

# **Feasibility of Construction of the North Sterling Irrigation District River Diversion Replacement Project**

Sponsored by:

North Sterling Irrigation District

in conjunction with the

Colorado Water Conservation Board

Prepared by:

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## **North Sterling Irrigation District**

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Dave Breidenbach  
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***Matt Stearns, P.E.***

Colorado Water Conservation Board

# **Feasibility Study North Sterling Irrigation District River Diversion Replacement Project**

## **Introduction (Need for the Project)**

The North Sterling Irrigation District (District) is the owner of the North Sterling Reservoir (aka Point of Rocks Dam), which is located in Logan County. The District operates the North Sterling Reservoir and its associated structures for the benefit of the landowners within the District by providing stored and direct flow water which, except for a few small wells, is the sole source of irrigation water. The North Sterling Inlet Ditch diverts from the South Platte River, approximately 8 miles upstream of the Morgan/Washington County line. The water is stored in the 74,590 acre-foot reservoir and deliveries are made to the North Sterling Outlet Canal for use by landowners within the District.

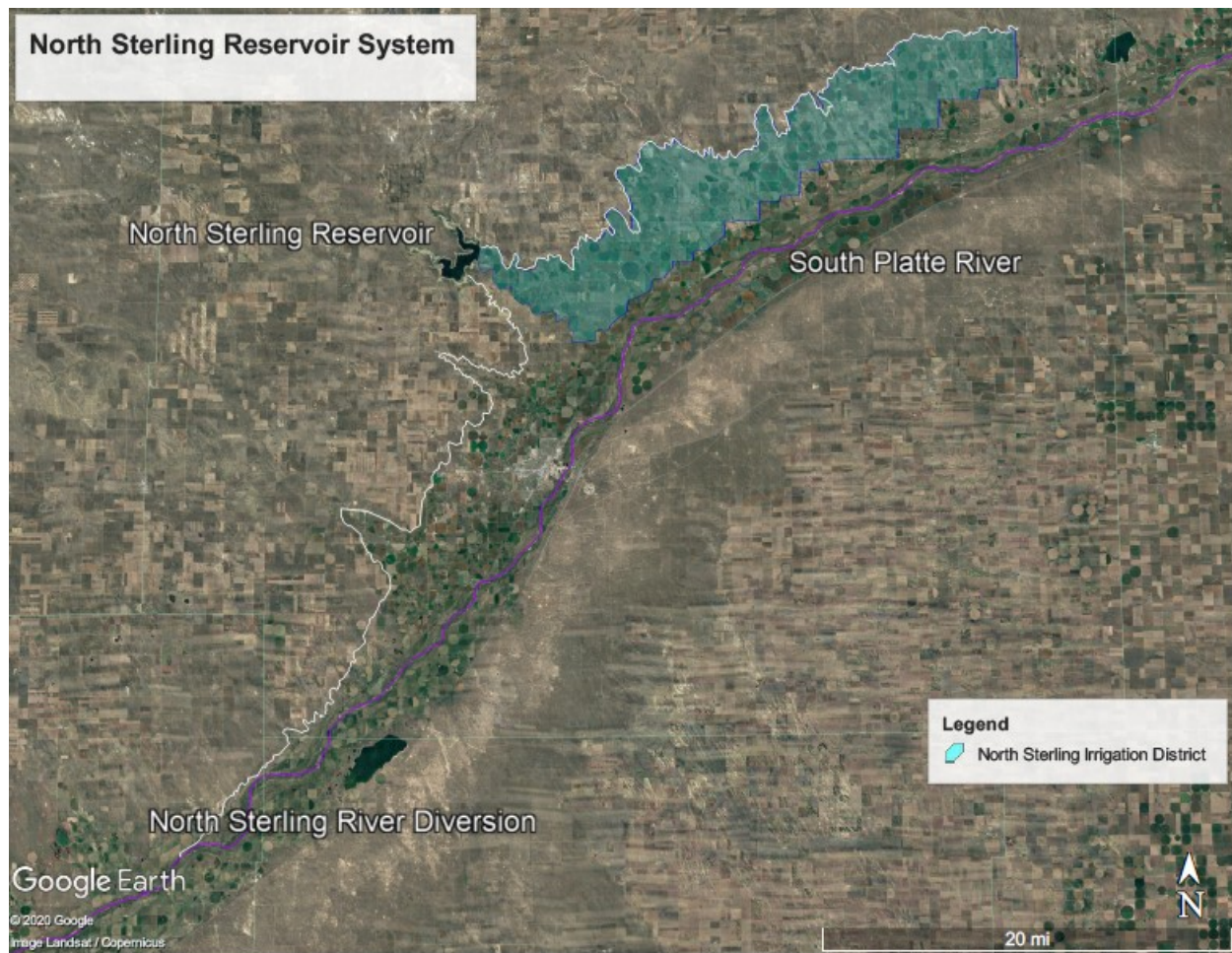
With the scarcity of water in Colorado, particularly in the South Platte Basin, the North Sterling Board of Directors (Board) and management are continually investigating ways to improve the District's diversion, delivery, and use of water. Throughout its history, North Sterling management and Board have always tried to maintain and upgrade, when necessary, the various infrastructure that is part of the North Sterling System. This project is the replacement of the current river diversion structure. While the existing diversion structure is still operable and could continue to operate for several years, it has become apparent that an upgrade is needed. The flood of 2013 eroded areas around the inlet headgate and the extended high water of 2015 created a small, but concerning, differential settlement in the headgate structure. In recent years, boils have appeared from time to time both in the inlet canal immediately downstream of the headgates and in the river channel below the diversion dam. These boils indicate failures occurring in the sheet piling under the existing diversion structure and inlet headgate. Over the years, the river diversion has been overlain with concrete, most recently in 1996 and the headgates to the inlet canal have been upgraded, however, the Board and management agree that the time has come for a complete replacement of the river diversion and inlet headgate. The upgraded structure will improve safety for employees, functionality, with automation and remote control, and will enable the conveyance of larger flood events with less damage to the structure and surrounding land.

## **Project Sponsor**

The North Sterling Irrigation District is an irrigation district formed under the Irrigation District Law of 1905. Appendix A contains the order creating the District. The District encompasses 40,916.94 acres and services 122 landowners. As with all irrigation districts, the Board of Directors certifies the levy each October to the County Commissioners and the levy is collected by the county treasurer with property taxes. Failure to pay the levy sends the land into a tax sale. The Board also has the power to limit the use of water until taxes are paid.

## Project Service Area and Facilities

The District predominately provides water for irrigation to a 40,916.94 acre service area in Logan County. The actual irrigated acreage varies annually depending on water supply, however the average irrigated acreage is approximately 35,000 acres. The District boundary begins just east of the North Sterling Reservoir, approximately 15 miles northwest of Sterling, Colorado and extends east to just northeast of Crook, Colorado. Figure 1 presents a picture of the North Sterling Reservoir System including the River Diversion, Inlet Canal, Reservoir, Outlet Canal, and a shaded outline of the North Sterling Irrigation District boundaries. The irrigated acreage within the service area is primarily used to grow corn, alfalfa, sugar beets, pinto beans, small grains, and feed crops.



**Figure 1. North Sterling Reservoir System**

The District also has an augmentation plan which provides water for 30 irrigation wells and 3 commercial cattle feeding operations within the District and 13 residential wells in the Sterling area. As part of the augmentation plan, the District changed 15,000 acre feet of its stored water right for uses other than irrigation. This change of use was to done to allow stored water to be

used as an augmentation source to offset depletions resulting from well pumping and to facilitate a deal with Xcel Energy. Through the use of the District's augmentation plan, water can be provided to Xcel Energy for use at its Pawnee Power Plant in Brush, Colorado on an as needed basis according to a 2005 agreement. The water provided to Xcel Energy can be either North Sterling stored water or water generated by recharge activities. Recharge water can also be used as an augmentation source to offset historic return flow obligations when stored water is used for a changed purpose.

To facilitate the agreement with Xcel Energy, the Point of Rocks Water Company, LLC (PORWC) was created. Membership in the PORWC was completely voluntary and only landowners willing to use a portion of their pro rata share of water for Xcel's benefit joined the water company. The lease agreement allows Xcel to request up to 3,000 acre feet of fully consumable water annually during the months of November through March. Landowners representing eighty four percent or 34,403.16 of the District's 40,916.94 acres joined the PORWC. The PORWC receives a base payment in November of each year, whether or not a delivery of water is made to Xcel, however, if water is delivered to Xcel, the PORWC additionally receives a delivery payment. The 2020 base payment was \$202,914, which is based on 3,000 acre feet at \$67.64/acre foot. The District receives one-third of this base payment for managing and operating the Xcel agreement. The remaining two-thirds is distributed to PORWC members on a pro rata basis. If water had been delivered to Xcel Energy in November 2020 through March of 2021 the PORWC would have received a delivery payment equal to the amount of water requested times \$574.92/acre foot. The entire delivery payment is distributed to PORWC membership. The base payment and delivery payment both increase annually with the consumer price index. The lease agreement between the PORWC and Xcel Energy is for 25 years and is presented in Appendix B.

A similar agreement was made with BNN Energy (BNN) in 2016. This agreement delivers water on demand through a 37 mile pipeline and 4 pumping stations to Northern Weld County for use by BNN in the production of oil and gas. The agreement with BNN is for the term of 10 years. Once again, participation in this temporary agreement was voluntary with participants and the District being compensated when water is used. The District formed Point of Rocks Water Company II, LLC (PORWC II) to facilitate the agreement with 99% participation from the landowners. For any water that is pumped from the North Sterling Reservoir and subsequently used by BNN, PORWC II is paid a minimum of \$1,551/acre foot pumped. So far PORWC II has leased nearly \$3.3 million worth of water to BNN Energy, with 5% of this income returning to the District and 95% paid directly to PORWC II members. The Purchase Agreement between the PORWC II and BNN is presented in Appendix C.

## **Hydrology and Water Rights**

The North Sterling Reservoir is an off stream reservoir, which diverts water from the South Platte River, approximately 8 miles upstream of the Morgan/Washington County line. The North Sterling receives water under Priority 53A for storage of 69,446 acre feet of water at a rate of 300 cfs with an appropriation date of June 15, 1908, Priority 79A for storage of an additional 11,954 acre feet of water at a rate of 711 cfs with an appropriation date of August 1, 1915, and a May 27, 1914 direct flow right with a diversion rate of 460 cfs measured at the outlet canal. The North Sterling also has two recharge rights the first is a May 8, 1996 recharge right with an absolute diversion rate of 294 cfs and a conditional rate of 306 cfs, the second is December 31, 2002 with an absolute diversion rate of 510 cfs and a conditional diversion rate of 90 cfs. A

summary of the District's water rights along with specifications of the reservoir is presented in Appendix D.

## **Project Description and Alternatives**

As mentioned above, this project is a complete replacement of the 210 foot long North Sterling Inlet Canal diversion structure and the 40-foot wide inlet headgate. Also included are in the project is a 10-foot radial sluice gate, the installation of a new measurement structure, and the replacement of the current Union Ditch Headgate. Each of these components are common to all alternatives evaluated. The differences in the alternatives occur in the angle of the inlet headgate in relation to the diversion dam and the length of Obermeyer gate used.

In order to accomplish the structure replacement, the old diversion structure and inlet headgate will first be demolished. The concrete that is removed during this demolition will be saved and used as riprap in critical areas. New piling and sheet pile will be placed beneath the entire structure for stability and to prevent erosion. The main floor of the current diversion structure has been overlain twice over the years and is 1 foot higher than the original diversion structure floor. There is, however a downstream scour pad that was originally one foot below the main floor and is currently two feet below the main diversion structure floor. The new concrete floor will re-establish the one-foot difference between the main diversion floor and the scour pad. The scour pad, if found to be in satisfactory condition, will remain in place and will be tied to the new main diversion structure floor. If it is determined that the scour pad is no longer in good operating condition, it too will be replaced, but will remain at its current elevation. This newly established main floor elevation will match the historic elevation of the riverbed and allow the conveyance of larger flood events. The current diversion structure also facilitates the diversion of water into the Union Ditch, which existed prior to the construction of the North Sterling system. A new Union Ditch headgate capable of diverting water at the appropriate decreed amounts will be installed in the new structure.

The existing structure contains 4 radial sluice gates with concrete piers and boards over the remainder of the length of the diversion structure. The installation of the Obermeyer gates will give the ability to safely convey not only flood events, but the passage of ice in the winter. The size of the North Sterling Reservoir, the length and capacity of the Inlet Canal, and the date of the North Sterling decree requires that the diversion structure and headgates be operated throughout the winter. This can create dangerous situations with ice flows and make it difficult to divert water. With the new design both ice and debris can be passed much more safely and efficiently. The District's maximum decree is for 711 cfs, therefore the inlet gate is designed to divert this entire flow. In order to ensure an appropriate structure to meet the District's needs, the Board and management considered four alternatives:

1. Canal intake oriented at 105 degrees clockwise from diversion with a 7' x 200' long Obermeyer diversion gate with 5 operating zones, a 4' x 40' Obermeyer inlet headgate, a 4' by 4' vertical slide gate for the Union Ditch headgate, a 10-foot radial sluice gate, and a 30-foot wide ramped flume canal measurement structure.
2. Canal intake oriented at 120 degrees clockwise from diversion with 7' x 200' long Obermeyer diversion gate in the same configuration as Alternative 1 and with inlet gate, Union Ditch headgate, radial gate, and ramped flume the same as Alternative 1.
3. Canal intake oriented as described in Alternative 2 with 7' x 140' long Obermeyer diversion gate with 3 operating zones, inlet gate, Union Ditch headgate, radial gate, and ramped flume

the same as Alternative 1 and a 60' long concrete rollover wall on south side of the diversion structure.

4. Canal intake oriented as described in Alternative 2 with 7' x 100' long Obermeyer diversion gate with 1 operating zone, inlet gate, Union Ditch headgate, radial gate, and ramped flume the same as Alternative 1 and a 100' long concrete rollover wall on south side of the diversion structure.

**Alternative No. 1** was selected since it is felt that the orientation of the inlet headgate will reduce sedimentation and debris accumulation in front of intake and the use of Obermeyer gates over the entire length of diversion structure will allow unhindered flow of the river during flood events and ice flows.

**Alternative No. 2** was ruled out because the orientation of the inlet gate, while in line with the canal has the potential to increase sedimentation and debris accumulation.

**Alternative No. 3** was unacceptable due the rollover structure impeding flow during flood events.

**Alternative No. 4** was unacceptable because, while it is the lowest cost alternative the increased length of the rollover structure would once again impede flow during flood events.

### **The Selected Alternative**

This alternative will involve the removal and replacement of the existing diversion structure. The new structure will be placed at or near the position of the existing structure, with the intake oriented nearly perpendicular to the diversion structure. This orientation will enhance sediment removal operations along the face of the intake and inhibit the detainment of surface debris. The floor of the new structure will be established at approximately 1 foot above the existing lower floor; the latter, if found to be in good condition, will be preserved and used as a scour pad on the downstream face of the new structure. Very little modification to the North Sterling Canal will be required to accommodate the new structure, excluding the demolition and removal of the existing canal intake.

The new structure will be constructed of reinforced concrete and founded on piling driven into the riverbed. Friction piling will consist of mild steel H piling or pipe piling. Steel sheet piling will be driven around the perimeter of the foundation to preclude seepage, reduce uplift pressures and exit gradient, and confine the material under the foundation during all conditions of river flow and turbulence. All sheet piling will be galvanized for increased resistance to corrosion. Principal components of the proposed structure will include:

- One 200-foot long by 7-foot tall inflatable crest gate spillway (bladder gate) as manufactured by Obermeyer Hydro, Inc. (Obermeyer) and placed in the river channel;
- A new intake structure for the North Sterling Canal;
- One 40-foot long by 4-foot tall Obermeyer headgate in the new North Sterling intake structure;
- One 10-foot long by 7-foot tall stainless steel radial gate sluiceway with manual hoist;

- One 20-foot by 15-foot control building, constructed of reinforced concrete. The control building will house the following:
  - Gate air-supply system, including air compressors, dryers, and air receiver tanks.
  - Gate control system, consisting of a pneumatic control panel and PLC for gate automation.
- New 30-foot wide, reinforced concrete ramped flume canal measurement structure.

The diversion bladder gate will be comprised of five operating zones, with three 20-foot long panels acting as sluiceways to suppress the formation of point bars across the channel during diversion operations. The sluiceway panels will be strategically placed along the length of the diversion dam for optimum efficacy. The two longer flood panels will be available for independent or conjunctive actuation for broader sediment management operations or to allow passage of flood flows. Lowering the diversion bladder gate during high flows will greatly reduce the stress on the entire intake system. The design and layout of the diversion structure is provided in Appendix E.

The bladder gate air supply system will include a series of automated valves controlled by a Programmable Logic Controller (PLC) mounted in the control building. The operator will have the ability to actuate the bladder gates and modify operational setpoints both locally and remotely through SCADA. The PLC will communicate with the canal flume via telemetry to verify flowrate as a basis for flow control.

This alternative will restore channel continuity and greatly improve the efficiency of operations at the diversion structure. The new bladder gate system will facilitate sediment passage and provide additional flow conveyance during floods, reducing the upstream backwater effect for smaller flood events and improving overall channel stability. During intermediate flows, the gates will have the ability to operate in a partially deflated mode to allow fish passage over the dam while maintaining a partial pool upstream of the diversion structure for the benefit of aquatic habitat and waterfowl.

The cost of the selected alternative is shown in Table 1.

**Table 1. North Sterling River Diversion Replacement Project  
Cost Estimate**

Item	Quantity	Unit	Unit Price \$	Amount \$
Obermeyer Gate 7 foot by 200 foot diversion structure gate and 4 foot by 40 foot inlet gate	1	Each	890,000	\$890,000
Demolition of Current Structure and Construction of New Structure	1	Job	2,297,905	\$2,290,000
<b>Base Construction Total</b>				<b>\$3,180,000</b>
Contingency (10%)	1	Job	318,791	\$318,000
<b>Total</b>				<b>\$3,498,000</b>

## **Implementation Schedule**

Construction is expected to begin July 2021 and to be completed within 120 days.

## **Permitting**

The Project is located on District property and no new easements or rights-of-way will be required. The District expects construction to be exempt from 404 permitting by statutory exemption for the repair of an existing diversion structure. Therefore, the District believes an Environmental Assessment or an Environmental Impact Statement will not be required.

## **Institutional Considerations**

Entities that are, or may be, involved in the design, construction, and financing of the project include:

North Sterling Irrigation District; financing, project management, and oversight.  
Harris Engineering Consultants, Inc.; design and project oversight.  
Colorado Water Conservation Board (CWCB); financing and construction.

The North Sterling Irrigation District will be the lead for the financing, design, and construction of the project and will be the entity entering into any contracts and/or agreements.

## **Financial Analysis**

The District is applying for a loan from the Colorado Water Conservation Board (CWCB) in maximum amount of \$3,532,980 (this includes the 1% CWCB service fee) to accommodate 100% of the estimated total cost of the project. The District will cover any costs that exceed the estimated project cost.

The District is requesting a 20-year loan from the CWCB. The current ownership of the District is 100% agricultural, resulting in a lending rate of 0.90%. At this rate annual payments would be \$193,816. To this would be added \$19,382 per year for the first 10 years to fund the emergency reserve account. This would make the District responsible for a total annual cost of \$213,198. The above figures are included in the summary of the financial aspects of the project presented in Table 2. The District was approved for a \$395,920 loan at the January 2021 meeting of the CWCB to construct Phase II of its automation project and anticipated the loan for this Project. Therefore, the Board approved a \$5.00 per acre increase in the 2020 levy to be collected with the 2021 property tax. The 2019 levy was \$17.00 per acre or \$10.24/acre foot based on the average delivery of 1.66 acre feet per district acre. With the increase of \$5.00 per district acre enacted by the Board in October 2020 the resultant District levy is \$22.00 per acre or \$13.25/acre foot.



**Table 2. Financial Summary**

Project Cost	\$3,498,000
Loan Amount (Including 1% service fee)	\$34,980
Total Loan Amount	\$3,532,980
CWCB Loan Payment Amount, including 10% loan reserve	\$213,198
Number of Landowners	122
Number of Acres in the District	40,916.94
Current Assessment per acre	\$22.00
Future Assessment per acre	\$22.00
Annual Project Cost per acre-foot (Average annual delivery: 1.66 acre-feet/acre)	\$3.14

Since 100% of the funding for the project is from the CWCB and the District has sufficient reserves for any overages, no other debt service is required for this project. The annual end of year financial statements for the years 2017, 2018, and 2019 for the North Sterling Irrigation District are provided in Appendix F.

### **Credit worthiness**

As mentioned above the District was awarded a CWCB loan at the January 2021 meeting and the District is currently in its 9<sup>th</sup> year of repayment on a 20-year loan with CWCB which was taken to enlarge the North Sterling Reservoir Spillway to comply with Colorado Dam Safety requirements. The annual payment to CWCB for the current loan is \$68,583. The payment for the newly acquired loan will be \$21,720. Table 3 shows the Financial Ratios for the District and indicates \_\_\_\_\_ to \_\_\_\_\_ ability to repay with the project in place.

**Table 3. Financial Ratios**

<b>Financial Ratio</b>	<b>Without the project</b>	<b>With the project</b>
Operating Ratio (revenue/expense)	___%* (____)	___%** (____)
Debit Service Coverage Ratio (revenues-expenses)/debt service	(____)	___%** (____)
Cash Reserves to Current Expense	___% (____)	___%** (____)
Annual Cost per acre-foot (1.66 acre-feet per acre)	\$3.14 (____)	\$0.35 (____)

\*revenue and expense

\*\*revenue with project is 20\_\_ revenue with a \$5.00/acre increase in district levy

### **Alternative Financing Considerations**

The District has not investigated any alternative financing sources.

## **Collateral**

As security for the CWCB loan the District can pledge assessment income, water rights, and land.

## **Economic Analysis**

Since the project is a replacement of a current structure, the economic benefit is difficult to estimate. The primary benefit is simply the ability of the District to continue the safe operation of its system for the benefit of its landowners. This project will allow the diversion of water for years into the future with minimal maintenance. The value of the water rights available in the North Sterling Reservoir for irrigation and augmentation based on the difference in value of irrigated land at \$5,000 per acre and dry farm land at \$1,000 per acre is \$4,000 per acre. With 40,916.94 district acres, the total value of the water is estimated to be \$163,667,760. As stated above, the average delivery is 1.66 acre feet/acre, therefore, the water has a value of \$2,454/acre foot.

It is critical to the Logan County economy that the North Sterling Reservoir is full each year, both to meet the water needs of the District's agricultural producers and to realize the recreational benefits associated with the reservoir. The North Sterling Reservoir is a Colorado State Park and had over 400,000 visitation days last year. In addition, it is important that the District employees can divert water under the District's direct flow decree in a variety of river conditions. This Project will help facilitate the long-term sustainability of the North Sterling Reservoir and all the benefits it provides.

## **Social and Physical Impacts**

The project will have no significant social impacts, since it will ensure the continued operation of a currently existing reservoir system. The project will have minor physical impacts during construction however these will be contained to current North Sterling rights-of-way.

## **Conclusions**

1. The North Sterling Irrigation District is an irrigation district formed under the Irrigation District Law of 1905 with the ability to enter into a contract with the CWCB for the purpose of obtaining a Construction Fund loan.
2. Rights-of Way easements are adequate for the construction of this project.
3. The project would provide for the continued delivery of irrigation water to the North Sterling Reservoir for subsequent release and use by District landowners and public recreation.
4. The total estimated cost of the River Diversion Replacement Project is \$3,498,000. The District is applying for a loan in the maximum amount of 100% of the total project cost or \$3,532,980 with the 1% service fee included, from the CWCB Construction Fund.
5. The project is technically and financially feasible.

## **Appendix A**

### **Order Creating North Sterling Irrigation District**

## **Appendix B**

### **Agreement Between Point of Rocks Water Company and Xcel Energy**

## **Appendix C**

### **Agreement Between Point of Rocks Water Company II and BNN Energy**

## **Appendix D**

### **Water Rights Summary & System Specifications**

## **Appendix E**

### **River Diversion Structure Design**

## **Appendix F**

### **Financial Statements for 2017, 2018, and 2019**



## **Appendix G**

### **CWCB Loan Application**



Order of the Board of County Commissioners  
creating the THE NORTH STERLING IRRIGATION  
DISTRICT - February 25th, 1907.

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The North Sterling Irrigation District bounded and comprised  
as follows, to-wit:

Commencing at a point to-wit: The northwest corner  
of the southwest quarter of the northwest quarter of section 2,  
township 9 north, range 53 west in said Logan County; thence  
east one mile, thence south to the southeast corner of said  
section, thence east 80 rods, thence south 160 rods, thence east  
to the center of section 7, thence north to the north quarter  
corner of said section, thence east to the northeast corner of  
section 8, thence south 80 rods, thence east 160 rods, thence  
north one mile, thence east 160 rods, thence north to the northeast  
corner of section 4, all in township 9, north, range 52 west, thence  
east to the north quarter corner section 3, thence north 80 rods,  
thence east 160 rods, thence south to the northeast corner of  
section 3, thence east 80 rods, thence north 80 rods, thence east  
240 rods, thence north to the northeast corner of section 35,  
thence east 160 rods, thence south 160 rods, thence east 160 rods,  
thence north one mile, thence west 80 rods, thence north 1 mile,  
thence west 80 rods, thence north 160 rods, thence east to the  
northeast corner of section 24, all in township 10 north, range  
52 west, thence east 160 rods, thence north to the center of  
section 7, thence east to east quarter corner section 8, thence  
south 1 mile, thence east to the east quarter corner of section  
16, thence south 160 rods, thence east 160 rods, thence north to  
the center of section 15, thence north 160 rods, thence east to  
the northeast corner of section 13, thence north to the east



quarter corner of section 12, all in township 10 north, range 51 west, thence east 160 rods, thence north to the north quarter corner of section 7, thence east to the northeast corner section 8, thence north to the northeast corner section 5, all in township 10 north, range 50 west, thence north 80 rods, thence east 80 rods, thence north 80 rods, thence east to center of section 34, thence north to north quarter corner section 27, thence east 160 rods, thence north 160 rods, thence east to east quarter corner of section 24, all in township 11 north, range 50 west, thence east to the east quarter corner section 19, thence north to the west quarter corner section 17, thence east to the center of Section 15, thence north to center of section 10, thence east to the east quarter corner section 12, all in township 11 north, range 49 west, thence east to the east quarter corner section 7, thence south to the northeast corner of section 30, thence east to the northeast corner section 29, thence south to the east quarter corner section 32, thence west 240 rods, thence south to the south line of section 32, all in township 11 north, range 48 west, thence south 160 rods, thence west to the west quarter corner of section 6, thence north to the northwest corner of section 6, all in township 10 north, range 48 west, thence west to the southwest corner of section 35, all in township 11 north, range 49 west, thence south 80 rods, thence west 1 mile, thence south to west quarter corner section 3, thence west to center of section 4, thence south 160 rods, thence west to the southquarter corner of section 5, thence south 240 rods, thence west 160 rods, thence south to the southeast corner of section 7, thence west to the northwest corner of section 18, all in township 10 north, range 49 west, thence south 80 rods, thence west 160 rods, thence



south 160 rods, thence west 160 rods, thence south to the northwest corner section 24, thence west to the northwest corner of section 22, thence south 80 rods, thence west 80 rods, thence south 160 rods, thence west 160 rods, thence south 160 rods, thence west to the northwest corner of the southwest quarter of the northeast quarter of section 30, thence south 160 rods, thence west 160 rods, thence south to the northwest corner section 31, all in township 10 north, range 50 west, thence west 80 rods, thence south 240 rods, thence west to the northwest corner of southeast quarter of southeast quarter of section 35, thence north 160 rods, thence west 160 rods, thence south to southwest corner of the southeast quarter of the southwest quarter section 35, thence west to southwest corner of the southeast quarter of southwest quarter section 34, all in township 10 north, range 51 west, thence south 160 rods, thence west to the west quarter corner of section 3, thence south 80 rods, thence west 160 rods, thence south to north quarter corner, section 9, thence west 240 rods, thence south 240 rods, thence west 80 rods, thence south to the south quarter corner of section 8, thence south 80 rods, thence west 240 rods, thence south 80 rods, thence west to center section 18, thence south 80 rods, thence west 80 rods, thence south 80 rods, thence west to the northwest corner section 19, all in township 9, north, range 51 west, thence west 160 rods, thence south to the center of section 24, thence west to the west quarter corner, section 22, thence west 240 rods, thence north 80 rods, ~~thence north 80 rods~~, thence west 240 rods, thence north to the north quarter corner of section 20, thence west 160 rods, thence south to the southeast corner section 19, thence west to the northwest



corner section 30, all in township 9 north, range 52 west, thence west 160 rods, thence north to the south quarter corner section 13, thence west 160 rods, thence north to the west quarter corner section 13, thence west to the center of section 14, thence north 160 rods, thence west to the northwest corner section 14, thence north to place of beginning, all in township 9 north, range 53 west, provided however, that the following described lands, to-wit: The southwest quarter section 30, township 11, north, range 48 west, east half southeast quarter section 24, township 11 north, range 49 west, west half section 11, southeast quarter section 10, northwest quarter section 14, and northeast quarter section 15, all in township 10 north, range 50 west, the southeast quarter section 24, township 10 north, range 51 west, west half section 7, township 9 north, range 51 west, south half of northeast quarter, northwest quarter of northeast quarter, southeast quarter of northwest quarter, and southwest quarter section 34, and southeast quarter, section 33, all in township 10 north, range 51 west, are excluded from said district and shall form no part thereof for reasons hereinbefore shown and the said lands are hereby exempted from any and all liability on account of participation in said proposed irrigation district.

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## **LEASE AGREEMENT**

This Lease Agreement is entered into this 30<sup>th</sup> day of Sept., 2005 between Point of Rocks Water Company, LLC ("Water Company"), a Colorado Limited Liability Company, and Public Service Company of Colorado d/b/a Xcel Energy ("PSCo"), a Colorado Corporation (the Water Company and PSCo are also referred to collectively, as the "Parties").

### **RECITALS**

A. PSCo is the owner and operator of the Pawnee Steam Electric Generating Station ("Pawnee Station"), located near Brush, Colorado.

B. The Water Company is a Colorado Limited Liability Company consisting of members who are landowners within the North Sterling Irrigation District ("North Sterling"), with such members being entitled to deliveries of water from North Sterling, and said members have entered into Subscription Agreements with the Water Company committing their water deliveries from North Sterling to the Water Company so that PSCo may use said water deliveries pursuant to the terms and conditions provided herein.

C. Subject to the terms and conditions below, the Parties desire to enter into a lease agreement under which the Water Company will supply to PSCo up to 3,000 acre-feet annually of fully-consumable water for industrial use at the Pawnee Station from November through March of each year during the term of this Lease Agreement.

**NOW THEREFORE**, for and in consideration of the mutual covenants and agreements set forth herein, the receipt and sufficiency of which is hereby acknowledged, the Parties agree as follows:

### **AGREEMENT**

#### **1. Definitions.**

1.1 "North Sterling" means the North Sterling Irrigation District.

1.2 "North Sterling Reservoir Water Rights" means the following water rights that are owned by North Sterling. Water diverted under said water rights is delivered by North Sterling to North Sterling landowners:

1.2.1 Priority 53-A with an appropriation date of June 15, 1908 for a storage amount of 69,446 acre-feet in the North Sterling Reservoir, at a diversion rate of 300 cubic-feet-per-second ("cfs") from the South Platte River, as decreed by the District Court in and for Water Division No. 1 in Case No. 2142.

1.2.2 Priority 79 with an appropriation date of August 1, 1915 for a storage amount of 11,954 acre-feet in the North Sterling Reservoir, at a diversion rate of 411 cfs from the South Platte River, as decreed by the District Court in and for Water Division No. 1 in Case No. 2142.



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The foregoing water rights are the subject of an application for change of water right and plan for augmentation pending before the Water Court in and for Water Division No. 1 in Case No. 96CW1034. For purposes of this Lease Agreement, the North Sterling Reservoir Water Rights shall also include fully consumable water delivered to the South Platte River including, but not limited to: (1) fully consumable recharge water delivered to the South Platte River from the use of the North Sterling Recharge Water Right described in the application pending before the District Court in and for Water Division No. 1 in Case No. 96CW1034; and (2) fully consumable water delivered to the South Platte River from delivery of the North Sterling Reservoir Water Rights described above, into recharge facilities described in the application pending before the District Court in and for Water Division No. 1 in Case No. 96CW1034; and (3) other fully consumable water that is delivered to the South Platte River on behalf of PSCo pursuant to this Lease Agreement.

1.3 "Pawnee Wells" means the following wells (or any replacement wells in Section 29 for the Pawnee Wells) owned by PSCo near the Pawnee Station:

<u>Well</u>	<u>Permit No.</u>	<u>Legal Description</u>
Pawnee Well A	24258-F	SW1/4, NW1/4, S29, T4N, R56W
Pawnee Well B	24259-F	NW1/4, NW1/4, S29, T4N, R56W
Pawnee Well C	24260	NE1/4, NW1/4, S29, T4N, R56W
Pawnee Well D	24261-F	NW1/4, NE1/4, S29, T4N, R56W
Pawnee Well E	24262-F	NE1/4, NE1/4, S29, T4N, R56W

1.4 "Subscription Agreement" means an agreement between the Water Company and land owners within the North Sterling Irrigation District committing said landowners' pro rata portion of the North Sterling Reservoir Water Rights to satisfy the water delivery obligation of the Water Company pursuant to this Lease Agreement.

2. Conditions Precedent. Both Parties' obligations to perform pursuant to this Lease Agreement are contingent upon full satisfaction of all of the following conditions:

2.1 The Water Company shall work with North Sterling to obtain a final decree (including any and all appeals) in its change of water right and plan for augmentation pending in Case No. 96CW1034 ("Final Decree"). The Final Decree must contain adequate terms and conditions, as determined by PSCo, to enable the Water Company to deliver up to 3,000 acre-feet of fully consumable water for industrial use at the Pawnee Station from November through March for each year of the term of this Lease Agreement and in accordance with the terms and conditions of this Lease Agreement.



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2.2 A sufficient number of North Sterling landowners shall enter into Subscription Agreements with the Water Company so that no less than 22,000 acres of land included within North Sterling shall be subject to such Subscription Agreements.

2.3 The Subscription Agreements described above shall be recorded with the Logan County Clerk and County Recorder.

2.4 North Sterling and the Water Company shall enter into a Management Agreement for the administration of this Lease Agreement that is acceptable to PSCo.

2.5 A structure shall be constructed at or below the headgate of the North Sterling Reservoir Inlet Ditch to allow for the measurement and delivery to the South Platte River of water diverted at or below the headgate of the North Sterling Inlet Ditch for the use of PSCo under this Lease Agreement. The headgate of the North Sterling Reservoir Inlet Ditch is located at a point whence the corner common to Sections 28, 29, 32, and 33, in Township 5 North, Range 55 West of the 6th P.M. bears north 4077 feet, in Morgan County, Colorado. Repairs to and/or replacement of this structure as required will be the responsibility of the Water Company, which shall pay any and all costs of such repairs or replacement.

2.6 If the foregoing conditions have not been fully satisfied by December 31, 2006, then either Party may, at its sole discretion, elect to terminate this Lease Agreement. Any such termination shall be in accordance with the notice provisions provided herein.

3. The Lease. Subject to the satisfaction of the foregoing conditions, and pursuant to the terms and conditions contained below, the Water Company will annually make available for lease and delivery to PSCo 3,000 acre-feet of fully consumable water from the North Sterling Reservoir Water Rights. Such water will be used by substitution, replacement, or exchange for industrial purposes at the Pawnee Station from November through March of each year of the term of this Lease Agreement.

4. Deliveries. The Parties acknowledge and agree that, at various times, the water to be delivered to PSCo by the Water Company will be available at the headgate of the North Sterling Canal or other locations below the headgate of the North Sterling Canal, and that, at various times, PSCo's ability to exchange water from water delivery locations at or below the headgate of the North Sterling Canal to the Pawnee Wells will be limited. The Parties have agreed to the following terms and conditions for the delivery of water to PSCo:

4.1 Delivery Amounts. The Water Company shall make available for delivery to PSCo 3,000 acre-feet of fully consumable water annually in accordance with the following schedule:

January	600	July	0
February	600	August	0
March	600	September	0



April	0	October	0
May	0	November	600
June	0	December	600

Subject to the notice requirements by PSCo under the Notice of Delivery Amounts section of this Lease Agreement, PSCo, in its sole discretion, will determine whether it will divert all, none, or a portion of the water made available to PSCo by the Water Company.

4.2 Carry Over Allowance. In the event that the Water Company is unable to deliver the full amount of water shown on the foregoing schedule during the month in which the water is to be delivered, or PSCo is unable to divert the full amount of water shown in the foregoing schedule during the month in which the water is to be delivered, the difference between the amount of water shown on the foregoing schedule and the amount of water actually made available and diverted may be added to the amount of water to be made available to PSCo by the Water Company during the following month. Any modification of the monthly amounts shown in the foregoing schedule based on this subsection shall not reduce the Water Company's obligation to make available for delivery 3,000 acre-feet of fully consumable water to PSCo from November 1 to March 31 of any year that this Lease Agreement remains in effect.

4.3 Variance of Delivery Amounts. Because actual pumping may vary, actual monthly delivery amounts shall be agreed to by PSCo and the Water Company on a month-to-month basis and upon verbal agreement between PSCo's water resources department and the manager of the Water Company. Such deliveries may vary between 80% of the amount described above for the subject month, to 120% of the amount described above for the subject month. Changes in deliveries of water from the Water Company to PSCo pursuant to this Lease Agreement that are less than 80% of the monthly amounts described above, or that exceed 120% of the monthly amounts described above are allowed, provided both PSCo's water resources department and the Water Company secretary-manager agree in writing to such modification of the monthly delivery amounts described above. Modifications to the delivery schedule shall not reduce the Water Company's annual obligation to make available for delivery 3,000 acre-feet of fully consumable water to PSCo.

4.4 Notice of Delivery Amounts. PSCo shall provide any written notice to the Water Company of the amount of water that is to be delivered to PSCo pursuant to Paragraph 4.3 of this Lease Agreement, on or before the 21st day of the month prior to the month in which such water is to be delivered to PSCo by the Water Company. The written notice from PSCo to the Water Company may pertain to more than one month, and may pertain to multiple months. If PSCo provides notice of the amount of water to be delivered by the Water Company to PSCo, and that amount of water is delivered by the Water Company to the South Platte River or another water right holder pursuant to this Lease Agreement, PSCo shall be obligated to pay the Water Company for the amount of water so delivered, without regard to whether PSCo actually diverted an amount of water equal to the amount of water delivered by the Water Company.



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4.5 Delivery Locations. The water to be delivered to the South Platte River for the benefit of PSCo shall be delivered to the following locations:

4.5.1 In the event that the North Sterling Reservoir Water Rights are in priority under Colorado law and water is available pursuant to the North Sterling Reservoir Water Rights at the headgate of the North Sterling Inlet Canal, the Water Company will deliver the water to the South Platte River at a location at or below the headgate of the North Sterling Inlet Canal.

4.5.2 In the event that the North Sterling Reservoir Water Rights are not in priority under Colorado law and the water right calling for delivery of water under Colorado law is the Julesburg Reservoir water right, which is diverted at the headgate of the Harmony Ditch and has an appropriation date of February 12, 1904, the Water Company shall either (1) deliver water through the North Sterling Outlet Canal to a location that the owner of the Julesburg Reservoir water right may divert the water, or (2) deliver other fully consumable water to a location upstream of the headgate of the Harmony Ditch, and PSCo may divert an amount of water equal to the amount of water delivered by the Water Company to the owner of the Julesburg Reservoir water right.

4.5.3 In the event that the North Sterling Reservoir Water Rights are not in priority under Colorado law and there is another water right located downstream of the headgate of the North Sterling Inlet Canal that is in priority and calling for water, the Water Company shall deliver fully consumable water to a location downstream of the headgate of the North Sterling Inlet Canal to satisfy the calling water right, and PSCo may divert the amount of water equal to the amount of water delivered to the calling water right.

4.5.4 In the event the Prewitt Reservoir water right in the amount of 32,300 acre-feet, with an appropriation date of May 25, 1910, and an adjudication date of January 15, 1914, as granted pursuant to the decree entered by the District Court in and for Weld County, Colorado in Case No. 2142 ("Prewitt Reservoir Water Right") is in priority and is calling for water, it is expressly agreed that, absent a separate agreement between the Water Company and one or more owners of interests in the Prewitt Reservoir Water Right for exchange of water provided by the Water Company water in lieu of water that would otherwise be diverted into Prewitt Reservoir, the Water Company shall not be required to deliver water to the South Platte River for diversion by PSCo. However, the inability of the Water Company to deliver water to the South Platte River for diversion by PSCo during such times as the Prewitt Reservoir Water Right is in priority and is calling for water shall not reduce the Water Company's obligation to make available for delivery 3,000 acre-feet of fully consumable water to PSCo from November 1 to March 1 of any year this Lease Agreement remains in effect.

4.5.5 In order to ensure that PSCo will be able to divert water at such times as PSCo has a need for the water, and the Water Company is not otherwise able to deliver water to the South Platte because the Prewitt Reservoir Water Right is in priority and is calling, the Water Company agrees to exercise good faith efforts to secure agreements with one or both types of the following types of agreements on or before March 1, 2006:

4.5.5.1 Agreements with one or more owners of interests in the Prewitt Reservoir Water Right for an exchange of water between the owners of such interests and the Water Company at alternate times and locations; and or

4.5.5.2 An agreement with North Sterling for delivery of recharge water into recharge facilities at such locations as will provide recharge water to the South Platte River upstream of the headgate of the Prewitt Reservoir, in accordance with the application pending before the Water Court in and For Water Division No. 1 in Case No. 96CW1034, so that such recharge may be used by PSCo as a replacement for out-priority depletions affecting the Prewitt Reservoir Water Right pursuant to the terms of this Lease Agreement.

4.5.6 If by March 1, 2006, the Water Company is unable to secure agreements with owners of interests in the Prewitt Reservoir Water Rights and/or an agreement with North Sterling for delivery of recharge water to the South Platte River, sufficient to enable PSCo to divert water in accordance with the schedule set for in Section 4.1 above, at times when the Prewitt Reservoir Water Rights are in Priority and is calling, then PSCo shall be entitled to a twenty percent (20%) reduction in the amount of the Base Payment, beginning with the November 1, 2006 Base Payment, and for each year thereafter that the Water Company fails to secure such agreement(s) by March 1 of that same year.

4.5.7 The Parties may mutually agree upon other locations to which the Water Company will deliver fully consumable water to enable PSCo to divert an amount of water at the Pawnee Well Field that is equal to the amount of water delivered to any calling water right.

4.5.8 Rate of Diversion. Water delivered by the Water Company to PSCo pursuant to this Lease Agreement may be diverted from the South Platte River by PSCo at a diversion rate not to exceed 35 c.f.s.

5. Measurement. The Water Company shall measure and maintain monthly records of its deliveries to the South Platte River under this Lease Agreement. PSCo shall measure and maintain monthly records of its diversions of water delivered by the Water Company. Each Party shall provide the other Party with copies of such records on a monthly basis.

6. Payments.

6.1 Calculation of Payments. Payments under this Lease Agreement shall consist of a Base Payment and a Delivery Payment.

6.1.1 Base Payments. PSCo shall annually pay to the Water Company a base payment regardless of whether PSCo elects to divert any water made available for delivery by the Water Company pursuant to this Lease Agreement ("Base Payment"). The first Base Payment, for water made available by the Water Company for the period from November 2005 through March 2006 shall be in the amount of \$150,000, and shall be paid by PSCo to the Water Company on or before January 10, 2006. Thereafter, the Water Company shall submit an invoice to PSCo by October 1st of each year for the Base Payment. The invoice shall be paid by PSCo within thirty days of receipt of said invoice, or by November 1st, whichever is later. If PSCo does not pay the invoice by the required date, it shall be assessed a carrying charge of 1.5% per month on the unpaid balance.

6.1.2 Delivery Payments. PSCo shall also pay to the Water Company an additional \$425 for each acre-foot of water that is delivered by the Water Company to the South Platte River pursuant to this Lease Agreement ("Delivery Payments"). Such Delivery Payments shall be billed by the Water Company in the first week following the month in which the deliveries occur, and shall be paid by PSCo within 30 days of receipt of the billing from the Water Company. If PSCo does not pay the invoice within the required thirty days, it shall be assessed a carrying charge of 1.5% per month on the unpaid balance.

6.2 Rate Adjustments. The initial rate for the Base Payment shall be \$50 per acre-foot. The initial rate for Delivery Payments shall be \$425 per acre-foot. Every year thereafter, these rates shall be increased in accordance with the following formula:

$$AP = BP(LI/LB)$$

Where: AP is the adjusted price per acre-foot of water

BP is the base price of \$50 per acre-foot for the Base Payments and \$425 per acre-foot for Delivery Payments.

LI is the Consumer Price Index for all urban consumers, all items, U.S. City Average as published for January of the year of adjustment. If the Consumer Price Index is changed, the Index shall be converted in accordance with the conversion factor published by the Bureau of Labor Statistics. Should the Index be discontinued, the Parties agree to substitute another index generally recognized to be authoritative.

LB is the base value of the above described index, which shall be the published value for January 2005.

6.2.1 Should the Consumer Price Index for all urban consumers, all items, U.S. City Average (LI in the above formula) decrease in any year, the adjusted price for the Base Payments and the Delivery Payments shall not be decreased and shall remain the same as the previous year.

6.3 Effective Date of Rate Adjustment. The Effective Date for adjusting the Base Payments and the Delivery Payments shall be April 1 of each year.

7. Term.

7.1 Unless previously terminated, as described in this section or the Force Majeure section of this Lease Agreement, this Lease Agreement shall terminate on January 21, 2031, and shall be of no force and effect thereafter. Upon termination of this Lease Agreement, the Water Company shall have no obligation to supply water to PSCo. PSCo waives any claim to continued water supply by the Water Company after termination, and PSCo shall no longer have any obligation to make payments hereunder to the Water Company.

7.2 This Lease Agreement may also be terminated as provided below in the event that PSCo discontinues electrical power generation at Pawnee Station; provided, however, that such right to terminate may not be exercised at any time prior to 10 years from the Effective Date of this Lease Agreement.

7.2.1 PSCo shall give the Water Company written notice of its intent to terminate this Lease Agreement ("Notice of Termination"). PSCo shall make all payments required by this Lease Agreement for the year in which the Notice of Termination is given. In addition, at PSCo's request, the Water Company shall deliver to PSCo all the water that is required to be delivered under this Lease Agreement for the year in which the Notice of Termination is given.

7.2.2 During the calendar years that follow the year in which PSCo gives the Notice of Termination, the Water Company shall have no obligation to deliver any water pursuant to this Lease Agreement. However, PSCo shall pay the following percentage of the Base Payment to the Water Company on November 1 of such years:

<u>Year Following Termination Notice</u>	<u>% of Base Payment Made</u>
1	100%
2	80%
3	60%
4	40%
5	20%
Subsequent years	0%

7.2.3 During the calendar years that follow the year in which PSCo delivers the Notice of Termination, there shall be no rate adjustment for the Base Payments, which payments shall be paid at the rate that existed as of the date of the Notice of Termination.



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8. Force Majeure. If at any time during the term of this Lease Agreement, either PSCo is rendered unable to operate the Pawnee Station, or the Water Company is rendered unable to deliver water pursuant to the terms of this Lease Agreement as a result of actions by federal, state or local governments, or their agencies, the affected Party shall give notice to the other Party within thirty (30) days from the date the affected Party has notice or knowledge of the governmental action or proposed action. The notice shall specify: (1) the nature of the governmental action or proposed action, (2) the impact on the affected Party, (3) the projected date on which the governmental action or proposed action will preclude the affected Party from operating pursuant to this Lease Agreement, and (4) a description of the actions that the affected Party will take with respect to the governmental action or proposed action. The Parties shall continue to perform under this Lease Agreement until the date that the affected Party is precluded from continued operations by the governmental action or proposed action. If PSCo is the affected Party, PSCo shall only pay the Water Company for water delivered as of the date of discontinuance of operations at the then-existing per acre-foot rate. If the Water Company is the affected Party, it shall deliver water hereunder until such date as it is precluded from operating pursuant to this Lease Agreement, and PSCo shall only pay the Water Company for water actually delivered during the calendar year in which the discontinuance of operations occurs. Payment shall be at the then-existing per acre-foot rate, and if PSCo has paid for more water than is actually delivered, the Water Company shall refund to PSCo any amounts paid for water that was not actually delivered by the Water Company. This Lease Agreement shall terminate on the date of discontinuance of operations, subject to the payment and delivery obligations described in this section of the Lease Agreement. If at any time during the term of this Lease Agreement the affected Party is able to continue or restart operations in compliance with federal, state or local law, the unaffected Party shall have the option of reinstating this Lease Agreement by providing written notice to the affected Party. The unaffected Party shall specify in the written notice the date on which this Lease Agreement shall be reinstated, and obligations under this Lease Agreement shall remain in full force and effect from the date of such reinstatement.

9. Water Court Proceedings. The Parties agree to fully cooperate in any Water Court proceedings that are necessary to implement performance under this Lease Agreement. Each Party shall bear its own costs and attorneys fees associated with such proceedings.

10. Inclusion in Substitute Water Supply Plan. The Water Company will work with North Sterling to include the Pawnee Wells in the 2005 Substitute Water Supply Plan and subsequent substitute water supply plans pertaining to the augmentation plan that is currently pending before the District Court in and for Water Division No. 1 in Case No. 96CW1034.

11. Priority of Delivery. It is expressly understood between the Parties, that should the Water Company contract with other entities or individuals for delivery of water, that such deliveries shall not interfere with, and shall be subordinate to, the delivery obligations imposed on the Water Company by this Lease Agreement.

12. Changes in Quantity or Timing of Delivery. The Parties may, by separate, written agreement: (1) increase or decrease the total annual amount and/or the monthly amount of fully consumable water from the North Sterling Water Rights that will be delivered to the South Platte River by the Water Company on behalf of PSCo; and/or (2) change or modify the months in which fully consumable water from the North Sterling Water Rights will be delivered to the South Platte River by the Water Company on behalf of PSCo; and/or (3) change the timing of any delivery of fully consumable water delivered to the South Platte River by the Water Company on behalf of PSCo to include delivery of all or any portion of fully consumable water available pursuant to the North Sterling Water Rights at any and all times, without limitation.

13. Indemnification. The Parties agree to save and hold each other harmless from and against all liability from damage to property, or death of any person, or liability arising from claims arising out of or specifically related to actions of the Parties and their agents, employees, and contractors and pursuant to the terms and conditions of this Lease Agreement.

14. Audits. The Water Company agrees to maintain accurate records in accordance with sound accounting principles to evidence compliance with this Lease Agreement. Said accounting records shall present a fair and accurate accounting of all charges to PSCo under this Lease Agreement. Upon 30 days written notice, the Water Company shall provide PSCo with access to such accounting records, so that PSCo can determine whether the Water Company is in compliance with the provisions of this Lease Agreement. These accounting records shall be made available to PSCo during the term of this Lease Agreement and for a period of twenty-four (24) months thereafter.

15. Default; Remedies. In the event of default hereunder by any Party, the remedies upon default are as set forth below unless otherwise provided in this Lease Agreement. The remedies of the Parties shall survive termination of this Lease Agreement.

15.1 A default shall be deemed to have occurred if any Party breaches its obligations hereunder and fails to cure such breach within 30 days of receipt of written notice specifying the breach.

15.2 Upon any default by any Party, the non-defaulting Party shall be entitled to seek any available remedies under law or equity (including, without limitation, specific performance and/or damages) and the prevailing Party shall also be entitled to recovery of its reasonable attorneys' fees, expert witness fees, and court costs. The Parties acknowledge that due to the unique subject matter of this Lease Agreement, legal remedies may be inadequate, damages may be difficult to determine, and it may be impossible to return the non-defaulting Party to the status quo as it existed at the time of default. As a result, the non-breaching Party shall have the right to specific performance under terms and conditions of this Lease Agreement.

16. Notice. All notices and other communications under this Lease Agreement shall be in writing and shall be deemed to have been received on the date of service, if served personally or via facsimile on the person to whom notice is given, or on the third day after

mailing, if mailed to the Party to whom notice is to be given by certified, first class mail, postage prepaid, return receipt requested and properly addressed as follows:

PSCo: Xcel Energy  
4653 Table Mountain Drive  
Golden, CO 80403  
ATTN: Water Resources

Water Company: Point of Rocks Water Company, L.L.C.  
112 North 8th Avenue  
Sterling, CO 80751

Any Party may change its address by giving notice in the manner provided hereunder.

17. Additional Provisions.

17.1 Survival of Terms. The representations, warranties, and covenants given by each Party hereunder, and the Parties' remedies and obligations set forth herein, shall be deemed to be continuing in nature.

17.2 Negotiation. This Lease Agreement has been submitted to the scrutiny of, and has been negotiated by all Parties hereto and their counsel. It shall be given fair and reasonable interpretation in accordance with its terms, without consideration or weight being given to its having been drafted by any Party or its counsel.

17.3 Waiver. This Lease Agreement may not be amended, nor any rights hereunder waived except by an instrument in writing signed by the Party to be charged with such amendment or waiver. The waiver by any Party of any term or condition of this Lease Agreement shall not be deemed to constitute a continuing waiver thereof, nor of any additional right that such Party may have under this Lease Agreement.

17.4 Binding Effect. This Lease Agreement shall be binding upon and inure to the benefit of the Parties and their respective successors.

17.5 No Third Party Beneficiaries. This Lease Agreement is entered into between the Parties for the purposes set forth herein. No other person or entity is a beneficiary of this Lease Agreement, nor shall any other person or entity be considered a beneficiary, third party or otherwise, of this Lease Agreement.

17.6 Colorado Law. This Lease Agreement shall be governed by the laws of the State of Colorado, insofar as any matter is not regulated by applicable laws of the United States. Wherever possible, each provision of this Lease Agreement shall be interpreted in such manner as to be effective and valid under the laws of the State of Colorado, or, as applicable, under the laws of the United States, but if any provision of this Lease Agreement shall be prohibited or invalidated thereby, such provision shall be ineffective to the extent of such



prohibition or invalidity, without invalidating the remainder of such provision or the remaining provisions of this Lease Agreement.

17.7 Paragraph Headings. The paragraph headings of this Lease Agreement are inserted for convenience and reference only and shall not alter, define, or be used in construing the text of the paragraphs.

17.8 Additional Documents. The Parties agree to execute such additional documents and give such further assurances as may be reasonably necessary to complete the transactions contemplated herein.

17.9 Counterparts. This Lease Agreement may be executed in any number of counterparts, each of which shall be considered to be an original, but all of which together shall constitute one and the same instrument.

17.10 Entire Agreement. This document constitutes the entire agreement between the Parties concerning the subject matter hereof. It supersedes any prior agreements or understandings between the Parties concerning the subject matter hereof.

17.11 Full Authority. The undersigned represent that they have full authority to enter this Lease Agreement on behalf of the respective Parties. The Parties have taken all actions required and secured the necessary approvals to enter this Lease Agreement.

17.12 Effective Date. This Agreement shall be effective on the last date it is signed by the Parties.

**IN WITNESS WHEREOF**, the Water Company and PSCo have caused these presents to be executed in their respective behalf by their proper officers.

**Point of Rocks Water Company, LLC**

By: James P. Riser  
Manager

ATTEST:  
James S. Yahn  
Secretary

**Public Service Company of Colorado**

By: David Wilks  
David Wilks, Vice-President

## WATER SALE AND PURCHASE AGREEMENT

This Water Sale and Purchase Agreement (“**Agreement**”) is entered into as of the 31<sup>st</sup> day of March, 2017 (“**Effective Date**”) by and between Point of Rocks Water Company II, LLC, a Colorado limited liability company, and its successors and assigns (“**Seller**” or the “**Water Company**”), and BNN Western, LLC, a Delaware limited liability company authorized to transact business within Colorado (“**Purchaser**”) (each referred to herein, individually, as a “**Party**” or, collectively, the “**Parties**”).

### RECITALS

A. Seller has or will enter into various subscription agreements (the “**Subscription Agreements**”) with its members (the “**Members**” or “**Seller’s Members**”) which, among other things, commit and pledge the Members’ rights to delivery of water from North Sterling Irrigation District (“**District**”) to Seller, subject to certain terms and conditions. The Subscription Agreements provide, in part, as follows:

The North Sterling Irrigation District is a Colorado irrigation district that distributes water to land owners within boundaries of the North Sterling Irrigation District. By virtue of ownership of the Property, the Member has the right to receive pro-rata water deliveries based on the number of acres of the Property within North Sterling Irrigation District, including, but not limited to, water storage rights decreed to the North Sterling Reservoir by the decree entered in Case No. 2142 by the District Court in and for Water Division No. 1 on January 5, 1922 including:

- a. Priority No. 53 A for 69,446 acre-feet, diverted at a rate of 300 cfs cubic feet per second of time, from the South Platte River, with an appropriation date of June 15, 1908;
- b. Priority No. 79 for 11,954 acre-feet, diverted at an additional rate of 411 cfs, from the South Platte River, with an appropriation date of August 1, 1915.

The foregoing water rights are described collectively hereinafter as the “North Sterling Reservoir Water Rights.” A change of use for the North Sterling Reservoir Water Rights to include domestic, industrial, commercial, municipal, irrigation, stockwatering, recreation, fish and wildlife purposes, fire protection and all other beneficial uses, including augmentation, in addition to previously decreed uses for irrigation, recreation, wildlife and piscatorial purposes has been decreed in Case No. 96CW1034 in the Water Court in and for Water Division No. 1. The Members’ rights to receive a pro-rata portion of the North Sterling Reservoir Water Rights shall be limited by and subject to the Water Company’s Operating Agreement, and shall be irrevocably pledged and leased to the Water Company pursuant to the terms of the Operating Agreement.

Sellers’ Members will receive copies of Seller’s Operating Agreement prior to their entering into Subscription Agreements with Seller. The reference to “Property” in the Subscription Agreements pertains to the land owned by the Member of Seller located within the District. The definition of

“North Sterling Reservoir Water Rights” specified in the Subscription Agreements, including the change of North Sterling Reservoir Water Rights and water rights decreed by the District Court in and for Water Division No. 1 in Case 96CW1034 by *Findings Of Fact, Conclusions Of Law, Judgment And Decree Of The Water Court* dated July 21, 2006 (the “**Change Decree**”), shall also apply to this Agreement.

B. Pursuant to the provisions of the Change Decree, the right to withdraw water from the Reservoir for commercial and/or industrial uses was authorized.

C. Purchaser intends to install a pipeline system to transport the water from North Sterling Reservoir, which will require construction of a diversion facility to divert water from the North Sterling reservoir outlet channel into the pipeline system for commercial and industrial uses within the State of Colorado.

D. Seller’s obligation to sell the water to Purchaser, and Purchaser’s obligation to purchase the water from Seller, as well as the applicable terms and conditions for such sale and purchase, are set forth in this Agreement.

**NOW, THEREFORE**, in consideration of the mutual promises, covenants, and agreements herein contained, the receipt and sufficiency of which are hereby acknowledged, the Parties agree as follows:

## ARTICLE I DELIVERY AND RECEIPT; PRICE AND PAYMENT

1.1 **Water Deliveries.** Subject to the terms and conditions of this Agreement, Seller agrees to sell to Purchaser certain volumes of water per calendar year on the following terms and conditions:

(a) **Water Supplies.** The water that will be sold by Seller to Purchaser constitutes water that is diverted pursuant to the North Sterling Water Rights, as changed pursuant to the terms of the Change Decree. The North Sterling Water Rights are primarily diverted out of the South Platte River and delivered to North Sterling Reservoir. The water delivered to North Sterling Reservoir is stored for later release and application to beneficial uses.

(b) **Base Water Deliveries.** On or before December 15 of each year during the Term of this Agreement (subject to Section 1.1(d) below with respect to requests for the 2017 calendar year), Purchaser shall send a request by Notice to Seller specifying the projected total volume of water to be delivered to Purchaser during the following calendar year (“**Projected Base Volume**”), provided that such volume shall not exceed 4,000 acre feet. Subject to Section 1.1(d) below with respect to requests for the 2017 calendar year, the Purchaser may request an increase to the Projected Base Volume amount at any time prior to March 15 of the calendar year in question by Notice to Seller; provided that such requested amount shall not cause the total requested amount for such calendar year to exceed 6,800 total acre feet). On or before April 1 of the calendar year in question, Seller shall provide Purchaser with Notice of the extent to which Seller has the requested increased volume available for purchase. The Projected Base Volume plus the requested increase, to the extent such requested increase is available for purchase as set forth in Seller’s Notice, shall be the “**Base Annual Volume**” for the calendar year in question. Seller shall make the Base Annual Volume available for delivery to Purchaser during the applicable calendar year, and Purchaser

shall pay for all water actually delivered to Purchaser during the applicable calendar year, up to the Base Annual Volume, at the “Base Purchase Price” (as defined in Section 1.2(a)).

(c) **Additional Water Deliveries.** At any time after April 1 and from time-to-time thereafter during any calendar year, Purchaser may provide Notice to Seller of Purchaser’s desire to purchase more water than the Base Annual Volume, and the Notice shall specify the total amount of additional water Purchaser wishes to purchase during the remaining portion of the calendar year (the “**Requested Additional Volume**”). Seller may, but shall not be obligated to, make any Requested Additional Volume of water available to Purchaser. Within 15 days following the receipt of the Notice of Requested Additional Volume, Seller shall provide Notice of the extent to which Seller will deliver the Requested Additional Volume during the remainder of the calendar year in question (the “**Confirmed Additional Volume**”). Seller shall make the Confirmed Additional Volume available for delivery to Purchaser during the applicable calendar year, and Purchaser shall pay for the amount of the Confirmed Additional Volume actually delivered to Purchaser during the applicable calendar year, at the “Additional Purchase Price” (as defined in Section 1.2(b)).

(d) **Request for Deliveries in Calendar Year 2017.** With respect to water to be purchased during the calendar year 2017, Purchaser may request a total of up to 6,800 acre feet of water by Notice to Seller on or before April 1, 2017. Such requested volume shall be the Base Annual Volume applicable to the calendar year 2017. Any subsequent requests for water to be purchased during the calendar year 2017 shall be considered as Requested Additional Volume as set forth in Section 1.1(c) above.

(e) **Diversion Facilities.** In order for the water to be delivered from Seller to Purchaser, Purchaser shall construct water diversion facilities to divert the water from North Sterling Reservoir (as further described and depicted on the attached Exhibit A, the “**Diversion Facilities**”). The Diversion Facilities shall be constructed at the location specified on Exhibit A and shall include, at a minimum, the requirements specified on the attached Exhibit A. As specified on Exhibit A and in this Agreement, the Diversion Facilities shall include a continuous recording flowmeter that records all diversions of water from North Sterling Reservoir by Purchaser through the Diversion Facilities. Purchaser acknowledges that the water levels at North Sterling Reservoir vary widely during each year and from year to year. Accordingly, the Diversion Facilities shall be designed and constructed to account for fluctuations in the levels of water in the North Sterling Reservoir. Further, the Diversion Facilities shall be designed and constructed so that Purchaser’s use of the Diversion Facilities will not interfere with the North Sterling Irrigation District’s use of any outlet pipe not directly connected to the Diversion Facilities or the outlet canal. As used herein, the term “Diversion Facilities” includes any temporary water diversion facilities constructed by Purchaser prior to completion of the Purchaser’s permanent Diversion Facilities, and other temporary facilities as provided herein. Purchaser acknowledges that the supply of water to the Diversion Facilities may be temporarily interrupted in connection with the District’s operation, maintenance, or repair of the District’s facilities including, without limitation, the North Sterling Reservoir’s outlet channel and related structures. The Parties agree that if the supply of water to the main or permanent Diversion Facilities is temporarily interrupted as set forth above in this section or in Article VII, Purchaser may construct temporary Diversion Facilities to facilitate continued supply of water to Purchaser’s Pipelines (as defined in Section 2.1 below), subject to Seller’s reasonable approval of such construction as set forth herein. Prior to construction or

material modification of any temporary or permanent Diversion Facilities, Purchaser shall provide Seller proposed construction plans for Seller's review and approval, such approval not to be unreasonably withheld, conditioned, or delayed. Seller's approval of the Diversion Facilities or any plans in connection therewith shall not be a representation or warranty by Seller as to the adequacy or sufficiency of the Diversion Facilities or plans for any use, purpose or condition. Plans for the Diversion Facilities shall be subject to further approval by the District as provided in Section 4.2 below. Purchaser shall construct the Diversion Facilities in accordance with the plans as approved by Seller and the District. Title, custody, control, risk of loss, and possession of the water shall transfer from Seller to Purchaser at the point the water enters the Diversion Facilities.

(f) **Diversion Records.** Purchaser shall record and provide to Seller: (i) within ten (10) days following the end of each month, the volume of water diverted by Purchaser, including the beginning of the month flowmeter reading and the end of month flowmeter reading; and (ii) within ten (10) days of the end of each calendar quarter, a copy of the electric power records for the preceding calendar quarter from the power company supplying the water pumps associated with the Diversion Facilities. To the extent such power company records are not available within ten (10) days following the end of the applicable calendar quarter, the power company records shall be provided within ten (10) days after Purchaser's receipt of the records from the power company. In the event that Purchaser installs a flowmeter that permits an electronic recording and transmitting rate of flow and volume of flows of water through the flowmeter by use of cellular or other electronic methods, Purchaser shall provide Seller with the information and passwords to allow the Seller to access the flow records electronically and if Seller has access to such flow records electronically, Purchaser shall not be required to submit the end of month flow records to Seller. All information provided to Seller under this section is subject to Seller's reasonable verification and audit, and Purchaser shall reasonably cooperate with such verification and audit, including, without limitation, by providing further information as reasonably requested by Seller in connection therewith.

(g) **Use of Water and Replacement of Depletions.** The Parties acknowledge and agree that all water diverted by Purchaser shall be applied to commercial and industrial purposes within the State of Colorado and shall be considered fully consumed. Pursuant to the Change Decree, up to 15,000 acre feet of water diverted pursuant to the North Sterling Storage Water Rights measured at the North Sterling Inlet Ditch Headgate Flume per year may be used for commercial, industrial and other non-irrigation purposes with no limitation on the place of use except as set forth above. The water diverted by Purchaser shall consist of the water usable for commercial, industrial and other non-irrigation purposes as defined by the Change Decree. To the extent the Change Decree requires the replacement of return flows, ditch losses or other deliveries of water to the South Platte River or its tributaries associated with the delivery of water to Purchaser, Seller shall be solely responsible for timely completing the deliveries of water at the sole cost and expense of Seller and Purchaser shall not be required to pay for any of the water delivered to the South Platte River or its tributaries associated with the requirements of the Change Decree.

(h) **Force Majeure Event.** Seller shall not be required to deliver water to Purchaser to the extent Seller is unable to do so as a result of the occurrence of a Force Majeure event.

(i) **Time and Manner of Construction.** The Parties acknowledge and agree that Purchaser intends to begin construction of Diversion Facilities and Pipelines as soon as practicable after the Effective Date. The Parties further acknowledge and agree that the District intends to begin delivering water to third parties through the North Sterling Reservoir outlet canal on or about April 15, 2017, and that after that date (and until the District suspends such water deliveries) it will not be feasible to perform construction work to connect the Diversion Facilities to the outlet canal or to perform boring or other earthwork underneath or in the vicinity of the outlet canal. Therefore, to the extent that construction and earthwork at, under, or in the vicinity of the outlet canal is required to facilitate Purchaser's purchase of water during the calendar year 2017, Purchaser shall complete such work prior to April 15, 2017. Purchaser shall perform all construction (including boring and other earthwork), modification, maintenance, repairs and operation required or permitted under this Agreement only at such times and in such manner as will not interfere with the District's delivery of water through the outlet canal.

1.2 **Purchase Price.** The payments for the water provided by Seller and diverted by Purchaser shall be determined pursuant to the following paragraphs:

(a) **Base Purchase Price.** With respect to all Base Annual Volume actually diverted by Purchaser through December 31, 2021, Purchaser shall pay Seller \$1,551.67 per acre foot (for reference only, \$0.20 per forty-two gallon barrel) (the "**Base Purchase Price**"). After December 31, 2021, the Base Purchase Price shall be escalated as set forth in Section 1.2(c) below.

(b) **Additional Purchase Price.** With respect to all Confirmed Additional Volume actually diverted by Purchaser through December 31, 2021, Purchaser shall pay Seller \$1,706.84 (for reference only, \$0.22 per forty-two gallon barrel) (the "**Additional Purchase Price**"). After December 31, 2021, the Additional Purchase Price shall be escalated as set forth in Section 1.2(c) below.

(c) **Price Escalation.** All prices set forth in this Agreement shall be constant through December 31, 2021. Beginning on January 1, 2022, and on the first day of each calendar year thereafter for the remainder of the Term ("**Adjustment Date**"), all purchase prices set forth in this Agreement shall be increased (but not decreased) by the annual percentage increase over the prior year, if any, in the Consumer Price Index for All Urban Consumers (CPI-U), published by the U.S. Department of Labor, Bureau of Labor Statistics, for the Denver-Boulder-Greeley area (1982-1984 = 100; not seasonally adjusted) ("**Index**") from November of the calendar year two years prior to the Adjustment Date to November of the calendar year prior to the Adjustment Date. No price shall be adjusted to a lower amount. The Base Purchase Price, Additional Purchase Price, and all other prices as adjusted herein shall be the applicable price for the year commencing on January 1, and such adjusted price shall be the Base Purchase Price, Additional Purchase Price, or other price, as applicable, for future calculations of adjustments of that price. If the adjusted price calculation results in fractional cents, the fractional cent amount shall be rounded to the nearest full cent (\$0.01). If the Index is no longer available, the adjustment to the Base Purchase Price, Additional Purchase Price, and all other prices as set forth in this paragraph shall be made on the basis of changes in the most comparable and recognized cost-of-living index then issued and available as agreed to by the Parties.

1.3 **Minimum Payments.** The Parties acknowledge and agree (1) that the water requirements of Purchaser will be variable, (2) that Seller must reserve water supplies that would otherwise be applied to other purposes in order to meet the requirements of this Agreement, and (3) that if Seller reserves water supplies that Purchaser does not purchase, Seller may not have a use for the reserved water supplies and will suffer damages in connection therewith. In order to ensure water supplies for Purchaser and to minimize the impact on Seller associated with reservation of the water supplies, the Parties have agreed to the following minimum payments:

(a) **Growing Season Allocation.** For clarity, this paragraph applies to the timing of water deliveries during a designated portion of each calendar year, and not the total volume of water to be delivered during the full calendar year. As used herein, the “**Growing Season**” means the period of April 1 through October 31 of each year. Prior to April 1 of each year Purchaser shall notify Seller of the volume of water (out of the Base Annual Volume) that Purchaser will require during that year’s Growing Season and Seller shall make such amount available to Purchaser during such Growing Season. Similarly, at the time of any Additional Request, Purchaser shall notify Seller of the volume of water (out of the Requested Additional Volume) that Purchaser will require during that year’s Growing Season and Seller shall make such amount available to Purchaser during such Growing Season. During any Growing Season, Seller shall not be obligated to deliver any water in excess of the volume allocated by Purchaser to that Growing Season. Any volume of water Purchaser allocates to a Growing Season but does not purchase during the applicable Growing Season is referred to herein as the “**Unused Allocation.**” Purchaser shall pay Seller for the Unused Allocation at the price of \$775.84 per acre foot (for reference only, \$0.10 per forty-two gallon barrel), which price shall be escalated as set forth in Section 1.2(c) above. Any amounts due to Seller with respect to an Unused Allocation shall be liquidated damages and not a penalty, and shall be in addition to all other amounts payable with respect to water actually purchased during the applicable full calendar year. Purchaser and Seller agree that proving actual damages with respect to allocated but unpurchased water would be costly, impractical, and extremely difficult, and that the amount of liquidated damages set forth herein is a reasonable amount considering all of the circumstances existing on the Effective Date.

(b) **Minimum Purchase.** As used herein, the “**First Purchase Period**” means the period beginning on the effective date of this Agreement and continuing through December 31, 2021, and the “**Second Purchase Period**” means the period beginning January 1, 2022 and continuing through December 31, 2026. During the First Purchase Period, Purchaser shall purchase at least 6,000 acre feet of water, or shall pay Seller for the difference between the amount of water actually purchased during the First Purchase Period and 6,000 acre feet (at the price Base Purchase Price). During the Second Purchase Period, Purchaser shall purchase at least 4,000 acre feet of water, or deliver additional payment to Seller for the difference between the amount of water actually purchased during the Second Purchase Period and 4,000 acre feet (at the Base Purchase Price in effect at the end of the Second Purchase Period, escalated as set forth in Section 1.2(c) above). Within a reasonable time following the end of the First Purchase Period and Second Purchase Period, as applicable, Seller shall determine the amounts due from Purchaser pursuant to this section. Such amounts shall be included in the next regular monthly invoice pursuant to Section 1.5 below, and shall be due and payable as set forth therein. For clarity, the minimum purchase requirements set forth in this section are in addition to any Unused Allocation (as defined in Section 1.3(a) above) and Purchaser shall have no minimum purchase obligation during any Renewal Term. No requirement under this paragraph shall be offset, reduced, or otherwise

affected by the volume of any Unused Allocation or any payment with respect to any Unused Allocation.

**1.4 Water Quality.** The water diverted into North Sterling Reservoir and delivered to Purchaser is primarily diverted from the South Platte River and Seller has no control over the chemical or biological constituents within the water diverted from the South Platte River or chemical and biological processes that may occur while the water is stored in North Sterling Reservoir. The water stored in North Sterling Reservoir is further used for public recreational uses and such uses of the water are administered by the Colorado Division of Parks and Wildlife, and the water quality may be affected by such public uses. Purchaser has had an opportunity to inspect and evaluate the quality of the water for the purposes that Purchaser intends to use the water delivered to Purchaser. Purchaser has determined that the quality of the water in North Sterling Reservoir is suitable for Purchaser's commercial and industrial uses. Seller agrees to not knowingly take any action to impair or adversely affect the quality of the water stored in North Sterling Reservoir. Seller does not agree to provide any treatment of the water stored in North Sterling or the water delivered to Purchaser. Purchaser takes all water diverted by Purchaser "as-is" and Seller does not represent or warrant the suitability of the water diverted by Purchaser for any specific purpose.

**1.5 Billing.** Following the end of each calendar month (and following receipt, verification, and audit of information provided to Seller under Section 1.1(f) above), Seller shall furnish Purchaser with a statement of water purchases by Purchaser during the preceding month and any other amounts owed to Seller as specified in this Agreement. Purchaser shall pay Seller within forty-five (45) days following the date of each statement at Seller's address specified in this Agreement. To the extent Purchaser desires to pay Seller by wire transfer or other electronic method, Seller shall provide Purchaser with information to permit the electronic funds transfer or other electronic method, and Purchaser shall deliver payments in accordance therewith.

**1.6 Other Use of Water; Right of First Refusal.** The parties acknowledge and agree that some or all of Seller's Members and others have leased their water rights to Point of Rocks, L.L.C., a Colorado limited liability company, in connection with an agreement by Point of Rocks, L.L.C. to sell water to Public Service Company of Colorado d/b/a Xcel Energy (the "**Xcel Agreement**"). Purchaser acknowledges that the Xcel Agreement was recorded in the records of the Logan County Clerk and Recorded on April 26, 2006, at Reception No. 676390. Purchaser further acknowledges that the leases of water rights by Seller's Members to Seller in connection with this Agreement are subordinate to the Members' leases of water in connection with the Xcel Agreement. Notwithstanding anything to the contrary in this Agreement, Seller's obligations under this Agreement are subject to fulfillment of Seller's Members' preexisting lease obligations in connection with the Xcel Agreement and all other applicable legal requirements with respect to the water that is the subject of this Agreement. At least fifteen (15) days prior to Seller entering into any new agreement to sell water to third parties for commercial or industrial purposes in an amount greater than 500 acre feet per calendar year, Seller shall provide Notice to Purchaser of the proposed agreement and a copy of the proposed agreement. Purchaser shall have twenty (20) days from the date of the Notice from Seller to provide Notice to Seller that Purchaser will enter into an agreement with Seller on the same terms and conditions as were specified in the proposed agreement provided to Purchaser. In the event Purchaser does not timely provide Notice to Seller, Purchaser shall be deemed to have rejected the right to enter into the agreement. In the event



Purchaser does provide Notice to Seller to accept the agreement, the Parties shall enter into a substantially similar agreement within thirty (30) days following the Notice from Purchaser. Purchaser's acceptance or non-acceptance of the preceding right of first refusal does not in any way limit Seller's obligation to make available and deliver water to Purchaser pursuant to this Article I.

## **ARTICLE II PURCHASER'S PIPELINES**

2.1 **Pipeline Construction.** Purchaser intends to construct pipelines for the transportation of the water that is the subject of this Agreement ("**Pipelines**"). Except with respect to the Diversion Facilities, Seller shall have no participation in or involvement in the construction or operation of the Pipelines.

2.2 **Lease Of Pipeline Capacity.** Seller may send Notice to Purchaser of Seller's desire to use the Pipelines to transport water for Seller's own non-energy-related purposes during times in which Purchaser is not using any of the Pipelines' capacity. If Purchaser approves of Seller's use of the Pipelines (which approval may be withheld in Purchaser's reasonable discretion), Purchaser and Seller shall enter into a mutually agreeable letter agreement governing such use, which may include reasonable provisions related to sharing of costs, notice requirements, and other applicable terms.

2.3 **Right of First Refusal.** If, at any time during the Term of this Agreement, Purchaser desires to offer to sell or lease all or any portion of the Pipeline or shall receive from a third party a bona fide offer to purchase or lease all or any portion of the Pipeline (in each case, except in connection with Purchaser's sale of all or substantially all of Purchaser's assets), which Purchaser desires to accept, at least fifteen (15) business days before making or accepting the offer, as the case may be, Purchaser shall send to Seller a proposal for sale or lease of the Pipeline embodying the terms of the offer to Seller. Seller shall have the right, which right must be exercised within twenty (20) business days of the receipt of the proposal and the written notice, to purchase the Pipeline or such part of the Pipeline on the terms and conditions set forth in the Notice. If Seller does not provide the Notice to Purchaser within the twenty (20) business day period, Purchaser shall be free to sell or offer to sell the Pipeline or such part of the Pipelines to third parties on terms not less favorable than those set forth in the Notice. If Seller provides Notice to Purchaser that Seller intends to purchase the Pipeline, or the portion of the Pipeline described in the Notice, on the terms and conditions specified in the Notice, the Parties shall negotiate a final agreement with respect to the sale and purchase of the Pipeline within thirty (30) days following the date that Seller provides the Notice, and upon consummation thereof, neither Party shall have any further obligations under this Agreement.

## **ARTICLE III FACILITIES AND MEASUREMENT**

3.1 Purchaser shall, at its sole expense, and subject to applicable laws, rules and regulations for the withdrawal of water, install or cause to be developed, installed and maintained and repaired all pumps, electrical extensions, and other equipment, facilities, and improvements, necessary to divert the water at the Diversion Facilities. In addition to the Easement Agreement (defined

below), Purchaser shall obtain and maintain all rights, consents, easements, government authorizations, permits, licenses, or other authorizations necessary to divert and deliver the water to Purchaser. Purchaser shall be responsible for all costs of operations, maintenance, and repairs and replacements of all such equipment, facilities, and improvements necessary to receive the water. In the event Purchaser fails to reasonably maintain or repair the Diversion Facilities, or any component thereof, and subject to the following provisions in this section regarding Notice, Seller may access the Diversion Facilities and perform such reasonable maintenance and repairs as are reasonably necessary, and shall be entitled to collect from Purchaser the reasonable and actual costs thereof. Seller's rights under the preceding sentence shall only be exercised after sixty (60) days' Notice to Purchaser, plus such additional time as reasonably required for Purchaser to complete required maintenance or repairs provided Purchaser has commenced such performance within the 60-day period. Notwithstanding the preceding sentence, in an emergency or other situation that directly impacts the Diversion Facilities and the District's facilities that are connected to or used in connection with the Diversion Facilities, and that reasonably requires immediate repairs, Seller's rights under this section may be exercised beginning five days after Seller has Notified Purchaser of such required repairs if Purchaser has not begun to make repairs by such time.

3.2 Purchaser, at its sole expense, shall furnish, install, operate, and maintain totalizing flow measurement equipment for accurate measurement of the volume of water diverted by Purchaser at the Diversion Facilities as required by the Change Decree, the State Engineer's Office or other governmental entity. Purchaser shall provide such measurement data showing the daily quantity of the water received by Purchaser to Seller for each calendar month on or before the 15th day of the calendar month following the month to which the daily measurements relate. Purchaser shall operate, maintain, test, and calibrate the measurement equipment in accordance with the Change Decree and the *Measurement Rule Policy*, promulgated by the Colorado State Engineer with an effective date of February 1, 2015. Any meter installed hereunder shall be open to inspection by Seller or its designee, upon request, and the Colorado State Engineer, Division Engineer for Water Division No. 1, and their designees, at all reasonable times when a representative of Purchaser is available to be present for such inspection.

3.3 Purchaser shall give at least five days' advance notice to Seller of the time of any measurement equipment calibrations in order that Seller may be present for the calibrations. With respect to any test made hereunder, a registration within 2% of correct shall be considered correct. However, if a test shows any discrepancy in measurement, then as soon as possible thereafter, the meter or meters shall be adjusted to read as accurately as practicable. Settlement for any period during which the meter registration deviates by more than 2% shall be corrected at the rate of inaccuracy for any period of inaccuracy which is definitely known or agreed upon, but in case the period is not definitely known or agreed upon, then for a period of 15 days prior to the date of said test. The rate of the inaccuracy shall be estimated and agreed upon by the Parties on the basis of the best available data, using the first of the following methods that is feasible:

- (a) by using the registration of Seller's measuring equipment, installed pursuant to this Agreement, if accurately registering; or, in the absence thereof,
- (b) by using the registration of any check meter or meters if installed and accurately registering;

- (c) by calibration, test, or mathematical calculation using historical volumes of water diverted through the Diversion Facilities and corresponding electric power records; or
- (d) by estimation based on comparison of the quantity of deliveries with deliveries during preceding periods under similar conditions when the meter was registering accurately.

3.4 Seller may, at its sole expense, furnish, install, operate, and maintain measurement equipment for accurate measurement of the volume of water received at the Diversion Facilities.

#### ARTICLE IV EARLY TERMINATION RIGHTS

4.1 **Subscription Agreements of Seller's Members.** Seller shall enter into Subscription Agreements with a sufficient number of Members by March 31, 2017 (the "**Early Termination Deadline**"), so that no less than 25,000 acres of land included within the District are subject to such Subscription Agreements. If Seller does not enter into such Subscription Agreements on or before the Early Termination Deadline, this Agreement shall be terminable by Purchaser on or before April 3, 2017 (the "**Early Termination Date**"), and neither Party shall have any further liabilities or obligations hereunder, except for liabilities or obligations that accrued prior to Purchaser's delivery of such Notice.

4.2 **Easement Agreement With North Sterling Irrigation District.** In order for Purchaser to construct the Diversion Facilities, Purchaser must obtain an easement agreement from the District authorizing the construction and operation of the Diversion Facilities (which include, for the purpose of this Section 4.2, Pipelines and related facilities and equipment associated with the diversion of water under this Agreement). On or before the Early Termination Deadline, Purchaser shall, at Purchaser's sole cost and expense, prepare proposed construction plans for the Diversion Facilities, including, but not limited to, any and all facilities required to be constructed on land owned by the District or within easements owned by the District. Purchaser shall present the proposed construction plans for the Diversion Facilities to the District and work with the District to obtain an easement agreement with the District (the "**Easement Agreement**"). Seller shall assist with the preparation and negotiation of the Easement Agreement to the extent reasonably requested by Purchaser, but Seller shall have no right to stipulate the specific terms thereof. Seller shall pay any and all fees and costs assessed by the District associated with the Easement Agreement, and Purchaser shall pay any and all costs associated with (1) the construction of the Diversion Facilities, (2) easements, rights-of-way, licenses, and other agreement with property owners, but excluding the District, (3) all operating costs associated with the use and operation of the Diversion Facilities, and (4) all costs associated with maintenance, repair, insurance, power and other costs associated with the use and operation of the Diversion Facilities. The Parties acknowledge and agree that the term of the Easement Agreement shall be contemporaneous with this Agreement, and upon termination of this Agreement, the Easement Agreement shall also terminate. The District may direct, within thirty (30) days following the termination of the Easement Agreement, Purchaser to remove all or a portion of the Diversion Facilities. The terms and conditions associated with the use and removal of the Diversion Facilities shall be specified in the Easement Agreement. In addition to the allocation of costs and expenses described above, Seller shall be solely responsible for the costs incurred by Seller in conjunction with the Easement Agreement, including, but not limited to, attorneys' fees and costs and engineering fees and costs, and

Purchaser shall be solely responsible for the costs incurred by Purchaser in conjunction with the Easement Agreement, including, but not limited to, attorneys' fees and costs and engineering fees and costs, and governmental permitting fees and costs. In the event Purchaser and the District do not complete an Easement Agreement on or before the Early Termination Deadline, this Agreement shall be terminable by Purchaser by Notice to Seller on or before the Early Termination Date, and neither Party shall have any further liabilities or obligations hereunder, except for liabilities or obligations that accrued prior to Purchaser's delivery of such Notice.

**4.3 Management Agreement With North Sterling Irrigation District.** The District is responsible for the management and distribution of water supplies owned by the District, and Seller's Members are owners of the land within the District and entitled to water supplies distributed by the District. In order to ensure that the water supplies required to meet Seller's obligations pursuant to this Agreement are available, Seller shall enter into a management agreement with the District (the "**Management Agreement**") to provide for the delivery of the water supplies to be delivered to Purchaser pursuant to this Agreement. To the extent compensation is required to be paid to the District to effectuate the terms of this Agreement or in conjunction with entering into the Management Agreement or there are other costs and expenses associated therewith, Seller shall be solely responsible for the compensation, costs and expenses and Purchaser shall have no responsibility for the compensation, costs or expenses. On or before the Early Termination Deadline, Seller shall provide to Purchaser the executed and effective Management Agreement providing for the delivery of the water supplies to be delivered to Purchaser pursuant to this Agreement. If Seller does not deliver to Purchaser the executed and effective Management Agreement as contemplated by this paragraph on or prior to the Early Termination Deadline, this Agreement shall be terminable by Purchaser by Notice to Seller on or before the Early Termination Date, and neither Party shall have any further liabilities or obligations hereunder, except for liabilities or obligations that accrued prior to Purchaser's delivery of such Notice.

**4.4 Diligent Efforts.** Each Party shall use diligent efforts to complete its obligations under this Article IV. As long as a Party has used such diligent efforts, the termination right set forth in the applicable section of this Article IV shall be such Party's sole liability and the other Party's sole remedy for a Party's failure to complete its obligations under this Article IV.

## **ARTICLE V REPRESENTATIONS, WARRANTIES, DISCLAIMERS AND COVENANTS**

**5.1** Seller makes the following representations, warranties and disclaimers to Purchaser, all of which shall be true, correct and complete as of the Effective Date.

(a) Seller has, or upon entry into the Subscription Agreements and the Management Agreement will have, the full authority and legal right to withdraw and use, lease or sell at least 6,800 acre feet annually from the North Sterling Reservoir.

(b) The water to be delivered to Purchaser has been changed pursuant to the Change Decree to allow the use of the water for commercial and industrial uses, as defined by and subject to applicable law. Seller does not have control over the actions of the State Engineer or any other

entity or person who may assert that additional judicial approvals may be or are required in order for Seller to perform under the terms and conditions of this Agreement.

(c) Seller and each person signing this Agreement on behalf of Seller has the full and unrestricted power and authority to execute and deliver this Agreement.

(d) The execution of this Agreement, and all of the terms and conditions and activities contemplated under this Agreement, have been duly approved by the Management Committee of Seller.

(e) Seller is not the subject of any: (i) legal, administrative, arbitral or other proceedings, claims, actions or governmental or regulatory investigations of any kind or nature that could be reasonably expected to impact the North Sterling Water Rights; or (ii) bankruptcy or insolvency proceedings.

(f) Except as disclosed in this Agreement, there are no agreements with any third parties (including, but not limited to, any leases, use or occupancy agreements, licenses or other rights of possession or any option for any of the foregoing) that would interfere with, conflict with, prohibit or restrict Purchaser's use of the water under this Agreement.

**5.2 No Claim to North Sterling Water Rights or Appropriate Rights.** Purchaser acknowledges and agrees that this Agreement concerns the sale of volumes of water on an annual basis, as set forth herein, and not the sale or other transfer of any interest in underlying water rights. Purchaser agrees to not make any claim of any type or nature to the ownership of the North Sterling Water Rights. Purchaser further agrees (1) to not claim any appropriate rights to the water diverted pursuant to this Agreement or through the Diversion Facilities, (2) to not assert that the water was not water diverted under the North Sterling Water Rights, and (3) to not assert any appropriate rights as a result of diversion and application of the water diverted by Purchaser.

**5.3 Purchaser Representations and Covenants.** Purchaser represents and warrants that Purchaser and each person signing this Agreement on behalf of Purchaser has the full and unrestricted power and authority to execute, perform and deliver this Agreement. Purchaser further covenants: (i) to complete construction of permanent Diversion Facilities within eighteen (18) months of the Effective Date of this Agreement; (ii) not to release upon or bring on to or discharge to North Sterling Reservoir any Hazardous Materials, and (iii) not to use any water from the North Sterling Reservoir in violation of law or in any manner that may cause injury to Seller or to Seller's Members' appropriate water rights; provided, however, that Purchaser's use of water as permitted by this Agreement shall not be considered a breach of this clause (iii).

#### **5.4 Insurance.**

(a) Each Party (the "**Insured Party**") shall procure and thereafter maintain through the Term of this Agreement, at its own expense, insurance coverage required by this Agreement, or greater coverage if required by law. At a minimum, the types of insurance and minimum policy limits specified in this Agreement shall be maintained in a form and from insurers that have at least an A- (excellent) rating by A.M. Best and are qualified to do business in the state of Colorado. Proof of the insurance required herein shall be provided by the Insured Party to the other Party (the "**Insurance Beneficiary**") before the commencement

of any construction activity with respect to the Diversion Facilities (as set forth below), upon renewal of the applicable insurance policy, and otherwise from time to time as reasonably requested by the Insurance Beneficiary. To the extent that the Insured Party contracts with any other entity or individual to perform any of its obligations hereunder, the Insured Party shall require such contractors to furnish evidence of equivalent insurance coverage, in all respects, terms and conditions as set forth herein, prior to the commencement of work by the contractor. In no event shall the failure by the Insured Party to provide proof of insurance be deemed a waiver by the Insurance Beneficiary of any of the insurance obligations set forth herein.

(b) The minimum insurance coverages and policy limits required hereunder are as follows, provided that Seller shall not be required to carry coverage for: (i) Business or Commercial Automobile Liability for any period during which Seller does not own any automobiles; or (ii) Worker's Compensation and Employer's liability, during any period in which Seller is not required by applicable law to maintain such coverage:

Commercial General Liability	\$1,000,000 Each Occurrence Limit (Bodily Injury and Property Damage)
	\$2,000,000 General Aggregate per Project
	\$2,000,000 Products & Completed Operations Aggregate
	\$1,000,000 Personal and Advertising Injury Limit
Business or Commercial Automobile Liability	\$1,000,000 combined single limit per accident
Workers' Compensation and Employers' Liability	\$100,000 Each Accident
	\$100,000 Each Employee for Injury by Disease
	\$500,000 Aggregate for Injury by Disease
Excess or Umbrella Liability	\$1,000,000 occurrence/aggregate

(c) The Insurance Beneficiary (and in the case of Seller as Insurance Beneficiary, the District), along with its Affiliates (as defined in Section 9.14 below), its and their managers, officers, directors, employees, agents and representatives, and the successors and assigns of all of the foregoing, shall be named as additional insureds for Ongoing Operations and Products/Completed Operations on the Commercial General Liability, Automobile Liability, and Excess or Umbrella Liability Policies of the Insured Party and any contractor of the

Insured Party performing its obligations under this Agreement, which policies must be primary and noncontributory with respect to the additional insureds. To the fullest extent permitted by applicable state law, a Waiver of Subrogation Clause shall be added to the Commercial General Liability, Automobile and Excess or Umbrella Policies of the Insured Party in favor of the Insurance Beneficiary (and in the case of Purchaser's policies, the District) and the other additional insureds.

(d) Prior to commencement of any construction activities with respect to the Diversion Facilities, the Insured Party shall submit a Certificate of Insurance in favor of the Insurance Beneficiary (and in the case of Seller as the Insurance Beneficiary, the District) and an Additional Insured Endorsement (in a form acceptable to the Insurance Beneficiary) as required hereunder. The Insured Party shall provide the Insurance Beneficiary with at least (30) days' notice of any cancellation or change in coverage. To the extent that the Insured Party has added the Insurance Beneficiary (and in the case of Seller as the Insurance Beneficiary, the District) as an additional insured on a blanket basis (in a form acceptable to the Insurance Beneficiary), the Insured Party shall submit a Certificate of Insurance in favor of the Insurance Beneficiary (and in the case of Seller as the Insurance Beneficiary, the District) on an annual basis. Copies of insurance policies shall promptly be made available to the Insurance Beneficiary upon request.

## ARTICLE VI INDEMNIFICATION

6.1 **Seller Indemnification.** Seller agrees to release, protect, defend, indemnify and hold harmless Purchaser, its Affiliates, its and their managers, officers, directors, employees, agents, and representatives, and the successors and assigns of all of the foregoing from all damages, losses, costs, liabilities, penalties, expenses, demands or claims, including but not limited to those arising from personal injury, violation of any laws, rules or regulations or any other type of claim, and including any and all costs and fees (including reasonable attorneys' and experts' fees, and discovery costs) arising out of litigation or settlement, (collectively, "**Losses**"), to the extent the Losses are caused by, arise from or relate to, directly or indirectly, (a) Seller's breach of this Agreement, (b) the negligent or wrongful acts or omissions of Seller or each of its respective agents, employees (including leased employees) or subcontractors in connection with this Agreement and Seller's obligations hereunder, (c) the presence or existence in, on, at, or under the lands on which the Diversion Facilities are built, or the environment beyond the physical boundaries of such lands, of any Hazardous Materials placed on such lands by Seller or its agents, employees, subcontractors, or predecessors, (d) any act or omission of Seller related to Hazardous Materials, including but not limited to manufacturing, storage, disposal, treatment, remediation, or any actual or threatened release, spill, or emission, occurring in any manner in connection with the lands on which the Diversion Facilities are built. If such Losses were also caused in part by the negligent or wrongful acts or omissions of Purchaser, its agents, employees or subcontractors, then Seller shall only be liable to the extent and for such portion that such Losses were not caused by the negligent or wrongful acts or omissions of Purchaser, its agents, employees or subcontractors.

6.2 **Purchaser Indemnification.** Purchaser agrees to release, protect, defend, indemnify and hold harmless Seller, its Affiliates, its and their managers, officers, directors, employees, agents and representatives, and the successors and assigns of all of the foregoing from all Losses to the

extent the Losses are caused by, arise from or relate to, directly or indirectly, (a) Purchaser's breach of this Agreement, (b) the negligent or wrongful acts or omissions of Purchaser, its agents, employees or subcontractors in connection with this Agreement and Purchaser's obligations hereunder, (c) the presence or existence in, on, at, or under the of any Hazardous Materials placed on the lands constituting the Diversion Facilities by Purchaser, its agents, subcontractors or employees; (d) any act or omission of Purchaser related to Hazardous Materials, including but not limited to manufacturing, storage, disposal, treatment, remediation, or any actual or threatened release, spill, or emission, occurring in any manner in connection with the Lands, (e) any injury, damages, or death caused by or associated with the failure of any equipment installed, owned by, used by Purchaser related to diversion, transportation and use of the water sold to Purchaser to the extent caused by Purchaser's negligence or willful misconduct. If such Losses were also caused in part by the negligent or wrongful acts or omissions of Seller, its Affiliates or either of their respective agents, employees, subcontractors or predecessors, then Purchaser shall only be liable to the extent and for such portion that such Losses were caused by, arise from or relate to, directly or indirectly, (i) Purchaser's breach of this Agreement, or (ii) the negligent or wrongful acts or omissions of Purchaser, its agents, employees or subcontractors.

**6.3 Hazardous Materials.** As used herein, "**Hazardous Materials**" means: (a) any substance which is or contains any "hazardous substance" as now or hereafter defined in § 101(14) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended ("CERCLA") (42 U.S.C. § 9601, *et seq.*), or any regulations promulgated under CERCLA; (b) oil, gas, gasoline, diesel fuel, or other petroleum hydrocarbons, or additives or by-products associated with such petroleum products or with oil and gas exploration, production, and transmission; and (c) any additional substances or materials which are now or hereafter classified or considered to be hazardous or toxic under environmental requirements of the common law, or any other applicable laws.

## ARTICLE VII FORCE MAJEURE

**7.1 Excuse for Non-Performance.** If either Party fails to observe or perform any of the covenants or obligations imposed upon it by this Agreement other than failure to timely deliver any payment due under this Agreement, then, to the extent that such failure is occasioned by or results from an event of Force Majeure, such failure is excused and deemed not to be a breach of the covenants or obligations by that Party (the "**Affected Party**").

**7.2 Notice of Force Majeure Event.** The Affected Party shall orally Notify the other Party as promptly as reasonably practicable after the occurrence of an event of Force Majeure. Oral Notice under this section shall be provided as specified in this Agreement, and shall be followed by written confirmation pursuant to Section 9.5 below.

### **7.3 Force Majeure Resolution.**

(a) Upon the occurrence of a Force Majeure event, the Affected Party shall use commercially reasonable efforts to remedy such Force Majeure event and shall resume performance of its obligations hereunder as promptly as reasonably practicable after the Force Majeure event has been remedied. The Affected Party shall provide prompt Notice to the other



Party when the relevant Force Majeure event has been remedied. Notwithstanding anything in this Agreement to the contrary, if despite the Affected Party's commercially reasonable efforts to remedy a Force Majeure Event, such Force Majeure Event continues for longer than four (4) calendar months after the date of the written confirmation delivered pursuant to Section 7.2 above, then at any time before the Affected Party provides Notice that the Force Majeure event has been remedied as set forth in Section 7.2, either Party may terminate this Agreement by written Notice to the other Party.

**7.4 Definition of Force Majeure.** "Force Majeure" means, in relation to a Party, any occurrence, condition, situation, or threat thereof that (directly or indirectly) renders that Party unable to perform its obligations under this Agreement; provided that:

- (a) such occurrence, condition, situation or threat thereof is not under or within the reasonable control of the Party claiming such inability; and
- (b) such Party could not have prevented or avoided such occurrence, condition, situation or threat thereof by the exercise of reasonable and good industry practice, and, provided that the foregoing requirements have been met, shall include the following:
  - (i) acts of God, including epidemics, landslides, dam failure or ditch failure, hurricanes, floods, washouts, drought, lightning, earthquakes, storm warnings, perils of the sea, extreme heat or extreme cold, and other adverse weather conditions and threats of any of the foregoing, and whether preceded by, concurrent with, or followed by acts or omissions of any human agency, whether foreseeable or not;
  - (ii) acts or omissions of governmental authorities not related to any wrongdoing by the Party claiming such inability (or by such Party's Affiliates);
  - (iii) acts of civil disorder, including acts of sabotage, acts of the public enemy, acts of war (declared or undeclared), blockades, insurrections, riots, mass protests, terrorism or demonstrations or threats of any of the foregoing, and police action in connection with or in reaction to any such act of civil disorder; and
  - (iv) acts of industrial disorder, including strikes, lockouts, picketing, and threats of any of the foregoing.

## **ARTICLE VIII TERM; DEFAULT AND REMEDIES**

**8.1 Commencement Date and Term.** This Agreement shall be effective and the Parties shall be bound to the terms of this Agreement from and after the Effective Date; provided, however, that the rights and obligations of the Parties under Sections 1.1(b), 1.1(c), 1.1(f), 1.2, 1.3, 1.5, 2.2, 2.3 and 3.3 shall not be effective until Purchaser notifies Seller in writing of the date on which the Diversion Facilities and Pipelines are commissioned and ready for service ("**Commencement Date**"). The term of this Agreement shall commence on the Effective Date and continue in full force and effect until December 31, 2026, unless earlier terminated as provided herein ("the "**Primary Term**"). At the conclusion of the Primary Term, this Agreement shall renew automatically year to year thereafter (each a "**Renewal Term**") unless either Party elects to

terminate this Agreement by Notice to the other Party at least sixty (60) days prior to the expiration of the Primary Term or any Renewal Term. The Primary Term and any Renewal Terms are collectively referred to herein as the “**Term**”.

8.2 **Default; Remedies.** In the event of default hereunder by any Party, the remedies upon default are as set forth below unless otherwise provided in this Agreement. The remedies of the Parties shall survive termination of this Agreement.

(a) **Payment Default by Purchaser.** In the event Purchaser fails to timely pay to Seller any amount specified in this Agreement (“**Payment Default**”), Purchaser shall not be entitled to divert any of the water that is subject to this Agreement and Seller shall be entitled to take any reasonable actions to prevent Purchaser from so doing. Any payment not received by Seller within five (5) days of its due date shall be subject to a late charge of five percent (5%) of the then-outstanding payment, and shall bear interest from the due date at the rate of twelve percent (12%) per annum. Purchaser shall have the right to cure the Payment Default by payment to Seller within twenty (20) days of the due date of the payment an amount equal to the full amount of the then-outstanding payment, plus the late fee and all interest then due.

(b) **Other Default.** A default other than a Payment Default as described in the foregoing paragraph shall be deemed to have occurred if any Party breaches its obligations hereunder and fails to cure such breach within 30 days of receipt of notice specifying the breach; provided that so long as a defaulting Party has initiated and is diligently attempting to effect a cure, the defaulting Party’s cure period shall extend for an additional 60 days.

(c) **Remedies.** Upon any default described above by any Party (not cured within the applicable cure period), the non-defaulting Party shall be entitled to terminate this Agreement and/or seek any available remedies under law or equity (including, without limitation, specific performance and/or damages) and the substantially prevailing Party shall also be entitled to recovery of its reasonable attorneys’ fees, expert witness fees, and court costs. The Parties acknowledge that due to the unique subject matter of this Agreement, legal remedies may be inadequate, damages may be difficult to determine, and it may be impossible to return the non-defaulting Party to the status quo as it existed at the time of default. As a result, the non-breaching Party shall have the right to specific performance under the terms and conditions of this Agreement.

## **ARTICLE IX GENERAL PROVISIONS**

9.1 **Memorandum of Agreement.** On the Effective Date, the Parties shall execute, acknowledge, deliver, and record a memorandum of this Agreement in the form attached hereto as Exhibit B, which shall be filed at the office of the Clerk and Recorder of Logan County, Colorado. Seller hereby authorizes Purchaser to record such executed memorandum.

9.2 **Representations and Warranties.** All statements contained in this Agreement, including recitals, or any other instrument delivered by Purchaser, Seller, or both, as provided in this Agreement shall be deemed representations and warranties by Purchaser, Seller, or both as provided in this Agreement.

9.3 **Survival.** All representations, warranties, indemnities, payment obligations, and other provisions of this Agreement that by their nature extend beyond the expiration or termination of this Agreement, shall survive the expiration or termination of this Agreement for any reason.

9.4 **Transaction Expenses.** Except as otherwise provided herein and regardless of whether the transactions contemplated hereby are consummated, each Party shall pay its own expenses incident to this Agreement and all action taken in preparation for carrying this Agreement into effect.

9.5 **Notice.** To the extent the words “notice” or “notify” (collectively referred to as “**Notice**”) are used in this Agreement, the words shall be construed to include (a) oral communication, but only if such communication is confirmed within three days of the oral communication by electronic mail, with delivery receipt, or letter mailed pursuant to the national postage system of the party providing the notice, postage prepaid, or letter delivered by a delivery service, with delivery receipt, or (b) communication by electronic mail, with delivery receipt, or (c) communication by letter mailed pursuant to the national postage system of the party providing the notice, postage prepaid, or (d) letter delivered by a delivery service, with delivery receipt. Notice shall be effective upon delivery to or rejection by the other party. For purposes of this Agreement, the parties agree to provide to each other party (1) electronic mail addresses, including additional electronic mail addresses that shall be included in the notice, and (2) a mailing and delivery address, including additional addresses that shall be included in the notice. The parties may change the electronic mail addresses and mailing and delivery addresses from time-to-time or anytime by notice to the other party. The initial addresses of the parties shall be the following:

If to Purchaser, addressed to:

BNN Western, LLC  
370 Van Gordon Street  
Lakewood, CO 80228  
Attn: Jeff Nelson  
Tel: (303) 957-6069  
Facsimile: (303) 763-3195  
Email: jeff.nelson@bnn-energy.com

If to Seller, addressed to:

Point of Rocks Water Company II, LLC  
Attn: Management Committee  
112 North 8<sup>th</sup> Avenue  
P.O. Box 103  
Sterling, Colorado 80751  
Tel: (970) 522-2025  
Facsimile: (970) 522-2025  
Email: jim@northsterling.org

9.6 **Governing Law; Venue; Waiver of Jury Trial.** This Agreement shall be subject to and governed by the laws of the State of Colorado, regardless of the laws that might otherwise govern under conflict of law principles. Any legal suit, action, or proceeding arising out of or related to

this Agreement or the transactions contemplated hereby shall be instituted in the United States federal courts located in Denver, Colorado, or in the state courts of the State of Colorado located in Logan County, Colorado. Each of the Parties irrevocably waives any and all right to trial by jury in any legal proceeding arising out of or relating to this Agreement or the transactions contemplated by this Agreement.

#### **9.7 Limitation on Liability.**

(A) EACH PARTY WAIVES, TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW, ANY RIGHT IT MAY HAVE TO RECEIVE DAMAGES FROM ANY OTHER PARTY BASED ON ANY THEORY OF LIABILITY FOR ANY SPECIAL, INDIRECT, CONSEQUENTIAL (INCLUDING LOST PROFITS), EXEMPLARY OR PUNITIVE DAMAGES (EXCEPT TO THE EXTENT THAT ANY SUCH DAMAGES ARE INCLUDED IN INDEMNIFIABLE LOSSES RESULTING FROM A THIRD PARTY CLAIM IN ACCORDANCE WITH ARTICLE VI).

(B) EXCEPT FOR LIABILITY FOR INDEMNIFICATION FOR THIRD-PARTY CLAIMS IN ACCORDANCE WITH ARTICLE VI, IN NO EVENT SHALL EITHER PARTY'S AGGREGATE LIABILITY ARISING OUT OF OR RELATED TO THIS AGREEMENT, WHETHER ARISING OUT OF RELATED TO BREACH OF CONTRACT, TORT (INCLUDING NEGLIGENCE), OR OTHERWISE, EXCEED THE TOTAL AMOUNTS PAID TO SELLER PURSUANT TO THIS AGREEMENT IN THE YEAR PRECEDING THE EVENT GIVING RISE TO THE CLAIM.

**9.8 Entire Agreement; Amendment and Waiver.** This Agreement constitutes the entire agreement among the Parties with respect to the subject matter hereof and supersedes all prior agreements and understandings, both written and oral, among the Parties with respect to the subject matter hereof. Each Party agrees that no other party (including its agents and representatives) has made any representation, warranty, covenant, or agreement to or with such Party relating to this Agreement or the transactions contemplated hereby, other than those expressly set forth herein. No supplement, modification, or waiver of this Agreement shall be binding unless executed in writing by each Party to be bound thereby. No waiver of any of the provisions of this Agreement shall constitute a waiver of any other provisions hereof (regardless of whether similar), nor shall any waiver constitute a continuing waiver unless otherwise expressly provided.

**9.9 Assignment; No Third-Party Beneficiaries.** This Agreement shall be binding upon and inure to the benefit of the Parties and their respective permitted successors and assigns. Neither Party may assign or transfer this Agreement or any of its rights, benefits or obligations hereunder, without the prior written consent of the other Party, which shall not be unreasonably withheld, except that Purchaser shall have the right to assign all of its rights, benefits, and obligations hereunder to any Affiliate of Purchaser or to the purchaser of the assets to which this Agreement relates without Seller's consent. Nothing in this Agreement, express or implied, is intended to confer upon any person or entity other than the Parties hereto and their respective permitted successors and assigns, any rights, benefits or obligations hereunder.

**9.10 Severability.** If any provision of the Agreement is rendered or declared illegal or unenforceable by reason of any existing or subsequently enacted legislation or by decree of a court

of last resort, Purchaser and Seller shall promptly meet and negotiate substitute provisions for those rendered or declared illegal or unenforceable, but all of the remaining provisions of this Agreement shall remain in full force and effect.

**9.11 Interpretation.** It is expressly agreed by the Parties that this Agreement shall not be construed against any Party, and no consideration shall be given or presumption made, on the basis of who drafted this Agreement or any provision hereof or who supplied the form of this Agreement. Each Party agrees that this Agreement has been purposefully drawn and correctly reflects its understanding of the transactions contemplated by this Agreement and, therefore, waives the application of any law, regulation, holding or rule of construction providing that ambiguities in an agreement or other document will be construed against the Party drafting such agreement or document. Unless the context requires otherwise, (a) the words “include,” “includes,” and “including” are deemed to be followed by the words “without limitation,” regardless of whether “without limitation” is actually used in the provision, (b) the word “or” is not exclusive, regardless of whether “and/or” is used in the applicable provision, and (c) the words “shall,” “will,” and “agree” have the same meaning, force, and effect.

**9.12 Headings.** Titles and subtitles of sections or articles contained herein are for convenience only and have no legal or other effect on the terms of this Agreement.

**9.13 Counterparts.** This Agreement may be executed in one or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

**9.14 Definition of Affiliate.** As used in this Agreement with respect to a Party, the term “Affiliate” means only an entity owing a controlling interest in, under common control with, or controlled by the applicable Party.


(signature page follows)

IN WITNESS WHEREOF, this Agreement has been executed as of the date first set forth above.

**BNN Western, LLC**

By:   
Jeff C. Nelson  
Vice President

**Point of Rocks Water Company II, LLC**

By:   
James T. Yahn  
Manager

**Exhibit A**  
**to**  
**Water Sale and Purchase Agreement**  
**between**  
**BNN Western, LLC**  
**and**  
**Point of Rocks Water Company II, LLC**  
**Diversion Facilities**  
**(see attached)**





Table with 10 columns: Station, Elevation, Station, Elevation, Station, Elevation, Station, Elevation, Station, Elevation. It contains a list of station elevations and corresponding data points.

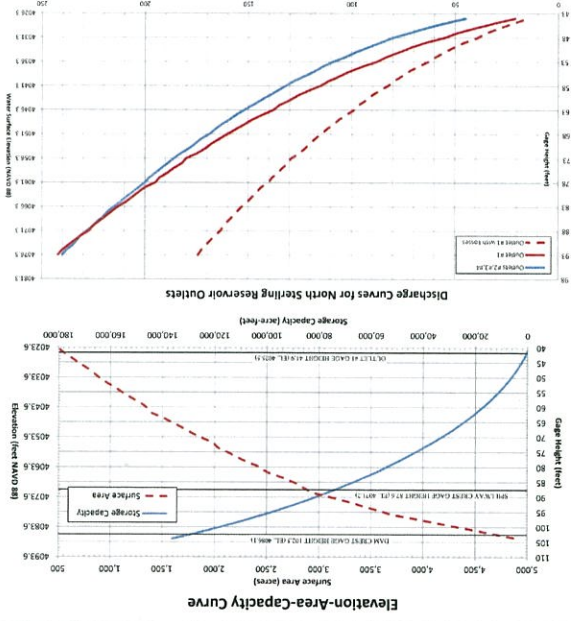
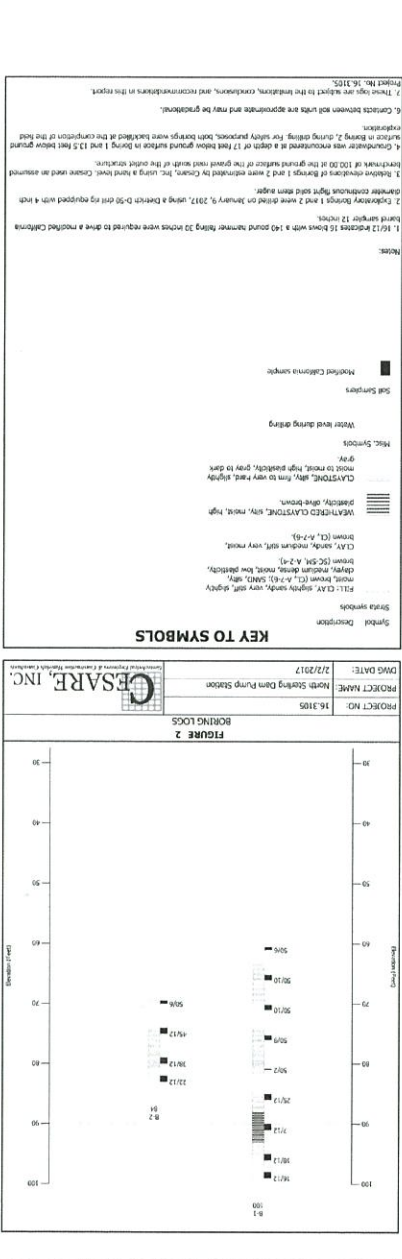
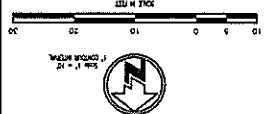


Table with 10 columns: Station, Elevation, Station, Elevation, Station, Elevation, Station, Elevation, Station, Elevation. It contains a list of station elevations and corresponding data points.



North Sterling Irrigation District, Sterling, Colorado. Includes project information, contact details for Applegate Group, Inc., and a filing stamp.

TOPOGRAPHIC SURVEY PERFORMED BY SURVEYING AND MAPPING  
 LLC OF LAKESIDE, COLORADO. SURVEY PERFORMED IN  
 COLORADO STATE PLANE COORDINATE SYSTEM, NORTH ZONE.  
 (NAD83, VERTICAL DATUM NAVD83)

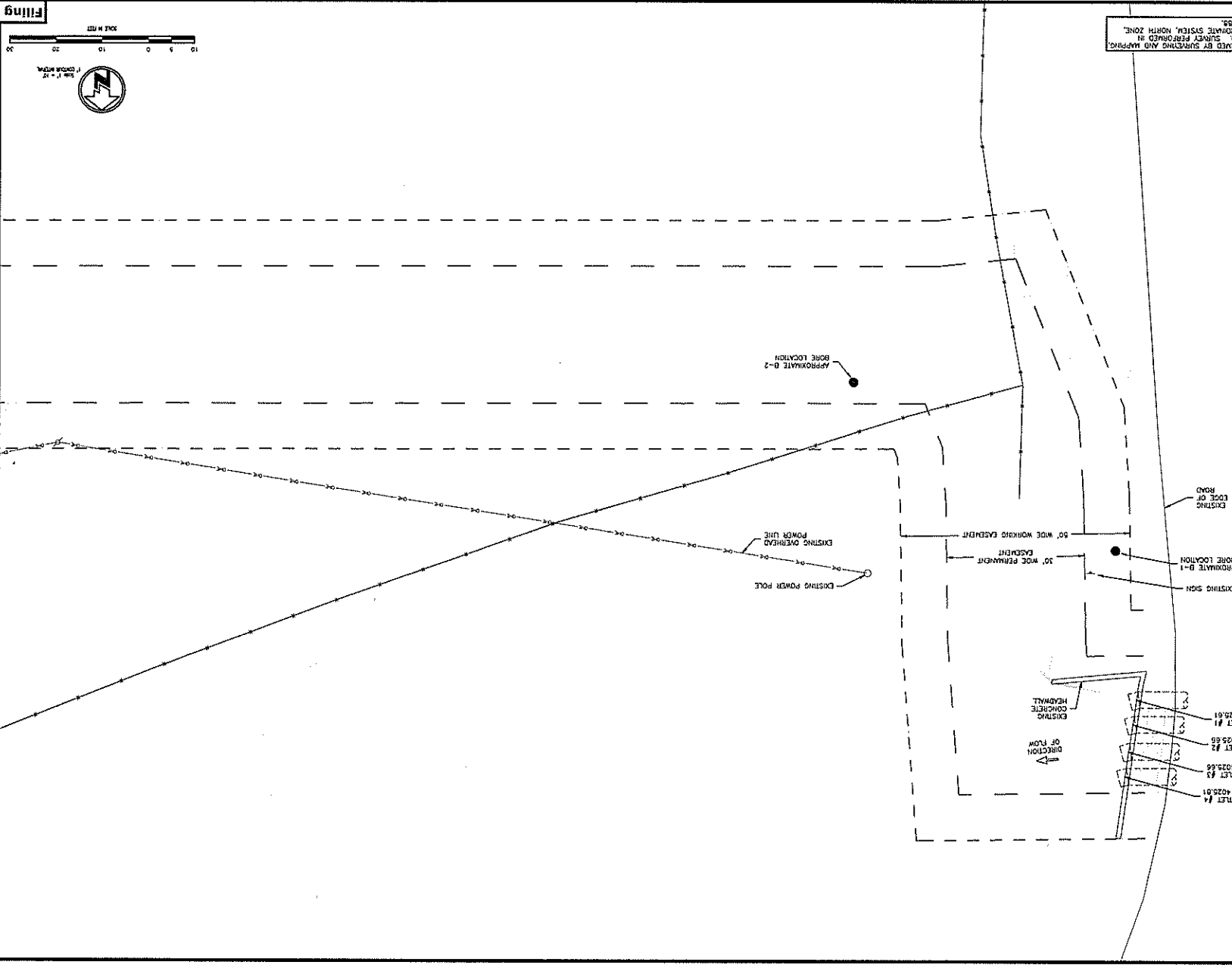


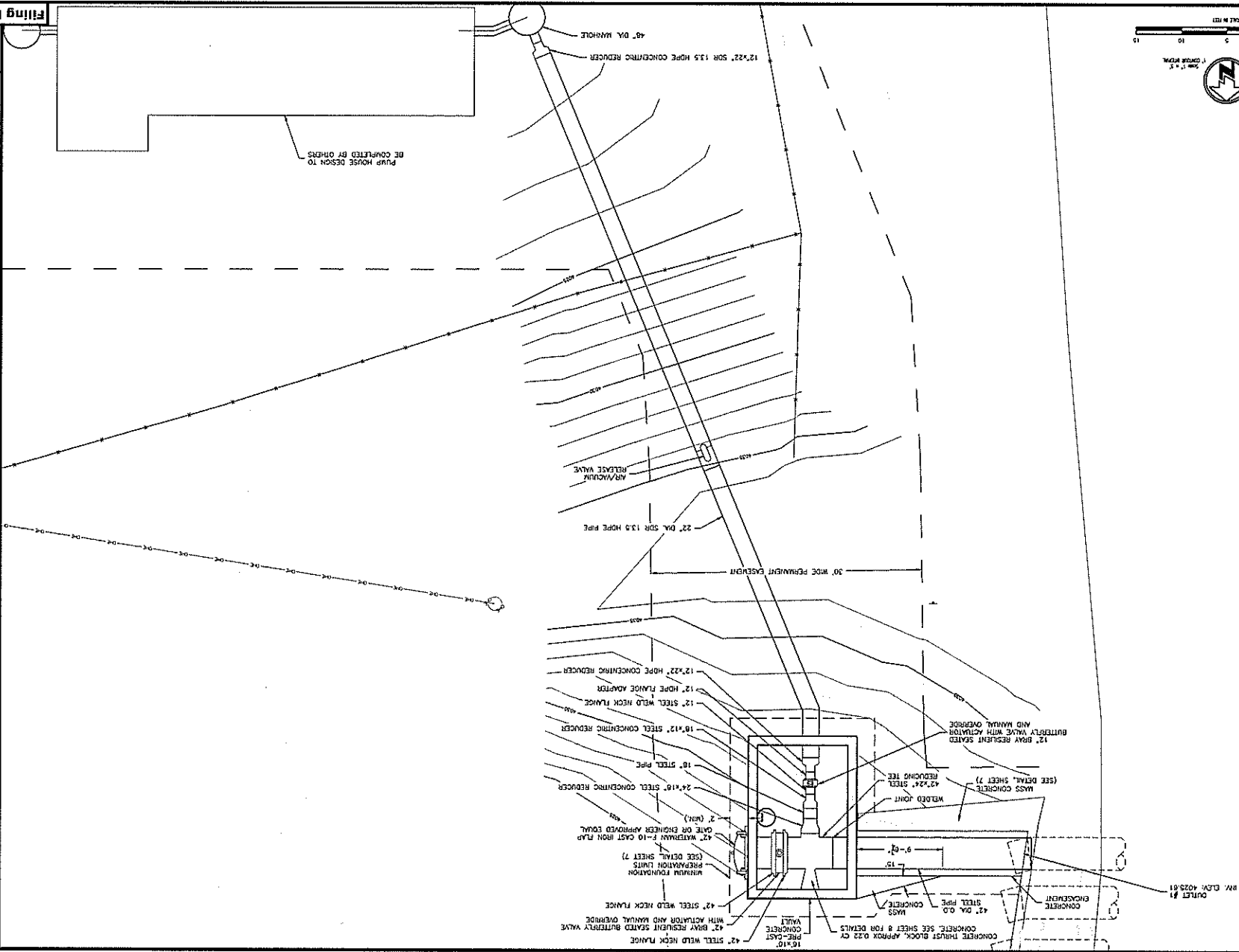
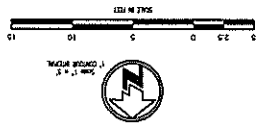
DATE	17/MAY/17
BY	CHC
REVISIONS	
DESCRIPTION	

**NORTH STERLING  
 IRRIGATION DISTRICT  
 STERLING, COLORADO**

**RESERVOIR OUTLET MODIFICATION  
 CONSTRUCTION PLANS  
 EXISTING SITE CONDITIONS**

**Applegate  
 Group, Inc.**  
 1001 N. 17th Ave., Suite 100  
 Denver, CO 80202  
 303.733.4577  
 www.applegategroup.com





**4**

Sheet

1" = 10'

Scale

1/2" = 10'

1/4" = 10'

1/8" = 10'

1/16" = 10'

1/32" = 10'

1/64" = 10'

1/128" = 10'

1/256" = 10'

1/512" = 10'

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1/309485009821345068724781056" = 10'

1/618970019642690137449562112" = 10'

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1/39614081257132168796771975168" = 10'

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1/5070602400912917605986812821504" = 10'

1/10141204801825835211973625643008" = 10'

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1/40564819207303340847894502572032" = 10'

1/81129638414606681695789005144064" = 10'

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1/649037107316853453566312041152512" = 10'

1/1298074214633706907132624082305024" = 10'

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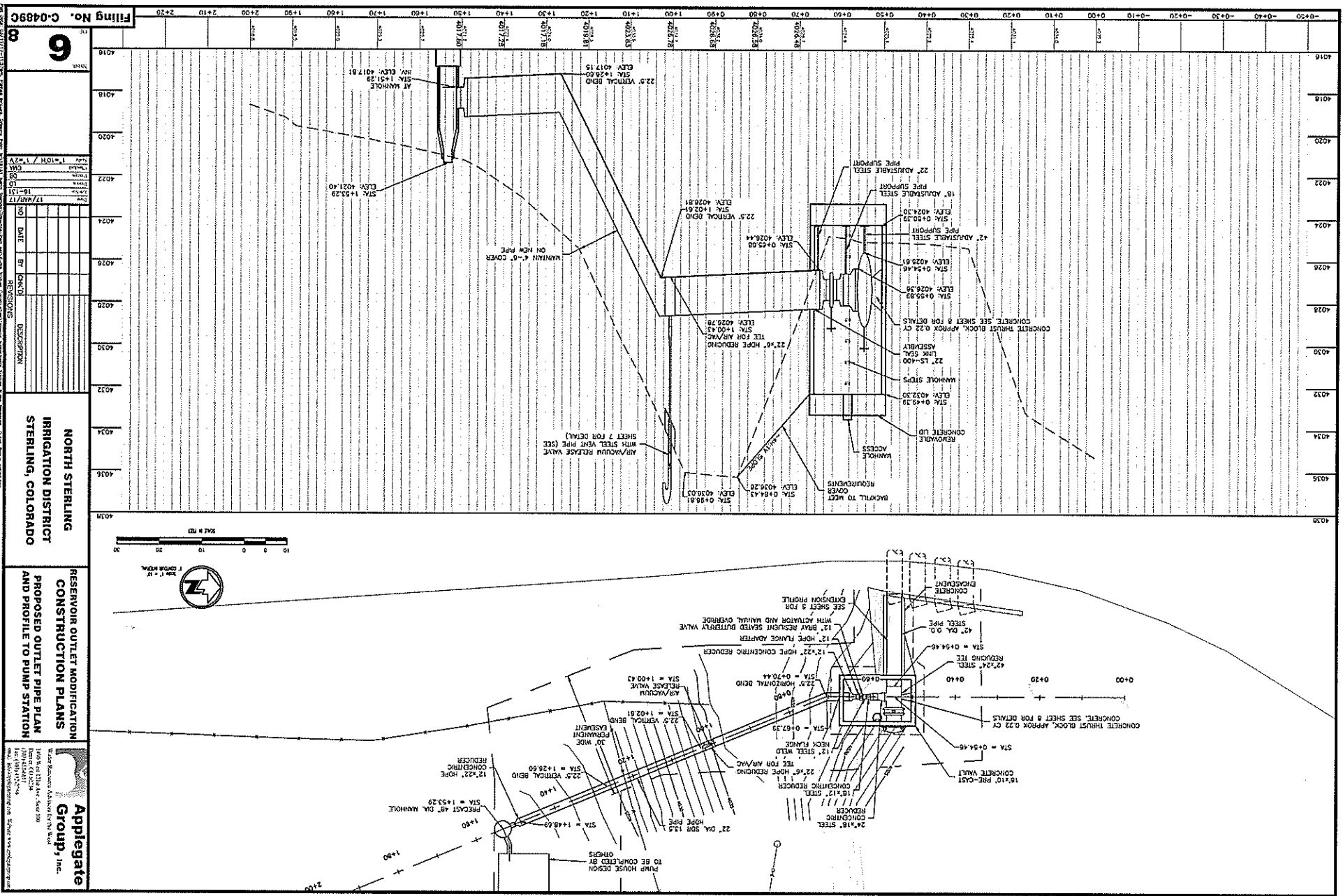
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**6**

DATE: 10/15/2014

BY: [Signature]

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DESCRIPTION: NORTH STERLING IRRIGATION DISTRICT PROPOSED OUTLET PIPE PLAN AND PROFILE TO PUMP STATION

**8**

DATE: 10/15/2014

BY: [Signature]

CHECKED: [Signature]

DESCRIPTION: NORTH STERLING IRRIGATION DISTRICT PROPOSED OUTLET PIPE PLAN AND PROFILE TO PUMP STATION

**North Sterling Irrigation District**

**Proposed Outlet Pipe Plan and Profile to Pump Station**

**Applegate Group, Inc.**

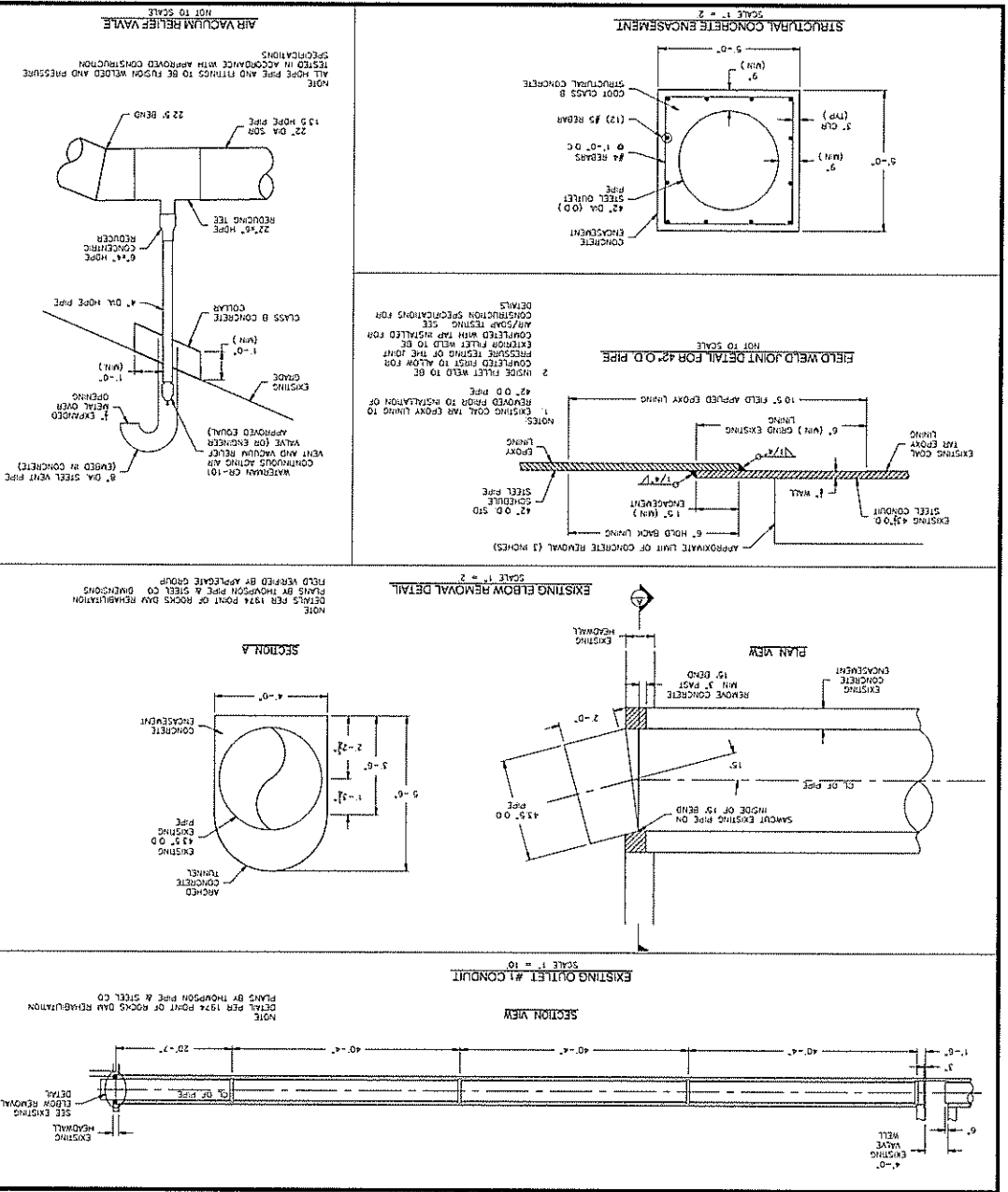
1015 N. 11th St., Suite 100  
Tulsa, Oklahoma 74103  
Tel: (918) 417-2000  
Fax: (918) 417-2001  
www.applegategroup.com

**North Sterling Irrigation District**

**Proposed Outlet Pipe Plan and Profile to Pump Station**

**Applegate Group, Inc.**

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Tulsa, Oklahoma 74103  
Tel: (918) 417-2000  
Fax: (918) 417-2001  
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WELL GRADED SAND (ASTM C33 SAND)			
NO	(US SIF.)	% PASSING	% PASSING
NO. 200	0.075	100.0%	100.0%
NO. 100	0.150	100.0%	100.0%
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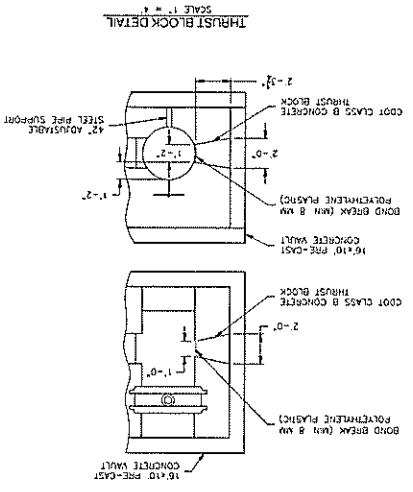
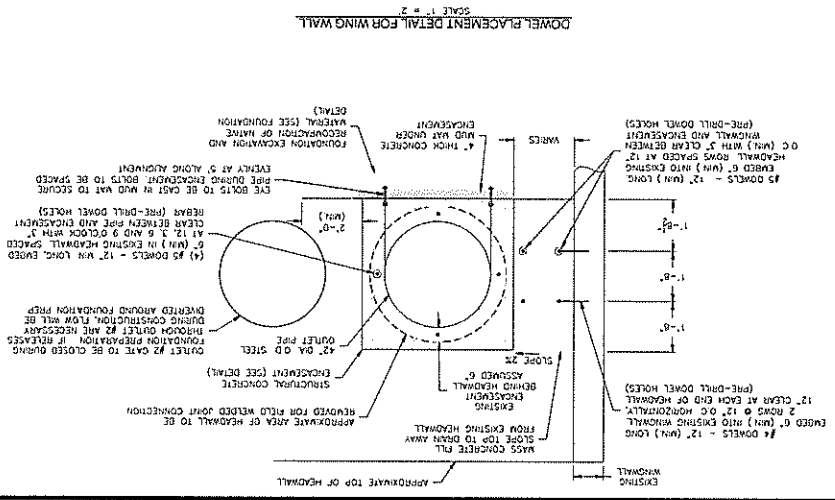
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**NORTH STERLING  
IRRIGATION DISTRICT  
STERLING, COLORADO**

**RESERVOIR OUTLET MODIFICATION  
CONSTRUCTION PLANS**

**DETAILS**

**Applegate Group, Inc.**  
Your Resource Advisors for the West  
1140 W. 121st Ave., Suite 150  
Denver, CO 80234  
(303) 485-6611  
Fax: (303) 485-2716  
www.applegategroup.com E-mail: [west@applegategroup.com](mailto:west@applegategroup.com)



**Exhibit B**  
**to**  
**Water Sale and Purchase Agreement**  
**between**  
**BNN Western, LLC**  
**and**  
**Point of Rocks Water Company II, LLC**  
**Executable Memorandum of Agreement**  
  
**(see attached)**

AFTER RECORDING RETURN TO:  
Spierer, Woodward, Corbalis & Goldberg, P.C.  
5619 DTC Parkway, Suite 525  
Greenwood Village, CO 80111

(Space Above For Recorder's Use)

**MEMORANDUM OF PURCHASE AGREEMENT**

THIS MEMORANDUM OF WATER SALE AND PURCHASE AGREEMENT (this "Memorandum") is made and entered into as of March 31, 2017 by and between Point of Rocks Water Company II, LLC, a Colorado limited liability company ("Seller") and BNN Western, LLC, a Delaware limited liability company authorized to transact business within Colorado ("Purchaser")

**RECITALS**

A. Seller's Members own real property, and appurtenant water rights, within the North Sterling Irrigation District ("District") in Logan County, Colorado. Seller has entered into various Subscription Agreements with its Members which, among other things, commit and pledge the Members' rights to delivery of water from the District to Seller, subject to certain terms and conditions.

B. Seller and Purchaser have entered into that certain Water Sale and Purchase Agreement dated as of March 31, 2017, as it has been or may hereafter be further amended (as so amended the "Purchase Agreement"), pursuant to which Seller has granted to Purchaser a right to purchase volumes of water on an annual basis, as more particularly described in the Purchase Agreement. The "Water" means the volumes of water to be purchased on an annual basis pursuant to the Purchase Agreement. For clarity, the Purchase Agreement does not affect ownership of any appropriate rights underlying the Water.

C. Seller and Purchaser desire to record this Memorandum to provide constructive notice of the Purchase Agreement and rights granted thereunder.

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Seller and Purchaser hereby agree as follows:

1. Purchase Agreement. Seller hereby grants to Purchaser and Purchaser accepts the rights and options to and agrees to purchase the Water, subject to and in accordance with the terms and conditions of the Purchase Agreement. The Purchase Agreement sets forth more particularly the terms and conditions of the purchase of the Water.
2. Seller's Right of First Refusal. The Purchase Agreement grants to Seller a right of first refusal with regard to the sale or lease of Purchaser's pipelines used for the transportation of the Water, subject to and in accordance with the terms and conditions of the Purchase Agreement.

*(Memorandum of Water Sale and Purchase Agreement)*

3. Recordation. This Memorandum is to be recorded in the Real Property records of Logan County, Colorado to provide notice of the Purchase Agreement.

4. Termination. This Memorandum shall remain in effect until the earlier of: (i) December 31, 2026, or (ii) the termination of this Memorandum by a written instrument, executed, delivered and recorded in the Real Property records of Logan County, Colorado.

(signature page follows)

**IN WITNESS WHEREOF**, this Memorandum of Purchase Agreement has been executed as of the date first set forth above.

**BNN Western, LLC**,  
a Delaware limited liability company

By: [Signature]  
Jeff C. Nelson  
Vice President

**Point of Rocks Water Company II, LLC**,  
a Colorado limited liability company

By: [Signature]  
James T. Yahn  
Manager

STATE OF COLORADO )

COUNTY OF Jefferson ) ss. )

The foregoing instrument was acknowledged before me this 30 day of March, 2017, by Jeff C. Nelson, as Vice President of BNN Western, LLC.

Witness my hand and official seal.

My commission expires: 12-13-20

[Signature]  
Notary Public



STATE OF COLORADO )

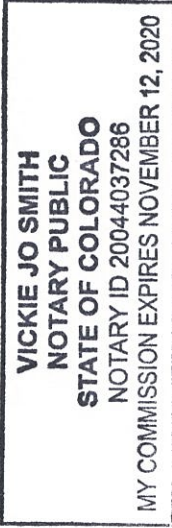
COUNTY OF Logan ) ss. )

The foregoing instrument was acknowledged before me this 31<sup>st</sup> day of March, 2017, by James T. Yahn as Manager of Point of Rocks Water Company II, LLC.

Witness my hand and official seal.

My commission expires: 11-12-2020

[Signature]  
Notary Public



(Memorandum of Water Sale and Purchase Agreement)

# North Sterling Irrigation District

## Water Rights Summary

Decree	Appropriation Date	Adjudication Date	Amount	Supply Sources	Decree Uses
2142	June 15, 1908	Jan 1, 1922	300 cfs 69,446 af	So. Platte River Springdale Cr. Pawnee Cr. Cedar Cr.	Storage for Irrigation
2142	June 15, 1908	Jan 1, 1922	2,000 af	Cedar Cr.	Storage for Irrigation
2142	June 15, 1908	Jan 1, 1922	540 cfs 5,000 af	Pawnee Cr.	Storage for Irrigation
2142	Aug 1, 1915	Jan 1, 1922	411 cfs 11,954	So. Platte River	Storage for Irrigation
8492	May 27, 1914	Jan 13, 1936	460 cfs	So. Platte River	Direct Flow for Irrigation
88CW234	Dec 1988	Jun 29, 1989	69,446 af 11,954 af	So. Platte River	Recreation, Wildlife, Piscatorial
96CW1034	May 8, 1996	Jul 21, 2006	294 cfs (abs) 306 cfs (cond) 7,800 af	So. Platte River	Recharge, Exchange, Augmentation
96CW1034	Dec 31, 2002	Jul 21, 2006	510 cfs (abs) 90 cfs (cond) 24,000 af	So. Platte River	Recharge, Exchange, Augmentation
96CW1034	Dec 31, 2002	Jul 21, 2006	15,0000 af	So. Platte River	Industrial, Commercial, Fire Protection, Recharge, Exchange, Augmentation, Municipal, Domestic



# The North Sterling Irrigation District

## Introduction

The North Sterling Irrigation District is a Public Municipal Instrumentality of the State of Colorado and was organized by order of the Board of County Commissioners under the Irrigation District Law of 1905 on February 25, 1907.

## Facts:

District Boundaries: The North Sterling Irrigation District encompasses 40,916.94 acres stretching from the North Sterling Reservoir, approximately 12 miles northwest of Sterling, Colorado to the end of the North Sterling Outlet Canal about 8 miles northeast of Crook, Colorado.

Water Source: The North Sterling Irrigation District receives its water from the South Platte River with its diversion near Snyder, Colorado. The water is carried 61 miles through the North Sterling Inlet Canal where it flows into the North Sterling Reservoir. The water in the reservoir is then released for delivery to North Sterling landowners via the 65 mile North Sterling Outlet Canal.

## Water Rights:

- 1908 storage right for 69,446 acre-feet measured at the reservoir diverted at a rate of 300 cfs
- 1915 storage right for 11, 954 acre-feet measured at the reservoir diverted at a rate of 411 cfs
- 1914 direct flow right for 460 cfs measured from reservoir
- 1996 recharge right for 294 cfs absolute and 306 cfs conditional
- 2002 recharge right for 510 cfs absolute and 90 cfs conditional

Reservoir Capacity: 74,590 acre-feet

Total Diversion from South Platte River: 130,023 acre-feet

Delivery: Over the past 20 years the average delivery has been 1.66 acre-feet per district acre

Ownership: 122 landowners

Cost: The District levy is \$22 per district acre and is collected by Logan County Treasurer along with property tax.

Board of Directors: David A. Hernandez, President  
Dave Breidenbach, Vice President  
Jim Aranci, Director

Manager: Jim Yahn

Office: 112 North 8<sup>th</sup> Avenue  
P.O. Box 103  
Sterling, CO 80751  
970-522-2025



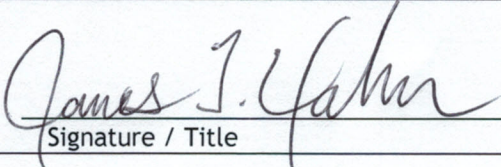
# COLORADO

## Colorado Water Conservation Board

Department of Natural Resources

## Water Project Loan Program

Projects financed by the Water Project Loan Program must align with the goals identified in Colorado's Water Plan and its measurable objectives.

<b>Application Type</b>	
<input type="checkbox"/> Prequalification (Attach 3 years of financial statements) <input checked="" type="checkbox"/> Loan Approval (Attach Loan Feasibility Study)	
<b>Agency/Company Information</b>	
Company / Borrower Name: North Sterling Irrigation District	
Authorized Agent & Title: James T. Yahn, P.E., Manager	
Address: 112 North 8th Avenue - P.O. Box 103, Sterling, CO 80751	
Phone: ( 970 ) 522-2025	Email: jim@northsterling.org
Organization Type: <input type="checkbox"/> Ditch Co., <input checked="" type="checkbox"/> District, <input type="checkbox"/> Municipality <input type="checkbox"/> other: _____	
Incorporated? <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO	
County: Logan	Number of Shares/Taps: 40,916.94 acres
Water District: North Sterling	Avg. Water Diverted/Yr <u>130,023</u> acre-feet
Number of Shareholders/Customers Served: 122	Current Assessment per Share \$ <u>22</u> (Ditch Co)
Federal ID Number: 84-0815082	Average monthly water bill \$ _____ (Municipality)
<b>Contact Information</b>	
Project Representative: Jim Yahn	
Phone: ( ) 970-520-0170	Email: jim@northsterling.org
Engineer: Matt Harris, P.E.	
Phone: ( ) 970-867-4971	Email: matt@harrisec.com
Attorney: Levi Williamson	
Phone: ( ) 970-522-2341	Email: levi@wlflawfirm.com
<b>Project Information</b>	
Project Name: North Sterling River Diversion Replacement Project	
Brief Description of Project: (Attach separate sheets if needed)	
The replacement of the existing North Sterling Inlet Canal river diversion structure.	
Project Start Date(s) Design: <u>Complete</u> Construction: <u>July 2021</u>	
General Location: (Attach Map of Area)	
See Feasibility Study	
<b>Project Costs - Round to the nearest thousand</b>	
Estimated Engineering Costs: Included in Construction	Estimated Construction Costs: 3,498,000
Other Costs (Describe Above):	Estimated Total Project Costs: 3,498,000
Requested Loan Amount: <u>3,532,980</u>	Requested Loan Term (10, 20, or 30 years): <u>20</u> Years
<b>Signature</b>	
 Signature / Title	Return to: Finance Section Attn: Matt Stearns 1313 Sherman St #718 Denver, CO 80203 Ph. 303/866.3441 e-mail: matthew.stearns@state.co.us