

**AGREEMENT CONCERNING TRANSFER OF WATER SYSTEM BETWEEN
RAINBOW WATER COMPANY, INC. AND CITY OF RAPID CITY**

This agreement ("Agreement") is entered into this _____ day of _____, 2016, by and between **RAINBOW WATER COMPANY, INC.**, ("Rainbow Water") a South Dakota corporation of 9469 Deerview Road, Piedmont, SD 57769, and the **CITY OF RAPID CITY** ("City"), a South Dakota municipal corporation, 300 Sixth Street, Rapid City, SD 57701.

WHEREAS, City is a municipal corporation organized and existing under the laws of the State of South Dakota; and

WHEREAS, Rainbow Water is the owner of a water system located in Valley View Estates Subdivision, Paradise Estates Subdivision, and adjoining parcels that are adjacent to the Subdivision along the east side of Radar Hill Road. Collectively called the ("Subdivisions") for purposes of this agreement; and

WHEREAS the Subdivisions are generally located in the SE $\frac{1}{4}$ of the NW $\frac{1}{4}$ and the N $\frac{1}{2}$ of the NE $\frac{1}{4}$ of the SE $\frac{1}{4}$ of Section 12, Township 1 North, Range 8 East, of the Black Hills Meridian, in Pennington County, South Dakota and the SW $\frac{1}{4}$ of the NW $\frac{1}{4}$ of Section 7 Township 1 North, Range 9 East, of the Black Hills Meridian, in Pennington County, South Dakota; and

WHEREAS the City desires to purchase the water distribution system as described herein; and

WHEREAS, Rainbow Water desires to convey to the City its water system and abandon identified components of the system upon the terms defined herein; and

WHEREAS the City desires to provide water service to the residences within the Property who are currently served by the Rainbow Water; and

WHEREAS, it is the intent of the parties to enter into this agreement stating the conditions under which Rainbow Water will transfer the water system to the City and the City will take over the water distribution system.

NOW THEREFORE, for and in consideration of the mutual promises, covenants, and agreements herein contained, the parties covenant and agree as follows:

1. Recitals. The recitals set forth above constitute an integral part of this Agreement and are incorporated herein by this reference as if fully set forth herein as agreements of the parties.

2. Purchase of Water System. The City agrees to purchase from Rainbow Water, and Rainbow Water agrees to sell to City, components of Rainbow Water's water distribution system as described in Paragraph 3 below, subject to the terms and conditions contained herein.

3. Description of System. The water system that shall be transferred by Rainbow Water to the City shall include the water mains, valves, appurtenances and system components as shown and described on Exhibit A, referred to herein as the "System."

4. Transfer of System. Rainbow Water shall transfer and convey the System described herein by a good and sufficient bill of sale, to be delivered at Closing. The transfer shall be made free of all liens and encumbrances.

5. Consideration. The total purchase price shall be Two Hundred Ninety-five Thousand Dollars (\$295,000), which shall be paid according to Paragraph 6 below. The parties acknowledge that Rainbow Water shall have the right to assign proceeds from this transaction to a third party, and City shall not withhold its consent from such assignment.

6. Payment Terms. The City agrees to make an earnest money payment of Forty-five Thousand Dollars (\$45,000) within forty-five days after execution of this Agreement by both parties. The remaining Two Hundred Fifty Thousand Dollars (\$250,000) shall be paid to Rainbow Water upon transfer of the System at Closing.

7. Allocation of Consideration. The parties hereby agree that the consideration paid for the System shall be allocated as follows:

Water Line: under Radar Hill Road 6" main.	\$15,000
City Participation in abandonment costs of Lot # 18 Well and Pump House	\$20,360
Curb Valves and Boxes	\$10,600
Water Main: 6" C-900	\$242,040
Water Main Valves	\$7,000
Total	\$295,000

8. Taxes. Rainbow Water shall be responsible for any and all taxes and assessments on or relating to the System. Rainbow Water shall be responsible for any tax assessments, deficiencies, penalties, interest, liens, or other assessments made, regardless of whether the transaction contemplated herein has closed.

9. Closing. The closing of this transaction shall take place at the office of the City Attorney at such time as mutually agreed. Should closing of this transaction not occur, Rainbow Water shall return to City, within thirty days following demand, the earnest money payment made pursuant to Paragraph 6.

10. Rainbow Water's Obligations. Rainbow Water agrees it will perform the following items to the satisfaction of the City:

- A. Operation and Maintenance of the System until Closing. Rainbow Water shall be responsible for operating the System as a public water system in compliance with all state and federal requirements until Switchover. Rainbow Water shall also maintain the System in good working order until the Switchover.

- B. Meter Coordination. Rainbow Water shall cooperate with its water customers and the City's utility billing personnel to facilitate the installation of City water meters prior to Switchover.
- C. Rainbow Water System Asset Inventory. Rainbow Water shall provide an inventory of its system assets, including but not limited to water mains, fire hydrants, service lines, water meters, curb stops, meter pits, and flushing hydrants. Rainbow Water agrees that the inventory will include a general description of the condition of each asset as well as a general map of the same. For service lines, meter pits, and curb stops, the inventory shall also include a listing of the property served by such asset. Rainbow Water agrees to complete and provide this inventory to the City within 60 days after execution of this Agreement. Rainbow Water agrees to use its best efforts to assist the City and its consultants in locating the water system assets, and this obligation shall survive Closing of the transaction as contemplated herein.
- D. Rainbow Water Accounts. Rainbow Water shall furnish the City a listing, by address, of all water accounts and service connections to Rainbow Water's distribution system within 60 days after execution of this Agreement.
- E. Curb stops and Valves. Rainbow Water agrees to ensure that all service line curb stops and distribution system valves are visible. Rainbow Water further agrees to coordinate with and assist the City and its contractor and consultants to demonstrate such curb stops and distribution system valves are in working order with the City or its contractor and consultant's personnel present. Curb stops and distribution system valves not found to be in working order will be replaced by the City. This work will occur after the City's Project has been let and the City's contractor is available to make all repairs or replacements.
- F. Easements. Rainbow Water agrees to assign, convey or transfer all easements and rights of way for the System.

11. Rainbow Water Post-Closing Obligations. Following the Closing, Rainbow Water shall have the following obligations:

- A. Rainbow Water shall abandon its well located on Lot 18 Valley View Estates located in the NE¼ Section 12, T1N, R8E, BHM (the "Well Lot"). Such abandonment shall comply with all applicable laws and regulations.
- B. Rainbow Water shall abandon the pumping facility located on the Well Lot. The structure housing the pumping facility need not be removed or demolished, but may be repurposed at Rainbow Water's discretion.
- C. Rainbow Water shall remove all storage tanks from the Well Lot.
- D. The above-listed obligations shall be completed within One Hundred Eighty (180) days following Closing.

12. City Obligations. The City agrees it will perform the following:

- A. Meter Coordination. The City shall cooperate with Rainbow Water and its water customers to facilitate the installation of City water meters prior to Switchover. The City shall coordinate meter reading with Rainbow Water to furnish usage reports to Rainbow Water on a monthly basis to allow Rainbow Water to accurately invoice its customers.
- B. Payments. The City agrees to make all payments contemplated by this Agreement in a timely manner.

13. Switchover of Water. The parties agree to coordinate the exact dates and times of the switchover from Rainbow Water supplying water to the System to the City supplying water to the System (the "Switchover"). The Switchover may occur over the course of up to a week, at the City's discretion. The parties agree to work together to give appropriate notice to water users, read all meters, open and close appropriate valves, and flush water lines.

- A. Time for Switchover. It is anticipated that Switchover will begin on or before, March 31, 2017. In the event that the City is unable to provide water service by March 31, 2017, the Switchover may be postponed, at the City's option, for up to another one hundred eighty (180) days.
- B. Switchover Prior to Closing. Switchover shall occur prior to Closing. The Closing shall take place no more than thirty days following the Switchover.
- C. Liability upon Switchover. Any liability that may arise from operation of the System, or any portion thereof, shall transfer to the City upon City water supplying the System, or any portion thereof.
- D. Risk of Loss following Switchover. If there is any loss or damage to the System, or a portion thereof, between the date of this Agreement and the Switchover, for any reason, the risk of loss shall be borne by Rainbow Water. Prior to commencement of the Switchover, if the System is destroyed or damaged in an amount more than 50% of the total purchase price, the City may, at its option, cancel this Agreement by written notice to the Seller. If the City cancels this Agreement, Rainbow Water shall promptly refund all earnest money paid hereunder to the City. The City shall bear all risk of loss or damage after the Switchover is complete. If damage occurs during the course of the Switchover, the party supplying water to that portion of the System shall bear the risk of loss or damage for such portion.

14. Well Lot. The parties recognize that Rainbow Water currently owns the Well Lot. The City is not acquiring the Well Lot, and Rainbow Water is retaining ownership of the property.

A. License for Entry on Property. Rainbow Water agrees that the City, its officers, employees, and contractors shall have a license to enter the Well Lot for the following purposes:

- i. Inspection of the System;
- ii. Operation and maintenance of the System, or coordination of the Switchover; or
- iii. Verification of Rainbow Water's obligations herein.

B. Use of Water on Well Lot. Rainbow Water, or its successors in interest, after completing the obligations listed above, shall have the option to redevelop the property in any way not prohibited by law or this Agreement. Any use of water on the property shall require a Water Service Agreement between the property's owner and the City, which will require, *inter alia*, adherence to city ordinances, policies and water rates.

15. Rainbow Water's Debts and Expenses. The parties agree that City will not be responsible for any debts or obligations of the Rainbow Water has incurred prior or subsequent to this Agreement or the Closing as described above. Furthermore, nothing in this Agreement limits Rainbow Water's rights to collect amounts due and owing on its accounts or to recover costs or other expenses incurred from its customers.

16. Notices. All notices and other communications required or permitted by this Agreement shall be in writing and shall be deemed given to a party when either (a) delivered to the appropriate address by hand or by nationally recognized overnight courier service (costs prepaid) or (b) received or rejected by the addressee, if sent by certified mail, return receipt requested, in each case to the addresses designated below (or such other address as a party may designate by notice to the other parties):

City of Rapid City
Attn: Public Works Director
300 Sixth Street
Rapid City, SD 57701

with a copy to

City Attorney
Attn: Wade Nyberg
300 Sixth Street
Rapid City, SD 57701

Rainbow Water Company, Inc.
Attn: Royal Nielsen
9469 Deerview Road
Piedmont, SD 57769

with a copy to

Attorney at Law
PO Box
Rapid City, SD 57709

17. Relationship between the Parties. The relationship of the parties is that of independent contractors. The parties are not, by virtue of this Agreement or otherwise, in an employer-employee, principal-agent, joint venture or partnership relationship with each other, and each party agrees not to represent to any other person, or to assert in any form or forum to the contrary. Neither party is authorized to act as an agent for, or legal representative of, the other party and neither party shall have the authority to assume or create any obligation on behalf of, in the name of, or binding upon the other party.

18. Integration. This Agreement and the agreements and documents referred to herein (including any exhibits and schedules incorporated herein) contain the entire agreement and understanding of the parties hereto with respect to the subject matter hereof and supersede all prior agreements, negotiations, and understandings, whether written or oral, relating to the subject matter hereof.

19. Amendments. This Agreement may only be amended by a written document duly executed by all parties.

20. Third Parties. This Agreement is for the sole benefit of the parties hereto and their respective successors and permitted assigns. Nothing herein shall give or be construed to give any person or entity, other than the parties hereto, their respective successors, and permitted assigns, any legal or equitable rights hereunder.

21. Assignment. This Agreement and the rights, duties, and obligations hereunder may not be transferred or assigned by either of the parties, whether directly or indirectly by merger, consolidation, reorganization, dissolution, operation of law or otherwise, without the prior written consent of the other party. Any attempted transfer or assignment without consent in violation of the foregoing shall be void. Subject to the foregoing, this Agreement and the provisions hereof shall be binding on the parties and their respective permitted successors and assigns.

22. Waivers. No waiver of any term or provision of this Agreement shall be binding unless executed in writing by the party waiving such term or provision.

23. Cumulative Remedies. The rights and remedies under this Agreement are in addition to and not exclusive of any other rights, remedies, powers and privileges, whether at law or in equity, under this Agreement or otherwise, that any party may have against another. No failure to exercise and no delay in exercising any right, power or privilege shall operate as a waiver thereof, nor shall any single or partial exercise of any right, power or privilege preclude the exercise of any other right, power or privilege. No waiver of any breach or default of any covenant or agreement hereunder shall be deemed a waiver of any preceding or subsequent breach or default of the same or any other covenant or agreement.

24. Time of the Essence. Time is of the essence with respect to all provisions of this Agreement in which a definite time for performance is specified; provided, however, that the foregoing shall not be construed to limit or deprive a party of the benefits of any grace or use period provided for in this Agreement.

25. Force Majeure. Neither party shall be liable for any delay or failure in performance due to any reason or unforeseen circumstance beyond the affected party's reasonable control, including shortages or delays in obtaining materials from suppliers that cannot reasonably be cured by obtaining the needed materials from another source, work stoppages not involving employees of either party that cannot reasonably be overcome, fires, riots, rebellions, wars, acts of terrorism, accidents, explosions, floods, storms, acts of God, and similar occurrences. The obligations and rights of the excused party shall be extended on a day-to-day basis for the time period equal to the period of the excusable delay.

26. Counterparts. This Agreement may be executed in counterparts; each such counterpart shall be deemed an original and when taken together with other signed counterparts, shall constitute one Agreement.

27. Further Action. The parties covenant and agree that each shall execute and deliver such further instruments or documents as shall be necessary or convenient to effectuate the purposes contemplated by this Agreement.

28. Construction. The language in all parts of this Agreement shall in all cases be construed as a whole according to its fair meaning and not strictly for nor against any party. The headings and numbering of the different paragraphs of this Agreement are inserted for convenience only and are not to control or affect the meaning, construction or effect of each provision. The parties agree that each party has reviewed this Agreement and has had the opportunity to have its counsel review the same. In the event an ambiguity or question of intent or interpretation arises, this Agreement shall be construed as if drafted jointly by the parties and no presumption or burden of proof shall arise favoring or disfavoring any party by virtue of the authorship of any of the provisions of this Agreement.

29. Severability. The invalidity of all or any part of any section of this Agreement shall not render invalid the remainder of this Agreement or the remainder of such section. If any provision of this Agreement is held to be unenforceable for any reason, it shall be modified rather than voided, if possible, in order to achieve the intent of the parties to this Agreement to the extent possible.

30. Choice of Law. This Agreement shall be governed and construed in accordance with the laws of the state of South Dakota, without regard for its choice-of-law principles, and all claims relating to or arising out of this Agreement, or the breach of the terms thereof, whether sounding in contract, tort or otherwise, shall likewise be governed by the laws of the state of South Dakota, without regard for its choice-of-law principles.

31. Jurisdiction and Venue. The parties hereto explicitly agree to submit to the personal jurisdiction of South Dakota state courts, and any dispute relating to or arising out of this Agreement, or the breach of the terms thereof, whether sounding in contract, tort or otherwise, shall be decided solely and exclusively by the state circuit court located in Rapid City, South Dakota.

Dated this 20 day of September, 2016.

RAINBOW WATER COMPANY, INC.

By: Royal N. Nielsen
Royal Nielsen, President

State of South Dakota)
)ss.
County of Pennington)

On this 20th day of September, 2016, before me, the undersigned officer, personally appeared Royal Nielsen, the President of Rainbow Water, Inc., known to me to be the person who is described herein, and who executed the within and foregoing instrument and severally acknowledged that she executed the same.

IN WITNESS WHEREOF, I hereunto set my hand and official seal.

(seal) Alvin G. Herman
Notary Public – South Dakota
My Commission Expires 11/22/2019
Dated this 20th day of September, 2016.

CITY OF RAPID CITY

By: _____
Steve Allender, Mayor

ATTEST:

Pauline Sumption, Finance Officer

(seal)

State of South Dakota)
)ss.
County of Pennington)

On this the _____ day of _____, 2016, before me, the undersigned officer, personally appeared Steve Allender and Pauline Sumption, who acknowledged themselves to be the Mayor and Finance Officer, respectively, of the City of Rapid City, a municipal corporation, and that they, as such Mayor and Finance Officer, being authorized so to do, executed the foregoing Agreement for the purposes therein contained by signing the name of the City of Rapid City by themselves as Mayor and Finance Officer.

IN WITNESS WHEREOF I hereunto set my hand and official seal.

(seal) _____
Notary Public – South Dakota
My Commission Expires _____