

AGREEMENT

This agreement (the "Agreement") is entered this 28 day of June, 2016, between Buckhorn Valley Metropolitan District No. 1 (the "District") and Trout Unlimited, Inc. ("Trout Unlimited"), for the purpose of partnering on a project designed to improve flows in Abrams Creek for the benefit of its native cutthroat trout fishery while preserving the District's ability to fully utilize its decreed water rights. The District and Trout Unlimited may collectively be referred to herein as the "Parties").

A. Recitals

1. Trout Unlimited is a non-profit, section 501(c)(3) corporation, which mission is to conserve, protect and restore North America's cold water fisheries and their watersheds.
2. The District is a quasi-municipal corporation and political subdivision of the State of Colorado organized pursuant to the laws of the State of Colorado in order to construct, operate and maintain certain public facilities and improvements in accordance with its approved service plan, including, but not limited to, irrigation services, and is authorized pursuant to § 32-1-1001(1)(d)(I), C.R.S., to enter into contracts affecting its affairs.
3. Abrams Creek contains a Core Conservation population of native, Green-Lineage cutthroat trout (*Oncorhynchus clarkii pleuriticus*). This population is the only known aboriginal cutthroat population in the Eagle River watershed and it possesses a unique genetic characteristic -a rare mitochondrial haplotype - which is not found in any other known cutthroat trout populations.
4. The District owns J.P.O Ditch No. 2 which diverts water from Abrams Creek. The JPO Ditch No. 2 is decreed a total of 3.0 cfs under Civil Action 548 (1.0 cfs for irrigation) and Civil Action 841 (2.0 cfs for irrigation and domestic use) in Water District 37, Division 5 ("JPO Ditch No. 2 water rights").
5. Water diverted by the JPO Ditch No. 2 is delivered to the District's irrigated lands, approximately 5 miles downstream in the Alkali Creek drainage. Preliminary estimates are that as much as 40 percent of the water diverted does not reach the irrigated lands due to ditch leakage. The District also diverts water at times from Abrams Creek during free river conditions for storage and plans to continue that practice.
6. The goals of Trout Unlimited and the District are to improve flows in Abrams Creek for the benefit of its native cutthroat fishery by improving the efficiency of the District's diversion and delivery system without impairing the District's JPO Ditch No. 2 water rights and the use thereof or its long term ability to operate and maintain its diversion and delivery system.

NOW THEREFORE, in consideration of the premises and the mutual promises and covenants set forth herein, the Parties agree as follows:

B. Project Description

1. Subject to the terms and conditions of this Agreement, the Parties propose to pipe portions of the JPO No. 2 Ditch to improve the efficiency of delivery of water to the District's irrigated lands



and reduce diversions from Abrams Creek for the benefit of the cutthroat trout fishery (the "Project").

- a. New diversion works and a pipeline for the JPO Ditch No. 2 shall be designed and engineered to increase diversion efficiency and water carriage efficiency without impairing the District's JPO Ditch No. 2 water right and use thereof, and without impairing the District's long term ability to operate and maintain the diversion and pipeline system.
 - b. The location of the point of diversion for the JPO Ditch No. 2 will remain the same unless otherwise agreed to by the Parties.
 - c. Subject to the District's determination of the optimal design of the Project, it is foreseen that the pipeline will generally follow the existing ditch alignment unless an alternate alignment is agreed to by the Parties, which approval will not be unreasonably withheld.
 - d. The Project will use the appropriately sized diameter pipeline as needed to accommodate delivery of the JPO Ditch No. 2 water right and the JPO Ditch No. 1 water right owned by the District and which diverts water out of Hernage Creek before being combined with water diverted under the JPO Ditch No. 2 water right for delivery to the District (i.e. a total capacity adequate to carry 7 c.f.s). Certain sections of the pipeline may vary in diameter to accommodate the physical situation.
2. Immediately upon completion of construction of the Project, the District will leave in Abrams Creek 40 percent of the amount of water that is physically available at the JPO Ditch No. 2 diversion point, except for instances when that 40 percent will result in less than 1.25 cfs in the Creek, in which case diversions under the JPO Ditch No. 2 water right will be limited or stopped in order to leave up to 1.25 cfs in the Creek. For purposes of example only, if there is 2 cfs available at the JPO Ditch No. 2 headgate, the District may only divert 0.75 cfs under its JPO Ditch No. 2 water right while leaving 1.25 cfs in the Creek, but if there is 4 cfs available at the JPO Ditch No. 2 headgate, up to 2.4 cfs may be diverted and delivered to the District through the pipeline under the JPO Ditch No. 2 water right and 1.6 cfs shall be left in Abrams Creek. Under this Agreement, 5 cfs of flow at the JPO Ditch No. 2 headgate is required to divert the full 3.0 cfs decreed to the JPO Ditch No. 2 water right. This Agreement shall have no impact on the amount of water the District may divert under the JPO Ditch No. 1 water right. The District's obligations under this paragraph will be met even if the Project, as built, results in efficiencies of less than 40 percent. As part of the Project, measuring devices will be installed as needed to ensure that the provisions of this paragraph are being met.
 3. A fish screen will be installed as part of the Project. The final design of the diversion and fish screen will be determined at the Project design stage, with input from Trout Unlimited and Colorado Parks and Wildlife.
 4. During high flows periods in Abrams Creek at the diversion structure and to allow for periodic flushing flows beneficial to the cutthroat trout fishery, the District agrees that in some years it will further reduce or curtail diversions under the JPO Ditch No. 2 water rights for up to 7 days so that flows in Abrams Creek are higher during that time, so long as it can be done without causing material injury to the District's use of its JPO Ditch No. 2 water rights. The District



agrees to cooperate with Trout Unlimited on determining the frequency, timing and amount of such flushing flows that meet the goals set forth in paragraph A.6.

C. Parties' Responsibilities

1. Securing adequate funding for the Project is a condition precedent to the other obligations set forth in this Agreement. Trout Unlimited is responsible for seeking \$1.2 million in funding for the Project through application for grants and/or donations. The District will be responsible for seeking funding in addition to the \$1.2 million, if any, as may be needed to complete the Project, provided that any financial obligations of the District hereunder are subject to annual appropriations as provided herein. The terms of any grants, donations or other funding must be reasonably acceptable to both Parties. Funding will be sought for Project design, permitting, engineering, construction, maintenance, and other costs associated with the design, approval and construction of the Project. Funding may be used to reimburse costs already incurred in the permitting and design of the Project but only if permitted under the terms of the grants and/or donations. Should Trout Unlimited or the District be unable to raise the necessary funds within 24 months of the date of this Agreement, then the Parties may agree to extend this Agreement for a mutually acceptable period. If no such extension is agreed to, then this Agreement shall automatically be rendered null and void and be of no further force and effect and the parties hereto shall have no obligations under this Agreement. The foregoing provision shall be self-effectuating.
2. Provided funding is obtained, the District will be responsible for (1) determining the optimal design of the Project, (2) design, plans and specifications to meet the Project goals set forth in this Agreement, and (3) contracting for construction and overseeing the construction of the Project in a manner consistent with this Agreement and with the terms of the grants and/or donations obtained to pay for the Project.
3. The Project shall be designed, constructed and maintained in a manner consistent with the goals set forth in paragraph A.6 of this Agreement. Trout Unlimited shall have the right to review Project design and construction for consistency with this Agreement and with the terms and conditions of any grant and/or donation for which Trout Unlimited is the fiscal agent or sponsor, provided, however, the District shall have the sole responsibility and authority for (a) determination of the appropriate Project design, construction methods, and materials, (b) location of all facilities, (c) contract letting and supervision of construction contracts, and (d) operation and maintenance of the Project. Design, construction, operation and maintenance of the fish screen contemplated under paragraph B.3 will be reasonably consistent with the recommendations of Colorado Parks and Wildlife. Project expenditures incurred by the District that are inconsistent with the terms and conditions of this Agreement and/or of any grant and/or donation for the Project will be the sole responsibility of the District.
4. Contracts with the company and/or engineers responsible for design and construction of the Project shall include adequate warranty and insurance provisions, and other appropriate provisions acceptable to the Parties.
5. Securing all necessary local, state and federal permits and approvals with conditions mutually acceptable to the Parties is also a condition precedent to the Project and the other obligations set forth in this Agreement. Trout Unlimited will seek funding, in the amount specified in a



scope of work obtained by the District and reasonably acceptable to Trout Unlimited, for all such necessary permits and approvals, which will be part of the \$1.2M being raised by Trout Unlimited. Trout Unlimited will assist the District in obtaining said permits and approvals for the Project before construction begins. The District will be the named applicant in said permits and approvals and will be responsible for the implementation of any and all terms and conditions of the permits and approvals. If permits and approvals acceptable to both Parties cannot be obtained with this funding within 12 months of the date of this Agreement, the Parties may agree to extend this Agreement for a mutually acceptable period. If no such extension is agreed to, then this Agreement shall automatically be rendered null and void and be of no further force and effect and the parties hereto shall have no obligations under this Agreement. The foregoing provision shall be self-effectuating.

6. The Parties understand this Project does not require a change of water rights and it is administrable by the State and Division Engineers without impairing the District's JPO Ditch No. 2 water rights and the use thereof. As part of the approvals described in paragraph C.5, above, which are a condition precedent of this Agreement, the District will seek to obtain a satisfactory approval of the Parties' understanding from the State and Division Engineers.
7. Once construction of the Project is completed, the District will be the exclusive owner of the Project infrastructure and will be responsible for the operation and maintenance of the Project including, but not limited to, the fish screen, maintenance of diversion structures and measuring devices to ensure that the District's obligations under this Agreement are met, and compliance with any terms and conditions imposed as part of the Project's permits and approvals. This Agreement shall not affect the District's discretion to continue its historical practice of diverting water under free river conditions at the JPO Ditch No. 1 and/or JPO Ditch No. 2, or to divert under new or changed water rights, so long as the District satisfies the terms of this Agreement.
8. The District will provide Trout Unlimited or its designee with such records including diversion records and stream flow measurements, so as to allow Trout Unlimited to monitor compliance with this Agreement. The District will also provide Trout Unlimited reasonable notice of any material issues related to implementation of the Project. Trout Unlimited will bear no responsibility for operation and maintenance of the Project or for compliance with conditions of the Project's permits and approvals under this Agreement.

D. Access

1. The District will grant access to JPO Ditch No. 1 and JPO Ditch No. 2, diversion structures, and other District facilities as may be reasonably necessary for the completion of the Project.
2. Once construction of the Project is completed, to the extent of the District's authority, the District will grant to Trout Unlimited and its authorized representatives access to the District's Project facilities as necessary to ensure that the provisions of paragraph B.2 are being met and the fish screen properly maintained.
3. The District will maintain District's access for operation and maintenance of the Project, to the extent practicable with the understanding that, at the time of this contract, the Project lies entirely on land owned by the US Bureau of Land Management.



E. Term/Termination

Prior to satisfaction of the conditions precedent set forth in paragraphs C.1, C.5, and C.6 above, either party may terminate this Agreement by giving the other party written notice as provided under paragraph F. Once the conditions precedent set forth in paragraphs C.1, C.5, and C.6 above have been satisfied, the term of this Agreement is in perpetuity.

F. Notices and Representatives

The following are the primary contacts for each party. All notices and communications regarding the Project will include the named individuals, the preferred form of communication being email. Either party may from time to time designate by written notice substitute or additional contacts for the party.

District
Buckhorn Valley Metropolitan Districts No. 1
Attn: President
P.O. Box 5127
0044 Indian Heights Way
Gypsum, CO 81637
jvhill.co@gmail.com

Trout Unlimited
Attn: Project Manager
P.O. Box 1544
Pagosa Springs, CO 81147
mwhiting@tu.org

Copy to:

Icenogle Seaver Pogue, P.C.
Attn: Jennifer L. Ivey
4725 South Monaco Street, Suite 225
Denver, Colorado 80237
Telephone: 303.867.3003
Facsimile: 303.292.9101
JIvey@isp-law.com

G. General Provisions

1. No provision, covenant or agreement contained in this Agreement, nor any obligations herein imposed upon the District shall constitute or create an indebtedness or debt of the District within the meaning of any Colorado constitutional provision or statutory limitation.
2. The District does not intend to hereby to create a multiple-fiscal year direct or indirect debt or other financial obligation whatsoever. The performance of those obligations of the District hereunder requiring budgeting and appropriation of funds are subject to annual budgeting and appropriations and if such appropriations are not available in any given year, the obligations of this Agreement requiring said appropriations will not be enforced in that year. The District's obligation to forego water diversions as set forth in paragraphs B.2 and B.4 shall be unaffected by this provision.
3. The terms of this Agreement are severable, and should any term or provision hereof be declared invalid or become inoperative for any reason, including without limitation by judicial order, administrative order, and/or change in applicable law, such invalidity or change in a term or

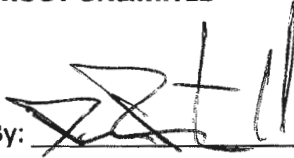


provision shall not affect the validity of any other term or provision hereof, unless such an interpretation impairs the ability to achieve one or more of the goals set forth in Paragraph A.6, in which case the Agreement will be revised as needed to best accomplish those goals. No waiver of any of the provisions of this Agreement shall be deemed to constitute a waiver of any other provision of this Agreement, nor shall such waiver constitute a continuing waiver unless otherwise expressly provided herein, nor shall the waiver of any default hereunder be deemed to be a waiver of any subsequent default hereunder.

4. This Agreement shall be governed by and construed in accordance with the laws of the State of Colorado, and venue for any dispute hereunder shall lie in the Eagle County District Court.
5. The headings, captions and titles contained herein are intended for convenience and reference only and are not intended to construe the provisions hereof.
6. This Agreement contains the entire agreement between the Parties, and no statement, promise or inducement made by either party or the agent of either party that is not contained in this Agreement shall be valid or binding.
7. Nothing in this Agreement or in any actions taken by the Parties pursuant to this Agreement shall be deemed a waiver of the District's sovereign immunity under the Colorado Governmental Immunity Act, §§ 24-10-101, *et seq.*, as amended from time to time.
8. The Parties may not assign or delegate their respective right, duties, and obligations hereunder absent the written consent of the other party.
9. All provisions herein, including the benefits and burdens, shall extend to and be binding upon the Parties' respective heirs, legal representatives, successors, and assigns.
10. This Agreement is a covenant that runs with and burdens the District's JPO No. 2 water rights to the extent not terminated pursuant to paragraphs C.1, C.5, or C.6. The District shall record this Agreement within the appropriate clerk and recorder office(s) within ten (10) days after it is executed by both Parties. The District shall provide notice to Trout Unlimited of its intent to sell or lease any portion of the JPO Ditch No. 2 water right no less than thirty (30) days prior to any such sale or lease. If the Agreement is terminated pursuant to paragraphs C.1, C.5, or C.6, either Party may record a Notice of Termination of the Agreement.
11. This Agreement may be executed in multiple identical original counterparts constituting one agreement.
12. Modifications of this Agreement shall not be effective unless agreed to by the Parties in a written, properly executed amendment hereto.
13. Enforcement of this Agreement and all rights and obligations hereunder are reserved solely to the Parties. Any services or benefits which third parties receive as a result of this Agreement are incidental to the Agreement and do not create any rights for such third parties.
14. The Parties agree that the terms and conditions of this Agreement are enforceable by specific performance.

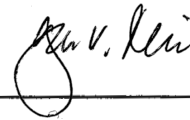


TROUT UNLIMITED

By: 

Title: Drew Peternell
Colorado Water Project
Director

**BUCKHORN VALLEY METROPOLITAN
DISTRICT NO. 1**

By: 

Title: President