

## **WATER AND STORAGE LEASE AGREEMENT**

This Water and Storage Lease Agreement (“Agreement”) is made and entered into this \_\_\_ day of April 2018 (the “Effective Date”) by and between The Farmers Reservoir and Irrigation Company, a Colorado mutual ditch company (“FRICO”) and the City of Brighton, a home rule municipal corporation in the County of Adams (“Brighton”). FRICO and Brighton are sometimes collectively referred to as the “Parties” or separately as a “Party”.

### **RECITALS**

- A.** Brighton is a Colorado home rule municipal corporation that operates a water supply and delivery system for the benefit of its constituents.
- B.** FRICO is a Colorado mutual ditch company that operates a raw water supply and delivery system for the benefit of its shareholders.
- C.** Brighton owns the Ken Mitchell Lakes Storage Complex and Ergers Pond reservoirs.
- D.** Brighton seeks to acquire fully consumable water that can be stored in Ken Mitchell Lakes and Ergers Pond.
- E.** FRICO anticipates having fully consumable water available for lease to Brighton.
- F.** FRICO desires to lease storage space in Ken Mitchell Lakes and to obtain the right to use the water stored in Ken Mitchell Lakes and/or Ergers Pond as described in this Agreement.
- G.** In exchange for FRICO’s lease of fully consumable water supplied to Brighton, Brighton is willing to lease FRICO storage space in Ken Mitchell Lakes Cell 3.

**NOW, THEREFORE,** in consideration of the mutual covenants and agreements contained in this Agreement, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged by the Parties, FRICO and Brighton agree as follows:

1. Term. The initial term of this Agreement shall be for seven (7) years commencing on the Effective Date and terminating on May 1, 2025 (“Termination Date”).
2. Lease of Fully Consumable Water. In exchange for the temporary use of storage space, FRICO agrees to provide Brighton with a total of approximately 4,400 acre-feet of fully consumable water at the locations and during the delivery periods described below (“Leased Water”). The intent of the Parties is to fill Ergers Pond and Ken Mitchell Lakes to capacity. Brighton shall take delivery of the Leased Water at Ergers Pond and Ken Mitchell Lakes in the amounts and pursuant to the

schedule set forth herein. Brighton shall bear all seepage and evaporation losses following the delivery of the Leased Water to Ergers Pond and Ken Mitchell Lakes.

- a. Delivery Schedule. FRICO agrees to provide Brighton with approximately 1,724 acre-feet of fully consumable water delivered to Ergers Pond as early as possible after March 31, 2019 and prior to May 1, 2020. FRICO will also provide Brighton with approximately 2,691 acre-feet of fully consumable water delivered to Ken Mitchell Lakes (Cell 3) as soon as possible after March 31, 2024 and prior to May 1, 2025. FRICO shall make delivery of the water at a rate not to exceed 50 c.f.s.
- b. Source of Leased Water. The source of the Leased Water shall be either 5K Water held by FRICO, or water diverted by FRICO under free river conditions. The source of the Leased Water may be other than 5K Water or free river water only by mutual, written agreement of the Parties. 5K Water shall be subject to the Settlement Agreement dated August 31, 1999 (“Settlement Agreement”), and the Amendment to the Settlement Agreement dated September 8, 2006 (“Amended Settlement Agreement”). The source of the 5K Water, per the Settlement Agreement, is reusable effluent, water released from gravel pits, lawn irrigation return flows, transmountain diversions, fully consumable water and other reusable water that is selected at the discretion of Denver Water. Brighton shall be responsible for securing any necessary approvals prior to re-using or successively using any 5K Water that is part of the Leased Water or Additional Leased 5K Water. To the extent that any portion of the 5K Water made available to FRICO derives from the decree in Case No. 01CW285, FRICO will coordinate with Brighton to ensure that no portion of the 5K Water, if any, that is derived from the decree in Case No. 01CW285 is delivered to Brighton under this Lease.
- c. Water Quality. The Leased Water delivered to Brighton under this Agreement is untreated, non-potable water. FRICO makes no warranty, express or implied, concerning the quality of the Leased Water. FRICO expressly disclaims any implied warranties of the Leased Water’s merchantability or fitness for a particular purpose or otherwise.
- d. Restrictions on Use of Leased Water. The Leased Water is “fully consumable” insofar as the water may be completely consumed during its first use. Brighton shall be responsible for securing any necessary approvals prior to re-using or successively using the Leased Water. In the event FRICO’s 5k Water is used as the source of supply for the Leased Water, to the extent applicable to Brighton’s use hereunder, Brighton shall also comply with all provisions of the Settlement Agreement, including any amendments thereto, between the City and County of Denver, FRICO, Henrylyn Irrigation District and Burlington Ditch Reservoir and Land Company dated August 31, 1999 that are related to the 5k Water.

3. Lease Option of Additional 5K Water. Brighton has a first option to lease any additional 5K water available to FRICO at a price of \$120 per a.f. during the term of this Agreement (the “Additional Leased 5K Water”).
  - a. No guarantee of Timing, Flow Rate or Volume of Additional Leased 5K Water. FRICO shall use its best efforts to provide the Additional Leased 5K Water to Brighton pursuant to the Delivery Schedule outlined above. Except as described in Section 2.a, FRICO expressly disclaims any warranty or guarantee as to the availability of the Leased Water or Additional Leased 5K Water in timing, flow rate, or volume, as such availability will be affected by factors outside of FRICO’s direct control.
  
4. Lease of Storage Space in Ken Mitchell Lakes Cell 3. Brighton agrees to lease to FRICO the immediate right to use all of the storage capacity in Cell 3 of Ken Mitchell Lakes, being approximately 2,691 acre-feet, from the effective date of this Agreement until November 1, 2022.
  - a. Source of Stored Water and Restriction on Use. FRICO may store any water lawfully available for storage including, but not limited to, 5k Water, water diverted under free river conditions, and other water owned, leased or controlled by FRICO. FRICO agrees that none of the stored water may be used by FRICO to supply industrial or commercial users, including but not limited to oil and gas industry users, in Brighton’s service area boundary without Brighton’s consent (City of Brighton Service Area Boundary Map Attached).
  - b. Use of Delivery and Release Structures. FRICO agrees to install and pay all costs and expenses related to the pumping equipment, appurtenant structures, utilities, and operations thereof, as necessary for delivery of water into and release of water out of Ken Mitchell Lakes Cell 3 under the supervision, review and approval of Brighton. During the process of Brighton’s approval of such delivery and release structures, the Parties will negotiate in good faith concerning which structures may be removed by FRICO upon expiration of the storage rights of FRICO in Ken Mitchell Cell 3 under this agreement, and which shall become the property of Brighton.
  - c. Reserved Minimum Storage. FRICO shall maintain a minimum amount of water stored in Cell 3 of Ken Mitchell Lakes, in the amount of 600 acre-feet, until September 2022.
  - d. Operation, including Release of Stored Water. FRICO shall be solely responsible for the operation of Ken Mitchell Lakes Cell 3 when it is operating the delivery and release of FRICO’s stored water under this Agreement, including accounting, out-of-priority unmeasured inflows and evaporation. FRICO shall notify Brighton each time it intends to deliver or

release water that FRICO has stored in Ken Mitchell Lakes Cell 3. The notice shall specify the volume and rate at which FRICO determines it will deliver or release said water. FRICO remains responsible for conveying or otherwise transporting the water to its ultimate place of beneficial use.

- e. Water Rights. FRICO is responsible for assuring that all of the water FRICO delivers may be legally diverted and stored in Ken Mitchell Lakes Cell 3.
5. Existing Ergers Pond and Ken Mitchell Water and Storage. By agreement of the Parties, as of the Effective Date of this Agreement, FRICO has taken control of approximately 1,075 acre-feet of free river water in Ergers Pond and released approximately 800 acre-feet of said water from Ergers Pond. As part of this Agreement, FRICO agrees to fully drain Ergers Pond, by trenching and excavating to a common pumping location. FRICO will also be required to release the remaining water, from the original 1,075 acre-feet delivered, once said trenching and excavating are complete, and as soon as practicable, but in no event later than May 31, 2018. FRICO also will be permitted to take control and use the remaining water existing in Cell 3 of Ken Mitchell Lakes as of the Effective Date of this Agreement.
6. No Conveyance. Nothing in this Agreement shall be deemed or construed to constitute the conveyance of any interest in real property, including but not limited to, water rights or interests.
7. Notice of Default and Right to Cure. If a Party defaults under any of the terms of this Agreement, the non-defaulting party shall provide the defaulting party written notice of the default. The defaulting party shall have thirty (30) days after receipt of notice to cure the default before the non-defaulting party may pursue any other available remedy to enforce this Agreement.
8. Notices and other Communications. Notice under this Agreement, including payments and other communications, must be in writing and will be 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, delivery service, or hand delivery. All notices delivered by recognized overnight delivery service or hand delivery shall be deemed effective on (i) one day after deposit with a recognized overnight delivery service, or (ii) upon receipt by hand delivery. All notices sent by email shall be deemed delivered on successful receipt of the email message. The electronic transmission of any signed 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 electronically 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.

Farmers Irrigation and Reservoir Company:

Farmers Irrigation and Reservoir Company  
Attn: Scott Edgar, General Manager  
80 South 27<sup>th</sup> Avenue  
Brighton, Colorado 80601  
Telephone: (303) 659-7373  
Email: scott@farmersres.com

City of Brighton:

Attn: Utilities Director  
500 S. 4<sup>th</sup> Avenue  
Brighton, Colorado 80601  
Telephone: (303) 655-2033  
Email: [cbauers@brightonco.gov](mailto:cbauers@brightonco.gov)

With Copy To:

City Manager  
500 S. 4<sup>th</sup> Avenue  
Brighton, Colorado 80601  
Telephone: (303) 655-8747  
Email: prodriguez@brightonco.gov

9. General Provisions.

- a. Assignment. The rights and obligations provided for under this Agreement are unique and specific in relation to the Parties. This Agreement may not be assigned by a Party without the prior written consent of the other Party, which consent is within the sole and absolute discretion of the other Party.
- b. Binding Agreement. This Agreement and all the terms and conditions herein shall be binding upon the successors, legal representatives, and assigns of the Parties.
- c. Captions. The captions and headings in the Agreement are for convenience of reference only and shall not be used to interpret, define, or limit its provisions.
- d. Counterparts. This Agreement may be executed in counterparts, each of which (or combination of which), when signed by both Parties shall be deemed an original, but both together shall constitute one agreement.
- e. Entire Understanding. This Agreement represents the complete integration of all understandings between the Parties and all prior representations and understandings, oral or written, are merged herein. Prior or

contemporaneous additions, deletions, or other changes hereto shall not have any force or effect whatsoever, unless embodied herein.

- f. Force Majeure. Each Party shall be excused from performance under this Agreement while and to the extent that it is unable to perform for any cause beyond its reasonable control. Such causes shall include, but not be restricted to, fire, drought, storm, flood, earthquake, explosion, war, labor disputes, total or partial failure of transportation or delivery facilities. In the event either Party is rendered unable wholly or in part by force majeure to carry out its obligations under this Agreement, either Party shall have the right to terminate this Agreement upon written notice to the other Party.
- g. Governing Law and Venue. This Agreement shall be governed and enforced in accordance with the laws, and rules and regulations issued pursuant thereto, of the State of Colorado. Any provision included or incorporated herein by reference which conflicts with said laws, rules, and regulations shall not be valid or enforceable or available in any action at law, whether by way of complaint, defense, or otherwise. Venue for any action regarding this Agreement shall be in the District Court for Adams County, Colorado or Water Court as appropriate.
- h. No Relationship. The Parties expressly understand and agree that nothing in this Agreement is intended to create a relationship, express or implied, of employer-employee, joint ventures, or principal-agent between FRICO and Brighton.
- i. Legal Counsel. Each Party to this Agreement has engaged legal counsel to negotiate, draft and/or review this Agreement. Therefore, in the construction and interpretation of this Agreement, the Parties acknowledge and agree that it shall not be construed against any Party on the basis of authorship.
- j. Modification.
  - i. By the Parties. Except as specifically provided in the Agreement, modifications hereof shall not be effective unless agreed to by the Parties in a written amendment hereto.
  - ii. By Operation of Law. This Agreement is subject to such modifications as may be required by changes in Federal or Colorado State Law, or their implementing regulations. Any such required modification shall be automatically incorporated as part of the Agreement on the effective date of such change, as if fully set forth herein.

- k. 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, provided, however, the Party commencing suit has first complied with ¶ 7 above and the defaulting party has failed to cure the default within the time provided in ¶ 7 above, 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.
- l. Survival. If any clause or provision of this Agreement is illegal, invalid or unenforceable under present or future laws or decrees effective during the term of this Agreement, then and in that event, it is the intention of the Parties that the remainder of this Agreement shall not be affected thereby.
- m. Third Party Enforcement. The terms and conditions of this Agreement, and all rights of action relating thereto, are strictly reserved to the Parties, and nothing in this Agreement shall give or allow any claim or right or cause of action whatsoever by any other person not included in this Agreement. Any person and/or entity, other than the Parties, receiving services or benefits under this Agreement shall be deemed an incidental beneficiary only.
- n. Waiver. A waiver of a breach of any provision of this Agreement shall not waive any subsequent breach of the same or different provision of this Agreement. Any Party's failure in any one or more instances to insist upon strict performance of any of the terms and conditions of this Agreement or to exercise any right herein conferred shall not be construed as a waiver or relinquishment of that right or of that Party's right to assert or rely upon the terms and conditions of this Agreement. Any express waiver of a term of this Agreement shall not be binding and effective unless made in writing and properly executed by the waiving Party.

**IN WITNESS WHEREOF**, the Parties have executed this Agreement effective as of the Effective Date.

THE FARMERS RESERVOIR  
AND IRRIGATION COMPANY

By: \_\_\_\_\_  
Scott Edgar, General Manager

CITY OF BRIGHTON

By: \_\_\_\_\_  
Philip Rodriguez, City Manager