

**RESOLUTION NO. 2016-02—WATERSHED ENTERPRISE, GENERAL**

**BOARD OF DIRECTORS**

**FOUNTAIN CREEK WATERSHED WATER ACTIVITY ENTERPRISE**

**RESOLUTION FORMALLY ACCEPTING AND RATIFYING ACCEPTANCE OF INITIAL PAYMENT FOR WATER ACTIVITY SERVICES FROM COLORADO SPRINGS UTILITIES, AND EXPLAINING BASIS FOR ACCEPTING PAYMENTS FOR SERVICES, PURSUANT TO THE PUEBLO COUNTY 1041 PERMIT CONDITION 6 MONETARY MITIGATION FOR FOUNTAIN CREEK IMPACTS AND PURSUANT TO ENTERPRISE/WATER ACTIVITY ENTERPRISE REQUIREMENTS.**

**WHEREAS**, the Fountain Creek Watershed, Flood Control and Greenway District ("District"), by Resolution No. 2015-01—General, dated January 23, 2015, recorded at Reception No. 216095160 of the records of the Clerk and Recorder of El Paso County, Colorado, established the Fountain Creek Watershed Water Activity Enterprise ("Watershed Enterprise") pursuant to C.R.S. §§ 37-45.1-101, *et seq.* (may be referred to herein occasionally as "the water activity enterprise statute"), as a government water activity business wholly and solely owned by, but operated separately from, the District, with its own separate bank account, with authority to issue its own revenue bonds, but with no authority to levy any tax, and specifically established for the purpose of providing watershed, flood control and greenway services, including but not limited to, construction, operation, repair and replacement of water projects and facilities as defined in C.R.S. § 37-45.1-102(5), as well as any other water activity that is described in C.R.S. §§ 32-11.5-101, *et seq.* (the District's enabling legislation), and shall have authority to perform all water activities authorized to such enterprises under the water activity enterprise statute; and

**WHEREAS**, on April 21, 2009, the Board of County Commissioners of Pueblo County enacted Resolution No. P & D 09-22 approving Pueblo County 1041 Permit No. 2008-002 With Terms and Conditions for Construction and Use of a Municipal Water Project Known as the Southern Delivery System ("SDS") within Pueblo County, Colorado. Colorado Springs Utilities ("CSU") was the SDS Permit Applicant on behalf of the named project partners. Condition No. 6 of the Permit, entitled Monetary Mitigation for Fountain Creek Impacts, requires CSU to pay annual installments of Ten Million Dollars (\$10,000,000.00) for a total sum of Fifty Million Dollars (\$50,000,000.00) in accordance with a specified schedule to mitigate the impacts of SDS to Fountain Creek in Pueblo County and requires that all such payments to be made to the District; and

**WHEREAS**, by Resolution No. 2015-02—General, dated March 27, 2015, the Board of Directors of the District (“District Board”) formally requested that the Board of County Commissioners of Pueblo County and the Board of Directors of CSU mutually agree and proclaim that the Condition No. 6 monetary mitigation payments under Pueblo County 1041 Permit for SDS (“SDS Condition 6 Payments”) be paid to the Fountain Creek Watershed Water Activity Enterprise, rather than to the Fountain Creek Watershed, Flood Control and Greenway District; and

**WHEREAS**, by letter dated April 30, 2015, the Chair of the Colorado Springs Utilities Board of Directors provided that it is the opinion of the SDS project partners that monetary mitigation payment under Condition No. 6 of the SDS directly to the Fountain Creek Watershed Water Activity Enterprise, in lieu of the District, is consistent with both the language and intent of the Pueblo County 1041 Permit for SDS; and

**WHEREAS**, the Board of County Commissioners of Pueblo County, Colorado, passed Resolution 15-225 on September 30, 2015, finding that direct payments of monetary mitigation under Pueblo County 1041 Permit No. 2008-002 for SDS, Condition No. 6, to the Fountain Creek Watershed Water Activity Enterprise is consistent with the intent of the Pueblo County 1041 Permit No. 2008-002, and thereby resolved that direct payments of monetary mitigation under Pueblo County 1041 Permit No. 2008-002 for SDS, Condition No. 6, Monetary Mitigation for Fountain Creek Impacts, to the Fountain Creek Watershed Water Activity Enterprise rather than the Fountain Creek Watershed, Flood Control and Greenway District as requested by the Board of Directors of said District is hereby approved, conditioned upon the Fountain Creek Watershed Water Activity Enterprise providing the same participation by Pueblo County and the City of Colorado Springs as voting members of the Board of Directors as required in Pueblo County 1041 Permit No. 2008-002 for SDS, Condition No. 6; and

**WHEREAS**, in accordance with the Intergovernmental Agreement (pp. 14-15, Para. 2) between Pueblo County and the City of Colorado Springs and its Utility Enterprise CSU (“Stormwater IGA”), executed May 2, 2016, Pueblo County, the City of Colorado Springs, and CSU further mutually agreed to make the SDS Condition 6 Payments to the District or to its Watershed Enterprise: “CSU shall make the first annual payment (together with the additional annual indexing amounts) due under Condition 6 of the SDS 1041 Permit for purposes stated therein to the Fountain Creek Watershed, Flood Control and Greenway District or its Enterprise in the amount of \$9,578,485.00. The remaining annual payments shall be made on or before January 15 of the years 2017, 2018, 2019 and 2020 respectively”; and

**WHEREAS**, CSU and the Watershed Enterprise are enterprises and not “districts” as that term is defined in Colo. Const. Art. X, § 20(2)(b), a provision within the Taxpayer’s Bill of Rights (“TABOR”), Colo. Const. Art. X, § 20; and

**WHEREAS**, as a water activity enterprise, the Watershed Enterprise is authorized to provide for water projects or facilities including any and all works, facilities, improvements, and property necessary or convenient for the purpose of conducting a water activity, C.R.S. § 37-45.1-102(5), and pursuant to its establishing Resolution, it has the authority to provide for watershed and flood control services, which water activity services the Watershed Enterprise understands that Pueblo County desires to acquire from the Watershed Enterprise based on Condition 6 of the SDS 1041 Permit; and

**WHEREAS**, the Watershed Enterprise interprets and thereby intends that the language in both Condition 6 of the 1041 Permit and the Stormwater IGA stated above (1) evidence the intent by Pueblo County for delivery of water activity services in the future by the Watershed Enterprise, and thus, by payment of the SDS Condition 6 Payments by CSU, will constitute an enterprise to enterprise transaction; (2) that it is an agreement between the City of Colorado Springs, CSU, and Pueblo County that authorizes CSU to pay the SDS Condition 6 Payments to the Watershed Enterprise in exchange for the Watershed Enterprise to (A) agree to be the recipient and manager of the SDS Condition 6 Payments (thus enabling CSU to meet the requirement of Condition 6 of the SDS 1041 Permit), and (B) to provide certain water activity services as generally described in Condition 6 of the SDS 1041 Permit; and (3) that the payment of the SDS Condition 6 Payments by CSU and the receipt of the same by the Watershed Enterprise, as identified herein, is a payment for services and is not a “grant” as that term is defined in the water activity enterprise statute at C.R.S. § 37-45.1-102(2), and thus, the receipt of said payments is in accordance with the authorized activities of both a water activity enterprise as defined in the water activity enterprise statute and of an enterprise as defined in TABOR at Colo. Const. Art. X, § 20(2)(d); and

**WHEREAS**, the governing body of a water activity enterprise may exercise the district’s legal authority relating to water activities, C.R.S. § 37-45.1-103(4); therefore, because the District has the authority to enter into contracts and agreements, C.R.S. § 32-11.5-205(1)(m), and “to promote, construct, and manage the protection and improvement of the Watershed to prevent and mitigate flooding, erosion, and sedimentation, improve drainage and water quality, address water quantity, [and] provide a healthy riparian habitat with recreational amenities” C.R.S. § 32-11.5-205(1)(q), the Watershed Enterprise also has the authority to enter into contracts and agreements to provide water activity services for the purposes of promoting, constructing, and managing the protection and improvement of the Watershed as contemplated in Condition 6 of the 1041 Permit ; and

**WHEREAS**, the water activity services the Watershed Enterprise contemplates performing are generally described as sedimentation, erosion, flood control and water quality improvements to the Fountain Creek Watershed from the southern city limits of Colorado Springs, Colorado to the confluence of Fountain Creek and the Arkansas River in Pueblo, Colorado, and the Watershed Enterprise desires to provide such water activity services with the SDS Condition 6 Payments; and

**WHEREAS**, the Watershed Enterprise is a business, and as such is entitled to earn a profit from the services it provides, and the water activity services contemplated herein will require expenses by the Watershed Enterprise including General and Administrative expenses; therefore, the Watershed Enterprise shall recover its General and Administrative expenses for providing the services outlined herein from the SDS Condition 6 Payments, but said expenses shall not exceed five percent (5%) of such payments as annually appropriated by the Board of Directors of the Watershed Enterprise; and

**WHEREAS**, at its regular meeting on May 20, 2016, the District Board was advised of receipt of the initial SDS Condition 6 Payment of \$9,578,485.00 from CSU on May 18, 2016; and

**WHEREAS**, the Board of Directors of the Watershed Enterprise (“Enterprise Board”) believes it is necessary and will serve the best interests of the public, the District, and the Enterprise to formally accept and ratify acceptance of the May 18, 2016 receipt of said initial SDS Condition 6 Payment by this Resolution, and to memorialize and clarify the Watershed Enterprise’s intent that said initial payment, as well as all subsequent annual SDS Condition 6 Payments, evidence the intent by Pueblo County for delivery of water activity services in the future by the Watershed Enterprise in exchange for said payments.

**NOW, THEREFORE, BE IT RESOLVED**, by the Board of Directors of the Fountain Creek Watershed Water Activity Enterprise that the Enterprise Board hereby formally accepts and ratifies acceptance of its receipt on May 18, 2016 of the initial SDS Condition 6 Payment of Nine Million, Five Hundred Seventy-eight Thousand, Four Hundred Eighty-five Dollars (\$9,578,485.00) from CSU, which payment was deposited into the Watershed Enterprise bank account.

**BE IT FURTHER RESOLVED**, as more specifically stated in the recitals above, that the Enterprise Board formally accepts said initial payment from CSU, as well as all subsequent annual SDS Condition 6 Payments from CSU, with the intent that such payments constitute an enterprise to enterprise transaction, and that such payments further evidence the intent by Pueblo County for delivery of water activity services in the future by the Watershed Enterprise in exchange for said payments, and that said payments do not constitute a “grant” as that term is defined in the water activity enterprise statute at C.R.S. § 37-45.1-102(2), and thus, the receipt of said payments is in accordance with the authorized activities of both a water activity enterprise as defined in the water activity enterprise statute and of an enterprise as defined in TABOR at Colo. Const. Art. X, § 20(2)(d).

**BE IT FURTHER RESOLVED** that the Chairperson of the Watershed Enterprise, or the Vice Chairperson in the Chairperson’s absence, is hereby authorized to execute on behalf of the Enterprise Board this Resolution and any other documents that may be necessary to accomplish the intent of the Enterprise Board in this matter.

**DATED** this 28th day of October, 2016, *nunc pro tunc*, May 18, 2016, at Fountain, Colorado.

**FOUNTAIN CREEK WATERSHED, WATER  
ACTIVITY ENTERPRISE**

**ATTEST:**

By: \_\_\_\_\_ By: \_\_\_\_\_

Richard Skorman, Secretary

Terry Hart, Chairperson