

**AGREEMENT BETWEEN THE CITY OF RAPID CITY AND BRIAN DAIL
FOR PURCHASE OF WATER RIGHTS**

This Agreement is made by and between the City of Rapid City, a municipal corporation, of 300 Sixth Street, Rapid City, SD 57701 (hereinafter the "City"), and BRIAN DAIL, of 7747 Croyle Avenue, Rapid City, SD 57702 (hereinafter "Dail").

WHEREAS, Dail currently owns certain water rights as described below; and

WHEREAS, the City desires to acquire Dail's water rights; and

WHEREAS, the parties have agreed to the terms and conditions under which the City shall purchase the Water Rights from Dail.

NOW THEREFORE, it is agreed by the parties 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. Purpose. The purpose of this Agreement is to set forth the terms and conditions under which the City agrees to purchase the water rights described below from Dail.

3. Water Right. The water rights to be transferred are generally described as all water rights held by Dail under the following:

- a. South Dakota Vested Water Right License No. 2040-2 dated May 2, 1988, utilizing water from the South Side Ditch, and
- b. South Dakota Reissued Vested Right Water License No. 2383-2 dated December 3, 2015, utilizing water from the Little Giant Ditch.

4. Consideration. The City will pay \$1,000 per acre-foot for the transferable Little Giant Ditch water rights. The City will pay \$900 per acre-foot for the transferable South Side Ditch water rights. The total consideration paid is dependent upon, and shall be calculated according to, the amount of water approved for transfer for beneficial use by the City by the South Dakota Department of Environment and Natural Resources (DENR) and the South Dakota Water Management Board (the Board).

5. Payment. The City shall make one lump sum payment 45 days following approval by the Board and issuance of a license by DENR. Any appeal of the final agency decision shall postpone payment until final adjudication of the matter. Payment shall be made as soon as practicable after any such final adjudication in the City's favor. If Dail desires to be paid in installments instead of a lump sum, the City agrees to develop a payment plan to meet Dail's needs, but the parties agree that no interest shall be due nor paid on deferred payments.

6. Engineering Fees. Dail agrees to pay for one-half (½) of the engineering fees incurred by the City related to the water rights purchase and transfer. Dail's share of the fees shall not exceed Seven Thousand Five Hundred Dollars, (\$7,500). Should the transfer be successful, the City agrees to release this obligation, and no contribution for engineering fees shall be due or owing from Dail.

7. City Option to Cancel Transaction. The City covenants and agrees to pursue purchase and transfer of the Water Rights unless or until it is clearly evident that the transfer will not be approved by the governing authorities, the Water Rights are not deemed valid, or the quantity is such that the City does not wish to pursue the transfer. At such time, the City shall have the option to terminate this transaction, and cease proceedings related to the transfer. The City has hired the RESPEC firm as its engineering consultant, and its independent judgment and analysis shall be adequate justification for the City reaching the above conclusions.

8. Denial of Transfer. Should a transfer be denied, whether by the Board or a court of competent jurisdiction, no consideration shall be due to Dail, and no payment shall be made by the City. Dail shall still owe engineering fees as described in Paragraph 6.

9. Dail Obligations.

- a. Dail shall not market, offer for sale, or sell to others the Water Rights until the City provides written notification that it is no longer interested in purchase of the Water Rights.
- b. Dail shall provide all information in his possession concerning the Water Rights to the City at no cost.
- c. Dail shall be an active and willing participant in the process to clarify and identify the Water Rights and the Water Rights transfer application process.
- d. Dail shall act as the liaison with the Little Giant Ditch Company and the South Side Ditch Company concerning this purchase and transfer.
- e. Dail shall make every reasonable attempt to obtain written documentation from the respective ditch companies that they will not oppose the transfer of the Water Rights.

10. City Obligations.

- a. The City will direct the research and engineering effort needed for purchase and transfer of the Water Rights.
- b. The City shall pay engineering fees related to the water rights purchase and transfer as described in Paragraph 6.
- c. The City shall provide Mr. Dail with copies of the finished work product resulting from the work paid for by the engineering fees, provided the purchase and transfer is successful, or if unsuccessful, provided Dail pays his portion of the engineering fees.
- d. The City shall be an active and willing participant in the process to clarify and identify the Water Rights and the water rights transfer application process.
- e. The City shall act as the liaison with DENR and the Board concerning the water rights purchase and transfer.

11. 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

Brian Dail
7747 Croyle Avenue
Rapid City, SD 57702

with a copy to

City Attorney
300 Sixth Street
Rapid City, SD 57701

12. 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.

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

14. 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.

15. 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.

16. 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.

17. 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.

18. 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.

19. 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.

20. 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.

21. 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.

22. 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.

23. 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.

24. 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.

25. 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 Circuit Court located in Rapid City, South Dakota.

DATED this 19 day of Dec, 2016



BRIAN DAIL

DATED this ___ day of _____, 2017.

CITY OF RAPID CITY

Mayor

Attest

Finance Officer

(seal)