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WATER CARRIAGE AGREEMENT

THIS WATER CARRIAGE AGREEMENT (the "Agreement") is made and entered into effective 5/16/2023, (the "Effective Date") by and between the **BILLINGS BENCH WATER ASSOCIATION** (the "BBWA"), a non-profit, private ditch corporation, having its principal office at 1111 Main Street, Suite 14, Billings, Montana 59105, and the **CITY OF BILLINGS**, a Montana municipal corporation (the "City"), having its principal office at City Hall, 210 N. 27th Street, Billings, Montana 59101, each referred separately, herein, as "the Party," or collectively as "the Parties".

RECITALS

A. The BBWA operates and maintains an irrigation ditch system, under the laws of the State of Montana, on behalf of and for the primary benefit of its shareholders, which includes a diversion structure and headgate that diverts water from the Yellowstone River to a main canal and over 200 miles of laterals, distribution canals and two storage reservoirs in Yellowstone County (the "BBWA Ditch"); this water is used for irrigation of crops, recreation, city parks, golf courses, schools, yard usage, and raw domestic water usage; and

B. The City is constructing a water reservoir and plant facility on the City's West End (the "West End Reservoir") for the primary purpose of storing and supplying clean and safe municipal water and an auxiliary function of providing public conservation and recreation amenities to area residents; the West End Reservoir is anticipated to begin operation in June 2025; and

C. The City owns certain water rights on the Yellowstone River for the purpose of furnishing municipal water supplies but needs a diversion and carriage link between the Yellowstone River and its West End Reservoir; the City desires to utilize the BBWA Ditch for this purpose and will substantially invest in improvements to the BBWA Ditch which will incidentally benefit the BBWA and its shareholders; and

D. The Parties have entered into this Agreement in order to provide for the use of the BBWA Ditch by the City to divert and carry City water from the Yellowstone River to the West End Reservoir on terms that will not interfere with the primary purpose and use of the BBWA Ditch by the BBWA and its shareholders and will provide substantial benefits to all of the Parties.

NOW, THEREFORE, in consideration of the recitals above and the mutual promises and agreements set forth below, the Parties hereto agree as follows:

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AGREEMENT

1. Agreement for the Carriage of Water. For a term of twenty (20) years (the "Term") from the Effective Date of this Agreement, the BBWA agrees to allow the City to utilize the BBWA Ditch, including its river headgate and associated infrastructure and facilities, for the diversion of any and all water supplies rightfully available to the City from the Yellowstone River for carriage to the City's take out point at the West End Reservoir, subject to the terms and conditions, herein. The City intends to divert 30 cubic feet per second (cfs) on a regular basis during the irrigation season and up to 74 cfs during non-irrigation season to supply the reservoirs. Understanding that volume may not always be available, the City and BBWA shall consult in good faith to reasonably determine the available carrying capacity of the BBWA Ditch, at any given time, that may be used by the City pursuant to this Agreement. If the available volume is less than 30 cfs during the irrigation season, the BBWA will work diligently to resume operations to allow the City to divert the full 30 cfs volume. This Agreement shall automatically renew for successive three-year terms unless either Party provides notice of its intent to amend or terminate to the other Party at least sixty (60) days prior to the expiration of any term.

2. Priority of BBWA Use. The use of the BBWA Ditch pursuant to this Agreement shall be subordinate to and shall not interfere with the use of the BBWA Ditch and the capacity thereof by the BBWA and its shareholders.

3. Priority of City in BBWA Ditch Carrying Capacity. The use of the BBWA Ditch carrying capacity under this Agreement shall be subordinate to the and shall not interfere with the use of the BBWA Ditch and the capacity thereof by third Parties under carriage agreements that pre-date this Agreement. Any carriage agreements with third Parties approved by the BBWA after the date of this Agreement shall be subordinate to and shall not interfere with the use of the BBWA Ditch and the capacity thereof by the City pursuant to this Agreement.

4. Time and Amount of Carriage. The City may not utilize the BBWA Ditch to divert or carry City water when or to the extent that:

    a. Such carriage would cause damage to the BBWA Ditch beyond customary wear and tear;
    b. During periods of extreme cold weather when the freezing water would damage facilities;
    c. All of the carrying capacity of the BBWA Ditch is required to divert and carry water for the benefit of shareholders of the BBWA under the BBWA's water rights or under carriage agreements that pre-date this Agreement;
    d. The BBWA is performing maintenance on the BBWA Ditch and carriage of water for the City would interfere with the maintenance activity.

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5. BBWA Ditch Improvements. The BBWA is the owner of all facilities and improvements installed by it. Subject to prior approval of the BBWA, the City shall fund and install all improvements to the BBWA Ditch necessary for the fulfilment of this Agreement., and The Parties agree and conclude that likely necessary improvements include, but are not limited to, the BBWA's Yellowstone River headgate, the BBWA's Canyon Creek flume, a diversion and check structure to allow City water to be diverted to the West End Reservoir both during and after irrigation season, and BBWA canal lining to increase the amount of water in the canal sufficiently to ensure the City has adequate water supply and reduce water loss. One year after the City begins to use the canal for water conveyance, the City and BBWA will determine improvements and modifications that are needed to effectively convey the water. The cost of the improvements will be split by benefit for each party. The City shall commit to providing matching funds for any such grant of canal lining should such canal lining be utilized for carrying City water and to the West End Reservoir pursuant to this Agreement. The BBWA will be the owner of all facilities and improvements installed by the City under this agreement with the exception of the diversion and check structure.

6. Maintenance. The BBWA will maintain the canal. The City will maintain the diversion structure and headgate if it is a separate structure.

7. Access. The City shall have access necessary along the right-of-way of the BBWA Ditch for purposes of ingress and egress to accomplish the terms of this Agreement. BBWA is not required to provide additional access beyond what is currently legally in place for BBWA operations.

8. Annual Fees.
   Annual fees to be paid by the City to the BBWA may be actual or in-kind; accordingly, the fees may be paid through direct funds or in-kind work performed by City crews. The first year of use, the annual fee will be $150,000. This fee will increase by the Consumer Price Index for All Urban Consumers (CPI-U) annually. Regarding in-kind fees, the City will provide the BBWA with an hourly rate for City work crews each year for BBWA Ditch maintenance. Should BBWA request in-kind work performance for BBWA Ditch maintenance, the City may opt to assist the BBWA with work that is needed, and the value of the requested in-kind work will be deducted from the City's annual seasonal fees. The City has no obligation to provide in-kind performance and has entire approval as to whether the City will perform in-kind work for a reduction in the City's direct annual fee payment to the BBWA. BBWA has no obligation to request in-kind work.

9. Water Rights. The Parties agree not to object in any forum, including Montana's Water Court, to carriage of the City's water in the BBWA Ditch, so long as such carriage is in accordance with the terms and conditions of this Agreement.

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10. Billing and Payment Terms. The BBWA shall invoice the City for all amounts due under this Agreement annually. Invoices shall be payable within thirty (30) days after the date of the invoice.

11. Default and Termination. Default shall be deemed to have occurred upon either Party's failure or refusal to perform any term or condition of this Agreement, provided thirty (30) days' notice of default is given to the defaulting Party and the defaulting Party fails or refuses to either cure or commence curing such default and diligently pursuing curation efforts to conclusion within ninety (90) days after having been provided written notice of such default. The Parties agree that a default in the performance of the terms of this Agreement is not subject to compensation in monetary damages, and this Agreement can only be enforced by specific performance or injunctive relief. No consequential or special damages shall be recoverable by either Party. In any legal proceeding brought to enforce the terms of this Agreement, the prevailing Party shall be entitled to recover reasonable attorney's fees and court costs.

    The term of this Agreement shall be for twenty (20) years from the Effective Date, except that:

    a. the City may opt to terminate this Agreement if the BBWA breaches its obligations hereunder and said breach continues for ninety (90) days after the City provides notice of default and an opportunity to cure to the BBWA;

    b. the City may opt to terminate this Agreement if it determines to transport City water from the Yellowstone River to the West End Reservoir via another carrier or mechanism and provides the BBWA notice of the City's intent to terminate this Agreement one (1) year prior to any such termination date;

    c. the BBWA may opt to terminate this Agreement if the City breaches its obligations hereunder and said breach continues for ninety (90) days after the BBWA provides written notice and an opportunity to cure to the City.

12. Waiver. Failure of a Party hereto to exercise any right hereunder shall not be deemed a waiver of such right and shall not affect the right of any Party to exercise at some future time said right or any other rights set forth in this Agreement.

13. Notice. Any notice required or permitted by this Agreement shall be in writing and shall be deemed to have been sufficiently given for all purposes if sent by U.S. first-class mail, postage prepaid, or hand-delivered, to the person whom such notice is intended to be given at the address set forth below:

BBWA:	BBWA Board Chairperson 1111 Main Street Suite 14 Billings, MT 59105

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CITY: City Administrator
c/o Public Works Director
City Hall
PO Box 1178
Billings, MT 59103

14. Immunity. Nothing contained herein shall constitute a waiver by the BBWA or the City of the provisions of any immunity provisions contained in the Montana Code Annotated, and as it may be amended from time to time.

15. Assignment. This terms and provisions of this Agreement shall inure to the benefit of and be binding upon the successors and assigns of the Parties hereto.

16. Amendment. No amendment or modifications to this Agreement shall be of any force or effect unless in writing and executed by the Parties hereto with the same formality as this as this Agreement.

17. Entire Agreement. This Agreement constitutes the entire agreement of the Parties with respect to the subject matter thereof.

18. Other Agreements. Nothing in this Agreement replaces or modifies any existing agreements between or among the Parties.

19. Severability. In the event any term or provision of this Agreement is determined to be invalid or unenforceable, then said term or provision shall be deemed severed from the balance of the Agreement, which shall remain in full force and effect.

20. Venue. Venue for resolution of any dispute under this Agreement resulting in litigation shall be in the 13th Judicial District Court for Yellowstone County, Montana. This Agreement will be interpreted and governed in accordance with Montana law.

21. Authority. Each Party represents that it has full authority to execute this Agreement and has taken all steps necessary to obtain full authority.

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IN WITNESS WHEREOF, the Parties have executed this Agreement the day and year first above written.

BILLINGS BENCH WATER ASSOCATION

By: DocuSigned by: Jim Stott 1CE997571FA8426...

Name: Jim Stott

Title: President

ATTEST: DocuSigned by: Kristina Franco FAFEF720F5464F0...

By_____

KRISTINA FRANCO, SECRETARY BBWA

CITY OF BILLINGS

By DocuSigned by: William A Cole 2CA11D5423334EE...

WILLIAM A. COLE, MAYOR

ATTEST:

By DocuSigned by: Toni Kuehner, Deputy City Clerk FOR A18D2B1EA45E44C...

DENISE BOHLMAN, CITY CLERK

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City Council Regular

Date:	05/08/2023
Title:	Agreement with BBWA for Conveyance of Water to Reservoirs
Presented by:	Debi Meling
Department:	Public Works
Presentation:	No
Legal Review	Yes

RECOMMENDATION

Staff recommends that City Council approve the agreement with BBWA to convey water to the reservoirs.

BACKGROUND (Consistency with Adopted Plans and Policies, if applicable)

The City is constructing a water treatment plant and raw water storage reservoirs on the west end of Billings. The original plan for the project included a river intake and pump station at the Yellowstone River and a large diameter pipe from the river to the reservoirs. The cost of the intake, pump station and pipeline are estimated at approximately $35 million. Given the increased cost of construction, city staff has been reviewing options to reduce the overall project cost. While using the BBWA has limitations, it was determined by staff to be the best option at this time. The biggest limitation with use of the BBWA is the inability to convey water during winter months. One of the improvements that will be made to the system is the installation of another headgate at the river or modification of an existing headgate. The modification or addition will enable the city to use the intake during times of low river flow when temperatures are adequate to flow water to the reservoirs. Other improvements will be made at the Canyon Creek Flume and lining will be added to stretches of the canal that experience significant seepage. The agreement calls for the BBWA to continue to maintain these facilities, with the exception of a new gate, if it is added. The City will also construct a diversion structure at the reservoir site to allow water to be diverted from the BBWA canal into the reservoirs. This structure will also serve as an offloader in the event the BBWA experiences a breach or backup. With the addition of this structure, a significant amount of water can be diverted to Canyon Creek as well as to the reservoirs.

The agreement also defines the annual fee that the city will pay the BBWA. The fee is based on a volumetric percentage of the overall flow and has an escalation clause based on the Consumer Price Index (CPI). The fee is less than the operations cost of the proposed intake and pump station, so the City will actually have lower O&M costs using the BBWA versus an intake and pump station.

Staff is recommending that the City utilize the BBWA for at least the next 5–10 years to see if the winter operations can meet our needs as well as if the overall conveyance through the BBWA continues to be beneficial or if other issues arise. If the City determines it would be better to have an intake and pump station, the project can be scheduled in the future and budgeted appropriately.

ALTERNATIVES

City Council may:

- Approve the agreement with the BBWA; or,
- Not approve the agreement. If the agreement is not approved, the City will need to construct a river intake, pump station and pipeline to serve the reservoirs and water treatment plant. The cost of these facilities would require rate increases to water users.

FISCAL EFFECTS

The agreement includes some capital investment into the BBWA Canal and diversion structure. While the exact amount if unknown until the project is bid, the FY24 budget includes $3 million for improvements. The agreement also includes an annual fee of $150,000. Both of these costs will come from water funds.

Attachments