

## **AUGMENTATION SERVICE AGREEMENT**

This Augmentation Service Agreement ("Agreement") is made and entered into by and between Colorado Springs Utilities, an enterprise of the City of Colorado Springs, a Colorado home rule city and municipal corporation, with its principal place of business at 121 S. Tejon Street, Colorado Springs, Colorado 80903 ("UTILITIES"), and Red Fox Properties, LLC, with its principal place of business at 11 First St., Colorado Springs, Colorado 80906, ("CUSTOMER") (collectively "the Parties").

### **RECITALS**

- A. CUSTOMER is the owner of a 2.42-acre parcel ("Property") as shown on attached Exhibit A, within UTILITIES' water service area, which Property was annexed to the City of Colorado Springs on \_\_\_\_\_.
- B. CUSTOMER is interested in drilling a new groundwater well to provide interim water service to the Property ("New Well") consistent with the terms of this Agreement until a public water distribution main is installed near the Property. The water from the New Well is anticipated to be withdrawn from the alluvial aquifer, tributary to Fountain Creek, beneath the Property.
- C. UTILITIES, by the decree entered in Consolidated Case Nos. 84CW202, 84CW203, 86CW118(A), and 89CW36, Division 2, Water Court, has the right to provide necessary augmentation or replacement water in order to use groundwater within the UTILITIES' water service area.
- D. It is the general policy of UTILITIES not to allow groundwater use for domestic development, but to require connection to UTILITIES' potable water distribution system, as stated in City of Colorado Springs' Resolution No. 233-86 and City Code § 12-4-401. However, at this time, due to, without limitation, CUSTOMER'S inability to obtain an easement across the property of a third party that is necessary for installation of a water service line for the Property, adherence to this general policy would not contribute to the orderly development of UTILITIES' potable water distribution system. Therefore, UTILITIES is willing to allow the CUSTOMER's use of groundwater withdrawn from the New Well to be drilled on the Property pursuant to the terms and conditions set forth in this Agreement.

### **AGREEMENT**

**NOW, THEREFORE**, in consideration of the premises recited above and the mutual benefits received by each Party from the performance of this Agreement, the sufficiency of which is acknowledged, **IT IS AGREED:**

1. Customer is hereby authorized to construct and use the New Well on the Property in accordance with the terms and conditions of this Agreement. CUSTOMER covenants and agrees that CUSTOMER shall be responsible for the following items:
  - 1.1 CUSTOMER may construct the New Well on the Property for the purposes described herein. CUSTOMER will pay all costs associated with permitting, engineering, construction, development, production, operations, maintenance, abandonment, and repair of the New Well to be constructed for CUSTOMER's use under this Agreement. CUSTOMER is also responsible for all costs associated with any filtering or treatment necessary to make the water withdrawn from the New Well useable and to comply with any applicable existing or future water quality regulations. So long as this Agreement is in effect, CUSTOMER shall retain all rights of ownership of the pumps, appurtenances, and associated surface facilities of the New Well.
  - 1.2 CUSTOMER shall use the groundwater produced from the New Well only within the Property for the domestic use in one single family residence and irrigation of up to 1.25 acres of land, which uses are

expressly approved by UTILITIES.

- 1.3 CUSTOMER shall not allow any cross-connections of the New Well with existing or future potable municipal water supplies within the Property.
- 1.4 CUSTOMER shall not sell or provide groundwater produced under this Agreement to another party within or outside the Property, or use the groundwater for any purpose other than those uses expressly allowed under the terms of this Agreement.
- 1.5 CUSTOMER shall indemnify and hold UTILITIES harmless from all claims, demands, and liabilities of any kind, including attorneys' fees and costs of defense, arising from or associated with the permitting, engineering, location, design, construction, maintenance and operation of either the New Well and associated facilities, or from any claims, demands, and liabilities of any kind arising from or associated with the existence or nonexistence of said groundwater, the use of said groundwater, any offensive characteristics or contamination of said groundwater, and any nuisances or contamination caused by its use. Furthermore, in the event any such claim arises, CUSTOMER shall take immediate action to abate any nuisance or contamination caused by the groundwater or its use and to remedy any dangerous condition of either well or associated facilities.
- 1.6 CUSTOMER's use of the groundwater withdrawn from the New Well shall comply with all requirements set forth in the City Code as now in effect or hereafter amended, all UTILITIES' policies and tariffs affecting the use of groundwater as now or hereafter adopted, and all other applicable federal, state, and local laws, ordinances, and regulations affecting the use of groundwater or the operation, maintenance, repair or replacement of said well.
- 1.7 CUSTOMER shall pay UTILITIES, according to standard and customary billing procedures of UTILITIES, the amounts computed and billed to CUSTOMER under subparagraphs 2.2 and 2.6 as a condition to the use of the groundwater withdrawn from the New Well under this Agreement.
- 1.8 CUSTOMER acknowledges and agrees that its failure to pay charges as required by subparagraphs 1.7, 1.12, 1.13, 2.2, and 2.6, or to indemnify UTILITIES or to abate any nuisances or to remove any dangerous conditions, pursuant to paragraph 1.5 above, shall entitle UTILITIES to terminate CUSTOMER's rights to withdraw any groundwater under this Agreement upon ten (10) days' notice in writing as provided herein.
- 1.9 CUSTOMER shall be responsible to prepare the New Well's head discharge pipeline for meter installation in accordance with UTILITIES' Line Extension and Service Standards. No water shall be used from the New Well until UTILITIES' meter is installed and functioning.
- 1.10 In the event UTILITIES' potable public water distribution system ("UTILITIES' System") is installed adjacent to the Property, then pursuant to City Code and UTILITIES' policies and tariffs, now in effect or hereinafter amended, CUSTOMER shall, upon UTILITIES' request, be required to pay for the design and installation of a public water distribution main extension that would facilitate connection of the Property to UTILITIES' System ("Extension"). UTILITIES will provide CUSTOMER with not less than 180 days prior notice of the date when CUSTOMER must complete the Extension or provide funding for such Extension. As determined appropriate by UTILITIES according to the City Code and all UTILITIES' policies and tariffs, as now in effect or hereafter amended, UTILITIES may provide CUSTOMER the opportunity to participate in a Recovery Agreement pertaining to the collection of CUSTOMER'S *pro rata* share of the eligible cost of such Extension.
- 1.11 In the event UTILITIES' System is installed adjacent to the Property, then pursuant to City Code and

UTILITIES' policies and tariffs, now in effect or hereinafter amended, CUSTOMER shall be required to connect the Property to the UTILITIES' System, upon UTILITIES request. Accordingly, within 90 days of CUSTOMER's receipt of UTILITIES' notice to connect to UTILITIES' System, or within 30 days of completion of the Extension, CUSTOMER shall be required to connect the Property to UTILITIES' System via CUSTOMER's new water service line extension. Prior to connection of CUSTOMER's water service line to UTILITIES' System, CUSTOMER shall be required to: (1) discontinue domestic use of the New Well and groundwater withdrawn therefrom; and (2) physically disconnect the New Well from the dwelling. After CUSTOMER connects to UTILITIES' System, CUSTOMER may continue the use of the New Well and groundwater withdrawn therefrom exclusively for irrigation and other non-potable uses if allowed under the terms of the permit for the New Well issued by the Colorado Division of Water Resources and this Agreement provided, however, that there is no cross-connection between the New Well and UTILITIES' System.

1.12 In anticipation of the future connection of the Property to UTILITIES' System, CUSTOMER shall pay to UTILITIES a Water Development Charge based on a ¾-inch water meter upon CUSTOMER's execution of this Agreement. Prior to connection of CUSTOMER's water service line to UTILITIES' System, CUSTOMER shall also pay to UTILITIES all applicable fees, including tap fees and recovery charges.

1.13 CUSTOMER shall provide to UTILITIES and record any rights-of-way or easements for the use of UTILITIES that will be sufficient for the construction, operation, maintenance, repair, and replacement of the future potable water distribution main described herein, including ingress and egress as necessary to the Property, that UTILITIES determines are necessary in its sole discretion.

2. UTILITIES shall be responsible for the following items:

2.1 UTILITIES shall install and maintain a meter ("New Meter") as necessary and shall be responsible for readings, calibration, and billing for groundwater production from the New Well. UTILITIES' Advanced Meter Infrastructure ("AMI") system may or may not be available to read the meter at the point in time the meter is installed on the New Well. If the meter cannot be read by the AMI system at the time it is installed, then CUSTOMER shall be automatically included in UTILITIES' Automated-Meter Opt-Out Program as described in section 2.F of the Utilities Rules and Regulations and shall be subject to all terms and conditions set forth therein. The CUSTOMER shall be part of the Automated-Meter Opt-Out Program until the AMI system infrastructure is available to automatically read the new meter, at which time the CUSTOMER will be removed from the Automated-Meter Opt-Out Program.

2.2 UTILITIES shall be responsible for and shall control all necessary water rights matters, including all necessary administrative or judicial approvals including, without limitation, obtaining the well permit for the New Well, approval of substitute supply plans for the New Well, and the Division Engineer's approval of the operation of the New Well under UTILITIES' augmentation plan decreed in Consolidated Case Nos. 84CW202, 84CW203, 86CW118(A), and 89CW36, Water Division No. 2. If required for CUSTOMER's intended use of the groundwater withdrawn from the New Well, UTILITIES will make application for a well permit and approval of the operation of the New Well under UTILITIES' augmentation plan promptly upon execution of this Agreement. Failure of UTILITIES to obtain a satisfactory well permit from the State Engineer or satisfactory approvals to provide augmentation water under the terms and conditions of UTILITIES' decrees in Consolidated Case Nos. 84CW202, 84CW203, 86CW118(A), and 89CW36, Water Division No. 2, for the New Well, shall allow UTILITIES, at its option, to terminate this Agreement without further compensation or liability to CUSTOMER upon notice to CUSTOMER. CUSTOMER shall reimburse UTILITIES for all fees and costs associated with obtaining the approvals that are the subject of this subparagraph within 30 days of CUSTOMER's receipt of UTILITIES' invoice for such fees and costs.

- 2.3 UTILITIES shall replace depletions due to groundwater production from the New Well in accordance with requirements of the Division 2 Engineer's administration.
  - 2.4 UTILITIES shall permit CUSTOMER to locate, relocate, design, develop, construct, operate and maintain the New Well and associated facilities in accordance with applicable State permits. However, UTILITIES shall retain ownership of all groundwater water rights associated with the New Well.
  - 2.5 UTILITIES makes no representations and does not guarantee that the quantity or quality of the groundwater to be withdrawn from the New Well will be adequate for CUSTOMER's intended uses or that the groundwater withdrawn from the well will be free of any physical characteristics making it undesirable for CUSTOMER's intended use.
  - 2.6 UTILITIES shall charge CUSTOMER for the groundwater withdrawn from the New Well, according to the metered groundwater production at the well head, at a rate equivalent to UTILITIES' then current Augmentation Tariff rate (\$0.0072/cf) as of the date of this Agreement
  - 2.7 UTILITIES shall have the right to change the rate in subparagraph 2.6 based on changes to UTILITIES' Augmentation Tariff rate provided that the changes are approved by City Council.
3. All withdrawals of groundwater by CUSTOMER from the New Well pursuant to the terms of the Agreement shall be metered. In the event either Party disputes the accuracy of the measurement of withdrawals of groundwater, that Party, upon written notice to the other Party, may request that the meter be tested by a mutually agreed upon third party agency. If the third party agency determines that a meter measuring well withdrawals has registered the amounts withdrawn within two percent (2%), plus or minus, of the actual amount withdrawn during the test, the Party requesting the test shall bear all costs thereof, and no billing shall be adjusted. If the third party testing agency determines that the meter has failed to confirm that the amounts withdrawn during the test are within the required accuracy, the cost of the testing shall be borne equally by CUSTOMER and UTILITIES, and the billings to CUSTOMER based upon the information obtained from such meter shall be adjusted based upon a reasonable estimate of the amount withdrawn or delivered considering all relevant factors and rebilled or credited to CUSTOMER. If the error was to result in CUSTOMER being underbilled for the water used, CUSTOMER will be billed for the adjusted usage for the last 12 months only. If the error was to result in CUSTOMER being overbilled for the water used, UTILITIES will refund CUSTOMER based on the adjusted usage for UTILITIES' period of record. Any amounts due from either Party resulting from such adjusted billing shall be due within thirty (30) days of the adjustment.
  4. CUSTOMER's rights to use groundwater from the New Well under this Agreement are contract rights only and shall not be construed in any manner to grant CUSTOMER any right, title, or interest in any groundwater, groundwater rights, water rights, or any appurtenances thereto belonging to the City of Colorado Springs and, without limitation of the foregoing provision, UTILITIES specifically reserves all rights of reuse and successive use of return flows from CUSTOMER's groundwater use.
  5. The term of this Agreement shall be for twenty-five (25) years. This Agreement may be renewed for an additional term of twenty-five (25) years at the sole discretion of UTILITIES.
  6. CUSTOMER acknowledges and consents to UTILITIES' right to terminate this Agreement: (1) due to CUSTOMER's breach of a material term or condition of this Agreement, if CUSTOMER has not taken substantial steps to cure the breach within thirty (30) days of receiving written notice of such breach from UTILITIES; or (2) as otherwise authorized by the City Code of Colorado Springs or the Colorado Springs City Council. UTILITIES will make reasonable efforts to notify CUSTOMER of circumstances that could result in such termination. CUSTOMER may terminate this Agreement and its obligations hereunder by

giving UTILITIES written notice of its intent to terminate thirty (30) days prior to termination. In the event of termination, CUSTOMER shall remain responsible to pay all charges due under subparagraphs 2.2 and 2.6 above up to the date of termination. Upon notice of termination of this Agreement by either Party as provided above, CUSTOMER may remove the pumps, appurtenances, and associated surface facilities of the New Well, provided that the well bore hole and well casing shall be left intact and title thereto shall be deemed transferred to UTILITIES for its use as of the date of termination. If CUSTOMER fails to remove the pumps and associated surface facilities of the New Well before the effective date of termination, ownership thereof shall revert to UTILITIES as of the effective date of termination. No groundwater thereafter shall be produced for CUSTOMER's use from the well that was constructed pursuant to this Agreement. UTILITIES, however, may utilize such well thereafter for its own use or for other lawful purposes, provided it obtains necessary easements from CUSTOMER over the Property, which easements will not be unreasonably withheld by CUSTOMER.

7. This Agreement is specifically conditioned upon UTILITIES obtaining satisfactory approvals and permits from the State Engineer to allow the construction and augmentation of the New Well as provided herein. If such approvals and permits are not obtained, this Agreement, at UTILITIES' option, shall become null and void.
8. Any notice required or permitted under this Agreement shall be considered given if the same is sent via first class mail to the following:

8.1 If to CUSTOMER:  
Red Fox Properties, LLC

---

Attn: Richard Young  
Colorado Springs, CO 80903

8.2 If to UTILITIES:

i Chief Water Services Officer

- a. Courier Service Address:  
Colorado Springs Utilities  
121 S. Tejon St., 5th Floor  
Colorado Springs, CO 80903  
ATTN: Chief Water Services Officer
- b. United States Postal Service Address:  
Colorado Springs Utilities  
P.O. Box 1103  
Colorado Springs, CO 80947-0950 Fax: (719) 668-8020  
ATTN: Chief Water Services Officer

ii City Attorney's Office - Utilities Division

- a. Courier Service Address:  
City Attorney's Office - Utilities Division  
30 S. Nevada Ave, Suite 501  
Colorado Springs, CO 80903
- b. United States Postal Service Address:  
City Attorney's Office - Utilities Division  
P.O. Box 1575, Mail Code 510  
Colorado Springs, CO 80901-1575 Fax: (719) 385-5535

9. This Agreement is assignable by CUSTOMER to another owner of the Property only for uses allowed hereunder. This Agreement shall benefit and bind alike the Parties hereto, their successors or assigns.
10. There shall be no assignment or delegation of the rights or obligations contained in this Agreement by either Party without the prior written consent of the other Party, and any such assignment or delegation shall be null and void. UTILITIES' consent to CUSTOMER's assignment or delegation of the rights or obligations contained in this Agreement to a subsequent owner of the Property shall not be unreasonably withheld. Notwithstanding anything herein to the contrary, upon written notice to CUSTOMER, UTILITIES may assign or delegate its rights and obligations under this Agreement, without consent from CUSTOMER, to the City of Colorado Springs, Colorado. Any such assignee of CUSTOMER or UTILITIES shall agree to assume and perform this Agreement. Nothing herein shall be construed to give any rights or benefits hereunder to anyone other than UTILITIES and CUSTOMER.
11. The Parties agree that neither of them intends that this Agreement shall in any way constitute a precedent or standard for any future agreement, nor vest any rights in either Party or any third party for novation, renewal, modification, or addition of any other rights or services on account of this Agreement's existence, as it is based solely on unique conditions currently existing at the time of execution. Any provision or part of this Agreement held to be void or unenforceable under any laws or regulations shall be deemed stricken, and all remaining provisions shall continue to be binding upon the Parties who agree that this Agreement shall be reformed to replace such stricken provision with a new provision that comes as close as possible to expressing the intention of the stricken provision.
12. Neither Party shall be liable for delays in performing its obligations under this Agreement to the extent the delay is caused by an unforeseeable condition beyond its reasonable control without fault or negligence including, but not limited to, strikes, riots, wars, floods, fires, explosions, acts of nature, acts of government, or labor disturbances.
13. In accord with the Colorado Springs City Charter, performance of UTILITIES' obligations under this Agreement is expressly subject to appropriation of funds by the City Council. In the event funds are not appropriated in whole or in part sufficient for performance of UTILITIES' obligations under this Agreement, or appropriated funds may not be expended due to City Charter spending limitations, then this Agreement will thereafter become null and void by operation of law, and UTILITIES will thereafter have no liability for compensation or damages to CUSTOMER in excess of UTILITIES' authorized appropriation for this Agreement or the applicable spending limit, whichever is less. UTILITIES will notify CUSTOMER as soon as reasonably practicable in the event of non-appropriation or in the event a spending limit becomes applicable.
14. CUSTOMER hereby agrees to release, discharge, indemnify and hold harmless the City of Colorado Springs, UTILITIES, the Colorado Springs City Council, the Utilities Board, and the officers, directors, employees and agents of each from and against any and all liability for any damages, injuries to the person or property, costs (including, but not limited to, all fees and charges of engineers, architects, attorneys, and other professionals and all court or other dispute resolution costs), causes of action, demands, or actions of whatsoever kind or nature, arising out of, or caused by the negligent acts or omissions, or intentional misconduct of CUSTOMER under this Agreement. CUSTOMER shall give UTILITIES timely and reasonable notice of any such claims or actions. Notwithstanding the foregoing, UTILITIES expressly reserves any and all of the protections, defenses, and limitations that it may be afforded under the Colorado Governmental Immunity Act. Additionally, the Parties understand and agree that the City of Colorado Springs, UTILITIES, CUSTOMER, the Colorado Springs City Council, the Utilities Board and the officers, directors, employees and agents of each shall not be liable, except where expressly provided by applicable laws, for incidental, special, or consequential damages of any kind.

15. This Agreement contains the entire understanding between the Parties; no modification, amendment, notation, or other alteration to this Agreement shall be valid or of any force or effect unless mutually agreed to by the Parties in writing as an addendum to this Agreement. At the time of the execution of this Agreement, there are no other terms, conditions, requirements, or obligations affecting this Agreement that are not specifically set forth herein. All electronic communications, including email and voice, from UTILITIES and CUSTOMER in connection with this Agreement, are for informational purposes only. No such communication is intended by UTILITIES or CUSTOMER to constitute any agreement by UTILITIES or CUSTOMER to conduct a transaction by electronic means. Any such intention or agreement is hereby expressly disclaimed.

16. This Agreement shall be construed in accordance with the laws of the State of Colorado, except for its conflict of law provisions, and the Colorado Springs City Charter and City Code. The place of performance and transaction of business shall be deemed to be in the County of El Paso, State of Colorado. In the event of litigation, the exclusive venue and place of jurisdiction shall be the State of Colorado, specifically in the District Court for El Paso County, Colorado, and if necessary for exclusive federal questions, the United States District Court for the District of Colorado, and for water matters as defined by Colo. Rev. Stat. § 37-92-201, et seq., District Court for Water Division 2.

**IN WITNESS WHEREOF**, the Parties hereto have executed this Agreement on the dates following their signatures below.

**COLORADO SPRINGS UTILITIES**

**CUSTOMER**

**RED FOX PROPERTIES, LLC**

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

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

Title: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_, 2018

Date: \_\_\_\_\_, 2018

**APPROVED AS TO FORM**

\_\_\_\_\_  
City Attorney's Office – Utilities Division  
City of Colorado Springs