

RESOLUTION No.2020-12-07

APPROVING A COMMON INTEREST, JOINT DEFENSE, AND CONFIDENTIALITY AGREEMENT WITH THE NORTHERN INTEGRATED SUPPLY PROJECT WATER ACTIVITY ENTERPRISE

WHEREAS, the City of Fort Morgan, Colorado, is a participant in the Northern Integrated Supply Project (NISP); and,

WHEREAS, the Northern Integrated Supply Project Water Activity Enterprise is a government-owned business within the meaning of Article X, Section 20(2)(d) of the Colorado Constitution, organized pursuant to Colorado Revised Statutes 37-42.5-101, et seq, and owned by the Northern Colorado Water Conservancy District and multiple governmental entities, including the City of Fort Morgan; and,

WHEREAS, NISP is developing a water project (the "Project") for the purpose of developing a new reliable water supply for the beneficial use of the City and other entities on the Eastern Slope of the state of Colorado; and,

WHEREAS, all costs and benefits of the Project will be divided among the City and other entities that participate in the Project, and all parties are interested in and will be affected and/or benefitted by the development, construction and operation of the Project; and,

WHEREAS, the NISP participants anticipate the possibility of legal challenges relating to the development, construction or operation of the Project; and,

WHEREAS, to that end, the City has been approached with an agreement to confirm the existence of a common interest among the parties and NISP participants in the development, construction and operation of the Project, in order to allow and encourage the free exchange of information between participants, share research, investigation and opinions, and reduce legal and engineering fees, by considering work performed by and communication between the parties and participants to be perceived pursuant to the joint defense doctrine and subject to the "common interest privilege;" and,

WHEREAS, the City wishes to execute the Common Interest, Joint Defense, and Confidentiality Agreement with the Northern Integrated Supply Project Water Activity Enterprise, a copy of which Agreement is attached hereto as **Exhibit A**, and incorporated herein by this reference.

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF FORT MORGAN, COLORADO:

Section 1. The Fort Morgan City Council incorporates the foregoing recitals as its conclusions, facts, determinations, and findings.

Section 2. The City Council hereby approves and authorizes the Mayor to execute the Common Interest, Joint Defense, and Confidentiality Agreement with the Northern Integrated Supply Project Water Activity Enterprise, a copy of which Agreement is attached hereto as **Exhibit A**.

INTRODUCED, PASSED, APPROVED AND ADOPTED this 15th day of December, 2020, the vote upon roll call being as follows:


Ayes: Mayor Protem Anderson, Councilmembers Deal, Kaper, Lindell, Schossow and Urdiales.

Nays: None.

Absent, Abstain Mayor Shaver, Absent - Excused



THE CITY COUNCIL OF THE CITY OF
FORT MORGAN, COLORADO

BY: 
Ronald Shaver, Mayor

ATTEST:

John Brennan, City Clerk

STATE OF COLORADO)
COUNTY OF MORGAN) ss.
CITY OF FORT MORGAN)

CERTIFICATE

I, John Brennan, City Clerk of the City of Fort Morgan, Colorado, do hereby certify that the above and foregoing **Resolution** is a true, perfect and complete copy of the **Resolution** adopted by the City Council and is identical to the original thereof appearing in the official records of the City of Fort Morgan, Colorado, and that the same has not been, since its adoption, in any respect, rescinded or amended.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the City of Fort Morgan this 15th day of December 2020.


John Brennan, City Clerk

Exhibit A

**Common Interest, Joint Defense, and Confidentiality Agreement with the Northern
Integrated Supply Project Water Activity Enterprise**

COMMON INTEREST, JOINT DEFENSE, AND CONFIDENTIALITY AGREEMENT

This Common Interest, Joint Defense, and Confidentiality Agreement ("Agreement") is made and entered into on _____, by and among the Northern Integrated Supply Project Water Activity Enterprise, a government-owned business within the meaning of Article X, §20(2)(d) of the Colorado Constitution, organized pursuant to C.R.S. § 37-42.5-101 et seq., and owned by the Northern Colorado Water Conservancy District ("NISP Enterprise"), the Northern Colorado Water Conservancy District ("Northern Water"), and the governmental entities listed on attached Exhibit A, which Exhibit may be amended by Northern Water and the NISP Enterprise from time to time to add entities that have a legal interest in NISP (sometimes referred to collectively in this Agreement as the "Parties," or individually as a "Party"). The date of this Agreement is _____.

RECITALS

- A. Northern Water and the Enterprise are in the process of developing and constructing, and will in the future operate, the Northern Integrated Supply Project, which will include, without limitation, new reservoirs, forebay reservoirs, pumping plants and pipelines (the "Project"). The Project will deliver water from the Cache La Poudre and South Platte Rivers to the Participants. The Participants are municipal water providers serving communities on the East Slope of the state of Colorado. The Participants are: Central Weld County Water District, Town of Dacono, Town of Eaton, Town of Erie, City of Evans, Town of Firestone, Fort Collins-Loveland Water District, City of Fort Lupton, City of Fort Morgan, Town of Frederick, City of Lafayette, Left Hand Water District, Morgan County Quality Water District, Town of Severance, and the Town of Windsor. The Participants will receive water through the Project.
- B. All Parties are interested in and will be affected and/or benefited by the development, construction and operation of the Project.
- C. Since at least 2004, Northern Water has been developing and permitting the Project with federal, state and local authorities, including *inter alia*, the U.S. Army Corps of Engineers, Colorado Department of Public Health and Environment, Colorado Department of Natural Resources and Larimer County.
- D. The Parties anticipate that one or more persons or entities may bring legal challenges relating to the development, construction or operation of the Project.
- E. The parties understand and agree that the purpose of this Agreement is to confirm the existence of a common interest among the Parties in the development, construction and operation of the Project, which provides benefits to the Parties including, but not necessarily limited to, the following:
 - i. Allowing and encouraging the free exchange of information by and between the signatories to this Agreement regarding development, construction and operation of the Project and prosecution or defense of legal actions challenging the Project; and

ii. Sharing of labor in connection with research, investigation, expert analysis and opinions related to the Project; and

iii. Reduction in legal fees, engineering fees, and other costs related to the Project.

AGREEMENT

1. The Parties have engaged the services of various attorneys, law firms, engineers and consultants with respect to the Project.
2. All work performed by, and all communications between, the Parties and their officers, employees, attorneys, law firms, engineers, consultants and consulting firms with respect to the development, analysis, and prosecution of the Project shall be conducted and perceived pursuant to the joint defense doctrine recognized in such cases as *Black v. Southwestern Water Conservation District*, 74 P.3d 462 (Colo. Ct. App. 2003), *Gordon v. Boyles*, 9 P.3d 1106 (Colo. 2000), and *Ritter v. Jones*, 207 P.3d 954 (Colo. Ct. App. 2009), and subject to the privilege therein described ("Common Interest Privilege").
3. The Parties may make available to each other privileged information and communications, both oral and written, including but not limited to, past and future, notes, reports, documents, memoranda, research, discussions among the Parties or their attorneys or consultants, at meetings, conferences or on telephones to investigate or to pursue a joint defense to any potential litigation or to litigation that commences; written or electronic communications between the Parties or their attorneys or consultants to investigate or to pursue a joint defense to any potential litigation or to litigation that commences; reports/analyses prepared by the Parties or their attorneys or consultants for any potential litigation or for any litigation that commences; and written and oral communications to or from the Parties and their attorneys or consultants, all in connection with the Project relating to the respective representations of the Parties, ("Common Interest Information"). The Common Interest Information may reflect and incorporate confidential communications made by the Parties to their attorneys and by their attorneys to them, which are protected by the attorney/client privilege, work product doctrine, or other applicable privilege from disclosure to others ("Primary Privilege"). It is the intent of this Agreement to ensure that the exchange of Common Interest Information among the Parties, shall not, in and of itself, result in any waiver or termination of the Primary Privilege because of the Parties' common interest in, and joint defense of, the Project and to preserve any privilege applicable to the Common Interest Information while pursuing the Parties' common interest and to keep all Common Interest Information confidential to the maximum extent allowed by law. Information obtained by the Parties as a result of exchanging Common Interest Information is protected from disclosure to any third party or non-client by the Parties' Primary Privilege in the same manner as if the exchange of Common Interest Information had not taken place.
4. A Party's disclosure of Common Interest Information exchanged pursuant to this Agreement shall not be deemed a waiver by the other Parties of their right to assert a

claim of the Common Interest Privilege and attorney/client or work-product privilege with respect to any Common Interest Information.

5. Because of the privileged nature of the Common Interest Information, no Party shall provide Common Interest Information to any non-Party or its representatives except as required by law or with the consent of the Party who first disclosed the Common Interest Information.
6. The Parties understand that the purpose of this Agreement is to facilitate common interest representation by increasing the information flow between the Parties. The Parties recognize, however, that under some circumstances, information known to one Party may not be shared with the other Parties to the Agreement.
7. Nothing in this Agreement is intended as, shall constitute, or shall be interpreted, construed or used as evidence of an admission by a Party of any wrongdoing, liability or fault (including comparative or proportionate fault), a waiver of any privilege, claim, right or defense, estoppel, or an admission as to any matter of law or fact, either as between the Parties or with respect to any person or entity not a party to this Agreement provided, however, that any Party shall be entitled to use this Agreement to enforce its terms.
8. Disclosure of information obtained from another Party by one of the Party's attorneys to his or her client is made pursuant to this Agreement and is not a waiver of the Primary Privilege or the Common Interest Privilege.
9. If any person or entity not a Party to this Agreement requests or demands, by subpoena or otherwise, any Common Interest Information from any Party or from any Party's agent, officer, employee, consultant, or representative, such Party shall: (1) immediately notify the other Parties, and (2) assert the Common Interest Privilege with respect to the requested Common Interest Information. Each Party and each Party's respective attorney shall take all steps necessary to assert all applicable rights and Primary Privilege with respect to such Common Interest Information and shall cooperate fully with the other Parties in any judicial proceedings related to the disclosure of the Common Interest Information.
10. All previous privileged communications, and all Common Interest Information previously exchanged, between the Parties and their respective attorneys, officers, agents, employees, consultants, and representatives, are subject to this Agreement.
11. Neither the execution nor the performance of this Agreement shall result in the inability of any party to this Agreement to use any data contributed by it to the effort, any raw data generated under this Agreement, or any expert opinion which has been disclosed to other parties in this or other litigation, in other ongoing or subsequent litigation.
12. Any Party may withdraw from this Agreement by giving written notice to every other Party of its election to withdraw.

13. Any Party that withdraws from this Agreement, together with such Party's respective attorneys and consultants, remains subject to all provisions herein as they pertain to Common Interest Information theretofore received, but not as to subsequent information. Any Party that withdraws from this Agreement shall promptly destroy or return to the other Parties all Common Interest Information in its possession or in the possession of its attorneys or consultants.
14. Each Party understands and acknowledges that it is represented only by its attorneys in this matter, that while an attorney representing any other Party has a duty to preserve the confidences disclosed to him or her pursuant to this Agreement, the attorneys representing any other Party will be acting only as attorneys for that other Party and will owe a duty of loyalty to their respective client only. Each Party will pay for the services of its respective attorneys.
15. Each Party understands that the Parties may now or in the future have some adverse interests and that the sharing of some confidences pursuant to this Agreement may lead to potential conflicts of interest of the various attorneys in the future. The Parties do not intend that the exchange of Common Interest Information will be a basis for the future disqualification of their respective attorneys and consultants and agree that they will not move for disqualification of attorneys or consultants in any matter solely on account of the exchange of Common Interest Information pursuant to this Agreement and waive any conflicts arising from the sharing of such confidences.
16. Colorado law shall control the interpretation and enforcement of this Agreement. This Agreement may be enforced in the Weld County, Colorado, District Court by a temporary restraining order and injunction in the event of a breach or anticipatory breach. The Parties accept jurisdiction and venue in that court. Any modification to this Agreement shall be in writing and signed by all Parties.
17. This Agreement shall be binding upon the Parties, their agents, consultants, and respective attorneys, even after the Windy Gap Firing Project has been constructed and is operating. In addition, this Agreement shall be binding on the successors and assigns of the Parties, their agents, consultants, and respective attorneys.
18. Although the Parties are engaged in a common enterprise as described in paragraph E above, nothing in this Agreement shall be deemed to create a partnership, joint venture, and/or principal and agent relationship between the Parties and/or their respective attorneys or consultants.
19. If any provision of this Agreement is deemed invalid or unenforceable, the balance of the Agreement shall remain in full force and effect.
20. The Parties acknowledge that this Agreement is the result of joint negotiations among the Parties, and agree that this Agreement shall not be construed or interpreted against any Party on the grounds of sole or primary authorship.

21. Each person signing this Agreement represents and warrants that he or she has been duly authorized to execute this Agreement by the entity on whose behalf it is indicated that the person is signing.
22. This Agreement may be executed in counterparts, each of which shall be deemed an original.

IN WITNESS WHEREOF, the Parties have executed this Agreement in duplicate originals, as of the date first above written.

Northern Integrated Supply Project Water Activity Enterprise

By: _____
Bradley D. Wind, General Manager

**Central Weld County Water District Water Activity Enterprise, organized pursuant to
C.R.S. § 37-45.1-101 *et seq.*, and owned by Central Weld County Water District, a
Colorado special district and quasi-municipal corporation**

By: _____

Name: _____

Title: _____

The City of Dacono, a municipal corporation

By: _____

Name: _____

Title: _____

The Town of Firestone, a municipal corporation, acting with and on behalf of the Firestone Water Activity Enterprise, a government-owned business within the meaning of Article X, § 20(2)(d) of the Colorado Constitution, organized pursuant to C.R.S. § 37-45.1-101 *et seq.*, and owned by the Town of Firestone

By: _____

Name: _____

Title: _____

Town of Frederick

By: _____

Name: _____

Title: _____

Town of Eaton, Colorado, Water Enterprise, a government-owned business within the meaning of Article X, § 20(2)(d) of the Colorado Constitution, a government-owned business organized pursuant to C.R.S. 37-45.1-101 *et seq.*

Town of Eaton, Colorado, Water Enterprise

Kevin Ross, Mayor

ATTEST:

Margaret Jane Winter

The Town of Erie, acting by and through its Erie Water Activity Enterprise, a water activity enterprise and government-owned business within the meaning of Article X, Section 20(2)(d), of the Colorado Constitution organized pursuant to C.R.S. 37-45.1-101 *et seq.*

By: _____

Name: _____

Title: _____

City of Evans

By: _____

Name: _____

Title: _____

The Fort Collins-Loveland Water District, acting by and through its Water Activity Enterprise, a quasi-municipal corporation and political subdivision of the State of Colorado

By: _____

Name: _____

Title: _____

City of Fort Lupton Utility Enterprise

By: _____

Name: _____

Title: _____

Fort Morgan Water Works and Distribution Enterprise, an enterprise of the City of Fort Morgan, a Colorado home rule municipal corporation and political subdivision of the State of Colorado

By: Ronald Shaver

Name: RONALD SHAVER

Title: MAYOR

The City of Lafayette, a Colorado home-rule municipality, acting with and on behalf of the Lafayette Water Fund Enterprise, a government-owned business within the meaning of Article X, § 20(2)(d) of the Colorado Constitution, organized pursuant to C.R.S. § 37-45.1-101 *et seq.*, and owned by the City of Lafayette

By: _____

Name: _____

Title: _____

Left Hand Water District, acting by and through its Water Activity Enterprise, a Colorado quasi-municipal corporation and political subdivision of the State of Colorado

By: _____

Name: _____

Title: _____

Morgan County Quality Water District acting by and through the Morgan County Quality Water District Enterprise, a government-owned business within the meaning of Article X, § 20(2)(d) of the Colorado Constitution, organized pursuant to C.R.S. § 37-45.1-101 *et seq.*, and owned by the Morgan County Quality Water District

By: _____

Name: _____

Title: _____

Town of Severance, a Colorado Statutory Town

By: _____

Name: _____

Title: _____

The Town of Windsor Water Utility Enterprise, an enterprise within the meaning of Article X, § of the Colorado Constitution, owned and operated by the Town of Windsor, a Colorado home rule municipal corporation

By: _____

Name: _____

Title: _____

EXHIBIT "A"

- **The Northern Integrated Supply Project Water Activity Enterprise**
- **Central Weld County Water District Water Activity Enterprise, organized pursuant to C.R.S. § 37-45.1-101 *et seq.*, and owned by Central Weld County Water District, a Colorado special district and quasi-municipal corporation**
- **The City of Dacono, a municipal corporation**
- **Town of Eaton, Colorado, Water Enterprise, a government-owned business within the meaning of Article X, § 20(2)(d) of the Colorado Constitution, a government-owned business organized pursuant to C.R.S. 37-45.1-101 *et seq.***
- **The Town of Erie, acting by and through its Erie Water Activity Enterprise, a water activity enterprise and government-owned business within the meaning of Article X, Section 20(2)(d), of the Colorado Constitution organized pursuant to C.R.S. 37-45.1-101 *et seq.***
- **City of Evans**
- **The Town of Firestone, a municipal corporation, acting with and on behalf of the Firestone Water Activity Enterprise, a government-owned business within the meaning of Article X, § 20(2)(d) of the Colorado Constitution, organized pursuant to C.R.S. § 37-45.1-101 *et seq.*, and owned by the Town of Firestone**
- **Town of Frederick**
- **The Fort Collins-Loveland Water District, acting by and through its Water Activity Enterprise, a quasi-municipal corporation and political subdivision of the State of Colorado**
- **City of Fort Lupton Utility Enterprise**
- **Fort Morgan Water Works and Distribution Enterprise, an enterprise of the City of Fort Morgan, a Colorado home rule municipal corporation and political subdivision of the State of Colorado**
- **The City of Lafayette, a Colorado home-rule municipality, acting with and on behalf of the Lafayette Water Fund Enterprise, a government-owned business within the meaning of Article X, § 20(2)(d) of the Colorado Constitution, organized pursuant to C.R.S. § 37-45.1-101 *et seq.*, and owned by the City of Lafayette**
- **Left Hand Water District, acting by and through its Water Activity Enterprise, a Colorado quasi-municipal corporation and political subdivision of the State of Colorado**
- **Morgan County Quality Water District acting by and through the Morgan County Quality Water District Enterprise, a government-owned business within the meaning of Article X, § 20(2)(d) of the Colorado Constitution, organized pursuant to C.R.S. § 37-45.1-101 *et seq.*, and owned by the Morgan County Quality Water District**
- **Town of Severance, a Colorado Statutory Town**
- **The Town of Windsor Water Utility Enterprise, an enterprise within the meaning of Article X, § of the Colorado Constitution, owned and operated by the Town of Windsor, a Colorado home rule municipal corporation**