

**FIRST AMENDMENT TO  
PARTICIPATION AGREEMENT  
FOR DESIGN OF STREAM RECLAMATION IMPROVEMENTS  
FOR  
McMURDO GULCH  
(2020/21/22 Project)**

**THIS FIRST AMENDMENT TO PARTICIPATION AGREEMENT FOR DESIGN OF STREAM RECLAMATION IMPROVEMENTS FOR MCMURDO GULCH** (“First Amendment”) is entered into this \_\_\_ day of \_\_\_\_\_, 2021 to be effective as of \_\_\_\_\_ 2021 (“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**, effective October 20, 2020, Authority and Town entered into that certain Participation Agreement for Design of Stream Reclamation Improvements for McMurdo Gulch for the Project as hereinafter defined (“Participation Agreement”); and

**WHEREAS**, pursuant to the Participation Agreement, Authority contributed \$75,000 to Town for the preparation of a preliminary and final design and construction documents for the reclamation of approximately 3,700 linear feet for that certain McMurdo Gulch Project known as the 2020/21/22 McMurdo Gulch Stream Reclamation Project (“Project”); and

**WHEREAS**, design of the Project is well under way, but may not be completed by the Town by the July 1, 2021 completion date set forth in the Participation Agreement; and

**WHEREAS**, the Town anticipates awarding a contract for the construction of the Project before the end of 2021, with a construction completion date in the summer of 2022; and

**WHEREAS**, the Town has requested that the Authority contribute \$540,000.00 of funds budgeted by the Authority for construction of this Project for 2021; and

**WHEREAS**, in its 2021 budget, the Authority budgeted \$540,000.00 for construction of the Project with the understanding that the Authority intended to contribute 25% of the Total Project Cost (i.e., the cost of design, permitting and

construction), but that the Authority's total contribution to the Total Project Cost would not exceed \$615,000.00; and

**WHEREAS**, the Authority recognizes that reclaiming streams tributary to Cherry Creek, like McMurdo Gulch, helps to preserve and protect water quality in Cherry Creek and in the Cherry Creek Reservoir ("Reservoir") by reducing the phosphorus loads and concentrations in both Cherry Creek and the Reservoir; and

**WHEREAS**, to bring the Authority's contribution to the Total Project Cost to \$615,000.00, the Authority now desires to contribute \$540,000.00 for construction of the Project; and

**WHEREAS**, the Parties desire to amend the Participation Agreement to extend the design completion date and to provide for Authority's contribution of \$540,000.00 for the construction of the Project.

**NOW THEREFORE**, the Authority and Town agree as follows:

1. **Purpose of Amendment.** The purpose of this Amendment is to provide for an extension of time for the Town to complete the design of the Project and to set forth the procedure whereby the Parties may jointly fund the construction of the Project in the amounts as set forth herein.

2. **Design of the Project.** The date for the Town to complete final design and construction contract documents for the Project is hereby extended from July 1, 2021 to December 31, 2021.

3. **Additional Authority's Contribution.** To facilitate the construction of the Project, the Authority will contribute \$540,000.00 in 2021, as more particularly set forth in paragraph 6 below.

4. **Construction of Project.**

4.1 **Construction.** Subject to paragraph 4.2 below, with input from the Authority, the Project will be constructed by a contractor selected by Town through a competitive bid process. Except as provided in this Amendment, all matters relating to the construction of the Project, shall be at the discretion of Town. Town shall use its best efforts to award a contract for the construction of the Project no later than December 31, 2021, and to cause the Project to be constructed and accepted for ownership and maintenance purposes, by the Town, on or before December 31, 2022.

4.2 **Bids.** After Town has received bids for construction of the Project and before a construction contract is awarded, Town shall submit to the Authority a summary of the bids received for the Project, together with Town's recommendation as to which contractor to award a contract for construction of the Project. The Authority shall have the right to review the bid summary and will notify Town of any objections to

Town's recommendation within five (5) days of receipt of a bid summary and Town's recommendation. Town will consider any objections raised by Authority, but Town may award a contract to a bidder as to which the Authority has objected and not withdrawn that objection after consultation with and consideration of objections of the Authority. Town will require that the construction contractor ("Contractor") provide performance and payment bonds for the Project, in the full amount of the construction price, and to name the Authority as an additional obligee on such performance and payment bonds.

If the bids for any reason are not acceptable to either Town or the Authority, and Town does not award a contract for the construction of the Project, all funds paid by the Authority to Town under paragraph 6 below shall be returned to the Authority as soon as reasonably practical and this Amendment shall be considered null and void as to those portions of the Amendment relating to the construction of the Project.

4.3 Construction in Accordance with Approved Plans. The Town shall cause the Project to be constructed in accordance with the construction plans as approved by the Town and the Authority and prepared by the design engineer retained by the Town.

4.4 Reports. Town shall provide to Authority periodic updates and written reports concerning the construction of the Project. Unless otherwise agreed, said periodic reports shall be provided to the Authority no less frequently than monthly.

4.5 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 to review any Authority concerns or obtain any additional information that Town has concerning the Project. If the Authority has concerns, Town agrees that it will address those concerns as soon as practical, but in no event later than twenty (20) days from the date such concerns are raised by the Authority and delivered in writing to Town. In the event the Authority's concerns are not addressed to the Authority's satisfaction, the Authority shall have a right to appeal to the Project engineer who shall render a written decision within ten (10) days from the date of the appeal. The decision of the Project engineer shall be final.

In addition to the foregoing, Town shall include Authority in construction progress meetings and meeting minutes distribution. Authority's attendance may be periodic, depending on work progress and availability of the Authority's representative.

4.6 Change Orders. In addition to the provisions set forth in paragraph 7 below, in the event there is a proposed change order to the Project, the Authority must approve the proposed change order, if as a result of the change order the Authority would be obligated to contribute funds for construction of the Project in excess of the \$540,000.00 agreed upon herein. The Authority shall have no obligation to contribute funds to the Project in excess of the \$540,000.00 authorized herein unless an appropriate

written amendment to the Participation Agreement, as amended by this First Amendment, is executed or otherwise agreed to by the Authority’s Board of Directors.

4.7 Record Drawings. Upon completion of the Project, the Town shall provide Authority with record drawings that reflect changes in constructed improvements from the design plans.

5. Authority and Town Contributions. If the Total Project Cost exceeds \$2,460,000.00, any amount of the excess shall be paid for by the Town, unless the Authority agrees voluntarily to contribute additional funds. Based upon an estimated Total Project Cost of \$2,460,000.00, the amount to be contributed by each party is as follows:

<u>Party</u>	<u>Contribution</u>	<u>Percentage of Total Project Cost</u>
Town	\$1,845,000.00 +	75%
Authority	\$ 615,000.00	25%
<u>TOTAL:</u>	\$2,460,000.00	100%

6. Payment of Authority Funds. From funds appropriated by the Authority for calendar year 2021, the Authority shall contribute \$540,000.00 (the “Authority’s Funds”) for construction of the Project. The Authority’s Funds shall be paid to Town within thirty (30) days from the date this First Amendment is executed by both Parties.

7. Use of Funds and Disbursement from Bank Accounts.

7.1 Use of Funds. Unless otherwise agreed to in writing by the Authority, the Authority’s Funds shall be used solely for the construction of the Project.

7.2 Disbursement. The Authority requires, and Town agrees, that it shall provide the Authority with a copy of each pay application for the Project so the Authority can review each pay application as set forth in paragraph 7.3. It is agreed that the Authority’s Funds will be utilized to pay 25% and no more, of each approved pay application, but in no event shall the Authority contribute more than \$540,000.00 towards construction of the Project.

7.3 Approval of Pay Application. A copy of each pay application for payment submitted by the Contractor with respect to the Project shall be provided to the Authority’s representative, who shall have five (5) days to review and approve the same. Failure of the Authority’s representative to object to any pay application within said five (5) day period shall be deemed approval of the pay application. Once a pay application has been approved, it shall be funded pro-rata from the Authority’s Funds, in accordance with the provisions of paragraph 7.2 above.

If the Authority's representative objects to all or any portion of a pay application, the Authority and Town shall immediately meet to discuss the same and resolve the issue. The Authority shall have the right to provide all input it deems relevant to any pay application and the Authority's objections shall be given due consideration by Town. If the Authority is not satisfied or still objects to a pay application after Town has made a determination, Town shall have the right to proceed with the pay application subject to Authority's contribution limit set forth in paragraph 7.2 above.

7.4 Monthly Accounting. Town shall provide a monthly accounting to the Authority, showing the amount and for what purpose the Authority's Funds were spent on the Project during the preceding calendar month. The accounting to be furnished to the Authority shall be as detailed as the Authority may reasonably require. Upon completion of the Project, Town shall also provide the Authority with a final accounting of the Project's expenditures which shall include, in detail, all costs and expenses incurred by Town in connection with the construction of the Project. If the Total Project Cost is less than \$2,460,000.00, the Authority shall be entitled to a refund of the remaining funds so that the Authority's contribution does not exceed 25% of the Total Project Cost incurred by the Town or \$615,000.00, or whichever amount is less.

## **8. Ownership and Maintenance of Project.**

8.1 Project Site. Town agrees it shall construct the Project on real property within easements the Town has obtained for the Project and/or on property the Town owns in fee, and that the Authority and Town shall have the ability to access the Project during construction and as to the Town, for maintenance purposes thereafter.

8.2 Ownership and Maintenance of the Project. Upon completion and acceptance of the Project by Town, Town shall own, operate, maintain and replace the same or shall make arrangements for the Project to be owned, operated and maintained by an appropriate governmental entity as determined by Town and approved by Authority.

8.3 Access of Authority to Project. As such time as construction of the Project is initiated, Town agrees that the Authority shall have the right of access to the Project for observation of construction activities and any subsequent general operation and maintenance, to the extent that Authority deems such access advisable.

## **9. Miscellaneous.**

9.1 Governing Law. The Parties agree this First Amendment shall be governed by and construed in accordance with the laws of the State of Colorado.

9.2 Successors and Assigns. This First Amendment shall be binding upon and inure to the benefit of the Parties and their successors, assigns, and legal representatives.

9.3 ThirdPartyBeneficiary. It is specifically agreed between the Parties executing this First Amendment that it is not intended by any of the provisions of any part of this First Amendment to create a third-party beneficiary hereunder, or to authorize anyone not a party to this First Amendment to maintain any claim under this First Amendment. The duties, obligations and responsibilities of the Parties to this First Amendment with respect to third parties shall remain as imposed by law.

9.4 EntireAgreement;Amendments. This First Amendment, including its exhibits, if any, contains the entire understanding of the Parties with respect to this subject matter hereof. The Participation Agreement, as amended by this First Amendment (“Amended Participation Agreement”) supersedes all prior agreements and understandings between the Parties with respect to its subject matter. The Amended Participation Agreement may be amended only by a written instrument duly executed by the Parties or their respective successors or assigns.

9.5 Notice and Communications. Any notice pursuant to the terms and conditions of the Amended Participation Agreement shall be in writing and delivered personally, or sent by certified mail, return receipt requested, or sent by a recognized overnight mail or courier services, with delivery receipt requested, to the following addresses (or to such other address as may from time to time be specified in writing by the Parties):

If to Authority:       Manager  
Cherry Creek Basin Water Quality Authority  
P.O. Box 3166  
Centennial, Colorado 80161

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

And a copy to:       Richard Borchardt  
R2R Engineers  
5975 S Quebec Street, Suite 225  
Centennial, Colorado 80111

If to Town:           David Van Dellen  
Town of Castle Rock  
175 Kellogg Court  
Castle Rock, Colorado 80109

And a copy to: Mike Hyman  
Town of Castle Rock  
100 Wilcox Street  
Castle Rock, Colorado 80104

Notices shall be effective when received by the party to whom addressed.

f) Designated Representative. In regard to all project documents and communications, including but not limited to, change orders, pay applications and construction contract amendments, the Authority designates Richard Borchardt and Chuck Reid, or their designees, as its representatives with each having the power to bind the Authority subject to the limitations set forth in paragraph 5; provided, however, neither of the Authority's representative shall have authority to amend the Amended Participation Agreement.

g) Default/Remedies. In the event of a breach or default of the Amended Participation Agreement by any Party, the non-defaulting party shall be entitled to exercise all remedies available at law or in equity, specifically including suits for specific performance and/or monetary damages. In the event of any litigation, arbitration or other proceeding to enforce the terms, covenants or conditions hereof, the prevailing party in such litigation, arbitration or other proceeding shall be entitled to obtain as part of its judgment or award its costs and reasonable attorneys' fees. The authorization by Town of a payment to the construction Contractor that has been objected to by the Authority, shall constitute a breach of the Participation Agreement as amended hereby, if Town's approval was unreasonable under the circumstances.

h) Force Majeure. Wherever there is provided in the Participation Agreement as amended hereby, a time limitation for performance by the Parties for any obligations related to the design and construction of the Project, the time provided therefore shall be extended for as long as and to the extent that the delay in compliance with such limitation is due to an act of God, strikes, labor disputes, inability to obtain labor or materials or reasonable substitutes therefor, fire or other casualty and other causes beyond the control of the Parties.

i) Counterpart Execution. This First Amendment may be executed in counterparts, each of which shall be deemed an original, and all of which together shall constitute one and the same instrument.

j) Governmental Immunity. Nothing herein shall be construed as a waiver of the rights and privileges of Authority or Town pursuant to the Colorado Governmental Immunity Act, § 24-10-101, *et seq.*, C.R.S., as amended from time to time.

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

**CHERRY CREEK BASIN WATER QUALITY AUTHORITY**, a quasi-municipal corporation and political subdivision of the State of Colorado

By: William P. Russo  
Name: William P. Russo  
Title: CO-Manager  
Date: 10/28/2021

Attest: Richard G. Borchardt

Name: Richard G. Borchardt  
Title: Pollution Abatement Project Manager  
Date: October 28, 2021

**TOWN OF CASTLE ROCK**, a Colorado municipal corporation

By: \_\_\_\_\_  
Jason Gray, Mayor

Attest:

\_\_\_\_\_  
Lisa Anderson, Town Clerk

Approved as to Form:

\_\_\_\_\_  
Mike Hyman, Town Attorney