

**PARTICIPATION AGREEMENT
FOR DESIGN OF STREAM RECLAMATION IMPROVEMENTS
FOR
McMURDO GULCH**

This Participation Agreement for Design of Stream Reclamation Improvements for McMurdo Gulch (“Agreement”) is entered into this 16 day of June, 2018 to be effective as of June 16 2018 (“Effective Date”) by and between the **Cherry Creek Basin Water Quality Authority**, a quasi-municipal corporation and political subdivision of the State of Colorado (“Authority”) and the **Town of Castle Rock**, a Colorado municipal corporation (“Town”). The Authority and Town are hereinafter sometimes collectively referred to as the “Parties” and singularly as a “Party.”

RECITALS

WHEREAS, the Town is authorized to enter into contracts and to fund and construct storm drainage, flood control and stream reclamation projects and improvements; and

WHEREAS, Authority was established for the purpose of preserving and protecting the water quality in the Cherry Creek Reservoir, Cherry Creek, and the Cherry Creek Watershed; and

WHEREAS, in furtherance of its purpose, the Authority is authorized to enter into contracts and to fund the design and construction of stream reclamation and other water quality improvements; and

WHEREAS, McMurdo Gulch is located within the Authority’s boundaries and is a tributary to Cherry Creek and the Cherry Creek Reservoir; and

WHEREAS, certain reaches of McMurdo Gulch as identified in a McMurdo Gulch 2016 Reach Assessment Report prepared by Muller Engineering Company identified approximately 2,000 linear feet of McMurdo Gulch that are experiencing stream degradation associated with increased urban runoff resulting in incised channels and exposed banks offering less vegetative filtering and infiltration, both necessary mechanisms for a healthy natural stream; and

WHEREAS, the Authority recognizes that reclaiming streams tributary to Cherry Creek helps preserve and protect water quality in Cherry Creek and in the reservoir by reducing phosphorous loads and concentrations in both Cherry Creek and the reservoir; and

WHEREAS, the Town desires to obtain a preliminary and final design and construction contract documents for the reclamation of the approximate 2,000 linear feet of McMurdo Gulch referred to above ("Project"); and

WHEREAS, the Authority has budgeted for 2018, \$34,000 for the Project and the Town has budgeted at least \$136,000 for the Project; and

WHEREAS, the estimated total cost of the Project is \$170,000.

NOW THEREFORE, the Authority and Town agree as follows:

1. **Design of the Project.**

1.1 **General.** The Town shall cause to be prepared preliminary and final design and construction contract documents for the Project, in accordance with the Town's Request for Proposals for the Project dated March 23, 2018 which is incorporated herein by this reference ("Scope of Services").

1.2 **Request for Proposals.** The Town shall obtain competitive design proposals for the Project. The Town shall coordinate with the Authority as needed during the request for proposal process.

1.3 **Award of Contract.** After the Town has received proposals for the Project, but before a design contract is awarded, the Town shall submit to the Authority a summary of the proposals received, together with the Town's recommendation as to which Consultant should be selected for the Project. In the event the Authority rejects the Consultant recommended by the Town as well as all other proposals, the Town shall not award a contract for the Project, but shall thereafter solicit additional proposals.

1.4 **Review of Design.** The Authority shall have the right to review and approve the design and construction contract documents as well as the plans and specifications for the Project at such time as the design and construction contract documents are 80% and 100% complete. Authority's approval of the plans and specifications and construction contract documents shall not be unreasonably withheld, conditioned, or delayed.

1.5 **Design of the Project.** The Project shall be designed by a Consultant selected by the Town through the above referenced competitive bid process. Except as provided in this Agreement, all matters related to the Project shall be at the discretion of the Town. The Town agrees to use its best efforts to cause a contract for the Project to be awarded no later than May 31, 2018 and to cause the Project to be finally completed on or before July 31, 2019.

1.6 **Reports.** If requested by Authority, Town shall provide periodic updates and written reports concerning the progress of the Project. Unless otherwise

agreed, said periodic reports shall be provided to the Authority no less frequently than monthly.

1.7 Meetings. At any time, and in particular, following receipt of any periodic report, the Authority shall have the right to request a meeting with Town representatives to review any concerns or obtain any additional information that the Authority requires concerning the Project. If Authority has concerns, Town agrees that it will address those concerns as soon as practical. In the event the Authority's concerns are not addressed to Authority's satisfaction, Authority shall have the right to appeal to the Town's Engineer who shall render a final decision within 10 days from the date of the appeal. The Town Engineer's decision shall be final.

2. Authority's Contribution.

2.1 Payment of Authority Funding. The Authority shall contribute \$34,000 for the Project. The Authority shall pay to the Town the sum of \$34,000 within 30 days after execution of this Agreement by the Authority and the Town. All funds provided by the Authority shall be separately accounted for by the Town and distributed and used only in accordance with the terms and provisions of this Agreement.

2.2 Authority Budget. The Authority represents that the \$34,000 to be paid to Town within 30 days after the execution of this Agreement has been budgeted by the Authority for expenditure during 2018.

2.3 Accounting. Upon completion of the Project, the Town will provide the Authority with a final accounting for the Project's expenditures which shall describe in detail all the costs and expenses incurred by the Town for the Project.

2.4 Documentation. The Authority shall be entitled to receive a copy of all Project documents, including the final design and construction contract documents.

2.5 Refund/Reimbursement. If any of the Authority's funds are spent by the Town for any purpose other than the Project, the amount so spent shall immediately be reimbursed to the Authority by the Town. Further, if for any reason the total cost for the Project is less than \$170,000, the Authority will receive a refund in proportion to the amount of the funds contributed by the Authority in relation to the total Project cost. The amount of the Authority's refund shall be paid to the Authority within 30 days after the total Project cost has been determined.

2.6 Limit on Authority's Liability. The Authority's funds provided hereunder shall constitute the entire funding to be provided by the Authority pursuant to this Agreement. The Authority shall not be a party to any design or construction contract nor shall the Authority have any payment or other obligation under said contracts. The

Authority's sole liability hereunder shall be to contribute the Authority's funds in accordance with the terms and provisions of this Agreement.

3. **Ownership.**

3.1 **Design.** The design and construction contract documents prepared for the Town shall be the property of the Town, but copies shall be made available to the Authority upon request.

4. **Miscellaneous.**

4.1 **Term of the Agreement.** Subject to the provisions of paragraph 4.2, this Agreement shall be effective upon execution by the Parties and shall remain in effect until the Project is completed.

4.2 **Survival of Terms and Conditions.** The Parties understand and agree that all terms and conditions of this Agreement that require continued performance, compliance, or effect beyond the termination date of this Agreement shall survive such termination date and all Parties shall remain bound by this Agreement until all of their respective obligations hereunder have been completely performed.

4.3 **TABOR.** The Parties understand and acknowledge that the Authority is subject to Article X, Section 20 of the Colorado Constitution ("TABOR"). The Authority represents to Town that it has budgeted and appropriated sufficient funds to meet the Authority's obligations hereunder provided in this Agreement for calendar year 2018. No provision of this Agreement, however, shall be construed or interpreted as creating any indebtedness or multiple fiscal year direct or indirect debt or other financial obligation whatsoever of Authority within the meaning of any Constitutional or statutory debt provisions, including without limitation Article X, Sections 1, 2, and 6, and Article X, Section 20 of the Colorado Constitution. This Agreement shall not directly or indirectly obligate the Authority to make any payment beyond the funds legally available to it for the then current fiscal year. No provision of this Agreement shall be construed to create or pledge a lien on any class or source of monies of the Authority, nor shall any provision of this Agreement restrict or limit the discretion of the Authority in budgeting and appropriating its funds. By way of explanation and not limitation, the Authority's obligations hereunder arising in any subsequent calendar year or portion thereof are expressly contingent upon and subject to the Authority's prior adoption of a budget and appropriation of funds for this Agreement for such calendar year or portion thereof, as required by the local government budget law of Colorado, Section 29-1-101, C.R.S., et seq.

4.4 **Indemnification.** To the extent permitted by law, the Town hereby covenants and agrees to indemnify, defend, save and hold harmless the Authority from any and all liability, loss, costs, charges, penalties, obligations, expenses, attorney's fees,

litigation, judgments, damages, claims and demands of any kind whatsoever incurred in connection with or arising out of any violation of this Agreement by Town or of any law, ordinance or regulation of Douglas County, the State of Colorado or the Town; or by reason of any injury or property damage occurring to any person or persons whomever as a result of the construction of the Project. Town's obligations hereunder shall be limited to the extent that is permitted by law to do so.

4.5 No Waiver of Governmental Immunity. Nothing contained in this Agreement shall be construed to waive, limit or otherwise modify any governmental immunity that may be available by law to the Authority, its officers, employees, contracts or agents, or any person acting on behalf of the Authority and in particular governmental immunity afforded or available pursuant to the Colorado Governmental Immunity Act, Title 24, Article 10, Part 1 of the Colorado Revised Statutes.

4.6 No Third Party Beneficiaries. Nothing contained in this Agreement is intended to or shall create a contractual relationship with, or cause of action in favor of, or claim for relief for, any third party, including any agent, subconsultant or subcontractor of a party. Absolutely no third party beneficiaries are intended by this Agreement. Any third party receiving a benefit from this Agreement is an incidental and unintended beneficiary only.

4.7 No Agency or Other Relationship. This Agreement is not intended to create any partnership or agency between the Parties.

4.8 Default. Every term and condition of this Agreement shall be deemed to be a material element of this Agreement. In the event either Party shall fail or refuse to perform according to the material terms of this Agreement, such Party may be declared in default by the other Party by a written notice.

4.9 Governing Law. This Agreement shall be governed by and interpreted in accordance with the laws of the State of Colorado.

4.10 Assignment and Release. All or part of the rights, duties, obligations, responsibilities or benefits set forth in this Agreement shall not be assigned by a Party without the express written consent of the other Party, which consent may be withheld for any or no reason.

4.11 Integration and Amendment. This Agreement represents the entire integrated Agreement between the Authority and the Town and supersedes all prior negotiations, representations or agreements, either written or oral. Any amendments to this Agreement must be in writing and must be signed by both the Town and the Authority.

4.12 Notices. Unless otherwise specifically required by a provision of this Agreement, any notice required or permitted by this Agreement shall be in writing and shall be deemed to have been sufficiently given for all purposes if sent by certified mail or registered mail, postage and fees prepaid, addressed to the Party to whom such notice is to be given at the address set forth below or such other address as has been previously furnished in writing to the other Party. Such notice shall be deemed to have been given when deposited in the U.S. mail properly addressed to the intended recipient.

If to Authority: Chuck Reid, Manager
Cherry Creek Basin Water Quality Authority
c/o R.S. Wells, LLC
8390 E. Crescent Parkway, Suite 500
Greenwood Village, CO 80111

with a copy to: Timothy J. Flynn, Esq.
Collins Cockrel & Cole
390 Union Boulevard, Suite 400
Denver, CO 80228-1556

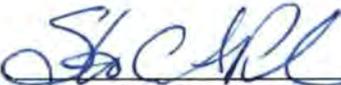
If to Town: David Van Dellen
Town of Castle Rock
100 Wilcox Street
Castle Rock, CO 80104

with a copy to: Robert Slentz
Town of Castle Rock
100 Wilcox Street
Castle Rock, CO 80104

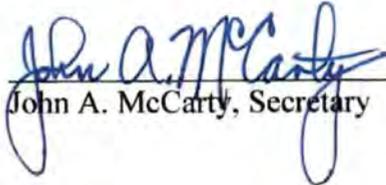
4.13 Counterparts. This Agreement may be executed in any number of counterparts, each of which shall be deemed an original and all of which together shall constitute the Agreement of the Parties.

IN WITNESS WHEREOF the Parties have executed this Agreement as of the day and year first above written.

CHERRY CREEK BASIN WATER
QUALITY AUTHORITY

By: 
Stephanie Piko, Chair

Attest:


John A. McCarty, Secretary

TOWN OF CASTLE ROCK

By: 
David L. Corliss, Town Manager

Attest:


Lisa Anderson, Town Clerk



Approved as to Content:

By: 
Mark Marlowe, Director of Castle
Rock Water

Approved as to form:


Town Clerk