

PUBLIC WORKS MEMORANDUM
#36-2022

DATE: July 25, 2022

TO: Honorable Mayor Meredith Leighty and City Council Members

THROUGH: Heather Geyer, City Manager *Hmg*

FROM: Kent Kisselman PE, Director of Public Works *KK*

SUBJECT: CR-121 – United Water and Sanitation Settlement and Water Delivery Agreement

PURPOSE

To consider CR-121, a resolution approving the settlement and water sale and delivery agreement between the City and United Water and Sanitation District, for the City's water court change case 18CW3007.

BACKGROUND

On May 16, 2022, City Council was updated on the status of the City's FRICO-Standley Change Case, and the potential for a settlement agreement with United Water and Sanitation District (United). The settlement agreement was considered the best solution for encouraging United to settle out of Northglenn's change case. Without an agreement, Northglenn would have to take its change case to trial. The issues United was claiming regarding the allocation of water in the FRICO-Standley system could have had substantial, negative impacts to Northglenn's water supply.

Following the direction that staff and water counsel received from City Council on May 16, negotiations with United on a settlement agreement commenced. Northglenn and United have finalized a settlement agreement that is agreeable to both parties.

The agreement broadly states that United will settle out of Northglenn's change case, for a quantity of water to be determined by the final volumetric limits set in the decree. The maximum amount of water will be 250 Acre Feet (AF); the minimum amount will be 175 AF. This water will be available to United from Bull Reservoir in perpetuity.

United has agreed to a one-time payment for this water. The amount Northglenn will receive depends on the amount of water that will be delivered to United as set in the final decree, but will range between \$1.96 and \$3.75 million.

The agreement stipulates that the funds received from this transaction will be used for enhancing the City's water supply, or the purchase of additional water rights. The agreement also sets forth a "Peace Pact" in which United and Northglenn have agreed to not file statements of opposition in any of the other party's change cases for 10 years after the agreement is finalized.

Upon the approval of this agreement, United will withdraw its statement of opposition to Northglenn's change case. United is one of a few remaining opposers to Northglenn's change case.

BUDGET/TIME IMPLICATIONS

The trial for Northglenn's change case is set for Nov. 28 through Dec. 16, 2022. It is anticipated that all parties will have settled out of the change case prior to this time, and a final decree will be submitted to the court. United will pay Northglenn under this agreement once the decree is final,

and the volumetric limits for water deliveries have been determined. The possible settlement amounts as listed in the agreement are as follows:

Acre Feet Delivered	Price Per Acre Foot	Total Payment
225 to 250 acre feet	\$15,000	\$3,375,000 to \$3,750,000
200 to 224 acre feet	\$13,500	\$2,700,000 to \$3,024,000
175 to 199 acre feet	\$11,250	\$1,968,750 to \$2,238,750

Funds received from the sale of water to United Water and Sanitation District will be applied to the Water Fund to be used for water supply enhancement projects and water rights purchases.

STAFF RECOMMENDATION

Attached is CR-121, a resolution that, if approved, would authorize the City Manager to execute the Water Sale and Delivery Agreement between the City and United Water and Sanitation District as a term for stipulation in the City’s water court case 18CW3007. Staff recommends approval of CR-121.

STAFF REFERENCE

If Council members have any questions, please contact Kent Kisselman, Director of Public Works, at kkisselman@northglenn.org or 303.450.4005.

CR-121 – United Water and Sanitation District Settlement and Water Delivery Agreement
 18CW3007 Water Sale and Delivery Agreement – United Water and Sanitation District

SPONSORED BY: MAYOR LEIGHTY

COUNCIL MEMBER'S RESOLUTION

RESOLUTION NO.

No. CR-121
Series of 2022

Series of 2022

A RESOLUTION APPROVING THE WATER SALE AND DELIVERY AGREEMENT BETWEEN THE CITY OF NORTHGLENN AND UNITED WATER AND SANITATION DISTRICT

BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF NORTHGLENN, COLORADO, THAT:

Section 1. The Water Sale and Delivery Agreement between the City of Northglenn and United Water and Sanitation District, attached hereto, is hereby approved and the City Manager is authorized to execute same on behalf of the City of Northglenn.

DATED at Northglenn, Colorado, this ____ day of _____, 2022.

MEREDITH LEIGHTY
Mayor

ATTEST:

JOHANNA SMALL, CMC
City Clerk

APPROVED AS TO FORM:

COREY Y. HOFFMANN
City Attorney

WATER SALE AND DELIVERY AGREEMENT

This Water Sale and Delivery Agreement (“Water Delivery Agreement” or “Agreement”) is entered into this ___ day of _____, 2022, by and between the City of Northglenn, a Colorado Home Rule Municipality (“Northglenn”) and the United Water and Sanitation District (“United”). Northglenn and United are also hereinafter referred to collectively as the Parties or individually as a Party.

Recitals

A. Northglenn owns and operates a municipal water supply system for the provision of municipal water supply to its residents and to contract municipal water supply customers. To this end, it owns and uses various decreed water rights in its system, which water rights and uses generate certain volumes of water that can be fully consumed and decreed consistent with paragraph 2.5 below (“Consumable Water”). Northglenn has determined that some of the Consumable Water in its water supply system could be used to increase the efficiency of its system and desires to enter into this Water Delivery Agreement with United on the terms and conditions expressed herein.

B. United is a governmental entity that facilitates or provides municipal water service and, as such, operates a number of ditches and gravel pits in the South Platte River basin related to its municipal water service systems. In connection therewith, United can utilize additional consumptive use credits on the South Platte River and its tributaries. United desires to obtain contract delivery rights for Consumable Water from Northglenn pursuant to the terms and conditions set forth herein.

C. Pursuant to Section ____ of the Northglenn City Charter, Northglenn may dispose of property constituting part of its utility system upon certain findings by the Northglenn City Council. The Council determines that the disposition of the City assets and perpetual contract delivery obligation contemplated herein will result in an improvement of the capacity and efficiency of the City’s municipal water supply system.

D. United has agreed to enter into a stipulation in Case No. 18CW3007 and forego the prosecution of the issues raised in that case solely in consideration of the commitments of Northglenn set forth herein.

Agreement

1. Term of Agreement. The term of this Water Delivery Agreement is perpetual, except if terminated in accordance with paragraph 5.4 below. Consumable Water delivery under this Agreement will commence no earlier than November 1, 2022, and subject to payment of the consideration by United to Northglenn as set forth in paragraph 4. Payment for the Consumable Water delivery will be at a closing to be scheduled on a mutually agreeable date within 90 days following entry of the final decree in Case No. 18CW3007 (“Closing”).

2. Sale and Delivery of Fully Consumable Water. Northglenn will provide United for the term of this Agreement up to 250 acre-feet (AF) annually (“Contract Amount”) of Consumable Water from Northglenn’s municipal water supply system subject to the further terms and conditions of this Agreement (“Contract Water”).

2.1. Delivery Season. Deliveries of the Contract Water will occur annually between November 1 and May 1, unless the Parties mutually agree to a different delivery period.

2.2. Delivery Rates and Timing. Northglenn will deliver the Contract Water at the rates and times described in paragraphs 2.2.1 and 2.2.2 below. Deliveries will be made at a flow rate no less than 1.0 cubic feet per second (“c.f.s.”) or no greater than 5.0 c.f.s., unless mutually agreed by the Parties. Under no circumstances will delivery rate requirements under this agreement take precedence over Northglenn’s augmentation delivery requirements or require Northglenn to be out of compliance with its National Pollutant Discharge Elimination System (NPDES) permit.

2.2.1. Default Delivery Rate and Time. Subject to paragraphs 5.7 and 5.8 below, the default rate of delivery is an average daily rate of 1.0 c.f.s. from the location described in Paragraph 2.2.3 which will continue for a period of 126 days, commencing on November 15 of each year unless Northglenn gives United 96 hours prior notice of an alternate commencement date and/or fixed flow rate for that delivery season. An alternate commencement date may be a date of Northglenn’s choosing anytime between November 1 and May 1 and extend for a continuous period at a fixed flow rate until a total Contract Amount has been delivered (the “Fixed Delivery Method”). An alternate fixed flow rate must satisfy the flow rate requirements set forth in paragraph 2.2 above and must be constant until such time as the total Contract Amount has been delivered in that season. Northglenn’s delivery obligation will be for a continuous delivery period independent of the then existing call (or lack of call) on the South Platte River.

2.2.2. Alternate Delivery by Slug Release. With 96 hours prior notice to United, Northglenn can forego making a release from a WWTP and may make a release from a reservoir or other structure to satisfy its delivery obligation of the Contract Amount, but not in a volume that exceeds 50 acre-feet in any month or at an instantaneous flow rate that is less than 1.0 c.f.s. or exceeds 5.0 c.f.s. without United’s advance consent. (i.e. “Slug Release”). Northglenn agrees it will not initiate a Slug Release when there is no call on the South Platte River without United’s consent. The Parties acknowledge and agree that a Slug Release could be at a flow rate greater than 5.0 c.f.s. and/or a volume in excess of 50 acre-feet monthly, but only with the advance consent of United.

2.2.3. Delivery Location. The Consumable Water must be delivered at Northglenn’s Wastewater Treatment Plant located in Section 36, Township 1 North, Range 68 West, 6th P.M., which discharges to Big Dry Creek above its confluence with the South Platte River.

2.2.4. With prior consent by United, which will not be unreasonably withheld,

Northglenn can deliver the water from any other location where Northglenn can currently, or in the future, deliver Consumable Water to Big Dry Creek at or below Northglenn's Big Dry Creek Wastewater Treatment Plant located on Big Dry Creek, to Clear Creek downstream of the Kershaw Ditch headgate, or to the South Platte River between the confluence of Big Dry Creek with the South Platte River and the Metro Plant outfall. Inability to bypass the deliveries around a dry-up or calling right is a reasonable basis for withholding approval of a new delivery location under this paragraph 2.2.4. Northglenn shall bear any transit losses from the point of release to the delivery points described in this paragraph 2.2.4.

2.2.5. Northglenn will determine and may from time to time in its discretion change, the location or locations where the Consumable Water will be delivered to United consistent with the terms of this Agreement. Northglenn will give United notice 96 hours prior to changing the location of delivery unless United consents to a change in location with less notice.

2.3. Transit Loss. After delivery at any of the locations described above, United shall bear any transit or evaporative losses from the point of delivery to the point of United's uses or rediversion.

2.4. Nature and Source of the Water. All water delivered will be fully consumable meaning that it can be used and successively re-used until extinction. The delivered water must be decreed for municipal use including domestic, irrigation, commercial, industrial, augmentation, replacement, and exchange. United will have the rights to all return flows from use of the delivered water. Upon request by United, Northglenn will identify, by water right, the source of the delivered water. Nothing in this Agreement prevents United from filing water court applications, notices of use, or other documents with the water court, state engineer's office, or other authority as may be necessary to beneficially use the water delivered under this Agreement within its water systems. The Parties agree that it is mutually beneficial for United to be able to beneficially use the water delivered under this Agreement without the need for a change of water rights. To that end, the Parties agree to cooperate concerning the sources of water delivered under this Agreement to minimize the need for United to file a change of water rights application.

3. Impact of Decree in Case No. 18CW3007. The Parties agree that if, in the final decree entered by the Water Court in Case No. 18CW3007, the 20-year volumetric limit on releases of water attributable to the subject shares from Standley Lake is reduced from the limit of 87,667 acre-feet as set forth in Paragraph 16.1.2 of the Draft Decree dated February 18, 2022, then Northglenn may reduce the Contract Amount up to a proportional amount from the maximum of 250 acre-feet. However, under no circumstances will the Contract Amount be reduced below 175 acre-feet.

4. Consideration. The consideration contemplated for this Agreement includes a one-time payment from United in an amount scaled to the final Contract Amount ("Contract Price"). United shall pay the Contract Price for the Contract Amount of water by wire transfer(s) at or before Closing. Consideration also includes the promises and other valuable consideration

contained in this Water Delivery Agreement, the receipt and sufficiency of which is acknowledged herein. The contemplated consideration includes the following:

4.1. Price per Acre-Foot. The Contract Price is based on the Contract Amount as follows:

4.1.1. For a Contract Amount between 225 and 250 acre-feet, inclusive, the Contract Price will be \$15,000.00 per acre-foot.

4.1.2. For a Contract Amount between 200 and 224 acre-feet, inclusive, the Contract Price will be \$13,500.00 per acre-foot.

4.1.3. For a Contract Amount between 175 and 199 acre-feet, inclusive, the Contract Price will be \$11,250.00 per acre-foot.

4.2. Peace Pact. The Parties acknowledge and agree that the items listed in this Paragraph 4.1 and its subparts are part of the consideration for entering into this Water Delivery Agreement. Failure to comply with the terms of these paragraphs constitutes a breach of this Water Delivery Agreement. The Parties agree to take, or refrain from taking, the following actions in addition to any other obligations set forth herein.

4.2.1. United and Northglenn mutually agree to not file statements of opposition or otherwise participate in each other's Water Court applications currently pending or subsequently commenced on or before 10 years from date of mutual execution of this Water Delivery Agreement.

4.2.2. United agrees to not file statements of opposition or otherwise participate in any future Northglenn and/or FRICO diligence/absolute Water Court applications involving the Standley Lake Conditional Water Right. For purposes of this agreement, the "Standley Lake Conditional Water Right" refers to Reservoir Priority No. 74-a on Clear Creek, Reservoir Priority No. 6-a on Ralston Creek, and Reservoir Priority No. 2-a on Leyden Creek, with an appropriation date of March 4, 1902, and an adjudication date of May 13, 1936, in the so-called Dunklee Decree in Case No. 60052, Denver District Court, in the amount of 16,699 acre-feet conditional. The Standley Lake Conditional Water Right was most recently the subject of a diligence decree in Case No. 18CW3043 entered on July 23, 2019.

4.2.3. In furtherance of this Peace Pact, the Parties will communicate annually following execution of this Agreement, to discuss matters related to Peace Pact operations and water delivery logistics for the upcoming delivery season. The Parties also agree to meet as needed to discuss issues that arise at other times of the year. Meetings may be in-person (subject to public health orders) or virtual.

4.2.4. The Parties acknowledge that as personnel and consultants change there is a chance that a statement of opposition could be inadvertently filed that conflicts with the Peace Pact described above. To the extent that a statement of opposition is filed in contravention of the Peace Pact, this act in and of itself shall not trigger termination of the Agreement, breach, or

default. Instead, the Party whose application was improperly objected to shall notify the opposing party and provide them with 15 days to withdraw the statement of opposition. To the extent that the statement of opposition is contrary to the Peace Pact and is not withdrawn 15 days after notice, the terms of paragraph 5.4 and/or 5.9 shall apply.

4.2.5. The provisions of this Paragraph 4 shall apply to any third-party to which the Consumable Water is assigned pursuant to Paragraph 5.3 herein.

5. Other

5.1. Allocation of Contract Price. Northglenn shall allocate all of the Contract Price to Northglenn's Water Enterprise Fund, which such allocation of funds will be used for water supply enhancement projects.

5.2. Source and Quality of Consumable Water. The Parties acknowledge and agree that Consumable Water delivered pursuant to this Water Delivery Agreement may comprise treated municipal wastewater effluent, or, at Northglenn's discretion, fully consumable raw water released from Northglenn's raw water supply system. Northglenn makes no representation or warranty as to the quality, or the fitness for a particular use, of the Consumable Water delivered hereunder except that the nature of the delivered water will be consistent with paragraph 2.5, above. The Parties further acknowledge that the Consumable Water provided hereunder is delivered on an as-is basis. Except for the requirements concerning the nature of the delivered water set forth in paragraph 2.5 above, United waives any actual or potential rights they might have concerning any warranties or representations by Northglenn as to the quality of the Consumable Water or its fitness for a particular use, any product liability claim and all other existing or later-created or conceived-of strict liability or strict liability claims and rights concerning the quality, or fitness for use, of the Consumable Water sold and delivered pursuant to this Agreement.

5.3. Ownership of Underlying Water Rights. The water delivered pursuant to this Water Delivery Agreement is provided strictly on a contract basis. United will not have any right of ownership of the underlying water rights from which the Consumable Water delivered hereunder is derived. Northglenn will properly account for the delivery of the water contemplated herein in a manner consistent with its current accounting practices and will provide copies of said accounting to United upon request. The accounting will identify the location of the delivery of water to United. Despite the foregoing, Northglenn shall not object in any fashion as to the use of the Northglenn delivered water in any water court applications, notices of use, or other documents filed by United with the water court, state engineer's office, or other authority as may be necessary to beneficially use the water delivered under this Agreement within their water systems and hereby grants permission to United to file such documents if necessary for them to beneficially use the delivered water. In the event that a third party challenges the fully consumable nature of the water delivered under this Agreement, Northglenn may participate in the relevant proceeding in support of the fully consumable nature of the water and United's right to beneficially use such water.

5.3. Assignment Limitations. This Water Delivery Agreement and the Consumable Water subject hereto may be assigned by United with prior notice to Northglenn, so long as such assignment is to a governmental entity formed under the laws of the State of Colorado with the obligation to provide a municipal water supply. Northglenn may assign its Consumable Water delivery obligation with prior notice to United, so long as such assignment does not negatively impact United's ability to beneficially use the water delivered in accordance with this Agreement.

5.4. Termination. This Water Delivery Agreement will terminate upon the occurrence of any one of the following events:

- a. United's failure to make a payment required by paragraph 4, above;
- b. United's failure to comply with the provisions set forth in paragraph 4 above, upon judicial confirmation that United violated the Peace Pact provisions; or
- c. The mutual agreement of the Parties.

5.5. Notices. All notices required to be given or made under this Water Delivery Agreement will be in writing and sent by United States mail or hand delivery to the following addresses:

To Northglenn: Tami Moon
Environmental Manager
11701 Community Center Drive,
Northglenn, CO 80233
Silas Adams
Water Resources Administrator
City of Northglenn
11701 Community Center Drive,
Northglenn, CO 80233

With copy to: Donald Frick
Whitney Coulter
Fischer, Brown, Bartlett, Larsen & Irby, PC
1319 E. Prospect Rd.
Fort Collins, CO 80525

Corey Hoffman
Hoffman, Parker, Wilson & Carberry, PC
511 16th St Mall #610,
Denver, CO 80202

To United: President

United Water and Sanitation District
8301 East Prentice Avenue, #100
Greenwood Village, CO 80111

With copy to: Tod Smith
Law Office of Tod J. Smith, LLC
5777 Central Avenue, Suite 228
Boulder, Colorado 80301

5.5.1. All notices will be deemed effective one (1) day after hand delivery, or if mailed, upon receipt. Any Party, by written notice, may change the address to which future notices shall be sent to that Party.

5.5.2. For purposes of notice regarding alternate delivery dates or fixed amounts under Fixed Delivery or Slug Release operations, notice will be by electronic mail at the following addresses. Any Party, by written notice, may change the email address to which future notices shall be sent to that Party for purposes of Fixed Delivery or Slug Release operations.

Silas Adams	sadams@northglenn.org
Tami Moon	tmoon@northglenn.org
Becca Evans	becca@dinatalewater.com
Katie Melander	katie@dinatalewater.com
Drew Damiano	drew@unitedwateridistrict.com

5.6. Use of Consumable Water. United will not identify or otherwise attempt to use the water delivered hereunder in a Substitute Water Supply Plan or a Water Court application, including but not limited to a plan for augmentation, without first giving 30 days advance notice to Northglenn. United agrees to take all reasonable actions, including coordination with Northglenn, to minimize the chance that use of the delivered water could result in negative impacts to Northglenn's decrees. United will reimburse Northglenn for any costs or expenses incurred if any United application causes Northglenn or its staff to be deposed, subject to a subpoena, compelled to testify at trial, or otherwise subject to discovery requests. In such an event, United agrees to promptly reimburse Northglenn for its costs and expenses associated with the same, including staff time and reasonable attorney fees.

5.7. Force Majeure. No Party will be held liable for failure to perform hereunder due to wars, strikes, terrorist actions, acts of God, natural disasters, unanticipated failure of infrastructure or other similar occurrences outside the control of such Party.

5.8. Damages for Temporary Failure to Deliver Consumable Water. If, for reasons unrelated to force majeure, as described in paragraph 5.7, above, and despite Northglenn's good faith effort to comply, Northglenn is temporarily unable to satisfy its obligations for delivery of water to United under this Water Delivery Agreement for any period of time and, as a result,

Northglenn fails to deliver the full Contract Amount in any delivery season, the Parties agree that any damages resulting to United therefrom shall be limited to a pro rata refund in the amount of \$1,000 per acre-foot, which amount shall be adjusted bi-annually commencing on the two-year anniversary date of execution of this Agreement by the percentage change since execution in consumer prices as measured by the United States Consumer Price Index entitled "All Urban Consumers: All items in U.S. City Average" or a similar index should such index no longer be published, for each acre foot of water less than the Contract Amount Northglenn temporarily fails to delivery during the delivery season. Other than a pro rata refund set forth above, no other damages may be asserted or paid by Northglenn to United as a result of a temporary inability to delivery water.

5.9. Damages for Permanent Breach. In the event either Party permanently defaults in its obligations hereunder for reasons unrelated to force majeure as described in paragraph 5.7, above, or as described in paragraph 5.8, above, the non-defaulting Party shall have legal remedy against the defaulting Party for specific performance if possible, or for actual and compensatory damages and reasonable attorney and engineering fees and costs only. To the extent that specific performance is not possible, the terms of the Peace Pact described in paragraph 4.1 will terminate, except that if United and/or its assignee(s) is in default the terms of the Peace Pact shall continue to apply. A Party's recovery of damages in any such action against the defaulting party shall be limited to actual and compensatory damages and reasonable attorney and engineering fees and costs. Absent a willful breach of this Agreement by the defaulting Party, recovery will not include any other type of damages, including, but not limited to, any consequential, punitive, or exemplary damages against the defaulting Party. Revisions to Northglenn's City Charter, ordinances, or other Northglenn City rules and regulations that result in a physical reduction in the perpetual water deliveries contemplated by this Agreement will constitute a permanent breach of this Agreement.

5.10. Default. A default will be deemed to have occurred if either Party breaches its obligations hereunder and fails to cure such breach within 15 days of written notice from the non-breaching Party specifying the breach or such other time frame as mutually agreed upon in writing by the Parties. The Parties will have all remedies available at law and in equity, subject to the limitations set forth in paragraph 5.9, above.

5.11. Entire Agreement. This Water Delivery Agreement represents the entire agreement of the Parties and supersedes all prior negotiations, representations, or agreements, either written or oral with respect to the delivery of the Contract Amount of Consumable Water.

5.12. Amendment. This Water Delivery Agreement may only be amended in writing by the mutual agreement of the Parties, or their successors and assigns.

5.13. Non-Severability. The terms of this Agreement concerning Northglenn perpetual deliveries of water to United are not severable and if Northglenn's water delivery obligations are held to be invalid or unenforceable, then Northglenn will be deemed to have permanently breached this Agreement and the terms of paragraph 5.10, above apply.

5.14. Waiver. The waiver of any breach of any provision of this Agreement by any Party hereto does not constitute a waiver of any subsequent breach of said Party, for either breach of the same or any other provision of this Agreement

5.15. Binding Agreement. This Agreement is binding upon the Parties hereto and their successors and assigns. In the event of an assignment pursuant to the terms of this Agreement, the provisions of paragraph 4.1, above, are permanently binding on the Parties.

5.16. Descriptive headings. The descriptive headings herein are inserted for convenience or reference only and are not intended to be a part of or to affect the meaning or interpretation of this Agreement.

5.17. Governing Law and Forum. This Agreement is governed by and construed in accordance with the laws of the State of Colorado. In the event any Party is required to take legal action to enforce its rights under this Agreement, the Parties agree that the forum for any such litigation will be the District Court for Water Division 1, State of Colorado..

5.18. Authority. Each of the persons executing this Agreement on behalf of the Parties hereto, covenants and warrants that he or she is fully authorized to execute this Agreement on behalf of the Party he or she represents. The Parties further agree that they each have sought the advice of independent legal counsel prior to entering into this Agreement.

5.19. Counterparts. This Agreement may be executed in duplicate original counterparts.

CITY OF NORTHGLENN

By _____
_____, City Manager

ATTEST:

City Clerk

**UNITED WATER AND SANITATION
DISTRICT**

By _____

ATTEST:
