

## **WATER RIGHTS BROKERAGE AGREEMENT**

THIS WATER RIGHTS BROKERAGE AGREEMENT (“Agreement”) is made and entered into effective this \_\_\_\_ day of March, 2017 by and between Stillwater Resources & Investments, Inc., a Colorado corporation, 2355 Canyon Blvd. Suite 105, Boulder, Colorado 80302 (“Stillwater”) and the Town of Castle Rock, a home rule municipal corporation, by and through the Town of Castle Rock Water Enterprise, 100 N. Wilcox Street, Castle Rock, Colorado 80104 (“Town”).

### **RECITALS**

WHEREAS, Town, on its own and through affiliation with water providers has undertaken studies of various renewable water rights and projects that Town may consider for acquisition and development; and

WHEREAS, Town has acquired and will develop the Box Elder Farm as a municipal wellfield and related facilities for exportation of water supplies it has or may acquire in the future (“Box Elder”); and

WHEREAS, Town desires to employ Stillwater for purposes of identifying and recommending potential water rights purchases within a designated geographic area that may be advantageous for the Town to acquire; and

WHEREAS, Stillwater is qualified as a water rights broker and is experienced in the acquisition of water rights for municipal entities; and

WHEREAS, Stillwater desires to act as Town’s exclusive limited agent as more particularly set forth in this Agreement upon the terms and conditions contained in this Agreement; and

WHEREAS, the Town and Stillwater entered into a certain Water Rights Brokerage Agreement on February 19, 2013 as amended by the First Amendment to the Water Rights Brokerage Agreement dated February 17, 2015 (the “Prior Agreement”), which has been fully performed by the parties and has expired according to its terms.

NOW THEREFORE, in consideration of the promises and good and valuable consideration, including the payments, terms, covenants and promises herein, the parties agree as follows:

**Section 1. Services.** During the term of this Agreement, Stillwater shall exercise reasonable care, skill and diligence in performing the following services for the Town (the “Services”):

- A. Identification of MSP Prospects. The Town shall identify its water needs to Stillwater and Stillwater shall assist Town's staff, experts and professional consultants, including, but not limited to, Town's water resource engineer and attorneys in identifying targeted water rights acquisitions which are suitable for utilization at Box Elder, provided that the principal point(s) of diversion of such prospects fall within the geographic area of the Middle South Platte drainage as depicted on that attached ***Exhibit 1*** ("MSP Prospects")... Potential water rights acquisitions that may come to the attention of the Town through Stillwater or third parties which are by definition not MSP Prospects are not subject to this Brokerage Agreement.
- B. Term Sheet. Stillwater shall prepare a written summary of the proposed acquisition terms for a particular MSP Prospect ("Term Sheet"). Town shall approve, reject or amend the Term Sheet. Stillwater shall assist Town staff and/or the Town Council in the evaluation of the Term Sheet.
- C. Brokerage. Based on an approved Term Sheet, Stillwater shall negotiate as Town's agent the purchase price and terms for the MSP Prospect acceptable to Town. Town shall have the right, in its sole discretion, for whatever reason to: (i) approve the final terms for any MSP Prospect and enter into a conforming contract with the seller, or (ii) reject the MSP Prospect, irrespective of the fact that Stillwater has secured a commitment from the seller consistent with the approved Term Sheet. Under Town regulations, any contract for acquisition of a MSP Prospect in excess of \$250,000 must be approved by the Town Council.

Stillwater shall provide the Town with regular status reports on the Services, and such updates as the Town may request.

**Section 2. Limitations on Services.** Services are limited to those activities prescribed in Section 1. Stillwater will not, and shall not be obligated to provide any legal or engineering review or analysis, including but not limited to, determining the technical feasibility of water resource alternatives, drafting agreements or legal or closing documents; examining title or water court records, or related services, all of which shall be the obligation of the Town to procure at its expense and make available to Stillwater in the performance of the Services.

Stillwater shall have no duty to conduct an independent inspection of MSP Prospect water rights for the benefit of Town and shall have no duty to independently verify the accuracy or completeness of statements made by a MSP Prospect or independent inspectors (provided however that Stillwater shall inform Town if it believes that any such statements are inaccurate). Stillwater shall have no duty to verify the accuracy or completeness of any statement made by Town. Stillwater shall not disclose to any person, including any prospective seller, any adverse material facts concerning Town, absent the Town's prior written authorization.

**Section 3. Agency/Vicarious Liability.** Town irrevocably appoints Stillwater as Town's exclusive limited buyer's agent during the term of this Agreement to represent Town in acquiring the MSP Prospects and authorizes and empowers Stillwater to exercise and perform

such acts reasonably necessary or incidental to the Services. Stillwater, as Town's agent, shall promote the interests of the Town with utmost good faith, loyalty and fidelity. Town agrees to conduct all negotiations for MSP Prospects through Stillwater. Each transaction shall be considered on a case by case basis, and Town agrees to refer in a timely manner to Stillwater all information regarding MSP Prospects potentially acceptable to Town. Town shall not be vicariously liable for the acts of Stillwater that are not approved, directed or ratified by Town.

**Section 4. Cooperation.** The parties shall fully cooperate with one another in order to facilitate the Services by timely providing information, documentation and expert and/or professional assistance necessary to enable the performance of the Services and as reasonably requested by Stillwater or the Town; provided, however, that Town shall only be obligated to incur costs as it deems necessary and authorizes pursuant to Section 6.

**Section 5. Compensation for Services.** Stillwater shall be compensated for the Services on a commission basis when the Town acquires an interest in a MSP Prospect as proved in this Section ("Brokerage Fee"), subject to the Town's annual appropriation and budgeting processes (if and as applicable). The Brokerage Fee for each transaction shall be based on one of the following provisions, as applicable. The Brokerage Fee shall be due with the closing of the transaction between Town and the MSP Prospect seller.

- A. Purchase. In the event that Town acquires a MSP Prospect or any partial interest in a MSP Prospect, Town shall pay Stillwater a Brokerage Fee of 5% of the purchase price paid by Town to the seller of such MSP Prospect, inclusive of all real and/or personal property simultaneously acquired, provided that the acquisition of such real or personal property is necessary for the acquisition of the MSP Prospect. The Brokerage Fee shall be calculated on the total purchase price paid by Town as evidenced by the closing statements approved by Town and the respective seller(s) for each purchase.
- B. Lease. In the event that Town leases a MSP Prospect or any partial interest in a MSP Prospect, Town shall pay Stillwater a Brokerage Fee of 5% of the aggregate rents payable during such initial lease term, and 5% of the aggregate rents payable under any renewal term of such lease exercised by the Town, provided that irrespective of the duration of the primary term or the number and duration of renewal terms, the Brokerage Fee shall apply only to the first 10 years of lease payments for which the Town is contractually obligated to make. The Brokerage Fee with respect to the initial lease term shall be paid at the time of lease execution, and the Brokerage Fee calculated on renewal terms shall be paid when the Town exercises such renewal term. Consequently, if Town enters into a lease with an initial term of 15 years, the Brokerage Fee would apply and be calculated on the total lease payments for lease years 1 through 10 only. If the lease provides for an initial term of 5 years with two 5-year renewal terms, both of which are exercised by the Town, the Brokerage Fee would apply to and be calculated on the lease payments under the primary term and the first renewal term, but not on the second renewal term.

C. Option. In the case of an option to acquire or lease a MSP Prospect, in addition to any other Brokerage Fee due Stillwater as provided herein, Town shall pay Stillwater a Brokerage Fee of 5% of each non-refundable option payment, contemporaneously with such option payment. If the subject non-refundable option payment is also credited against the purchase price, at the time of closing of the subject option, the Town shall be entitled to a credit against the Brokerage Fee due Stillwater in consideration of such closing in an amount equal to the Brokerage Fee the Town paid Stillwater with respect to non-refundable option payments which were credited against the purchase price. In the event of an option which provides for an option term of one year or longer from the date the Town's inspection, due diligence, feasibility or investigation period (the "Inspection Period") ends until the date of closing, if the Town does not terminate the option prior to the end of the Inspection Period and does not close its acquisition or terminate the option on or before the first annual anniversary of the end of the Inspection Period, on the first annual anniversary of the end of the Inspection Period (the "Fee Accrual Date") the Town shall pay Stillwater a Brokerage Fee as calculated under A above (if the option is for the purchase of a MSP Prospect) or B above (if the option is for the lease of a MSP Prospect). However, in that event, the Brokerage Fee shall be based on the net present value of the purchase price or sum of the initial term lease payments calculated from the last day the option may be exercised to the date of payment, based on a 5% interest rate, non-compounded. Upon such payment, Town shall not be required to make any further Brokerage Fee payments to Stillwater with respect to the subject option. By way of example (and not limitation), if the Town entered into an option to purchase a MSP Prospect for \$1,000,000, which provided that the Town could exercise the Option at any time within five (5) years from the date of contract execution, and the option had a one (1) year Inspection Period. If the Town did not terminate the option prior to the second annual anniversary of option execution (one year after the end of the Inspection Period), Stillwater would be entitled to receive a Brokerage Fee of \$46,250.00 on the Fee Accrual Date (one year after the end of the Inspection Period), calculated as follows:

$$\begin{aligned} \$1,000,000 \text{ purchase price} - \$75,000 \text{ (3 year remaining option term times} \\ 5\% \text{ per annum net present value interest rate)} = \$925,000 \text{ net present} \\ \text{value of purchase price} \times 5\% = \text{Brokerage Fee of } \$46,250 \end{aligned}$$

And if, under the foregoing example, the Town had made non-refundable option payments which applied to the purchase price, and had paid Stillwater a Brokerage Fee with respect to same, the Town would be entitled to a credit against the above-calculated Brokerage Fee of \$46,250 equal to the Brokerage Fee paid Stillwater with respect to the non-refundable option payments which applied to the purchase price. Likewise, if the Town, in its discretion, terminates an option prior to the Fee Accrual Date, it shall owe no Brokerage Fee with respect to the terminated option, except any Brokerage Fee due as a result of each non-refundable option payment made prior to termination. Similarly, if the Town pays Stillwater a Brokerage Fee on the Fee Accrual Date with respect to a lease pursuant to the foregoing provisions and later renews or extends that lease, the Town will pay Stillwater a Brokerage Fee with

respect to each such renewal or extension (subject to the ten (10) year limitation set forth above in section 5(C)).

In the event the purchase price or lease rate is not determinable on the Fee Accrual Date, for the purposes of calculating the Brokerage Fee due Stillwater on the Fee Accrual Date, the purchase price or lease rate used for calculating the Brokerage Fee due Stillwater on the Fee Accrual Date shall be the lesser of (i) \$400 per acre foot or (ii) the minimum purchase or lease rate provided in the option.

**D. Other Acquisition.** In the event that Town acquires any interest or control in a MSP Prospect by exchange or other means other than a direct purchase subject to A, above, or a direct lease subject to B, above, or an option subject to C, above, in the absence of further written agreement between the Town and Stillwater with respect to the Brokerage Fee due Stillwater with respect to the subject MSP Prospect, Town shall pay Stillwater a fee of \$400.00 per acre foot of water subject to such transaction at the time of the Town's acquisition of the MSP Prospect. The foregoing includes acquisition of a MSP Prospect in any other fashion, including without limitation, the Town's entry into or otherwise receiving the benefit of any Alternative Transfer Mechanisms.

The Brokerage Fee required to be paid to Stillwater pursuant to this Section 5 shall apply to any MSP Prospect placed under contract by the Town: (i) during the term of this Agreement and then is later closed after the term; or (ii) within 180 calendar days after this Agreement expires or is terminated for any reason other than the default of Stillwater, provided that the MSP Prospect is one on which Stillwater submitted a Term Sheet or a written description of the MSP Prospect during the term of this Agreement which Term Sheet or MSP Prospect description was approved in writing by the Town or its staff, or concerning which Term Sheet or MSP Prospect, Stillwater was instructed in writing to proceed by the Town or its staff. For the purpose of the prior sentence, written approval or written instruction to proceed includes, but is not limited to, an approval or instruction to proceed by email.

**Section 6. Responsibility for Outside Expenses.** Stillwater shall not obtain or order any services or products from third party sources without the Town's prior written consent, including, but not limited to, legal, engineering and other expert and professional services all of which, shall be obtained and promptly paid for by Town. Stillwater shall not be obligated to advance any funds on behalf of Town. Town shall provide its own legal review and counsel of all contracts for acquisition of a MSP Prospect.

**Section 7. Non-exclusivity of Services/Disclosure.** Town acknowledges receipt of disclosure from Stillwater of the clients for whom Stillwater currently performs work similar to the Services, and Town agrees that Stillwater may continue to provide such third-party services to such clients. In the event that either Stillwater or Town perceives that there may be a potential conflict with Stillwater's duty to Town under this Agreement with either such existing clients or new clients acquired after the commencement of the term of this Agreement, such party shall inform the other in writing of the potential conflict. In such event, the parties shall endeavor to resolve the potential conflict such that there is no material impairment of the Services or

Stillwater's performance of the other services. However, if the potential conflict of interest cannot be resolved to their mutual satisfaction, Stillwater shall either: (i) terminate the engagement, (ii) decline such other engagement, or (iii) withdraw from and terminate this Agreement. For the purpose of qualification for payment of Brokerage Fee under Section 5, a termination under this Section 7 shall be considered a termination without fault or breach by Stillwater.

**Section 8. Term.** This Agreement and the provision of the Services shall commence upon the effective date indicated above and shall terminate two years from the effective date of this Agreement, unless previously terminated pursuant to Sections 7 or 9, or unless the term is extended by mutual written agreement.

**Section 9. Termination and Brokerage Fee.** In the event of a default of this Agreement by either party, the non-defaulting party shall give the defaulting party 30 days written notice of such default and the opportunity to cure such default within such 30-day period. In the event that the defaulting party fails or refuses to cure the default within such 30-day period, this Agreement shall terminate on the 30<sup>th</sup> calendar day after such notice is given. If such termination for cause results from an uncured default by Stillwater, Stillwater shall not be entitled to any further Brokerage Fees, irrespective of the provisions Section 5. In addition to such termination for cause, Town shall have the right to terminate this Agreement at any time for any reason with 60 days prior written notice to Stillwater. In the event of such termination for convenience by Town or a termination under Section 7, Stillwater shall be entitled to Brokerage Fees as provided in Section 5.

**Section 10. Limitation of Liability and Exclusive Remedy.** In no event will either party be liable to the other for any lost profits, incidental, special, exemplary, punitive, indirect or other consequential damages, even if such party knows or has been advised of the possibility of such damages.

**Section 11. Limitation on Third Party Compensation.** Stillwater shall not accept compensation from any other person or entity in connection with the MSP Prospects without the written consent of the Town. Additionally, Stillwater shall not be permitted to assess and receive mark-ups or compensation for services performed by any third party or affiliated business entity unless the Town signs a separate written consent for such services.

**Section 12. Separate Business Operations.** By this Agreement, Stillwater and Town are not creating, nor do they intend to create, an employer-employee relationship, a partnership, joint venture, merger of business operations or any business association and specifically agree and represent that their respective business operations shall remain separate and distinct.

**Section 13. Assignability.** This Agreement shall not be assigned by Town or Stillwater without the other party's written consent.

**Section 14. Notices.** Any notice required or permitted to be given pursuant to this Agreement shall be in writing and addressed with the address set forth at the beginning of this Agreement for the particular party to be notified. The address of any party may be changed by giving written notice of such change to the other party in the manner provided herein. Any

notice delivered in person shall be deemed to have been duly given on the date of such delivery. Any notice delivered by mail in accordance with this provision shall be deemed to have been duly given on the third calendar day after the same is deposited in any post office or postal box regularly maintained by the United States Postal Service with postage prepaid.

**Section 15. Prohibition Against Employing Illegal Aliens.** Stillwater shall not knowingly employ or contract with an illegal alien to perform work under this contract. Stillwater shall not enter into a contract with a subcontractor that fails to certify to Stillwater that the subcontractor shall not knowingly employ or contract with an illegal alien to perform work under this contract.

Stillwater has confirmed the employment eligibility of all employees who are newly hired for employment to perform work under the public contract for services through participation in either the E-verify program or the Department program, as defined in C.R.S. §§ 8-17.5-101(3.3) and 8-17.5-101(3.7), respectively. Stillwater is prohibited from using the E-verify program or Department program procedures to undertake pre-employment screening of job applicants while this contract is being performed.

If Stillwater obtains actual knowledge that a subcontractor performing work under this Agreement for services knowingly employs or contracts with an illegal alien, Stillwater shall:

- A. Notify the subcontractor and the Town within three days that Stillwater has actual knowledge that the subcontractor is employing or contracting with an illegal alien; and
- B. Terminate the subcontract with the subcontractor if within three days of receiving notice required pursuant to this paragraph the subcontractor does not stop employee or contracting with the illegal alien; except that Stillwater shall not terminate the contract with the subcontractor if during such three days the subcontractor provides information to establish that the subcontractor has not knowingly employed or contracted with an illegal alien.

Stillwater shall comply with any reasonable request by the Department of Labor and Employment made in the course of an investigation that the Department is undertaking pursuant to the authority established in C.R.S. §8-17.5-102(5).

If Stillwater violates a provision of this Agreement required pursuant to C.R.S. §8-17.5-102, Town may terminate the Agreement for breach of contract. If the Agreement is so terminated, Stillwater shall be liable for actual and consequential damages to the Town.

**Section 16. Insurance.** Stillwater agrees to procure and maintain, at his own cost, the following policy or policies of insurance. Stillwater shall not be relieved of any liability, claims, demands or other obligations assumed pursuant to this Agreement by reason of its failure to procure or maintain insurance, or by reason of its failure to procure or maintain insurance in sufficient amounts, durations, or types.

A. Stillwater shall procure and maintain, and shall cause each subcontractor of Stillwater to procure and maintain a policy with the minimum insurance coverage listed below.

Such coverage shall be procured and maintained with forms and insurers acceptable to the Town. All coverage shall be continuously maintained from the date of commencement of services hereunder. In the case of any claims-made policy, the necessary retroactive dates and extended reporting periods shall be procured to maintain such continuous coverage.

1. Workers Compensation insurance to cover obligations imposed by the Workers Compensation Act of Colorado and any other applicable laws for any employee engaged in the performance of Work under this contract, and Employer's Liability insurance with minimum limits of FIVE HUNDRED THOUSAND DOLLARS (\$500,000) each accident, FIVE HUNDRED THOUSAND DOLLARS (\$500,000) disease-policy limit, and FIVE HUNDRED THOUSAND DOLLARS (\$500,000) disease-each employee.

2. Comprehensive General Liability insurance with minimum combined single limits of ONE MILLION DOLLARS (\$1,000,000) each occurrence and ONE MILLION DOLLARS (\$1,000,000) aggregate. The policy shall be applicable to all premises and operations. The policy shall include coverage for bodily injury, broad form property damage (including for contractual and employee acts), blanket contractual, independent contractors, products, and completed operations. The policy shall contain a severability of interests provision.

3. Professional Liability/Errors and Omissions coverage in an amount of not less than \$100,000 per claim and \$300,000 annual aggregate.

B. The policies required above, except Workers' Compensation insurance and Employers' Liability insurance shall be endorsed to include the Town, its officers and employees, as an additional insured. Every policy required above, except Workers' Compensation and Professional Liability insurance, if applicable, shall be primary insurance, and any insurance carried by the Town, its officers, or its employees, shall be excess and not contributory insurance to that provided by Stillwater. The additional insured endorsement for the Comprehensive General Liability insurance required above shall not contain any exclusion for bodily injury or property damage arising from completed operations. Stillwater shall be solely responsible for any deductible losses under each of the policies required above.

C. Certificates of insurance shall be completed by Stillwater's insurance agent as evidence that policies providing the required coverage, conditions and minimum limits are in full force and effect, and shall be subject to review and approval by the Town. Each certificate shall identify the Project and shall provide that coverage afforded under the policies shall not be cancelled, terminated or materially changed until at least 30 days prior written notice has been given to the Town. If the words "endeavor to" appear in the portion of the certificate addressing cancellation, those words shall be stricken from the certificate by the agent(s) completing the certificate. The Town reserves the right to request and receive a certified copy of any policy and any endorsement thereto.

D. Failure on the part of Stillwater to procure or maintain policies providing the required coverage, conditions, and minimum limits shall constitute a material breach of contract upon which the discretion may procure or renew any such policy or any extended connection

therewith, and all monies so paid by the Town shall be repaid by Stillwater to the Town upon demand, or the Town may offset the cost of the premiums against any monies due to Stillwater from the Town.

E. The parties understand and agree that the Town is relying on, and does not waive or intend to waive by any provision of this contract, the monetary limitations or any other rights, immunities, and protections provided by the Colorado Governmental Immunity Act, §24-10-101, et seq, 10 C.R.S., as from time to time amended, or otherwise available to Town, its officers, or its employees.

### **Section 17. Indemnification.**

A. Stillwater expressly agrees to indemnify and hold harmless Town or any of its officers or employees from any and all claims, actual out-of-pocket damages (but not consequential or other damages), liability, or court awards including attorney's fees that are or may be awarded as a result of any loss, injury or damage sustained or claimed to have been sustained by anyone, including, but not limited to, any person, firm, partnership, or corporation, to the extent caused by the negligent acts, errors or omissions of Stillwater or any of their employees or agents in performing work pursuant to this Agreement. In the event that any such suit or action is brought against Town, Town will give notice within ten (10) days thereof to Stillwater.

B. To the maximum extent permitted by law, Town expressly agrees to indemnify and hold harmless Stillwater or any of its officers or employees from any and all claims, damages, liability, or court awards including attorney's fees that are or may be awarded as a result of any loss, injury or actual out-of-pocket damages (but not consequential or other damages), sustained or claimed to have been sustained by anyone, including, but not limited to, any person, firm, partnership, or corporation, to the extent caused by the negligent acts, errors or omissions of Town or any of their employees or agents in performing work pursuant to this Agreement. In the event that any such suit or action is brought against Stillwater, Stillwater will give notice within ten (10) days thereof to Town.

**Section 18. Attorney's Fees and Costs.** In any action to enforce, interpret or seek damages for breach or default of this Agreement, whether in law or in equity, the substantially prevailing party shall be entitled to and shall be awarded all of its attorney's fees, expenses and costs thereof.

**Section 19. Waiver.** A waiver by any party to this Agreement of the breach of any term or provision of this Agreement shall not operate or be construed as a waiver of any subsequent breach by either party.

**Section 20. Binding Effect.** This Agreement shall inure to the benefit of and be binding upon the parties hereto and their respective successors and assigns permitted pursuant to the provisions of this Agreement.

**Section 21. Modification.** No provision of this Agreement may be amended, waived or otherwise modified without the prior written consent of both of the parties hereto.

**Section 22. Severability.** Any provision of this Agreement which is held by a court of competent jurisdiction to be prohibited or unenforceable shall be ineffective to the extent of such prohibition or unenforceability without invalidating or rendering unenforceable the remaining provisions of this Agreement.

**Section 23. Governing Law.** This Agreement is made and entered into and shall be governed by and construed in accordance with the laws of the State of Colorado.

**Section 24. Jurisdiction and Venue.** Any and every legal action, in law or in equity, concerning enforcement, interpretation, effect, breach, default or dispute regarding this Agreement shall be resolved in District Court for the County of Douglas, State of Colorado and each party hereto consents to any such action being brought in the District Court for the County of Douglas, State of Colorado.

**Section 25. Section Headings.** This section and other headings contained in this Agreement are for reference purposes only and shall not affect the meaning or interpretation of this Agreement.

**Section 26. Representations of Authority.** Each of the parties signing this document on behalf of Stillwater and Town respectively represent and warrant to each that they have full and complete legal authority to execute this Agreement on behalf of such party Agreement.

**STILLWATER RESOURCES &  
INVESTMENTS, INC.**

By:

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Walraven Ketellapper, President

**ATTEST:**

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Sally A. Misare, Town Clerk

**Approved as to form:**

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Robert J. Slentz, Town Attorney

**TOWN OF CASTLE ROCK, by and  
through the Town of Castle Rock Water  
Enterprise**

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Jennifer Green, Mayor

**Approved as to content:**

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Mark Marlowe, Director of Castle Rock Water

