

# NON-POTABLE IRRIGATION SYSTEM INTERGOVERNMENTAL AGREEMENT

This Agreement is made and entered into effective as of the 2<sup>nd</sup> day of August, 2006 by and between the **Town of Johnstown**, a Colorado municipal corporation ("Johnstown") and the **Thompson Crossing Metropolitan District No. 2**, a Colorado Special District ("District No. 2").

## RECITALS

1. In 2001, Thompson Crossing Metropolitan District No. 2 was formed pursuant to the applicable provisions of the Colorado Special District law by Court Order dated December 17, 2001, Larimer County, District Court, Case No. 01 CV 1051.
2. All of the property located within District No. 2 is also located within the corporate limits of Johnstown.
3. On October 3, 2005, the Modified Consolidated Service Plan for Thompson Crossing Metropolitan Districts No. 1-6 was approved by the Board of Trustees of the Town.
4. The Modified Consolidated Service Plan provides that District No. 2 has the power to design, install, construct, maintain and operate a non-potable irrigation system to serve property within District No. 2.
5. The parties desire to enter into this Intergovernmental Agreement for the design, construction, operation and maintenance of a non-potable water irrigation system to serve property within District No. 2.
6. A non-potable water irrigation system designed, installed, constructed, maintained and operated by District No. 2 shall also provide non-potable water service to the northern boundary of the single-family residential development located within Johnstown known as Thompson Crossing PUD.
7. Johnstown is authorized pursuant to Section 31-15-708, C.R.S., to provide non-potable water services. District No. 2 is authorized by Section 32-1-201 et. seq. C.R.S., to provide non-potable irrigation water system facilities pursuant to an approved Service Plan.
8. Johnstown and District No. 2 are authorized by provisions of Article XIV, Section 18 of the Colorado Constitution and 29-1-201, et. seq. C.R.S., to enter into contracts with

each other for the provision of functions, services and facilities which they are authorized by law to provide on their own.

9. The parties to this Agreement have negotiated and agreed upon the terms and conditions pursuant to which non-potable irrigation system will be financed, designed, constructed, maintained and operated and desire by this Agreement to set forth the mutual understandings and agreements with regard thereto.

In consideration of the foregoing recitals which are incorporated herein by reference and in consideration of the mutual promises and undertakings herein set forth, the parties agree as follows:

## **Article 1      PURPOSE AND SCOPE OF AGREEMENT**

- 1.1      **General Purpose.** An agreement for the design, construction, operation and maintenance of a non-potable irrigation system serving the Property as defined herein.

## **Article 2      DEFINITIONS**

- 2.1.1    **The Property.** All real property within Thompson Crossing Metropolitan District No. 2 and Thompson Crossing PUD, including any subsequent approved additions thereto. All additions are subject to the provisions of Article 8.
- 2.1.2    **Improvements.** The non-potable irrigation system and related appurtenances designed, constructed, maintained and operated to provide non-potable irrigation water to the Property.
- 2.1.3    **Non-Potable Water Rate.** The charge by Johnstown for non-potable water service within Johnstown.

## **Article 3      THE IMPROVEMENTS**

### **3.1      Design**

- 3.1.1    **Design.** District No. 2 has designed a non-potable irrigation water system (the "Improvements") for the Property. The design of the Improvements shall be submitted to, and reviewed and accepted by, Johnstown prior to construction.

### **3.2      Construction of the Improvements**

- 3.2.1    **Construction of the Improvements.** District No. 2 shall construct the Improvements.
- 3.2.2    **Inspection by Johnstown during Construction.** Johnstown shall have the right to inspect the construction of the Improvements at any time to determine whether or not the actual construction of the Improvements meets design and contract specifications. In the

event that it is determined by Johnstown that the Improvements do not meet the design and contract specifications, Johnstown shall notify District No. 2 in writing specifying the actual deviation from the design and/or contract specifications. It shall be the responsibility of District No. 2 to correct any portion of the construction that does not meet the design specifications and contract documents. The District shall reimburse Johnstown for all costs of inspection incurred by Johnstown for an outside consultant during construction of the Improvements.

**3.2.3 Construction Contract Documents.** District No. 2 shall provide a complete set of final construction drawings of the Improvements to Johnstown. Johnstown shall have thirty (30) days to review the final construction drawings. Johnstown shall transmit all comments and concerns of the construction drawings to District No. 2 within said 30-day period. District No. 2 shall incorporate in the final construction drawings all reasonable changes to the construction drawings requested by Johnstown.

**3.2.4 Completion Certificates.** Following completion of the Improvements, District No. 2 shall file a Certificate of Substantial Completion with the Town. The Town shall have thirty (30) days following the filing of the Certificate of Substantial Completion to conduct a final inspection to determine conformance of the constructed Improvements with the contract documents. In the event that it is determined by Johnstown that the Improvements do not meet the contract specifications, Johnstown shall notify District No. 2 in writing specifying the actual deviation from the design and/or contract specifications. It shall be the responsibility of District No. 2 to correct any portion of the construction that does not meet contract documents. Upon acceptance by the Town of the Improvements, the Town shall issue a Final Completion Certificate to District No. 2.

**3.2.5 Transfer to Johnstown.** Following completion of the Improvements, Johnstown shall have the right to request transfer of the Improvements to Johnstown subject to the following terms and conditions.

- (1) Transfer shall not occur until ten (10) years following the Final Completion Certificate of the Improvements.
- (2) The transfer of the Improvements shall include any warranties which District No. 2 has on the Improvements which are still in force and effect. The transfer of the Improvements to Johnstown shall be by written instrument, shall include all easements necessary for the Town to reasonably access, operate, maintain, repair, and replace the Improvements and shall be at no cost to Johnstown. There shall be no warranty from District No. 2 to Johnstown with regard to the Improvements; except that the District No. 2 shall warrant that it has good and marketable title to the Improvements, that the conveyance to the Town shall be free and clear of all encumbrances, and that the Improvements have been reasonably operated and satisfactorily maintained by District No. 2.
- (3) District No. 2 shall provide the Town with a set of "as built" drawings of the Improvements

**Article 4      OPERATION AND MAINTENANCE OF THE SYSTEM.**

- 4.1      **Operation and Maintenance.** District No. 2 shall reasonably operate and maintain the non-potable irrigation system until transfer to Johnstown. Upon transfer of the Improvements, Johnstown shall operate and maintain the non-potable irrigation system.
- 4.2      **User Fees.** District No. 2 shall charge users of the non-potable irrigation system a rate of no more than 80% of Johnstown's published potable water rate for the first five (5) years of operation of the system by District No. 2. Following the completion of five (5) years, District No. 2 shall charge non-potable irrigation water rates on a cost of service basis but this amount cannot be greater than Johnstown's published non-potable irrigation water rates. Prior to establishing or modifying any cost of service rates, District No. 2 shall provide Johnstown the proposed water rates for its review. Johnstown shall have sixty (60) days to review the proposed non-potable irrigation water rates and forward any written comments to District No. 2 with regard to the rates. District No. 2 shall incorporate any of Johnstown's written comments with regard to the rates to the extent practically and financially feasible. The final determination of the non-potable irrigation water rates on a cost of service basis shall be that of District No. 2; but this amount cannot be greater than Johnstown's published non-potable irrigation water rates.
- 4.3      **Johnstown Fees.** Upon transfer of the Improvements to Johnstown, Johnstown shall charge for non-potable irrigation for the Property at its then published non-potable irrigation water rates.

**Article 5      WATER FOR THE NON-POTABLE IRRIGATION SYSTEM**

- 5.1      Owners of property located within District No. 2 have entered into a Non-Potable Water Agreement with Johnstown for the purpose of dedicating to Johnstown the raw water necessary to operate a non-potable irrigation system on the Property. Pursuant to provisions of the Non-Potable Irrigation Water Agreement, the owners agree to obtain a Water Court decree adjudicating the water rights specified in the Non-Potable Irrigation Water Agreement for use in the non-potable irrigation system on the Property. Due to the fact that the Water Decree will control the use of dedicated raw water in the non-potable irrigation system and other water rights will be dedicated to Johnstown by the owners of the Property for use in the non-potable irrigation system, the terms and conditions of the Non-Potable Irrigation Water Agreement shall control the use of the raw water dedicated pursuant to that Agreement for use in the non-potable irrigation system constructed, operated and maintained pursuant to this Agreement.

**Article 6      GENERAL PROVISIONS.**

- 6.1.1    **Alternative Dispute Resolution; Mediation.** If a dispute arises relating to this Agreement, and is not resolved, the parties involved in such dispute shall first proceed in

good faith to submit the matter to mediation. The parties will jointly appoint an acceptable mediator and will share equally in the cost of such mediation. In the event the entire dispute is not resolved within thirty (30) calendar days from the date written notice requesting mediation is sent by one party to the other, the mediation, unless otherwise agreed, shall terminate. This section shall not alter any date in this Agreement, unless otherwise agreed. After completion of mediation, any party may submit any unresolved disputes or controversies to binding arbitration between the parties involved, and judgment or other judicial relief, including mandatory or other injunctive relief, may be entered upon the decision of the arbitrators in any court having jurisdiction. Unless the parties involved in the dispute agree otherwise, the dispute shall be resolved by a panel of three arbitrators, one of which shall be selected by Johnstown. The second arbitrator shall be selected by District No. 2. The third arbitrator shall be selected by the two arbitrators previously chosen. Each party shall bear one-half (1/2) of the fees and costs of the arbitors. Prior to any arbitration hearing, the parties shall have the right to enter into such discovery activities as may be permitted under the Colorado Rules of Civil Procedure, as the same are in effect at that time. All discovery disputes shall be determined by the arbitrators.

- 6.1.2 **Specific Performance.** The obligations of Johnstown and District No. 2 set forth in this Agreement are an essential purpose of this Agreement. Any legal remedies for a breach of any of said obligations which results or will result in any non-breaching party's inability to have or utilize the Improvements hereunder shall be conclusively deemed to be inadequate and, in addition to any and all other remedies, the remedy of specific performance shall be available to such party to enforce the entitlements and other rights provided to it in this Agreement.
- 6.1.3 **Partial Invalidity.** If any portion of this Agreement is determined by a court having jurisdiction to be invalid or unenforceable, such judgment shall not affect, impair, or invalidate the remaining portions of this Agreement, the intention being that the various provisions hereof are severable; provided that the remaining portions of the agreement reasonably meet the intentions of the Parties
- 6.1.4 **Amendment.** No amendment to this Agreement shall be effective unless it is in writing and signed by both Johnstown and District No. 2.
- 6.1.5 **Governing Law.** This Agreement shall be governed by and construed in accordance with the laws of the State of Colorado.
- 6.1.6 **Authority.** Each party represents and warrants that it has all requisite power, corporate and otherwise, to execute, deliver and perform their obligations pursuant to this Agreement, that the execution, delivery, and performance of this Agreement and the documents to be executed and delivered pursuant to this Agreement have been duly authorized, and that upon execution and delivery, this Agreement and all documents to be executed and delivered pursuant to this Agreement will constitute its legal, valid and binding obligation, enforceable against it in accordance with their terms.

- 6.1.7 **Counterparts.** This Agreement may be executed in one or more counterparts, all of which together shall constitute one and the same instrument.
- 6.1.8 **Further Assurance.** Each of the parties hereto, at any time and from time to time, will execute and deliver such further instruments and take such further action as may reasonably be requested by the other party hereto, in order to cure any defects in the execution and delivery of, or to comply with or accomplish the covenants and agreements contained in this Agreement and/or any other agreements or documents related thereto.
- 6.1.9 **Force Majeure.** Should any party be unable to perform any obligation required of it under this Agreement, other than the payment of money, because of any cause beyond its control (including, but not limited to war, insurrection, riot, civil commotion, shortages, strikes, lockout, fire, earthquake, calamity, windstorm, flood, material shortages, failure of any suppliers, freight handlers, transportation vendors or like activities, or any other force majeure), then such party's performance of any such obligation shall be suspended for such period as the party is unable to perform such obligation.
- 6.1.10 **Assignment.** No party shall assign its rights or obligation hereunder without the express written consent of the other party.
- 6.1.11 **Notices.** If under the terms of this Agreement, notice is to be provided to any party, said notice shall be deemed provided upon personal delivery or three (3) business days after the mailing of the same by registered or certified mail, return receipt requested, and first-class postage prepaid addressed as follows:

Thompson Crossing Metropolitan District No. 2  
Attn: Board President  
1739 S. County Rd. 13C  
Loveland, CO 80537

Town of Johnstown  
Attn: Town Administrator  
P.O. Box 609  
Johnstown, CO 80534

- 6.1.12 **Entire Agreement.** This Agreement, including the items referenced herein or to be attached in accordance with the provisions of this Agreement, constitutes the entire agreement among the parties pertaining to the subject matter of this Agreement and supersedes all prior and contemporaneous agreement and understandings of the parties as to the subject matter of this Agreement. No representation, warranty, covenant, agreement, or condition not expressed in this Agreement shall be binding upon the parties or shall change or restrict the provisions of this Agreement.

## **Article 7      NON-POTABLE WATER TAP FEE.**


- 7.1      In consideration of the design, installation, construction, financing, operation and maintenance of the non-potable water irrigation system (the "Improvements") by District No. 2, Johnstown shall not charge or collect a non-potable water tap fee for any development on the Property.

**Article 8 INCLUSION OF ADDITIONAL PROPERTY.**

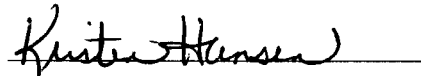
8.1 The parties understand and agree that certain properties may be included within District No. 2 in the future. The properties are listed on Exhibit A attached hereto and incorporated herein by reference. The parties agree that upon annexation of one or more of the properties into Johnstown and the inclusion of the annexed property within District No. 2, that District No. 2 shall have the right to expand the non-potable water irrigation system into said property. Said expansion shall be upon the same terms and conditions as if said property was included in the definition of the Property set forth in Section 2.1.1 of this Agreement.

**THIS AGREEMENT** is made as of the above stated date.

**THOMPSON CROSSING METROPOLITAN DISTRICT NO. 2**

By: 

ATTEST:



**TOWN OF JOHNSTOWN**

By: 

ATTEST:

