

**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 ___ day of _____, 2020 by and between the **Cherry Creek Basin Water Quality Authority** (“Authority”) and the **Town of Castle Rock**, a Colorado municipal corporation (“Town”). The Authority and the 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, the Authority was established for the purpose of preserving and protecting the water quality in 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 and construct stream reclamation and other water quality improvements; and

WHEREAS, pursuant to a Participation Agreement entered into on or about December 15, 2009, as amended by a First Amendment entered into on or about March 16, 2011, the Authority participated in the improvement of approximately 2.84 miles of McMurdo Gulch; and

WHEREAS, in 2016, Muller Engineering identified additional areas of McMurdo Gulch in need of reclamation (“Muller Report”); and

WHEREAS, pursuant to a Participation Agreement dated to be effective June 16, 2018, as amended by a First Amendment, dated to be effective June 4, 2019, (collectively, the “2019 Participation Agreement”), Authority participated with the Town in the reclamation of approximately 2,000 additional linear feet of McMurdo Gulch; and

WHEREAS, in connection with the restructuring of the Town’s five-year Capital Improvement Program, the Town combined the areas of McMurdo Gulch identified in the Muller Report as Project Priority 2 and Project Priority 3 into a single project now known as the 2020/21/22 McMurdo Gulch Stream Reclamation Project (“Project”); and

WHEREAS, the Authority budgeted \$60,000 as its contribution toward the design of the Project in the Authority's 2020 Budget; and

WHEREAS, the Town has asked the Authority to increase its planned contribution toward the design of the Project from the \$60,000 to \$75,000 with the expectation that the Authority will budget \$540,000 in calendar year 2021 for the construction of the Project, which is currently estimated to cost approximately \$2,160,000; and

WHEREAS, the estimated cost to design the Project is \$300,000 with the Town funding \$225,000 of that amount and the Authority funding \$75,000 of that amount, as hereinafter provided.

NOW THEREFORE, the Authority and Town agree as follows:

1. **Design of the Project.**

1.1 **Design Procured by the Town.** The Town is causing or has caused a preliminary and final design and construction contract documents for the Project to be prepared by Muller Engineering Company, Inc., pursuant to a contract that was awarded by the Town on January 7, 2020 and subsequently amended on July 6, 2020. Muller was selected in accordance with the Town's competitive selection process.

1.2 **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 of the Project, which approval shall not be unreasonably withheld, conditioned or delayed.

1.3 **Reports.** Unless the design and construction contract documents have been finalized, the Authority, if it requests, shall be provided with periodic reports by the Town which include written updates as to the progress of the design of the Project. Unless otherwise agreed, said periodic reports shall be provided to the Authority no less frequently than monthly.

1.4 **Meetings.** At any time during the Design Phase of the Project, 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 has concerning the design of the Project. If the Authority has concerns, the Town agrees that it will address those concerns as soon as is reasonably practical. In the event the Town's concerns are not addressed to the Authority's satisfaction, the Authority shall have the right to appeal to the Town's Stormwater Director, who shall render a final decision within 10 days from the date of the appeal. The Town's decision will be final.

2. **The Authority's Contribution.**

2.1 **Payment of the Authority Funding.** The Authority shall contribute \$75,000 for the design of the Project. The Authority shall pay to the Town the sum of \$75,000 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 **The Authority Budget.** The Authority represents that the \$75,000 to be paid to the Town within 30 days after the execution of this Agreement has been budgeted by the Authority for expenditure during 2020, either specifically, or as part of a contingency fund.

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

2.4 **Documentation.** The Authority shall be entitled to receive a copy of all design 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 design of 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 design of Project is less than \$300,000, the Authority will receive a refund in proportion to the amount of the funds contributed by the Authority in relation to the total cost for the design of the Project. The amount of the Authority's refund shall be paid to the Authority within 30 days after the total Project design cost has been determined. In the alternative, the Authority at its option, may elect to apply any refund to which it is entitled, to the Authority's proportionate share of the Project's construction cost.

2.6 **Limit on the Authority's Liability.** The Authority's funds provided hereunder shall constitute the entire funding to be provided by the Authority for the design of the Project. 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 **2019 Participation Agreement/Time Extension.** The Parties agree that the construction period for the 2,000 linear foot project, which is the subject of the 2019 Participation Agreement is hereby extended from July 1, 2020 to July 1, 2021.

4.2 **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 design of the Project is completed.

4.3 **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.

4.4 **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 2020. 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 the 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 calendar 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.

4.5 **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 applicable 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 design of the Project.

4.6 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 Parties, their officers, employees, contracts or agents, or any person acting on behalf of the Parties 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.

4.7 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.

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

4.9 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.

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

4.11 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.

4.12 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.

4.13 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 the Authority: Chuck Reid, Manager
Cherry Creek Basin Water Quality Authority
PO Box 3166
Centennial, CO 80161

with a copy to: Richard G. Borchardt PE, CFM
R2R Engineers
5975 S Quebec Street, Suite 225
Centennial, Co. 80111

And 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:

¶ Michael Hyman, Esq.
Town Attorney
Town of Castle Rock
100 Wilcox Street
Castle Rock, CO 80104

4.14 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:  _____
Joshua Rivero, Chair

Attest:

Chuck Reid

Chuck Reid, Manager

TOWN OF CASTLE ROCK

By: _____
Title: Jason Gray, Mayor

Attest:

Lisa Anderson, Town Clerk

Approved as to form:

Michael J. Hyman, Town Attorney