

FRICO–BRIGHTON AGREEMENT TO BYPASS WATER

THIS AGREEMENT is entered into by THE FARMERS RESERVOIR AND IRRIGATION COMPANY, a Colorado mutual ditch company with offices located at 80 South 27th Avenue, Brighton, Colorado 80601 (“FRICO”) and the CITY OF BRIGHTON, a Colorado municipal corporation located at 500 South 4th Avenue, Brighton, Colorado 80601 (“Brighton”). FRICO and Brighton may be individually referred to as a “Party” or collectively referred to as the “Parties.”

RECITALS:

- A. FRICO owns and operates, for the benefit of its shareholders, a number of reservoirs and canals located in Denver, Adams, Boulder, Jefferson, and Weld Counties, Colorado. As pertinent to this Agreement, FRICO owns and operates the Burlington-O’Brian Canal, located in Denver and Adams Counties.
- B. The BURLINGTON DITCH, RESERVOIR AND LAND COMPANY, a Colorado mutual ditch company (“Burlington”), and the HENRYLYN IRRIGATION DISTRICT, an irrigation district organized under the Irrigation District Law of 1921 (“Henrylyn”), each own interests in certain of the facilities that may be used for purposes of this Agreement. Burlington, Henrylyn, and FRICO are collectively referred to in this Agreement as “Three-Way.”
- C. Brighton desires to deliver water rights it owns or controls, for all legal uses, (“Brighton Water”) through the headgate of the Burlington-O’Brian Canal, approximately 900 feet of lined canal, and the bypass gate installed in the canal in 2016, located approximately 900 feet down-ditch from the Burlington-O’Brian Canal headgate (“FRICO’s Facilities”) during times when FRICO, Burlington, or Henrylyn are individually or collectively diverting the entire flow of the South Platte River (or all of such flow except amounts that are required by court decree or administrative order to be bypassed).

NOW, THEREFORE, the Parties agree as follows:

AGREEMENT:

- 1. Representations and Warranties.
 - 1.1. FRICO represents and warrants that it is authorized by Burlington and Henrylyn to enter into and perform all of its obligations under this Agreement, for itself and for and on behalf of and to the extent that those entities’ rights are affected by this Agreement. FRICO, Burlington, and Henrylyn have agreed, by separate agreement, that FRICO shall be solely responsible for the performance of this Agreement on behalf of Three-Way and, as agent for collection, FRICO shall solely be responsible for the agreed allocation of appropriate payments to Burlington and Henrylyn. Brighton shall have no liability, whether directly or indirectly, to Burlington or Henrylyn, including any obligation to make payment

hereunder to them. Brighton agrees, for purposes of this Agreement only, to rely upon FRICO as the sole authorized representative of Burlington and Henrylyn.

- 1.1.1. Attached hereto and identified as **Exhibit A** is the form of corporate resolution to be delivered to Brighton upon execution by Burlington and Henrylyn within thirty-one (31) days from the effective date of this Agreement, and in conformity with the provisions of Paragraph 1.1.
 - 1.2. FRICO makes no other representations or warranties about the ability of Brighton to obtain any necessary approvals for the use of water proposed by Brighton. Brighton shall be solely responsible for obtaining any and all approvals from any applicable state agency or official necessary to use and transport the Brighton Water as intended by Brighton.
 - 1.3. FRICO makes no guarantee of the quality of the water delivered pursuant to this Agreement or the water's suitability for any purposes whatsoever. Any water bypassed under this Agreement shall be delivered "as is" without any treatment by FRICO.
 - 1.4. If the bypass is approved by the Division Engineer's Office, FRICO warrants that it has the right and authority to bypass Brighton Water through FRICO's Facilities as provided in this Agreement, to enter into this Agreement and grant the rights set out in this Agreement.
 - 1.5. Brighton represents and warrants that it is authorized to enter into and perform all of its obligations under this Agreement and has taken all actions required by its respective procedures to exercise that authority and obligate its performance hereunder.
 - 1.6. Brighton understands that FRICO requires every entity desiring to bypass water through FRICO's Facilities to obtain a separate agreement from FRICO. Brighton agrees that it will only bypass water rights it owns or has the right to use. Brighton will not bypass water owned by another entity ("third party") for the benefit of a third party. Brighton may bypass Brighton Water, without limitation on the subsequent use or disposition of Brighton Water. The Parties understand and agree that the intent of the restrictions herein is not to prevent Brighton from exercising its rights under this Agreement, but rather to prevent circumvention of this Agreement through cooperation between Brighton and a third party, by utilizing water trades, lease and leaseback, or other mechanisms that purport to make the water bypassed "owned or controlled" by Brighton, when the water rights are in fact or effect owned or controlled by said third party, and the effect of the agreement with the third party is to make water available to the third party below the Burlington headgate that the third party otherwise would have to bypass in order to be able to use it below the headgate.
2. Agreement for Bypass of Water.

- 2.1. Effective Date. This Agreement shall be deemed effective as of the date it is signed by both parties and the payments described in paragraph 2.2.1 and 2.2.2 have been made.
- 2.2. Payment for Bypass. FRICO agrees to bypass Brighton Water through FRICO's Facilities pursuant to the following terms:
 - 2.2.1. No later than the Effective Date of this Agreement, Brighton shall make a one-time payment to FRICO in the amount of \$125,000, for a permanent right under this Agreement to bypass up to five cubic feet per second (5.0 c.f.s.) through FRICO's Facilities according to the terms of this Agreement; and
 - 2.2.2. No later than the Effective Date of this Agreement, Brighton shall also pay to FRICO the amount of \$25,000 as an up-front payment ("Deposit") for Brighton's pro-rata share of the operation and maintenance costs FRICO incurs operating and maintaining FRICO's Facilities to bypass water ("O&M Costs"). Brighton's pro-rata share of O&M Costs shall be three and one-third percent (3.33%), reflecting Brighton's right to use five c.f.s. of the 150 c.f.s. capacity in FRICO's Facilities for bypasses. It is anticipated that the \$25,000 Deposit will cover Brighton's share of O&M Costs until the first time FRICO's Facilities must be replaced, likely in thirty to fifty years, but Brighton's Deposit may last more or less time depending on actual O&M Costs. However, FRICO will track its actual O&M Costs and, if requested by Brighton, will provide an accounting to Brighton at any time upon reasonable notice. If Brighton's share of O&M Costs exceeds the Deposit, FRICO will invoice Brighton annually for any amounts in excess of the Deposit as described in ¶ 2.4, below. If the actual O&M Costs are less than the estimated in thirty years, then any excess Deposit will either be refunded to Brighton or applied to future O&M Costs, at Brighton's direction.
 - 2.2.3. The cost of replacing FRICO's Facilities shall be considered O&M Costs. When FRICO's Facilities must be replaced, Brighton agrees to pay its pro rata share of such costs. Unless otherwise agreed, the FRICO Facilities will be replaced with facilities of the same capacity, and Brighton shall continue to be entitled to the use of five c.f.s. of such capacity, and Brighton's pro rata share of the cost of replacement will be 3.33% of the total cost of replacement.
- 2.3. Quantification of bypassed water. Brighton is responsible for coordinating with the Division Engineer and Water Commissioner to calculate the amount of Brighton Water legally and physically available to bypass through FRICO's Facilities, after reduction for transit losses, and notifying FRICO of that amount.

- 2.3.1. FRICO Bypass of Brighton Water. The amount of Brighton Water deemed bypassed under this Agreement shall be the quantity of Brighton Water FRICO diverts from the South Platte River at the Burlington-O'Brian Canal headgate and releases back to the South Platte River through the bypass gate. The Burlington-O'Brian Canal headgate and bypass gate are each equipped with a measuring device.
 - 2.4. Billing. Once Brighton's annual share of O&M Costs, in the aggregate, exceeds the amount of its Deposit, FRICO will bill Brighton after the end of each Water Year (ending on October 31) for Brighton's pro-rata share of the annual O&M Costs described in paragraph 2.2.2 and incurred in the previous year. The invoice will detail the calculation of operation and maintenance costs incurred in the previous year and Brighton agrees to pay such invoice within thirty (30) days of receipt. In the event that FRICO's Facilities must be replaced, FRICO will notify Brighton at least 18 months in advance of proposed replacement plans for discussion and to permit compliance with budgeting obligations. Brighton agrees to make an additional deposit with FRICO in the amount of its pro rata share of the estimated cost of replacement prior to the initiation of project construction. If the actual cost of replacement is less than the estimated cost, any excess deposit will either be refunded to Brighton or applied to future O&M Costs, at Brighton's direction. If the actual cost of replacement is more than the estimated costs, Brighton will pay its pro rata share of the additional costs upon invoice from FRICO. In the event that FRICO's Facilities must be replaced due to catastrophic failure, Brighton agrees to make the additional deposit to FRICO as soon as reasonably practicable based on budgeting and approval requirements.
3. Conditions on Bypass. Bypass of Brighton Water is subject to the following conditions:
 - 3.1. Orders for Bypass and Notice to FRICO. In order for Brighton to have FRICO bypass Brighton Water through FRICO's Facilities, Brighton must give FRICO 24 hours' advance notice before it delivers Brighton Water into the South Platte River or Brighton Water is available in the South Platte River above the Burlington-O'Brian Canal headgate. Such notice shall specify when Brighton Water will be available for diversion at the Burlington-O'Brian Canal headgate, in what volume, and at what rate. Brighton is responsible for placing orders with FRICO for bypass based upon Brighton's daily needs. In the absence of a change order, Brighton shall be deemed to have ordered a bypass of Brighton Water at the rate and in the amounts last specified. Brighton shall place its order with the FRICO ditch rider during FRICO's water call hours of 11:30 A.M. to 1:00 P.M. for bypasses on the following day. If, in the event of an emergency, Brighton places a change order outside of the water call hours but during FRICO's normal business hours of 7:00 A.M. to 5:00 P.M., FRICO will attempt to fulfill the change order, but makes no guarantee that it will do so. No change order will be recognized or fulfilled by FRICO if it is placed outside of FRICO's normal business hours. Any untimely change order shall be deemed to have been ordered

as of FRICO's next water call period unless retracted before 1:00 PM of the applicable water call period.

- 3.2. Available Capacity. FRICO's obligation to bypass Brighton Water under this Agreement will be subordinate to Three-Way's existing water storage, carriage, and bypass obligations, and water rights, priorities, and accounts that Three-Way, their shareholders or others may have in FRICO's Facilities at the time of this Agreement. Bypass under this Agreement is strictly limited to the Available Capacity in FRICO's Facilities, and FRICO warrants and represents that it has Available Capacity sufficient to provide for Brighton's permitted bypass rate described in this Agreement. "Available Capacity," as used in this Agreement, shall mean that physical flow rate through the Burlington-O'Brian Canal headgate, in the first approximately 900 feet of the canal, and through the bypass gate (expressed in cubic feet per second) that may from time to time hereafter actually exist in such structures, considering in FRICO's sole discretion all relevant safety factors, and only after all legal and fiduciary obligations to Three-Way's shareholders (or landowners, in the case of Henrylyn) and existing contractual rights of third parties for such carriage, bypass and storage are satisfied. Brighton acknowledges that capacity may be temporarily unavailable if FRICO is performing maintenance or repairs on the FRICO Facilities and it shall have no claim against FRICO in such circumstances. It is Brighton's obligation to coordinate with FRICO so that Brighton Water may be bypassed at times when there is Available Capacity in FRICO's Facilities.
- 3.3. Notice to Division Engineer and Water Commissioner. Any time Brighton plans to deliver or convey Brighton Water in the South Platte River, Brighton must first provide notice to the Division Engineer or Water Commissioner and also provide a copy of that notice to FRICO. Brighton is responsible for coordinating with the Division Engineer and Water Commissioner to determine the time, volume, and rate at which Brighton Water is available at FRICO's Burlington-O'Brian Canal headgate. FRICO will bypass Brighton Water according to the Division Engineer's or Water Commissioner's determination of available Brighton Water at the Burlington-O'Brian Canal headgate.
- 3.4. Force Majeure. No Party to this Agreement shall be liable for any delay or failure to perform due solely to conditions or events of force majeure, as that term is defined in this paragraph; provided that: (i) the non-performing Party gives the other Party prompt written notice describing the particulars of the force majeure; (ii) the suspension of performance is of no greater scope and of no longer duration than required by the force majeure event or condition; and (iii) the non-performing Party proceeds with reasonable diligence to remedy its inability to perform. As used in this Paragraph, "force majeure" shall mean any delay or failure of performance under this Agreement caused by events beyond a Party's reasonable control and without the fault or negligence of the Party, including, without limitation, (a) acts of God, (b) sudden actions of the elements such as floods, earthquakes, hurricanes, or tornadoes, (c) sabotage, (d) vandalism beyond

that which can be reasonably prevented by the Party, (e) terrorism, (f) war, (g) riots, (h) fire, (i) explosion, (j) blockades, (k) insurrection, (l) strike, slow down or labor disruptions (even if such difficulties could be resolved by conceding to the demands of a labor group), (m) denial or revocation of any governmental or regulatory permit, agreement, or approval necessary to perform under this Agreement, (n) freezing conditions that prevent the conveyance of water through FRICO's Facilities, (o) disruptions or breakdowns in ditches or other of FRICO's Facilities, or (p) governmental restriction, denial, or moratoria related to the issuance of necessary permits or approvals to conduct FRICO's or Brighton's operations. To the extent either Party's performance is excused by an event of force majeure, the other Party's corresponding obligation to perform shall likewise be excused.

3.5. Rate of Bypass. Unless otherwise agreed in writing, Brighton's bypass shall not exceed five (5) cubic feet per second (c.f.s.) ("permitted bypass rate").

3.6. FRICO Operation, Measurement and Accounting.

3.6.1. The operation of all of FRICO's Facilities, the measurement of all water conveyed through FRICO's Facilities, and the accounting for all water bypassed under this Agreement shall be performed by FRICO personnel, using pre-existing measurement structures, in a manner and timeliness consistent with practices used to serve existing FRICO shareholders. All ditch operations, including all operations of the ditch headgates and sand-out gates on the South Platte River and all operations of the facilities to carry Brighton Water into and out of FRICO's Facilities, shall be carried out by FRICO's ditch superintendent or other employees under his supervision.

3.6.2. FRICO shall maintain records of measurement of flow rates and volumes of water diverted and bypassed pursuant to this Agreement, and such records shall be available for inspection by Brighton during normal business hours with at least two business days' advance notice. The level of accuracy of such measurements shall be consistent with the accuracy of measurements taken and provided to FRICO's shareholders and to the State Engineer's Office.

3.6.3. In the event that any portion of any bill is in dispute, the undisputed amount shall be paid. The Parties shall attempt to resolve the dispute amicably and promptly. Upon determination of the correct billing amount, the proper adjustment shall be paid or refunded within ten (10) days of the determination.

3.7. Consequential Damages Not Available. Notwithstanding any other provision contained herein, neither Party shall be liable to the other for consequential, indirect, special or punitive damages, howsoever arising, including but not limited

to loss of profits, revenues or production, EVEN IF CAUSED, IN WHOLE OR IN PART, BY THE JOINT, SOLE, OR CONCURRENT NEGLIGENCE, STRICT LIABILITY (INCLUDING ANY PRE-EXISTING DEFECTS), CONTRACTUAL OBLIGATIONS OF AN INDEMNIFYING PARTY UNDER THIS AGREEMENT TO DEFEND AND INDEMNIFY OR OTHER FAULT, WHETHER PASSIVE OR ACTIVE, OF ANY PERSON OR ENTITY, INCLUDING BUT NOT LIMITED TO THE PARTIES INDEMNIFIED. A Party may be liable to the other for consequential, indirect, special or punitive damages arising out of intentional or grossly negligent conduct.

4. General.

- 4.1. Entire Agreement. This Agreement constitutes the entire agreement of the Parties with respect to the matters described, and shall not be altered, amended or extended except in writing executed with the same formality as this Agreement. Neither Party has relied upon any fact or representation not expressly set forth herein. This Agreement supersedes all other prior agreements and understandings of any type, both written and oral, among the Parties with respect to the subject matter hereof.
- 4.2. Notices. Notice under this Agreement shall be in writing and deemed to have been sufficiently given for all purposes if sent by certified or registered mail, postage and fees prepaid, addressed to the party to whom such notice is intended to be given at the address set forth below, which notice is effective upon receipt. Alternatively, notice may be given by email, facsimile, delivery service or hand delivery. All notices delivered by facsimile, recognized overnight delivery service, or hand delivery shall be deemed effective upon: (i) the successful transmission of the facsimile; (ii) one day after deposit with a recognized overnight delivery service; or (iii) upon receipt by hand delivery. All notices sent by email shall be deemed delivered upon successful receipt of the email message. The electronic transmission of any signed original document, and transmission or retransmission of any signed electronic transmission, shall be the same as delivery of an original. At the request of either Party, the Parties hereto shall confirm electronic transmitted signatures by signing an original document for delivery between them. Any Party may change its address by giving notice in the manner provided hereunder.

If to Brighton:	If to FRICO:
City of Brighton Attn: Curtis Bauers 500 S. 4th Avenue Brighton, Colorado 80601 Telephone: 303-655-2033 Facsimile: Email: Cbauers@brightonco.gov	General Manager 80 South 27th Avenue Brighton, Colorado 80601 Telephone: 303-659-7373 Facsimile: 303-659-6077 Email: scott@farmersres.com

With a copy to: Brent A. Bartlett, Esq. Sara J.L. Irby, Esq. Fischer, Brown, Bartlett & Gunn 1319 E. Prospect Road Fort Collins, CO 80525 Telephone: 970-407-9000 Facsimile: 970-407-1055 E-mail: brentbartlett@fbgpc.com E-mail: sarairby@fbgpc.com	With a copy to: Joseph B. Dischinger, Esq. Fairfield and Woods, P.C. 1801 California Street, Suite 2600 Denver, CO 80202-2645 Telephone: 303-894-4404 Facsimile: 303-830-1033 E-mail: jdischinger@fwlaw.com
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- 4.3. Representatives. The operating representatives non-exclusively authorized to communicate concerning this Agreement, including directions or communications concerning bypass of water and other related administrative matters concerning this Agreement from day-to-day and time-to-time shall be as follows:

If to Brighton: Name Telephone: Email: Followed by email or facsimile confirmation.	If to FRICO: For the Barr Lake Division: Tom Schupman Telephone: 303-944-6371 Email: fricotom@wildblue.net Followed by email or facsimile confirmation to FRICO's General Manager.
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The foregoing contact information may be changed by written notice.

- 4.4. Applicable Law and Venue. This Agreement shall be governed by the laws of the State of Colorado. Venue for any legal action arising out of or concerning this Agreement shall be the District Court for the City and County of Denver.
- 4.5. No Assignment or Sublease. This Agreement shall not be assignable, nor may Brighton sublease its rights under this Agreement. If Brighton desires to assign or sublease its rights under this Agreement, it must first receive written approval from FRICO's General Manager and pay additional consideration. The decision to allow an assignment or sublease of this Agreement shall be in FRICO's sole discretion, and FRICO may deny an assignment or sublease for any reason or no reason.

- 4.6. Authority. Each Party represents that it has full authority to execute and perform under this Agreement, and has taken all steps necessary to obtain full authority.
- 4.7. Prevailing Party. In the event either Party commences suit to recover damages arising from a breach of this Agreement or otherwise to seek enforcement hereof, the prevailing party shall be entitled to an award of reasonable attorneys' fees, together with court costs and litigation expenses reasonably incurred and actually paid. Brighton expressly waives any protection against the payment of court costs resulting from its status as a governmental entity.
- 4.8. Amendments. This Agreement may not be amended (nor may any of its terms be waived) except and only by writing signed by both Parties.
- 4.9. Execution in Counterparts. This Agreement may be executed in counterparts, each of which shall be considered to be an original, but all of which together shall constitute one and the same Agreement.
- 4.10. Waiver. The waiver of any provision of this Agreement by any Party hereto shall not constitute a continuing waiver of any subsequent breach of said Party, for breach of either the same or any other provision of this Agreement.
- 4.11. Further Assurances. The Parties shall execute such additional documents, instruments and assurances as may be reasonably required from time to time to carry out the terms and intentions of this Agreement.
- 4.12. Binding Effect. This Agreement and the rights and obligations created hereby shall be binding upon and shall inure to the benefit of the Parties hereto and their respective successors and assigns.
- 4.13. No Third-Party Beneficiaries. This Agreement is intended to describe the rights and responsibilities of and between the Parties, and, notwithstanding Paragraph 1.1, is not intended to, and shall not be deemed to, confer rights or obligations upon any persons or entities not signatories hereto, nor to limit, impair or enlarge in any way the powers, regulatory authority and responsibilities of either Party or any other governmental entity not a Party hereto.
- 4.14. No Partnership. Nothing contained in this Agreement shall be deemed or construed by the Parties or by any third person to create the relationship of principal and agent, partnership, joint venture or any other association between the Parties.
- 4.15. No Conveyance. Nothing contained in this Agreement shall be deemed or construed by the Parties or by any third person to constitute the conveyance of any interest in real property, including but not limited to any water rights, mineral rights, or easements.

- 4.16. Severability and Effect of Partial Invalidity. If any provision or portion of this Lease or the application thereof to any person or circumstance shall, at any time or to any extent, be declared invalid or unenforceable for any reason by a court of competent jurisdiction, and the basis of the bargain between the Parties hereto shall not be destroyed or rendered ineffective thereby, the remainder of this Agreement, or the application of such provisions to persons or circumstances other than those as to which it is held invalid or unenforceable, shall not be affected thereby.
- 4.17. Brokerage. The Parties warrant and represent to each other that no commission liability has been incurred by any Party and that neither Party has engaged the services of any agent, finder or broker of any type involved in transactions contemplated by this Agreement. Each Party shall defend, indemnify, protect and hold the other, and its partners, employees, agents, representatives, affiliates successors and assigns harmless from any and all demands, claims, actions, causes of action, damages, losses, liabilities, obligations, costs and expenses, including, without limitation, attorneys' fees, arising out of, resulting from or relating to any act, event or occurrence relating to the assertion of any brokerage fee, commission or other claim of compensation arising from this Agreement by the claimed acts of the indemnifying party.
- 4.18. No Fees and Expenses and Apportionment. Except as may otherwise expressly be set forth in this Agreement, each Party shall bear its own costs and expenses, including legal fees, in connection with the transactions and activities contemplated by this Agreement.
- 4.19. Recitals and Exhibits. The recitals to this Agreement and all exhibits attached, if any, are incorporated herein by this reference.
- 4.20. Headings for Convenience Only. Paragraph headings and titles are intended for convenience and reference only and are not intended to define, limit or describe the scope or intent of any provision of this Agreement.
- 4.21. Non-Business Day. If the date of any action under this Agreement shall fall upon a Saturday, Sunday or a day that is a holiday, as defined by the Colorado Rules of Civil Procedure, then the relevant date shall be extended automatically until the next day that is not a Saturday, Sunday or a holiday.
- 4.22. Interpretation. The negotiation and preparation of this Agreement has been a collaborative drafting effort between the Parties who agree that the terms of this Agreement shall not be interpreted more stringently against one Party as compared to the other Party based upon authorship.

AGREED as of the Effective Date set forth in Paragraph 2.1 above.

Attest:

THE FARMERS RESERVOIR AND IRRIGATION
COMPANY

By: _____
Heidi Garner, Secretary

By: _____
Scott Edgar, General Manager

Date: _____

Attest:

CITY OF BRIGHTON

By: _____

By: _____
Curtis Bauers, Director of Utilities

Date: _____

END OF AGREEMENT

[EXHIBIT A FOLLOWS]