreement, which is stated above on the initial page.

5. **TERM AND RENEWAL.** The term of this Agreement is 10 years, unless terminated sooner pursuant to the terms and conditions of this Agreement or terminated in writing by the Parties. The Parties may also renew this Agreement in writing for an additional 10 year term if, at the end of the term, such a renewal is needed to further the purposes of this Agreement.

5.1. **Abandonment of Enlargement of the Reservoir.** The Parties acknowledge that the permitting and approval processes for the Halligan Project include some level of uncertainty regarding the ultimate ability of Fort Collins to enlarge the Reservoir and replace the North Poudre Canal Diversion Structure. If Fort Collins abandons the enlargement of the Reservoir (and thus the replacement of the North Poudre Canal Diversion Structure), Fort Collins may terminate this Agreement by providing written notice to CPW pursuant to Paragraph 16. If Fort Collins terminates this Agreement, CPW has no obligation to return to Fort Collins any monetary payments previously made to CPW under this Agreement.

6. **RELATIONSHIP OF THE PLAN AND THIS AGREEMENT.** The Plan includes various elements and intended actions that are not the subject of this Agreement, which will instead be the subject of other agreements, permits, and approvals. The Plan and its terms and conditions are not a part of this Agreement and are not made binding by this Agreement. Nevertheless, the Plan includes a description of the anticipated impacts to fish and wildlife resources from the Halligan Project and all of Fort Collins’ planned mitigation and enhancement measures for the Halligan Project that are related to fish and wildlife. To the extent that parts of this Agreement may be construed to be ambiguous despite the Parties’ best efforts to the contrary, the Plan may be consulted to clarify the intent of the Parties with respect to the specific obligations that are set forth in this Agreement. To the extent there is a conflict between this Agreement and the Plan with respect to the Parties’ obligations hereunder, this Agreement controls. The Parties agree to act in good faith in their work pursuant to this Agreement.

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7. **MITIGATION MEASURES.**

- 7.1. **Bighorn Sheep Habitat Improvements (Plan Section 4.2.3.18).** Within 90 days of the date of this Agreement, Fort Collins will pay \$263,037.74 to CPW to improve bighorn sheep habitat and water access on the Cherokee State Wildlife Area.
- 7.1.1. CPW will use the funds for chemical treatment to abate invasive cheatgrass. CPW will use its best efforts to treat a minimum of at least 500 acres with a focus on the Lower Unit of the State Wildlife Area.
- 7.1.2. CPW may additionally use the funds for the installation of up to two remote passive water sources on the State Wildlife Area. Any funds not needed for the cheatgrass treatment or the water sources installation may be used by CPW for habitat treatment on additional acreages within the State Wildlife Area.
- 7.1.3. The Parties intend that at least one round of treatment will be completed at least two years before the commencement of construction of the Halligan Project. Based on the construction timeframe provided by Fort Collins, CPW intends to begin treatments in spring of 2024. Any delay in treatments resulting from CPW's actions or inactions shall not require a delay in Fort Collins' construction schedule.; however, any delay resulting from force majeure as described in Paragraph 19 may require modification of construction schedule if necessary to meet the intent and purpose of the treatment for mitigation purposes.
- 7.1.4. If CPW determines that additional cheatgrass treatments are needed after the first round, CPW will perform additional treatments as needed through construction and up to 2 years postconstruction.
- 7.2. **Bighorn Sheep Collaring Study (Plan Section 4.2.3.19).**<sup>2</sup> Within 90 days of the date of this Agreement, Fort Collins will pay \$126,258.11 to CPW to monitor potential impacts to bighorn sheep.
- 7.2.1. CPW will use the funds for the purpose of supporting a GPS (global positioning system) collaring and monitoring study of bighorn sheep from the Lone Pine herd that will include tracking their movements and habitat use, and conducting disease testing, before, during, and immediately after Halligan Project construction. Any excess funds not needed for the bighorn sheep collaring and monitoring may be used by CPW for big horn sheep purposes in Area 4.
- 7.2.2. The Parties intend that CPW will begin the monitoring study at least two years before the commencement of construction of the Halligan Project. Based on the construction timeframe provided by Fort Collins, CPW

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<sup>2</sup> This is also an enhancement measure in Plan Section 5.3.3.

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intends to start collaring in winter 2024-2025, and will begin necessary planning and purchasing in spring of 2024. Any delay in treatments resulting from CPW's actions or inactions shall not require a delay in Fort Collins' construction schedule.; however, any delay resulting from force majeure as described in Paragraph 19 may require modification of construction schedule if necessary to meet the intent and purpose of the treatment for mitigation purposes.

7.2.3. For preconstruction monitoring, CPW will collar up to 15 bighorn sheep with GPS collars. Preconstruction monitoring data will be considered viable for up to 5 years. In the event that the construction schedule is delayed, a second round of preconstruction monitoring will be required at least one year before commencement of construction.

7.2.4. To monitor bighorn sheep during and after construction, CPW will continue monitoring up to 15 bighorn sheep with GPS collars, which may require replacing collars and adding new collars as needed. The post construction monitoring will continue for 2 years following completion of construction.

**8. CONSTRUCTION SCHEDULE.** The bighorn sheep habitat improvements addressed in Paragraph 7.1 and the bighorn sheep collaring study addressed in Paragraph 7.2 are intended to begin at least two years before the commencement of construction on the Halligan Project; however, the benefits of each measure will decrease if conducted too far in advance or if construction is delayed or prolonged. Fort Collins currently anticipates that construction of the Halligan Project will start in 2026-2027 and run through 2030. Any significant deviation from the expected construction schedule at the time of this Agreement may require amendment of this Agreement and additional funds to meet the intent and purposes of the Plan. The Parties agree that if the construction schedule is extended after CPW has initiated either the cheatgrass treatment or collaring study, CPW and Fort Collins will discuss whether additional funding is necessary to meet the intent and purposes of the Plan.

**9. TRANSFER OF FUNDS.**

9.1. **Inflation.** All payments set forth in the Plan were provided in 2022 dollars based on calculations made when the Plan was developed. . All payments included in this Agreement have been increased from the amounts in the Plan by the amount of the annual percentage increase in the U.S. Bureau of Labor and Statistics Consumer Price Index for Denver-Aurora-Lakewood (CPI-U) from January 2023 to the date of payment identified herein, so that no further adjustment is needed. These funds will be placed in the Wildlife Cash Fund, and the principal and interest shall only be used in accordance with the purposes designated herein.

**10. ASSIGNMENT.**

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10.1. If Fort Collins conveys the Halligan Project to another entity, Fort Collins may assign its rights and obligations under this Agreement to the entity acquiring the Halligan Project with written notice to CPW.

### 11. **REMEDIES.**

11.1. If a Party (“Complaining Party”) believes that another Party (“Responding Party”) has failed to comply with the provisions of this Agreement, the Complaining Party will provide written notification of the same to the Responding Party. If the Responding Party fails to achieve compliance within thirty-five (35) days following receipt of such notice, the Complaining Party may require mediation of the issue(s) under Paragraph 11.2.

11.2. If mediation is sought following the procedures of Paragraph 11.1, the Parties shall jointly select a mediator within 35 days following the Complaining Party’s written notice to require mediation. The selection of the mediator shall be confirmed in writing. If the Parties cannot jointly select a mediator, each Party shall select a mediator within 42 days following the Complaining Party’s written notice to require mediation and the two selected mediators shall then jointly select a third person to mediate the issue(s) within 56 days following the Complaining Party’s written notice to require mediation, who shall be impartial as to the Parties and the issue(s) and have mediation experience. The Parties agree to participate in good faith in such mediation.

11.3. Following the good faith completion of mediation under Paragraph 11.2 or if the two selected mediators are unable to jointly select a third person to mediate the issue(s), the Complaining Party may seek all such remedies available under Colorado law, excluding any exemplary and/or consequential damages.

12. **FISCAL CONTINGENCY.** Notwithstanding any other provisions of this Agreement to the contrary, the obligations of Fort Collins and CPW in fiscal years after the fiscal year of this Agreement shall be subject to appropriation of funds sufficient and intended therefor, with each Party having the sole discretion to determine whether the subject funds are sufficient and intended for use under this Agreement.

13. **GOVERNMENTAL IMMUNITY.** No term or condition of this Agreement is intended nor shall be construed as a waiver, either express or implied, of the monetary limits, notice requirements, immunities, rights, benefits, defenses, limitations and protections available to the Parties under any applicable law, including but not limited to the Colorado Governmental Immunity Act, C.R.S. §§ 24-10-101, *et. seq.*, as currently written or hereafter amended or implemented.

14. **RELATIONSHIP OF THE PARTIES.** The Parties enter this Agreement as separate and independent entities and shall maintain such status at all times.



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or prevented by force majeure. Force majeure shall be any cause beyond the control of the defaulting Party which could not reasonably have been foreseen and guarded against. Force majeure includes, but is not limited to, acts of god, fires, riots, pandemics, incendiarism, interference by civil or military authorities, compliance with regulations or orders of military authorities, and acts of war (declared or undeclared), provided such cause could not have been reasonably foreseen and guarded against by the defaulting Party. Force majeure shall not include increases in labor, commodity, utility, material, supply, fuel, or energy costs, or compliance with regulations or orders of civil authorities.

20. **SEVERABILITY.** If any provision of this Agreement is held to be invalid or unenforceable to any extent, the Parties shall meet, confer, and agree on appropriate modifications to this Agreement to ensure that the original intent, obligations, goals, and purposes of this Agreement are satisfied.

21. **AUTHORITY.** Each of the Parties represents to the other Parties that such Party has full power and authority to execute, deliver, and perform this Agreement, that such Party has taken the necessary steps that are lawfully required to execute, deliver, and perform this Agreement, and that the individual(s) executing this Agreement on behalf of such Party are fully empowered and authorized to do so.

22. **ENTIRE AGREEMENT.** The making, execution and delivery of this Agreement by the Parties has been induced by no representations, statements, warranties or agreements other than those expressed in this Agreement. This Agreement embodies the entire understanding of the Parties as to the subject matter hereof and there are no further or other agreements or understandings, written or oral, in effect between the Parties relating to its subject matter unless expressly referred to in this Agreement. Modification of this Agreement by the Parties may be made only by a writing signed by the Parties.

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

By: \_\_\_\_\_  
Kelly DiMartino, City Manager

Date: \_\_\_\_\_

ATTEST:

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

APPROVED AS TO LEGAL FORM:

By: \_\_\_\_\_  
Eric Potyondy  
Assistant City Attorney

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**STATE OF COLORADO, ACTING THROUGH THE DEPARTMENT OF NATURAL RESOURCES, for benefit and use of the Colorado Division of Parks and Wildlife**

By: \_\_\_\_\_  
Mark Leslie  
Northeast Region Manager

Date: \_\_\_\_\_