

RESOLUTION NO. 144-15

A RESOLUTION DIRECTING THE CHIEF EXECUTIVE OFFICER OF COLORADO SPRINGS UTILITIES TO EXECUTE AN AUGMENTATION WATER LEASE BETWEEN COLORADO SPRINGS UTILITIES AND PF, LLC

WHEREAS, City Code § 12.4.304 allows Colorado Springs Utilities to provide by contract a connection to the City's water supply system by institutions, organized special districts, governments, municipal corporations, or other similar users, and

WHEREAS, PF, LLC, a subsidiary of the Broadmoor Hotel, is the owner of that certain property in the mountains southwest of the City of Colorado Springs upon which the attraction known as Seven Falls is located, and

WHEREAS, PF, LLC has an immediate need for up to 15 acre feet annually of fully consumable water to replace out-of-priority depletions to the Fountain Creek Basin resulting from the use of water at the Seven Falls attraction and has requested that Colorado Springs Utilities lease water to it for such purposes, and

WHEREAS, Colorado Springs Utilities is in a position to supply up to 15 acre feet annually of fully consumable water to replace out-of-priority depletions resulting from the use of water at the Seven Falls attraction, and

WHEREAS, Colorado Springs Utilities requests that City Council authorize and direct the Chief Executive Officer of Colorado Springs Utilities to execute an augmentation water lease with PF, LLC, and

WHEREAS, the City Council finds that it is in the best interest of the City of Colorado Springs and the surrounding community for Colorado Springs Utilities to enter into such an augmentation water lease with PF, LLC.

BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF COLORADO SPRINGS:

SECTION 1. The Chief Executive Officer of Colorado Springs Utilities is authorized and directed to enter into and administer an augmentation water lease with PF, LLC in a form substantially similar to that attached hereto.

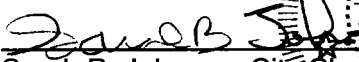
SECTION 2. This Resolution shall be in full force and effect immediately upon its adoption.

Dated at Colorado Springs, Colorado, this 8th day of December, 2015.




Council President

ATTEST:



Sarah B. Johnson, City Clerk



**AUGMENTATION WATER LEASE BETWEEN
COLORADO SPRINGS UTILITIES AND PF, LLC**

This Augmentation Water Lease ("Lease") 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 PF, LLC with its principal place of business at One Lake Avenue, Colorado Springs, Colorado 80906 ("CUSTOMER") (collectively "the Parties").

RECITALS

- A. Based on current conditions and operation system constraints, UTILITIES has determined that a sufficient but interruptible supply of fully consumable water owned by UTILITIES that is: (1) released from its wastewater treatment plants; (2) released from non-sewered return flows to Fountain Creek; or (3) exchanged into Rosemont Reservoir pursuant to the decrees in District Court, Water Division No. 2, State of Colorado Case Nos. 84CW203, 86CW118(a), and Consolidated Case Nos. 84CW202, 84CW203, 86CW118(b) and 89CW36 ("Augmentation Water") is available for lease.
- B. CUSTOMER desires to lease up to fifteen (15) acre feet of Augmentation Water annually from UTILITIES for the purpose of replacing out-of-priority depletions to the Fountain Creek Basin resulting from CUSTOMER's use of water at the Seven Falls property, including evaporative and spray losses, and CUSTOMER's pumping of water from three existing wells (Well Permit No. 39190, Well Permit No. 49794-A, and Well Permit No. 49795-A) and any other wells that may be constructed in the future (the "Wells"), including uses associated with the restaurant known as Seven Falls 1859, located at 2850 South Cheyenne Canyon Road, Colorado Springs, Colorado 80906.
- C. UTILITIES desires to lease up to fifteen (15) acre feet annually of Augmentation Water to CUSTOMER for augmentation of such depletions.
- D. Pursuant to Section 6-50 (Water Rights) of Article VI (Utilities) of the Charter of the City of Colorado Springs, as amended, the City of Colorado Springs has the authority to buy, exchange, augment, lease, own, and control water and water rights.
- E. UTILITIES has entered into this Lease pursuant to Section 12.4.304 (Service; Special Contract) of Article 4 (Water Code) of Chapter 12 (Utilities) of the Code of the City of Colorado Springs 2001, as amended.

AGREEMENT

NOW, THEREFORE, in consideration of mutual benefits to the Parties and the payment to UTILITIES as hereinafter provided, the receipt and sufficiency of which is acknowledged, **IT IS AGREED**:

- 1. **Term.** The effective date ("Effective Date") of this Lease shall be January 1, 2016. This Lease shall commence on its Effective Date and shall remain in effect for an initial period of three (3) years following the Effective Date, unless terminated sooner in accordance with its terms. The Lease shall be automatically renewed for up to seven (7) additional three (3) year terms unless notice is given by either Party of its intent not to renew the Lease. Such notice of a Party's intent not to renew the Lease shall be sent at least

ninety (90) days before the expiration of the then current term. In no event shall the term of this Lease extend beyond twenty-five (25) years from the Effective Date, including all renewals of the term. Each twelve month period, beginning on the Effective Date, is treated as a "Contract Year" under this Lease.

2. **Supersedes Previous Agreement:** CUSTOMER and UTILITIES agree that, upon its effective date, this Lease supersedes and voids the Augmentation Water Lease between the parties dated March 31, 2015.
3. **Lease of Augmentation Water.** During the term of this Lease, UTILITIES agrees to lease and deliver to CUSTOMER up to fifteen (15) acre feet of Augmentation Water during each Contract Year in accordance with the terms of this Lease. Of the fifteen (15) acre feet of Augmentation Water made available under this Lease, three (3) acre feet shall be leased on a "take or pay" basis. The amount and timing of delivery of Augmentation Water leased to CUSTOMER during each Contract Year shall be in accordance with the attached Schedule A and CUSTOMER's measured out-of-priority depletions reported to UTILITIES and the Division 2 Engineer on a monthly basis. Releases of the Augmentation Water will be made either through: (1) non-sewered return flows to Fountain Creek; (2) sewered return flows discharged at UTILITIES' Las Vegas Wastewater Treatment Plant, UTILITIES' J.D. Phillips Wastewater Treatment Plant; and/or (3) water discharged from UTILITIES' Rosemont Pipeline and will be in accordance with Schedule A. Schedule A shall be reviewed and amended in writing as needed and agreed to by the Parties from time to time.
4. **Price for Augmentation Water.** For each year this Lease is in effect, the price for the Augmentation Water shall be the prevailing Augmentation Rate set forth in UTILITIES' Tariffs multiplied by 1.5 (as of the date of this Lease $\$0.006/\text{cf} \times 1.5 = \$0.009/\text{cf}$ or $\$392.04/\text{AF}$). CUSTOMER agrees to pay UTILITIES the total of the above cost per acre foot of water multiplied by the total acre feet of Augmentation Water deemed delivered hereunder. As stated above, three (3) acre feet of the Augmentation Water is made available to CUSTOMER on a "take or pay" basis. Accordingly, CUSTOMER agrees each Contract Year to pay the cost per acre foot of Augmentation Water set forth above as revised based on UTILITIES' then existing Augmentation Tariff multiplied by 3AF in advance ("Annual Fee"), whether or not said quantities of water are actually taken by CUSTOMER or are required for use by CUSTOMER. The failure of CUSTOMER to take delivery of the full quantity of Augmentation Water leased hereunder in any Contract Year shall not entitle CUSTOMER to the delivery of additional quantities of water in any subsequent Contract Year or to a refund of any sums paid. CUSTOMER shall also pay UTILITIES an annual non-refundable fee of \$1,000.00 ("Administrative Fee") each Contract Year in consideration of the legal and administrative costs associated with this Lease. The Administrative Fee may be increased by UTILITIES at its sole discretion upon notice to CUSTOMER on or before 90 days prior to the commencement of the next Contract Year. On or before the Effective Date, CUSTOMER shall pay UTILITIES the Annual Fee and the Administrative Fee for the first Contract Year. The Annual Fee and Administrative Fee for each subsequent Contract Year shall be paid to UTILITIES on or before the first day of that Contract Year. UTILITIES shall provide CUSTOMER with a timely invoice for the Annual Fee and Administrative Fee, and CUSTOMER shall make full payment of the invoice to UTILITIES by the due dates set forth in this paragraph. UTILITIES shall provide CUSTOMER with timely invoices based on Schedule A for all Augmentation Water deemed delivered hereunder in excess of three (3) acre feet and

CUSTOMER shall make full payment of the invoices to UTILITIES within 30 days of its receipt of the invoices.

5. **Measurement.** The Augmentation Water leased hereunder shall be measured and deemed delivered at UTILITIES' Las Vegas Wastewater Treatment Plant or UTILITIES' J.D. Phillips Wastewater Treatment Plant, UTILITIES' Rosemont Pipeline release to South Cheyenne Creek, or other means approved by the Office of the State Engineer. CUSTOMER shall be responsible for any and all transit losses and evaporation losses subsequent to the delivery of the leased Augmentation Water.
6. **Approvals.** CUSTOMER is solely responsible, financially or otherwise, for obtaining all approvals of the State Engineer, Division 2 Engineer, or Water Court including, but not limited to, adjudication of an augmentation plan and/or approval of a substitute water supply plan authorizing use of the Augmentation Water to replace depletions associated with CUSTOMER's use of water at the Seven Falls property, including evaporative and spray losses, and CUSTOMER's pumping of water from the Wells, as well as all other necessary approvals required for the delivery and use of the Augmentation Water. CUSTOMER shall also be responsible for complying with all terms and conditions including, but not limited to, all reporting and accounting requirements under any augmentation plan or substitute water supply plan adjudicated to replace depletions associated with CUSTOMER's use of water at the Seven Falls property.
7. **Arrangements for Delivery.** CUSTOMER shall be responsible to arrange with UTILITIES' Water Resource Supply Department for the delivery of the Augmentation Water. Schedule A shall reflect the delivery schedule for Augmentation Water required by any augmentation plan and substitute water supply plan adjudicated for the Seven Falls property and UTILITIES will make reasonable efforts to deliver Augmentation Water in accordance with Schedule A. The Parties acknowledge that the delivery of Augmentation Water under this Lease will take place within the supply limitations of UTILITIES' water supply system and that those limitations vary by season. The actual timing of the delivery of Augmentation Water shall be at the reasonable discretion of UTILITIES.
8. **Notice.** CUSTOMER is required to provide UTILITIES two working days' notice in writing by mail, facsimile, or electronic mail at the address shown below prior to UTILITIES beginning delivery of the leased Augmentation Water.

Abby Ortega
P.O. Box 1103, MC 0930
Colorado Springs, CO 80947
(719) 668-8748
alortega@csu.org

Kalsoum Abbasi
P.O. Box 1103, MC 0930
Colorado Springs, CO 80947
(719) 668-8758
kabbasi@csu.org

9. **Augmentation Water Use.** All Augmentation Water under this Lease shall be for one time use only and for CUSTOMER's use exclusively to replace depletions associated with operation of Seven Falls 1859. In the event CUSTOMER does not or cannot beneficially use the Augmentation Water delivered under this Lease to replace depletions from CUSTOMER's use of water at the Seven Falls property, including evaporative and spray losses, and CUSTOMER's pumping of water from the Wells, all dominion over the Augmentation Water shall revert completely to UTILITIES. UTILITIES retains the legal ownership of and the right to use, reuse, and successively use the

Augmentation Water. CUSTOMER agrees not to use the Augmentation Water delivered pursuant to this Lease, directly or indirectly, to furnish water outside the Arkansas River Basin.

- 10. Interruptible Supply.** CUSTOMER acknowledges that UTILITIES' delivery of Augmentation Water under this Lease is on an interruptible basis. CUSTOMER acknowledges and consents to UTILITIES' right to discontinue deliveries of water under this Lease: (1) due to a significant interruption of water supplies, a substantial disruption (including, but not limited to, legal challenges impacting the water system, and maintenance and repair to the infrastructure) to UTILITIES' water system; or (2) as otherwise authorized by the City Code of Colorado Springs. UTILITIES will use reasonable efforts to provide CUSTOMER with 30 days prior notice of a discontinuance of water supplies provided for in the foregoing sentence. CUSTOMER acknowledges that UTILITIES cannot always anticipate when interruptions in water supplies or disruptions to its water system will occur and that UTILITIES has no obligation to provide CUSTOMER with prior notice of a discontinuance of deliveries of Augmentation Water due to an interruption in water supplies or a disruption in its water system. UTILITIES may also discontinue the delivery of Augmentation Water under this Lease at any time a water shortage with corresponding water use restrictions has been declared under the City's Water Shortage Ordinance, Chapter 12 (Utilities), Article 4 (Water Code), Part 13 (Water Shortage) of the Code of the City of Colorado Springs as it currently exists or is amended in the future. Prior to the discontinuance of the delivery of Augmentation Water due to declaration of a water shortage, UTILITIES will provide CUSTOMER with 30 days prior notice of such discontinuance.
- 11. Termination.** CUSTOMER acknowledges and consents to UTILITIES' right to terminate this Lease: (1) due to CUSTOMER's breach of a material term or condition of this Lease, 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 Lease due to a material breach on the part of UTILITIES, if UTILITIES has not taken substantial steps to cure the breach within thirty (30) days of receiving written notice of such breach from CUSTOMER.
- 12. Revocation.** CUSTOMER acknowledges that this Lease is in the nature of a license as defined in the Colorado Springs, Colorado, City Charter for the use of City of Colorado Springs property. As such, this Lease is expressly subject to Article 10 of the Charter of the City of Colorado Springs, and is expressly revocable by the City of Colorado Springs City Council at any time.
- 13. Water Use Restrictions.** CUSTOMER agrees to abide by any water use restrictions UTILITIES imposes on its customers and to declare and enforce such restrictions as directed by UTILITIES at any time during the term of this Agreement, consistent with Section 12.4.602 of the City Code of the City of Colorado Springs.
- 14. Rules and Regulations.** CUSTOMER shall comply with all Colorado Springs City ordinances, resolutions and policies, and the provisions of UTILITIES' Rules and Regulations and Line Extension & Service Standards for Water.

15. Water Rights Unaffected. No water rights are being transferred to or from UTILITIES or CUSTOMER under this Lease.

16. Disclaimer of Warranties. UTILITIES makes no warranty of any kind as to the timing, availability, quality, or suitability of the Augmentation Water delivered hereunder to CUSTOMER for any particular use; CUSTOMER assumes all such risks.

17. Legal Notice. Notices under this Lease, other than CUSTOMER's requests for Augmentation Water delivery and UTILITIES' responses to such requests, shall be given in writing, signed by an authorized representative of the Party giving notice. Telephonic or email notice is not acceptable. Notices shall be delivered by facsimile, by courier service delivery (such as Federal Express), or by first-class mail to the people specified below at the following addresses and telephone numbers:

A. For UTILITIES

i. Chief Water Services Officer

Courier Service Address:

Colorado Springs Utilities
ATTN: Chief Water Services Officer
121 S. Tejon St., 5th Floor
Colorado Springs, CO 80903

United States Postal Service Address:

Colorado Springs Utilities
ATTN: Chief Water Services Officer
P.O. Box 1103
Colorado Springs, CO 80947-0950
Fax: (719) 668-8020

ii. City Attorney's Office - Utilities Division

Courier Service Address:

City Attorney's Office – Utilities Division
30 S. Nevada Ave, Suite 501
Colorado Springs, CO 80903

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

B. For CUSTOMER:

PF, LLC
ATTN: President
One Lake Avenue
Colorado Springs, CO 80906

Michael F. Browning
Porzak, Browning & Bushong, LLP
2120 13th Street
Boulder, CO 80302

- 18. Assignment/Third Party Beneficiary.** There shall be no assignment or delegation of the rights or obligations contained in this Lease by either Party without the prior written consent by the other Party, and any such assignment or delegation shall be null and void. Notwithstanding anything herein to the contrary, upon written notice to CUSTOMER, UTILITIES may assign or delegate its rights and obligations under this Lease without consent from CUSTOMER to the City of Colorado Springs, Colorado. Nothing herein shall be construed to give any rights or benefits hereunder to anyone other than UTILITIES and CUSTOMER.
- 19. No Precedent; Severability.** The Parties agree that neither of them intends that this Lease shall in any way constitute a precedent or standard for any future lease 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 the existence of the Lease, as it is based solely on unique conditions currently existing at the time of execution. Any provision or part of this Lease 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 Lease 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.
- 20. Force Majeure.** Neither Party shall be liable for delays in performing its obligations under this Lease 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.
- 21. Appropriation of Funds.** In accord with the Colorado Springs City Charter, performance of UTILITIES' obligations under this Lease 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 Lease, or appropriated funds may not be expended due to City Charter spending limitations, then this Lease 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 Lease 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.
- 22. Indemnification.** 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 Lease.

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, CUSTOMER understands and agrees that the City of Colorado Springs, UTILITIES, 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 or consequential damages of any kind.


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


24. Governing Law. This Lease 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.*, the District Court for Water Division 2.

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

COLORADO SPRINGS UTILITIES

PF, LLC

By: 
Tyler Allison, P.E.
Acting Chief Water Services Officer

By: 
Stephen Bartolin, Jr.
Manager

Date: 12/17, 2015

Date: 10/23, 2015


APPROVED AS TO FORM
City Attorney's Office – Utilities Division
City of Colorado Springs

Schedule A
Seven Falls Projected Water Use
(acre-feet)

	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Total
<i>Well Pumping</i>													
Well No. 1	0.000	0.000	0.000	0.000	0.000	0.000	0.000	0.000	0.000	0.000	0.000	0.000	0.000
Well No. 2	0.447	0.404	0.447	0.691	1.389	1.980	2.266	1.956	1.360	0.705	0.433	0.447	12.526
Well No. 3	0.033	0.030	0.033	0.032	0.033	0.032	0.033	0.033	0.032	0.033	0.032	0.033	0.392
Total	0.481	0.434	0.481	0.723	1.422	2.012	2.299	1.989	1.393	0.739	0.465	0.481	12.918
Lagged Depletions	0.499	0.454	0.490	0.710	1.352	1.924	2.224	1.970	1.423	0.802	0.515	0.505	12.868
<i>Metered Use</i>													
Restaurant	0.224	0.202	0.224	0.217	0.437	0.423	0.437	0.437	0.423	0.224	0.217	0.224	3.686
Public Restroom	0.048	0.043	0.048	0.046	0.112	0.109	0.112	0.112	0.109	0.048	0.046	0.048	0.879
Mobile Restroom	0.176	0.159	0.176	0.170	0.323	0.313	0.323	0.323	0.313	0.176	0.170	0.176	2.800
Admin Building	0.033	0.030	0.033	0.032	0.033	0.032	0.033	0.033	0.032	0.033	0.032	0.033	0.392
Irrigation	0	0	0	0.258	0.516	1.135	1.393	1.084	0.516	0.258	0	0	5.160
Total	0.481	0.434	0.481	0.723	1.422	2.012	2.299	1.989	1.393	0.739	0.465	0.481	12.918
<i>Evaporation</i>													
Pond Evap.	0.012	0.108	0.215	0.334	0.552	0.733	0.646	0.475	0.512	0.343	0.170	0.020	4.120
Gross Depletions	0.511	0.562	0.705	1.044	1.904	2.657	2.870	2.445	1.935	1.145	0.685	0.525	16.988
<i>Return Flows</i>													
Septic	0.274	0.248	0.274	0.265	0.524	0.507	0.524	0.524	0.507	0.274	0.265	0.274	4.462
Irrigation	0.000	0.000	0.000	0.026	0.052	0.114	0.139	0.108	0.052	0.026	0.000	0.000	0.516
Unlagged RF	0.274	0.248	0.274	0.291	0.576	0.621	0.663	0.633	0.559	0.300	0.265	0.274	4.978
Lagged RF	0.283	0.262	0.276	0.295	0.507	0.590	0.633	0.612	0.550	0.353	0.288	0.285	4.934
Net Depletions	0.228	0.300	0.429	0.749	1.397	2.067	2.237	1.833	1.385	0.792	0.397	0.240	12.054

Restaurant Use based on 21 gpd/seat during October - April and 41 gpd/seat during May - September.
Public Restroom Use based on an average of 780 gpd with increased usage assumed during May - September.
Mobile Restroom Use based on an average of 2500 gpd with increased usage assumed during May - September.
Admin Building Use based on 350 gpd.
Irrigation Use based on estimates by Broadmoor staff.
Evaporation Depletions are subject to revision as more data is collected.
Gross Depletions = Lagged Pumping Depletions + Evaporation Depletions
Net Depletions = Gross Depletions - Lagged RF
Septic Return Flows = 90% of Restaurant, Public Restroom, and Admin Building Use
Irrigation Return Flows = 10% of Irrigation Use
Mobile Restroom Use considered to be 100% consumed.