

MEMORANDUM OF UNDERSTANDING
OF THE TOWN OF JOHNSTOWN AND THE TOWN OF MILLIKEN
(re: Application to Change the Use of Shares of the Consolidated Hillsborough Ditch Company)

This Memorandum of Understanding (“MOU”) is entered into on this ___ day of _____, 2024 by the Town of Johnstown, a municipal entity and political subdivision of the State of Colorado, whose address is 450 S. Parish Avenue, Johnstown, Colorado 80534 (“Johnstown”) and the Town of Milliken, a municipal entity and political subdivision of the State of Colorado, whose address is 1101 Broad Street, P. O. Box 290, Milliken, Colorado 80543 (“Milliken”). Collectively, Johnstown and Milliken are referred to together as the “Parties.”

RECITALS

WHEREAS, Johnstown is a home rule municipality with a current population of approximately 19,204 and projected population growth will add approximately 30,250 residents by the year 2050, which will result in increased water demand and a need for approximately 8,100 additional water taps; and,

WHEREAS, Milliken is statutory town with a current population of approximately 9,038 and projected population growth will add approximately 8,880 residents by the year 2050, which will result in increased water demand and a need for approximately 2,990 additional water taps; and,

WHEREAS, Johnstown is the owner of 7 shares of the 118 shares of capital stock issued and outstanding in the Consolidated Hillsborough Ditch Company (“CHDC”); and

WHEREAS, Milliken is the owner of 14 shares of the 118 shares of capital stock issued and outstanding of the CHDC; and

WHEREAS, on November 8, 2009, the Court in Case No. 02CW339, Water Division No. 1, entered a corrected decree changing the use of Milliken’s 14 shares to include augmentation, replacement, recharge, and exchange as well as the decreed irrigation use either directly or after storage (“02CW339 Decree”); and

WHEREAS, To the extent possible, Milliken is desirous of keeping the water historically used within the boundaries of its service area within those boundaries in the future; and

WHEREAS, To the extent possible, Johnstown is desirous of keeping the water historically used within the boundaries of its service area within those boundaries in the future; and

WHEREAS, the Parties desire to jointly file an application in Water Court to change their respective shares in the CHCD, Johnstown as a first change for its shares to be decreed for municipal use, and Milliken to change its shares to add municipal use to the changed uses in the

02CW339 Decree (“Joint Change Application”); and

WHEREAS, in anticipation that various parcels of land that have been historically irrigated by such other shareholders using CHDC shares may, in the future, become annexed into Johnstown or Milliken, and that such shares will be dedicated to Johnstown or Milliken in exchange for annexation and potential commensurate rights, including but not limited to potable and non-potable water service, the Parties have solicited other shareholders in CHDC to join in the Joint Change Application and as a result, 62 additional shares (subject to change) have been pledged to the Joint Change Application; and

WHEREAS, because portions of the acreage historically irrigated by the non-Party shareholders’ shares to be included in the Joint Change Application may overlap the service areas of the Parties and / or the historic return flow obligations sectors, to the extent possible, the Parties desire to establish equitable means of keeping water historically used within the boundaries of a respective Party’s service area in the future and maintaining historic return flow obligations not detrimental to either Party; and

WHEREAS, in an effort to prosecute a single, joint change of use and place of use case of the various share of the Parties and other shareholders in the CHDC in the Water Court for Division 1, the Parties desire to jointly endeavor to pool their efforts and resources to accomplish the same.

NOW THEREFORE, the Parties desire to set forth the terms of their participation in the Joint Change Application and hereby agree to the following:

MEMORANDUM OF UNDERSTANDING

1. **AUTHORITY.** This MOU has been duly adopted by the Parties’ governing bodies, and the undersigned representatives are authorized to execute this MOU on behalf of each respective party.

2. **PURPOSE.** The foregoing Recitals are hereby incorporated into and made part of this MOU.

3. **COMMON INTEREST AND CONFIDENTIALITY AGREEMENT.** The Parties executed a Common Interest and Confidentiality Agreement (“CICA”) in July of 2023. The CICA is incorporated into this MOU.

4. **ENGINEERING SERVICES.** The Parties will enlist and maintain their own water resource engineer(s) throughout the development and prosecution of the Joint Change Application.

a. **Historical Consumptive Use Engineering.** Johnstown’s engineer, Helton & Williamsen, P.C. (“H&W”), will be the primary engineer to develop the historical consumptive use (“HCU”) analysis necessary for the Joint Change Application.

i. *Apportionment of HCU Analysis Fees and Costs.* The Parties agree to apportion the engineering and consulting fees and costs incurred by H&W

in the following percentages, based on: 1) the percentage of 62 shares in the CHDC to be changed and which require a historical consumptive use analysis compared to the total shares to be changed in the Joint Change Application (the “Unchanged Shares”); and 2) which Party the shareholder independently chose to align their Unchanged Shares with prior to the filing of the Joint Change Application:

- Johnstown: 79.0%, which is approximately representative of 49 Unchanged Shares historically used within the Johnstown service area and/or elected to be included in Johnstown’s allocation of Unchanged Shares by the owner of such Unchanged Shares out of 62 Unchanged Shares to be changed.
- Milliken: 21.0%, which is approximately representative of 13 Unchanged Shares historically used within the Milliken service area and/or elected to be included in Milliken’s allocation of Unchanged Shares by the owner of such Unchanged Shares out of 62 Unchanged Shares to be changed. The Unchanged Shares do not include Milliken’s 14 CHDC shares changed in the 02CW339 Decree, which do not require an additional historical consumptive use analysis.
- A list of the owners of the Unchanged Shares is attached as Exhibit A to this MOU. To the extent that any shareholder changes its election on aligning its Unchanged Share(s) to the other Party prior to the filing of the Joint Change Application in Water Court, Exhibit A shall be amended and the allocation of relative payments of fees and costs shall likewise be modified to reflect such change(s) at that time, subject to the provisions of this Paragraph 4.a.i.
- If the total number of Unchanged Shares increase or decrease from 62 as the Joint Change Application progresses, the proportional share of engineering and consulting fees and costs will change proportionally subject to the provisions of this Paragraph 4.a.i. However, a Party is not required to accept a request by the owner of such additional Unchanged Shares to include additional Unchanged Shares in that Party’s allocation of Unchanged Shares. Under such circumstances, the Party opting not to accept the additional Unchanged Shares will not be responsible for reallocated engineering and consulting fees and costs.
- If, prior to the entry of a final, non-appealable decree pursuant to the Joint Change Application, a shareholder already participating in the Joint Change Application dedicates or enters into to an agreement to dedicate at a future time, Unchanged Shares that were previously dedicated to one Party to the other Party, the allocation percentage of engineering costs will be changed retroactively to reflect that dedication consistent with the terms in Paragraph 4.a.i. However, a Party is not required to accept a dedication of Unchanged Shares changed in the Joint Change Application which were not previously

elected to be included in that Party's allocation of Unchanged Shares by the owner of such Unchanged Shares. Under such circumstances, the Party opting not to accept the dedication will not be responsible for reallocated engineering and consulting fees and costs.

- Engineering and consulting fees and costs incurred by H&W will be promptly paid by Johnstown with a proportionate bill sent to Milliken, which shall also be promptly paid.
- ii. Additional or Alternate Water Resource Engineer(s) or Consultant(s). If the Parties mutually determine a different or additional water resource engineer and / or consultant is necessary to develop and support the historical use analysis portion of the Joint Change Application, the Parties agree any such engineering and consulting fees and costs incurred by said water resource engineer and / or consultant will be apportioned as set forth in Paragraph 4.a.i. between the Parties and promptly paid.
- b. Additional or Alternate Water Resource Engineer(s) or Consultant(s). If a Party determines a different or additional water resource engineer and / or consultant is necessary to develop and prosecute elements of Joint Change Application not related to the historical consumptive use analysis (by way of example, a future needs and demand consultant), the Parties agree any such engineering and consulting fees and costs incurred by said water resource engineer and / or consultant will be the responsibility of the endorsing Party. If such additional water resource engineer's and / or consultant's work product and opinions are mutually beneficial to both Parties, any such engineering and consulting fees and costs incurred by said water resource engineer and / or consultant will be apportioned equally between the Parties and promptly paid.
- c. Milliken's Independent Engineering. Milliken's engineer, Forrest Leaf, will assist H&W in developing the historical consumptive use analysis necessary for the Joint Change Application. Milliken will pay all of Forrest Leaf's incurred engineering and consulting fees and costs.

5. **LEGAL SERVICES.** The Parties will maintain their own legal representation throughout the development and prosecution of the Joint Change Application. The Parties agree to pay their own legal fees incurred in the development and prosecution of the Joint Change Application.

- a. Legal filing costs incurred in the development and prosecution of the Joint Change Application, to the extent they are filings mutually applicable to the Parties (example: application, notices, joint motions) will be apportioned equally.
- b. Legal filing costs incurred in the development and prosecution of the Joint Change Application, to the extent they are filed by one Party for that Party's benefit (example: entry of appearances) will be paid for by that filing Party.

6. CATLIN APPLICATION TO THE CHDC. The Parties understand that the Bylaws of the CHDC requires that, prior to filing the Joint Change Application in Water Court, the Parties must first submit to the CHDC for review and approval a draft proposed change application and preliminary engineering supporting the draft proposed change application. The CHDC will require the Parties to cover any legal, engineering, and administrative costs incurred by the CHDC in its review and approval of the draft proposed change application (“CHDC Catlin Costs”). The Parties agree the CHDC Catlin Costs will be apportioned equally.

7. DEFINING RETURN FLOW OBLIGATION SECTORS. The Parties agree that delineation of the location where each Unchanged Share changed in the Joint Change Application will owe return flows is important to utilizing the Unchanged Shares changed in the Joint Change Application. The Parties agree to identify and map the return flow obligation locations of each Unchanged Share in the Joint Change Application.

8. DEDICATION OF UNCHANGED SHARES CHANGED IN APPLICATION. The Parties agree that, because they are each investing time and financial resources to change those Unchanged Shares historically used within their respective service areas, they will endeavor to keep any Unchanged Share changed in the Joint Change Application based on which Party the shareholder chose to align their Unchanged Shares with and to the extent possible, and where those Unchanged Shares were historically used. However, in the event any Unchanged Shares changed in the Joint Change Application are dedicated to one Party, whether by a shareholder directly or by a developer acquiring the Unchanged Share(s) for subsequent dedication to that Party, and those Unchanged Shares owe historic return flows to a sector outside of that Party’s service area, that Party benefiting from the dedication shall be exclusively responsible for maintaining all historic return flow obligations.

9. MILLIKEN’S RIGHT OF FIRST REFUSAL ON SALE OF UNCHANGED SHARES. To the extent any Unchanged Shares changed which were aligned with Milliken in the Joint Change Application are offered for sale to Johnstown or any entity developing in Johnstown’s service area, and those Unchanged Shares or a portion of those Unchanged Shares were historically used to irrigate land within Milliken’s service area, Johnstown shall immediately disclose such offer in writing to Milliken and Milliken shall have a one hundred and twenty (120) day right of first refusal to acquire such Unchanged Shares or the portion thereof historically used to irrigate land within Milliken’s service area at the same price or fair market value, whichever is lower.

10. JOHNSTOWN’S RIGHT OF FIRST REFUSAL ON SALE OF UNCHANGED SHARES. To the extent any Unchanged Shares changed which were aligned with Johnstown in the Joint Change Application are offered for sale to Milliken or any entity developing in Milliken’s service area, and those Unchanged Shares or a portion of those Unchanged Shares were historically used to irrigate land within Johnstown’s service area, Milliken shall immediately disclose such offer in writing to Johnstown and Johnstown shall have a one hundred and twenty (120) day right of first refusal to acquire such Unchanged Shares or the portion thereof historically used to irrigate land within Johnstown’s service area at the same price or fair market value, whichever is lower.

11. NO CONFLICT OF INTEREST. Both parties agree that neither this MOU nor the

prosecution of an application in Water Court can be used in the future by one Party to claim a conflict of interest as to any attorney or engineer continuing to work for the other Party in this or any other matter.

12. COMPLIANCE WITH STATE AND FEDERAL REQUIREMENTS. Both parties agree to timely comply with all state and federal laws.

13. NOTICE. All notices, demands, or other written communication required or permitted to be given by this MOU shall be by electronic mail, hand delivered or sent by certified or registered mail, postage prepaid, and return receipt requested, to the parties at their most recent address of record.

If to the Town of Johnstown:

Matt LeCerf
450 S. Parish Avenue
P. O. Box 609
Johnstown, Colorado 80534

With a copy to:
Hill & Robbins
Attn: Peter Ampe
3401 Quebec St., Suite 3400
Denver, CO 802070

If to the Town of Milliken:

Cheryl Powell
1101 Broad Street
P. O. Box 290
Milliken, Colorado 80543

With a copy to:
Lyons Gaddis, PC
Attn: Scott Holwick
515 Kimbark St., Second Floor
Longmont, CO 80501

14. NO WAIVER OF IMMUNITY. Notwithstanding any other provision to the contrary, nothing herein shall constitute a waiver, express or implied, of any of the immunities, rights, benefits, protection, or other provisions of the Colorado Governmental Immunity Act (“CGIA”), C.R.S. § 24-10-101, *et seq.*

15. GOVERNING LAW. This MOU shall be governed by and construed in accordance with the laws of the State of Colorado and the laws of the United States of America. Venue for any claim, proceeding, or action shall be in Weld County, State of Colorado.

16. COMPLETE AGREEMENT. This MOU consists of all the agreements, understandings, and promises between the parties, including the CICA which is incorporated herein, and there are no agreements, understandings, or promises between the parties other than those set forth in this MOU.

17. **AMENDMENTS.** Any amendments or modifications to this MOU must be in writing and executed by all parties to be valid and binding.

18. **SEVERABILITY.** If any provision of this MOU is invalidated by any court of competent jurisdiction, the remaining provisions shall continue in full force and effect.

19. **TERMINATION.** This MOU shall automatically terminate at the earlier of (i) the final resolution of the Joint Change Application, through a final order from which all appeals have been taken and resolved or have been waived; (ii) the decision of all the Parties, memorialized in writing, to abandon the Joint Change Application, whether by not filing an Application or by jointly moving to dismiss a filed Application; or (iii) the termination of this MOU by any Party, who may terminate its participation in this MOU at any time, but termination shall be effective only when the withdrawing Party has provided at least ten days' advance written notice to all other Parties, and the Parties shall remain bound by any outstanding financial obligations under this MOU and the terms of the CICA.

- a. Right to the Use of Engineering Work after Termination. If this MOU is terminated under subsentence iii, above, both parties will have the right to the use any engineering work if the following is met: (i) if Milliken terminates this MOU, they must pay to Johnstown 50% of all costs, fees, and charges from H&W in order to use H&W's prior work in this matter; (ii) if Johnstown terminates this MOU, they must pay to Milliken 50% of all costs, fees, and charges from Forest Leaf in order to use Forest Leaf's prior work in this matter.
- b. Testimony. Use of engineering work under Paragraph 19(a) does not include the right to compel drafting of reports or to provide expert testimony at any future hearing or trial.

20. **THIRD PARTY ENFORCEMENT- NONE.** This MOU and all rights and obligations are reserved solely to the signing parties and not any third party. This MOU does not create any rights to any third parties.

21. **NO PRESUMPTION.** Each Party acknowledges that it has carefully read and reviewed the terms of this Agreement. Each Party acknowledges that the entry into and execution of this Agreement is of its own free and voluntary act and deed, without compulsion. Each Party acknowledges that it has obtained, or has had the opportunity to obtain, the advice of legal counsel of its own choosing in connection with the negotiation and execution of this Agreement and with respect to all matters set forth herein. The Parties agree that this Agreement reflects the joint drafting efforts of all Parties and in the event of any dispute, disagreement or controversy arising from this agreement, the Parties shall be considered joint authors and no provision shall be interpreted against any Party because of authorship.

22. **HEADINGS FOR CONVENIENCE ONLY.** Paragraph headings and titles contained herein are intended for convenience and reference only and are not intended to define, limit, or describe the scope or intent of any provision of this Agreement.

23. **COUNTERPARTS.** This MOU may be signed in identical original counterparts, all of which shall constitute one MOU.

[remainder of page left intentionally blank]

IN WITNESS WHEREOF, the parties hereto have executed this MOU on the dates set opposite their respective signatures below.

TOWN OF JOHNSTOWN	_____	_____
	By: _____	Date _____

	Title: _____	
TOWN OF MILLIKEN	_____	_____
	By: _____	Date _____

	Title: _____	