

**SETTLEMENT AGREEMENT BETWEEN THE COUNTY OF BOULDER AND  
THE DENVER BOARD OF WATER COMMISSIONERS  
for the GROSS RESERVOIR EXPANSION PROJECT**

THIS SETTLEMENT AGREEMENT ("Agreement") is entered into by and between the COUNTY OF BOULDER, acting by and through its Board of County Commissioners ("County" or "Boulder County"), a body politic of the State of Colorado, whose address is 1325 Pearl Street, Boulder, Colorado, 80302, and the City and County of Denver, acting by and through its BOARD OF WATER COMMISSIONERS ("Denver Water"), a municipal corporation of the State of Colorado, whose address is 1600 West 12th Avenue, Denver, Colorado, 80204 (collectively, the "Parties").

- A. Denver Water operates as a municipal water utility that provides water to 1.5 million customers in the City and County of Denver and in many communities throughout the Denver metropolitan area.
- B. Denver Water is proposing to construct the Gross Reservoir Expansion Project ("Project") by enlarging Gross Reservoir, located in unincorporated Boulder County on South Boulder Creek. The Project aims to store additional water resources for Denver Water's customers and increase the reliability, flexibility, and resilience of Denver Water's raw water collection system.
- C. In July 2020, the Federal Energy Regulatory Commissioner ("FERC") issued an Order amending Denver Water's hydropower license and directing Denver Water to proceed with the Project. FERC's 2020 Order requires construction work on the Expansion Project to commence within two years of issuance (i.e., by July 2022) and finish within seven years of issuance (i.e., by July 2027).
- D. Gross Reservoir and Dam reside on federal and private land situated within Boulder County. On or about July 14, 2021, Denver Water initiated litigation in the U.S. District Court for the District of Colorado ("District Court") against Boulder County, entitled *CITY AND COUNTY OF DENVER, ACTING BY AND THROUGH ITS BOARD OF WATER COMMISSIONERS v. BOULDER COUNTY, ACTING BY AND THROUGH ITS BOARD OF COUNTY COMMISSIONERS, and MATT JONES, CLAIRE LEVY, AND MARTA LOACHAMIN*, in their official capacity as Commissioners. Case No. 21-cv-01907-RBJ ("Civil Action"), alleging that, under the Federal Power Act, the Federal Energy Regulatory Commission's ("FERC") Order directing Denver Water to proceed with the Project preempts Boulder County's 1041 permit process and requirements.
- E. The Parties desire to enter into this Agreement to provide for final resolution of the Civil Action and/or any claims related to the same, upon the terms and conditions set forth in this Agreement.

NOW THEREFORE, in light of the above recitals, the Parties agree to the terms and conditions set forth in this Agreement.

1. Motion to Dismiss. Within ten days of the Parties' execution of this Agreement, Denver

Water will file a motion to dismiss its claims in Case No. 21-cv-01907-RBJ – *City and County of Denver, acting by and through its Board of Water Commissioners v. Boulder County, acting by and through its Board of County Commissioners, et. al.*, without prejudice and with all parties to the litigation to bear their own costs and fees. Boulder County will support the motion.

2. Reduce Impacts to Residents. Boulder County is concerned that numerous households in the vicinity of the Project may experience an increase in noise, light, and/or dust generated by various aspects of the Project. Residents and other road users may also be impacted by traffic delays and traffic noise.

2.1. Denver Water will provide \$5,000,000 for a fund to mitigate noise, light, and air impacts to households near the Project. Boulder County will administer the fund and will develop standards or formulas for the fund that ensure a fair and equitable distribution of the money based on the expected type and severity of the noise, light, and/or air impacts to eligible households. Boulder County will use a publicly accessible website to post the standards or formulas and account for all claims on and payments out of the fund in a manner sufficient to show that the standards or formulas are being followed. Boulder County may use money from the fund to offset administrative costs for the fund and/or to hire a consultant to develop the standards or formulas and an appropriate program for distribution of the funds. Any money remaining in the fund at Project completion will be retained by Boulder County for use on projects that would benefit the community living near the Project.

2.2. Denver Water will use its best efforts to reduce noise at the source. Upon receiving noise complaints from residents, Denver Water will examine sources of onsite noise and attempt to resolve the complaints. Denver Water will freely share information with the County about the complaints it receives and steps Denver Water has taken to reduce noise.

2.3. Denver Water will establish and follow a dust mitigation program for all dust-generating construction activities. Denver will use its best efforts to respond to dust complaints from neighbors. Denver Water will freely share information with the County about its dust mitigation measures and responses to complaints.

2.4. To reduce traffic and associated carbon emissions, Denver Water will develop an onsite quarry to develop both the sand and gravel and the roller compacted concrete for the Project. The quarry will be located away from homeowner viewsheds and, upon completion, it will be mostly submerged, with any footprint above the reservoir level being reclaimed according to the Quarry Reclamation Plan on file with FERC. Denver Water will abide by all commitments related to the onsite quarry in the plans submitted to FERC and those plans shall be enforceable through FERC enforcement mechanisms.

2.5. To reduce the amount of diesel power generators on site, Denver Water will use onsite electrical line power for dam construction work, the concrete batch plant, and office complex. If sufficient onsite electrical line power is unavailable from Xcel, Denver Water may use generators until sufficient power is available from Xcel.

2.6. No Project related cement or fly ash truck hauling traffic will occur during school

bus operating hours as defined in the Project's Traffic Management Plan on file with FERC (7:00-8:30am and 3:00-4:30pm on weekdays). Denver Water will abide by all commitments in the Traffic Management Plan submitted to FERC and those plans shall be enforceable through FERC enforcement mechanisms.

2.7. Denver Water will restrict work hours for road construction so that road construction traffic does not occur between 7:00-8:30 am and 3:00-4:30 pm on weekdays or on federal holidays (except for Columbus Day). Work zones that will incorporate this approach include shoulder widening on SH72 at the Gross Dam Road intersection, roadway grading on Gross Dam Road at the SH72 intersection, and various areas with curve widening along Gross Dam Road. Denver Water will also coordinate work hours to minimize lane closures between 7:00-8:30 am and 3:00-4:30 pm on weekdays.

2.8. Denver Water will work cooperatively with the Boulder County Sheriff to establish a fifth amendment to Agreement No. 501315. Denver Water and the Sheriff will consider any additional law enforcement expenses anticipated as a result of the Project in negotiating the amendment.

2.9. Denver Water will consider changes to its Recreation Management Plan on file with FERC if those changes would address resident concerns related to parking and recreational traffic, such as the provision of additional parking at other locations, shuttles to other locations, and reservation systems to avoid congestion. To the extent Denver Water decides to pursue any such changes, Denver Water will seek confirmation from Boulder County that it supports such changes prior to seeking any changes from FERC.

3. Reduce Impacts to Roads. Boulder County is concerned that current road conditions may not safely accommodate the traffic that the Project will generate, including an increase in large truck traffic.

3.1. Denver Water will improve the intersection at SH72 and Gross Dam Road to accommodate the expected traffic vehicles and type. All road improvements shall comply with Boulder County's Multimodal Transportation Standards. Denver Water has provided Boulder County detailed design plans for the intersection improvements, and the Boulder County Engineer does not anticipate substantial changes to the design proposed by Denver Water.

3.2. Denver Water will improve narrow curves along Gross Dam Road as permanent safety improvements. Denver Water will be responsible for obtaining all easements necessary to accommodate construction of the new improvements. Upon the County's request at the conclusion of construction, Denver will transfer the easements to the County.

3.3. For improvements that Denver Water will construct on permanent County roads as well as Denver Water-owned portions of Gross Dam Road, Denver Water will meet Boulder County's Multimodal Transportation Standards. In circumstances where the steep mountainous terrain makes compliance with the standards unfeasible, Denver Water will submit plans to Boulder County's Public Works Department for review of a design exception.

3.4. Denver Water will require that haulers, shuttle drivers, and other frequent drivers to the site complete a bike awareness training approved by the County. Denver Water will establish 5 "truck free" days a year for cyclists except during the dam raise portion of the Project.

3.5. Denver Water will work cooperatively with the Timberline FPD, Coal Creek Canyon FPD, Mountain View FPD, and Nederland FPD to offset anticipated increased costs for emergency calls resulting from the Project. The parties anticipate that Denver Water will reach separate agreements with these fire districts based on the increased costs reasonably anticipated to result from the Project. Denver Water will freely share such agreements with Boulder County.

3.6. Denver Water will establish a staging area near the intersection of SH72 and SH93 to receive trucks delivering materials (such as fly ash) and equipment to the Project site. The contractor will use the site as needed to control the frequency of trucks traveling through Coal Creek Canyon to reduce congestion.

3.7. Denver Water will implement the ridesharing program identified in its Traffic Management Plan on file with FERC and will make best efforts to go beyond 50% rideshare. Denver Water will abide by all commitments in the Traffic Management Plan on file with FERC and that plan shall be enforceable through FERC enforcement mechanisms. Denver Water will freely share information with the County about its ridesharing program.

4. Reduce Impacts to County Recreation Areas. Boulder County is concerned that, during construction, recreational uses of the reservoir will redirect to County open space. After construction, some areas of the reservoir previously used for recreation will no longer be available.

4.1. Denver Water will provide \$50,000/year during recreation closure of the reservoir to Boulder County Parks and Open Space to be used for additional rangers, communication, staff, signage, shuttles, and similar measures. Denver Water also agrees to work collaboratively with the County to make Denver Water ranger staff available to help manage overflow issues during peak times or critical recreation closures.

4.2. Boulder County Parks and Open Space may use a portion of the funds specified in section 5.1 below for trail construction/maintenance or other Parks and Open Space projects intended to offset increased recreation on County open space land and reduced recreation opportunities.

4.3. Denver Water will convey easements over land owned by Denver Water to allow for trail connections in the area of Gross Dam Reservoir, except that Denver will not convey easements that would interfere with its operations or site security. Boulder County Parks and Open Space will work with Denver Water to agree upon appropriate trail connection easements.

5. Land Preservation. Boulder County is concerned that the Expansion Project will inundate approximately 424 acres of forested land and cause the removal of approximately 234,000 trees.

The area is home to many terrestrial animals, habitats for rare and sensitive species of flora and fauna, and other biodiversity. As partial mitigation for the loss of 268 acres of United States Forest Service (USFS) land, Denver Water participated in the acquisition and conveyance to USFS of 539 acres of the Toll Property, located in Gilpin County.

5.1. Denver Water will allocate \$5,100,000 to a fund that the County will use for acquisitions of fee properties, conservation easements, and trail corridors.

5.2. Denver Water will transfer to Boulder County ownership of 70 acres of land it owns adjacent to Walker Ranch Open Space, the approximate location of which is shown in Exhibit A. Prior to the transfer, Boulder County may perform a due diligence review of the 70 acres and refuse the transfer based on the review. The land will be deed restricted for open space/conservation use.

6. Riparian and Sensitive Habitat Restoration. Boulder County is concerned that the inundation of land will result in the loss of about 1.2 miles of perennial creek, as well as the loss of seasonal creeks and habitat at the edge of the existing reservoir. Denver Water performed the South Boulder Creek Restoration Project and has also used wetland credits to offset the Project's impact around Gross Reservoir. Denver Water will allocate funds to pay for the restoration of the South Saint Vrain Creek on the Hall Ranch Lyons Quarry site (a former andesite mine). Denver Water will contribute \$1,000,000 toward the restoration project, which will be undertaken by Boulder County and will restore 0.5 miles of creek corridor that is currently of low habitat value. Any funds remaining at the end of the South Saint Vrain Creek restoration project may be used by the County for other riparian or wetland projects in the South Boulder Creek watershed.

7. Carbon Impact. Boulder County is concerned that, in addition to the 26,606 CO<sub>2</sub>e of carbon emission predicted from the construction work itself, carbon impacts will result from the use of approximately 898,000 cubic yards of concrete (approximately 160,000 MTO<sub>2</sub>e of carbon) and from tree removal (the carbon-related impacts could vary substantially depending on whether the trees are turned into biochar, used in construction, burned as pellets, or incinerated on site). Once completed, the Project is estimated to generate an additional 4,404,597 kilowatt-hours per year of emission-free hydropower being sent to the grid, which Denver Water equates to 2,823 tons of carbon per year in avoided emissions.

7.1. Denver Water will work with Boulder County to develop a pilot program aimed at minimizing the carbon impact of forest 'waste' from Project. The pilot program will not require the implementation of measures that will prolong the construction schedule or exceed a \$250,000 contribution from Denver Water. In addition to Denver Water's \$250,000 contribution, Boulder County also may use part of the funds specified in 7.3 for the pilot project if it wishes to do so. Denver Water will allow Boulder County to use produced carbon ash or biochar in restoration, agricultural, carbon-sequestration, or other projects. Denver Water also agrees to stay in communication with the County regarding other possible methods to productively dispose of the material in a way that would benefit the County or its residents, such as pellets, cord wood, or Christmas tree events.

7.2. Denver Water will undertake an analysis of opportunities to reduce impacts in the creation of concrete for the Project, such as the use of low-embodied concrete. Denver

Water will freely share with Boulder County its analysis. Denver Water will employ any practical opportunities to reduce impacts in the creation of concrete without compromise to the design, construction, or durability of the concrete.

7.3. Denver Water will pay the County an offset amount of \$1,250,000. The County will use this money to create a climate innovation/impact fund to:

7.3.1. Fund projects that responsibly and sustainably drawdown carbon dioxide from the atmosphere with guidance from experts to assess critical issues such as additionality, leakage, and durability (permanence). The priority will be direct investment in local/regional carbon offsetting and carbon-removal projects that are able to be third party verified with the goal to remove or offset a majority of the Project's greenhouse gas emissions. If localized projects are not viable or cannot fully offset the Expansion Project's impact, Boulder County will use the recently developed Oxford Principles for Net- Zero Aligned Carbon Offsetting to secure high-quality carbon offset projects outside of our region.

7.3.2. Support for other local restoration and climate stabilization projects such as the following:

7.3.2.1. Projects that enhance and regenerate soils through soil carbon sequestration;

7.3.2.2. Projects that mitigate wildfire risk, including creating and using biochar with forest residue/waste;

7.3.2.3. Programs that support workforce development such as the Climate Conservation Corp which focuses on land stewardship and restoration;

7.3.2.4. Boulder County services and programs that provide energy efficiency and renewable energy to residents and businesses in Boulder County;

7.3.2.5. Climate change policy work;

7.3.2.6. The acceleration of the adoption of electric vehicles and installation of electric vehicle charging stations.

7.3.2.7. The biochar pilot project specified in section 7.1.

7.3.3. Denver Water will ensure that there will be no interruption to normal stream flow through the reservoir to downstream water users during construction.

7.3.4. Denver Water agrees that it will not use water from the Project outside its service area, except as specified in the Colorado River Cooperative Agreement ("CRCA"). Denver Water further agrees to limit geographical growth to its existing service area (not including existing raw water contracts) as specified in

the CRCA. Boulder County is not a party to or a third-party beneficiary of the CRCA.

7.3.5. Denver Water will continue to promote water conservation and continue to explore and implement programs that help its customers become more efficient. This provision in no way constrains the Board of Water Commissioners' discretion to review and adopt specific water conservation measures. Examples of such efforts include:

- 7.3.5.1. Summer water restrictions with permanent three-day watering rules.
- 7.3.5.2. Use of recycled water for parks, golf courses, schools, and power plants.
- 7.3.5.3. Requiring those who use more water than typical households pay a higher rate.
- 7.3.5.4. Sending Summer Watering Rules direct mailer to all customers and Distributor customers every year regardless of weather conditions.
- 7.3.5.5. Providing single-family customers with monthly communications with options to increase water use efficiency.
- 7.3.5.6. An efficiency campaign that sets indoor (40 gallons per person per day) and outdoor (12 gallons per square foot per year on landscaped areas) benchmarks for smart water use.
- 7.3.5.7. Offering outdoor irrigation audits to single-family residents in conjunction with nonprofit Resource Central.
- 7.3.5.8. Partnering with "Garden In A Box" to sell customers native landscapes to use in refashioning their yards.
- 7.3.5.9. Providing water budget management tools for large commercial and industrial customers.
- 7.3.5.10. Working with the City & County of Denver to align the policy of metro area water, wastewater, and stormwater services in ways to increase efficient use, including opportunities for turf replacement.

8. Boulder County's Obligations.

8.1. Denver Water asserts that, because of the federal permitting requirements applicable to the Project and the Project's FERC license, Boulder County lacks the authority to require a permit under Article 8 of the Boulder County Land Use Code (aka, Boulder County's "1041 Regulations"). In final settlement of Denver Water's federal

preemption claim and in consideration for Denver Water's commitments in this Agreement, Boulder County agrees not to dispute that, under the unique circumstances particular to this case, it lacks the authority to require Denver Water to obtain a permit under Boulder County's 1041 Regulations.

8.2. Boulder County will maintain records related to all funding provided by Denver Water to the County and will make such records available to Denver Water upon written request for auditing purposes.

8.3. Boulder County staff will process any other required permits on a timely basis. Boulder County staff will process any required County permits based on a schedule developed by Denver Water and the County. The Parties will develop a schedule by December 3, 2021. If Denver Water submits complete permit application materials according to the schedule, Boulder County staff will issue permits for the Project components identified in the schedule, including permits and approvals for road work, buildings, and grading activities, in time for the Project to begin no later than April 1, 2022. Denver Water will pay Boulder County's permit fees (including staff review time) and inspection fees related to such permits. The County understands the importance of completing the dam raise portion of the Project in two construction seasons.

8.4. Within ten days of the settlement becoming effective as specified in section 9.1, Boulder County will file a notice of withdrawal or motion to withdraw as *amicus curiae* with the United States Court of Appeals for the Tenth Circuit in *Save the Colorado et al v. Lieutenant General Scott A Spellmon et al*, Case No. 21-1155 stating that, because it has reached a settlement with Denver Water to resolve the dispute over the 1041 permit process, it no longer takes a position on the appeal.

9. Timing of Denver Water Commitments.

9.1. This Agreement will not become effective until the District Court grants the motion specified in section 1 and the Civil Action has been dismissed without prejudice.

9.2. All of Denver Water's commitments are contingent on the Project moving forward to construction after final award of a construction contract. If Denver Water's Board of Water Commissioners does not award a construction contract or the Project otherwise does not proceed to construction, Denver Water shall have no obligations to Boulder County and Boulder County shall have no obligations to Denver Water. Denver Water's commitments in 4.3, 5.1, 5.2, 6, and 7.3 shall not become effective unless and until Denver Water has begun construction on the dam raise portion of the Project (anticipated in 2024). Denver Water's other commitments will become effective once Boulder County has issued all permits necessary for the Project to begin construction by April 1, 2022.

10. Definition of "best efforts". The term "best efforts" requires Denver Water to make a reasonable, diligent, and good faith effort to accomplish the objective. It does not require Denver Water to take steps that would involve a commercially unreasonable expenditure of funds.

11. Notice. All notices required or given under this Agreement shall be in writing and shall be deemed effective: a) when delivered personally or sent via electronic mail to the other party; or b)



three (3) days after posting in the United States mail, first-class postage prepaid, properly addressed as follows.

To Denver Water:  
Jessica Brody  
General Counsel  
Denver Water  
1600 West 12<sup>th</sup> Avenue  
Denver, Colorado 80204  
Jessica.brody@denverwater.org

To Boulder County:  
Ben Pearlman  
County Attorney  
P.O. Box 471  
Boulder, CO 80306  
bpearlman@bouldercounty.org

Or such other persons or addresses as the Parties may have designated in writing.

12. Entire Agreement. This Agreement, including any exhibits, contains the entire contract and agreement between the Parties concerning the Project and supersedes all prior understandings, all of which are by execution of this Agreement rendered null and void.

13. No Admissions. This is an agreement to resolve disputed claims in litigation. No Party to this Agreement admits any fault or liability, and no Party admits the accuracy of the others' factual or legal assertions, predictions, or concerns, including (but not limited to) assertions regarding the nature or degree of impacts resulting from the Project.

14. No Third-Party Beneficiaries. This Agreement is for the sole benefit of the Parties and nothing in this Agreement, express or implied, is intended to or shall confer upon any other person or entity any legal or equitable right, benefit, or remedy of any nature whatsoever under or by reason of this Agreement. Only the Parties to this Agreement may enforce its terms.

15. Amendments. This Agreement may be modified by an agreement in writing duly authorized and executed by the Parties with the same formality, and subject to the same statutory and regulatory requirements, as this Agreement.

16. Default. If either Party is in default of any material terms of this Agreement, the non-defaulting Party may elect to treat this Agreement as terminated, in which case the non-defaulting Party may recover damages, as well as all other remedies available under law, including injunctive relief and/or specific performance. No such default shall be deemed to exist until the defaulting Party has been given notice of the alleged default and fails to remedy such default within 30 days after receipt of notice and there is a determination by a court of competent jurisdiction that there has been a breach of this Agreement.

17. Venue and Governing Law. The validity and effect of this Agreement shall be determined

in accordance with the laws of the State of Colorado. To the extent authorized by law, venue for any litigation associated with this Agreement shall be in Jefferson County District Court.

18. Force Majeure. The parties shall not be responsible for any failure or delay in the performance of any obligations under this Agreement solely caused by the following events: natural disaster, flood, fire, drought, war, or public enemy. Events not listed in the preceding sentence, including, but not limited to, epidemics such as the current COVID-19 pandemic, economic conditions, and labor strikes, shall not be considered force majeure events. As a condition precedent to invoking this force majeure clause, the invoking party must provide timely written notice detailing the reasons why the force majeure event has made performance under the original contract terms impossible, and the invoking party must immediately take all reasonable measures to mitigate or avoid damages to the other party.

19. Charter of the City and County of Denver. This Agreement is made under and conformable to Article X of the Charter of the City and County of Denver; which controls the operation of the Denver Municipal Water System. Insofar as applicable, the Charter provisions are incorporated by this reference and shall supersede any apparently conflicting provisions otherwise contained in this Agreement.

20. Governmental Immunity Act. The Parties are relying upon, and have not waived, the monetary limitations and all other rights, immunities and protections provided by the Colorado Governmental Immunity Act, C.R.S. § 24-10-101, *et seq.*, as it may be amended from time to time.

21. Counterparts. This Agreement may be executed in any number of counterparts, each of which shall be deemed an original, and all of which shall constitute one and the same agreement. Facsimile signatures shall be acceptable to and binding upon all Parties.

22. Electronic Signatures and Records. The Parties consent to the use of electronic signatures. The Agreement, and any other documents requiring a signature hereunder, may be signed electronically in the manner specified by Denver Water. The Parties agree not to deny the legal effect or enforceability of the Agreement solely because it is in electronic form or because an electronic record was used in its formation. The Parties agree not to object to the admissibility of the Agreement in the form of an electronic record, or a paper copy of an electronic document, or a paper copy of a document bearing an electronic signature, on the ground that it is an electronic record or electronic signature or that it is not in its original form or is not an original.

IN WITNESS WHEREOF, the Parties have executed this Agreement with their signatures below.

**CITY AND COUNTY OF DENVER,**  
acting by and through its  
**BOARD OF WATER COMMISSIONERS**

ATTEST

\_\_\_\_\_  
Jim Lochhead, CEO/Manager

\_\_\_\_\_  
Gary Reiff, President

\_\_\_\_\_  
Jessica R. Brody, General Counsel

Date: \_\_\_\_\_

REGISTERED AND COUNTERSIGNED:  
AUDITOR, CITY AND COUNTY OF DENVER

By: \_\_\_\_\_

**COUNTY OF BOULDER**, a body corporate and politic

*Matt Jones*  
\_\_\_\_\_  
Matt Jones, Chair

ATTEST


*Ben Pearlman*  
\_\_\_\_\_  
Ben Pearlman, County Attorney


IN WITNESS WHEREOF, the Parties have executed this Agreement with their signatures below.

**CITY AND COUNTY OF DENVER,**  
acting by and through its  
**BOARD OF WATER COMMISSIONERS**

ATTEST

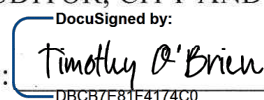
  
Jim Lochhead, CEO/Manager

  
Gary Reiff, President

  
Jessica R. Brody, General Counsel

Date: 11/3/2021

REGISTERED AND COUNTERSIGNED:  
AUDITOR, CITY AND COUNTY OF DENVER

By:   
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DS

**COUNTY OF BOULDER**, a body corporate and politic

\_\_\_\_\_  
Matt Jones, Chair

ATTEST

\_\_\_\_\_  
Ben Pearlman, County Attorney



