

**EXCESS CAPACITY AGREEMENT  
LARIMER COUNTY CANAL NO. 2 IRRIGATING COMPANY  
AND  
THE TRI-DISTRICTS AND GREELEY**

**THIS AGREEMENT** entered into this \_\_\_\_ day of June, 2022, is made by and between LARIMER COUNTY CANAL NO. 2 IRRIGATING COMPANY, a Colorado mutual ditch corporation (hereinafter “Company”), and the EAST LARIMER COUNTY WATER DISTRICT (hereinafter “ELCO), the FORT COLLINS - LOVELAND WATER DISTRICT (hereinafter “Fort Collins-Loveland”) and the NORTH WELD COUNTY WATER DISTRICT (hereinafter “North Weld”), each a quasi-municipal corporation and political subdivision of the State of Colorado (collectively ELCO, Fort Collins-Loveland and North Weld are referred to hereinafter as “Tri-Districts”), and the City of Greeley, a home rule municipality, acting by and through its Water Enterprise (“Greeley”). Company, Tri-Districts, and Greeley are sometimes referred to herein as the “parties” collectively, and “party” individually.

**RECITALS**

**WHEREAS**, Company is the owner and operator of that certain irrigation system commonly known as the Larimer County Canal No 2 Ditch (“Ditch”) which takes its supply of water from the Cache la Poudre River at a point located near the south section line of the SW ¼ of Section 29 and the north section line of the NW ¼ of Section 32, Township 8 North, 69 West, 6<sup>th</sup> P.M., in Larimer County, Colorado; and

**WHEREAS**, Tri-Districts and Greeley desire to use the Ditch to convey water supplies that they are entitled to divert and use pursuant to appropriations (whether decreed or undecreed), leases, and/or contracts (“Tri-Districts’ Water” and “Greeley’s Water”) from the Ditch’s point of diversion on the Cache la Poudre River to a headgate on the Ditch to deliver Tri-Districts’ and Greeley’s Water into the Overland Trail Reservoirs; and

**WHEREAS**, any rights the Company grants to Tri-Districts and Greeley to utilize capacity pursuant to this Agreement are subject to the priority system described in the: (1) *Easement Agreement*, dated December 18, 2015, recorded with the Larimer County Clerk and Recorder at Reception No. 20150085207 on December 18, 2015; and (2) the *Easement Agreement*, dated December 18, 2015, recorded with the Larimer County Clerk and Recorder at Reception No. 20150085208 on December 18, 2015 (together, “Fort Collins Agreements”); and

**WHEREAS**, any rights to use capacity in the Ditch granted under this Agreement are subordinate to the rights of the City of Fort Collins to use capacity in the Ditch pursuant to the Fort Collins Agreements; and

**WHEREAS**, the parties desire to enter into this Agreement allowing Tri-Districts and Greeley to utilize capacity in the Ditch consistent with this Agreement.

**NOW, THEREFORE**, in consideration of the mutual covenants and agreements, the sufficiency of which is hereby acknowledged, the parties hereby agree as follows:

### **AGREEMENT**

1. Use of Capacity in the Larimer County Canal No. 2 Ditch. The parties recognize that from time to time capacity may be available in all or a portion of the Ditch that is not then needed by Company, its stockholders, or pursuant to other agreements, including the Fort Collins Agreements, or to meet Company's operational obligations. As described in this Agreement, Company is granting the right to utilize capacity in the Ditch for conveyance of water available to Tri-Districts and Greeley, pursuant to and under the terms and conditions prescribed by this Agreement.
2. Definitions. The following terms are defined for purposes of this Agreement:
  - 2.1. **"Company Water"** means waters that derive from the exercise of water rights including but not limited to: (i) diversions to the Ditch under Ditch Priority #57 with an adjudication date of April 11, 1882 and an appropriation date of April 1, 1873, originally decreed for direct irrigation; (ii) water carried by Company by arrangement with and for the benefit of the Warren Lake Reservoir Company pursuant to existing priorities for storage as follows: (a) Ditch Priority #76 for five hundred fifty (550) acre-feet with an adjudication date of April 11, 1882 and an appropriation date of April 15, 1875; (b) Reservoir Priority #31 for one thousand five hundred forty-five (1,545) acre-feet with an adjudication date of December 9, 1904 and an appropriation date of January 10, 1893; and (c) Reservoir Priority #100 for eight hundred eighteen (818) acre-feet with an adjudication date of April 22, 1922 and an appropriation date of July 27, 1908, totaling two thousand nine hundred thirteen (2,913) acre-feet with no right of refill; (iii) the Company's historical deliveries of water during the irrigation season pursuant to contractual or leased rights to water available from the Colorado-Big Thompson Project, or pursuant to exchanges listed in the Decree in Case No. W-8086-75, Water Division No. 1, entered on March 24, 1978; and (iv) water historically carried for the benefit of the owner(s) of the John R. Brown Ditch pursuant to Ditch Priority #14 with an adjudication date of April 11, 1882 and an appropriation date of May 1, 1865, decreed for direct irrigation at a flow rate of three and five-tenths (3.5) cubic feet per second, and any other water the Company deems, in its sole discretion, in the best interest of the Company and its stockholders. For purposes of this Agreement, Company Water includes any waters later acquired by the Company. Company Water is First Priority Water is described in the Fort Collins Agreements.
  - 2.2. **"Company System Water"** means waters that have historically been carried in the Ditch by the Company and/or its stockholders, including but not limited to Company Water. Company System Water shall also include water not historically diverted in the Ditch, whether owned by stockholders or non-stockholders that the Board of Directors determines, in its sole discretion, is in the best interests of the Company to run in the Ditch
  - 2.3. **"New Waters"** means all water whether owned by stockholders or non-stockholders of Company, or river water (free river) which are not classified as Company System Water, including but not

limited to any water diverted and delivered for the benefit of Tri-Districts and Greeley as provided for herein.

- 2.4. **“Stockholder Capacity”** is the then existing capacity above what is needed by the Company to divert, transport or store Company System Water, i.e. at any given time, the difference between the maximum physical safe capacity of any structure of the Company (as determined by the Board of Directors) and the volume of water diverted, transported or stored through or in said structure for the Company’s operational obligations, which include the diversion and delivery of Company Water, and any existing obligations of the Company to deliver water pursuant to agreements in existence prior to the date of execution of this Agreement. Stockholder Capacity shall be determined by the Board of Directors as frequently as is necessary in the Board’s discretion. The Board may also revise this determination in its discretion as necessary to protect the Company, its stockholders, and its infrastructure and surrounding properties and structures from damage. Stockholder Capacity is Second Priority in the priority system described in the Fort Collins Agreements.
  - 2.5. **“Stockholder Capacity Entitlement”** shall mean a stockholder’s allocation of capacity for delivery of Company System Water that may be utilized only through agreement with the Company, plus or minus canal shrink, provided there is capacity in the canal. If there is insufficient capacity for stockholders then requesting and having consent of the Company for use of their stockholder capacity entitlement, then each stockholder’s capacity entitlement is reduced on a pro-rata basis.
  - 2.6. **“Residual Excess Capacity”** means capacity over and above Stockholder Capacity Entitlement then being used by stockholders for purposes of taking delivery of Company System Water, the use of which may only be granted by the Company pursuant to written agreements with Company stockholders or third parties (not Company stockholders), subject to the terms and conditions of this Agreement and Company policy. Residual Excess Capacity is Third Priority in the priority system described in the Fort Collins Agreements.
  - 2.7. **“Irrigation Season” and “Off-Season”**. “Irrigation season” is that period when the Company is diverting Company Water pursuant to their original decreed priorities and “Off-Season” represents all other periods, with said diversions of Company Water being in the sole discretion of the Company.
3. Consent. Company hereby consents to Tri-Districts’ and Greeley’s use of Residual Excess Capacity, as defined herein, pursuant to the terms, conditions and provisions recited in this Agreement. Tri-Districts’ and Greeley’s right to utilize Residual Excess Capacity as provided herein is independent of the right, if any, to use capacity by virtue of any shares of stock now owned or in the future owned by Tri-Districts or Greeley. The Company agrees that the Tri-Districts’ and Greeley’s rights for use of Residual Excess Capacity as described in this Agreement shall be a first priority right for said Residual Excess Capacity in relation to any subsequent rights the Company may grant to others (Company stockholders or third parties) for Residual Excess Capacity.
  4. Terms and Conditions of Tri-Districts; and Greeley’s Use of Residual Excess Capacity. Tri-Districts’ and Greeley’s use of Residual Excess Capacity granted herein is subordinate to use by the City of Fort

Collins under the Fort Collins Agreements and use by Company for operational obligations described in Sections 2.1-2.5 of this Agreement, and when necessary Tri-Districts' and Greeley's use may be reduced accordingly. In the event such a reduction in Tri-Districts' or Greeley's use of its Residual Excess Capacity is necessary, Company agrees to provide reasonable notice to Tri-Districts and Greeley. At times when Tri-Districts or Greeley desire to utilize Residual Excess Capacity, Tri-Districts and Greeley shall submit the specific details of their respective desired use (including the point of inflow, source and amount of water, timing, release, point of delivery, and other relevant information reasonably requested by the Company) and request review and approval from the Company, which request shall be timely considered, and approval shall not be unreasonably withheld so long as such request is consistent with this Agreement and the Company articles, bylaws and policies, and also subject to the following:

- 4.1. "Tri-Districts' Water" and "Greeley's Water" shall be the water diverted at the Company river headgate less any transportation losses. In addition to transportation loss prior to diversion at the Company headgate to be assessed, if at all, by the Water Commissioner for District No. 3, Tri-Districts' Water and Greeley's Water may be assessed for reasonable evaporation, seepage and similar "shrink" losses associated with the water that Tri-Districts or Greeley divert and carry as part of their respective Residual Excess Capacity. Transportation losses, evaporation, seepage and shrink will be as reasonably determined by the Company.
- 4.2. Tri-Districts' and Greeley's use of capacity under its Residual Excess Capacity will be allowed only if such uses would in no way be detrimental to the Company or its stockholders.
- 4.3. Tri-Districts' and Greeley's use of capacity under its Residual Excess Capacity, for both irrigation season carriage and for carriage in the off-season, as each such period is further defined herein, shall be limited to an amount not exceed 4,600 acre feet and a rate of no more than 25 c.f.s. at the river headgate.
- 4.4. Tri-Districts and Greeley shall make prompt payment to the Company for any additional operations, maintenance and other costs associated with use of its Residual Excess Capacity, which are specifically identified by the Company and which the parties agree are reasonable and directly related to Tri-Districts' or Greeley's Excess Capacity Entitlement. The nature and amount of compensation shall be subject to mutual agreement of the parties.
- 4.5. Tri-Districts' and Greeley's rights to utilize Residual Excess Capacity are subordinate to the first and preferential right of the Company and its stockholders to utilize Stockholder Capacity Entitlement and Residual Excess Capacity. Once such rights to capacity are satisfied, Tri-Districts and Greeley may utilize available Residual Excess Capacity for the delivery of Tri-Districts' Water and Greeley's Water.
- 4.6. Tri-Districts and Greeley recognize and agree that Stockholders shall have a first and preferential right to utilize Residual Excess Capacity prior to Tri-Districts and Greeley, subject to the terms of this Agreement and Company policy.
- 4.7. The Company shall determine, in its sole discretion, the amount of Stockholder Capacity entitlement and Residual Excess Capacity that is available at any given time. Tri-Districts and

Greeley understand and agree that their rights for use of Residual Excess Capacity shall be a first priority right for said Residual Excess Capacity in relation to any subsequent rights the Company may grant to others (Company stockholders or third parties) for Residual Excess Capacity. Off-season carriage is that period when the the Company is not running water for stockholders during the irrigation season. The availability of Residual Excess Capacity for off-season carriage is determined in the sole and absolute discretion of the Company.

5. Term and Payment.

- 5.1. The Term of this agreement shall be from June 1, 2022 to December 31, 2036, and shall be automatically renewed for two subsequent fifteen-year terms unless Company provides written notice to Tri-Districts and Greeley not less than ninety (90) days prior to the expiration of the then-current Term citing the reason(s) for such termination and providing Tri-Districts and/or Greeley with the opportunity to meet collectively or separately with the Company's Board of Directors within thirty (30) days of receipt of such notice and to conduct good faith negotiations for a revised Agreement
- 5.2. The carriage fee for Tri-Districts' and Greeley's utilization of Residual Excess Capacity for 2022 shall be \$11.00 per acre foot for irrigation season carriage, and \$21.00 per acre foot for carriage during the off-season pursuant to the limitations described in this Agreement ("Annual Fee"). The minimal annual charge for any amount up to 100 acre feet is \$1,100.00 (annual per acre foot fee multiplied by 100 acre feet). Tri-Districts and Greeley shall pay Company the minimum fee annually on or before January 1 of each year of this Agreement and the remaining amount shall be paid on or before November 13<sup>th</sup> of each year. Unless curtailment or termination occurs as described in this Agreement, the amount paid is non-refundable. The Annual Fee shall be increased by fifty cents (\$.50) every year and the minimal annual charge shall be increased in the same ratio as described herein.
- 5.3. At execution of this Agreement, the Tri-Districts and Greeley shall pay a one-time fee of \$100,000.00 as compensation separate and apart from assessments required from all stockholders of the Company during the term of this Agreement. The compensation described herein is non-refundable, not contingent upon any renewal described in this Agreement, and may be used by the Company in their complete and sole discretion.
- 5.4. Additional charges will be assessed as necessary for administration, operation, legal review, engineering review, and any other charges incurred by the Company related to this Agreement. Tri-Districts and Greeley shall pay a minimum annual fee for administration and operation fees in the amount of \$500.00 for irrigation season carriage, and a minimal fee of \$1,000.00 for off-season carriage, with an annual amount not to exceed \$2,500.00 for irrigation season carriage and a maximum annual fee of \$5,000.00 for off-season carriage, all to be paid on or before November 13<sup>th</sup> of each year. The minimum annual fees will increase by the amount of twenty-five percent (25%) every fifteen years and the maximum amounts adjusted accordingly.
- 5.5. Tri-Districts and Greeley will secure the proper approval and provide the appropriate decrees and/or authorization and documentation for Tri-Districts' Water and Greeley's Water to be carried

in the ditch. Tri-Districts and Greeley will provide all measuring devices for proper tracking and accounting for Tri-Districts' Water and Greeley's Water delivered from ditch.

6. No Modification of the Ditch. After execution of this Agreement, the Tri-Districts and Greeley anticipate submitting to the Company for its approval plans to improve the turn-out structure to the Overland Trails Pond system. The Company agrees to review such plans in a timely manner. For any other improvements sought by the Tri-Districts and Greeley that are not related to the turn-out structure improvement, the Tri-Districts and Greeley agree that they may not construct facilities on or in, or operate or modify the Ditch, its headgate, or any other reservoir, ditch, facility or other structure or property owned, controlled or operated by Company, unless the written approval of Company's Board of Directors is obtained. Such other approval(s) may be withheld or denied in the sole and absolute discretion of the Board. Company, and not Tri-Districts or Greeley, shall operate the Ditch to effectuate Tri-Districts' and Greeley's utilization of its Residual Excess Capacity granted herein.
7. Indemnification. Tri-Districts and Greeley agree that in the event there is any lawsuit or claim brought by Company stockholders or third parties against Company or its Board of Directors, officers and employees arising from or related to the diversions, storage, deliveries or use of water under Tri-Districts' and Greeley's right to utilize Residual Excess Capacity granted herein, then to the extent permitted and limited by Colorado law Tri-Districts and Greeley shall hold harmless, indemnify and defend Company, its directors, officers and employees for the cost and defense of said suit and/or any claim for damages relating thereto. If agreed upon by Company and Tri-Districts in writing, Tri-Districts and Greeley may directly defend such suit or suits. Nothing in this paragraph shall be interpreted to require Tri-Districts or Greeley to indemnify or defend Company, its Board of Directors, officers and employees for damage or injury caused by (i) the negligence of Company in the operation, maintenance or repair of any ditch, reservoir, or other structure owned, controlled or operated by Company or (ii) the breach of any third-party agreement by Company or its Board of Directors, officers, and employees.
8. No Warranties or Representations. Company does not warrant or represent that the Ditch and/or its appurtenances is or are owned in fee simple title, but rather may exist by grant of right of way, easement or prescriptive use. The intent of Company is to grant Tri-Districts and Greeley such rights as it is in Company's power to grant, to allow for Tri-Districts' and Greeley's use as described in this Agreement, insofar as Company is legally authorized to allow it. Company makes no warranties or representations as to the quality of water delivered or diverted pursuant to this Agreement.
9. Irresistible Force. Company shall not be liable or responsible for any delay or failure to perform under this Agreement due to conditions or events of irresistible force. Irresistible force shall mean any delay or failure of a party to perform its obligations under this Agreement caused by events beyond Company's reasonable control, including, without limitation, acts of God, terrorism, explosion, vandalism, flood, earthquakes and tornadoes. For purposes of this Agreement, Irresistible Force shall also include a material alteration in the historical operations of Company with respect to carriage, such that carriage of water through the Ditch for Tri-Districts' or Greeley's use is affected, and in such event, and upon written notice to Tri-Districts and Greeley, Company's obligations pursuant to this Agreement shall be suspended or curtailed for such time and to the extent as necessary, or this Agreement may be terminated at the option of Company. In the event Company fails to carry the water pursuant to this Agreement as described in this paragraph, Company shall reimburse to Tri-



ATTEST:

\_\_\_\_\_

[Print Name]

THE TRI-DISTRICTS:

EAST LARIMER COUNTY WATER DISTRICT

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

\_\_\_\_\_

ATTEST:

\_\_\_\_\_

[Print name]

NORTH WELD COUNTY WATER DISTRICT

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

\_\_\_\_\_

ATTEST:

\_\_\_\_\_

[Print name]

FORT COLLINS - LOVELAND  
WATER DISTRICT

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

\_\_\_\_\_

ATTEST:

\_\_\_\_\_

[Print name]

THE CITY OF GREELEY, a home rule  
municipality, acting by and through its Water  
Enterprise

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

Sean Chambers, Director of Water and Sewer



APPROVED AS TO FORM:

By: \_\_\_\_\_  
Doug Marek, City Attorney