

WHOLESALE WATER AGREEMENT

This **WHOLESALE WATER AGREEMENT** (“Agreement”) is made and entered into as of this ___day of April 2022, (the “Effective Date”) by and between the City of Augusta, Kansas, a municipal corporation of the State of Kansas (hereinafter “Augusta”), and the City of El Dorado, Kansas, a municipal corporation of the State of Kansas (hereinafter “El Dorado”).

WHEREAS, the City of Augusta desires to enter into a multi-year agreement for the purpose of purchasing water from City of El Dorado for municipal use;

WHEREAS, the cities of Augusta and El Dorado previously entered into a similar agreement for the purchase of water and such agreement terminates on January 1, 2026;

WHEREAS, both cities wish to continue the partnership as provided herein to ensure the City of Augusta has adequate water supply to meet current and future demands; and

WHEREAS, El Dorado desires to enter into a multi-year contract with Augusta to ensure adequate and ongoing supply is reserved to meet the needs of Augusta;

WHEREAS, water purchased by the City of Augusta from the City of El Dorado shall be administered under the terms and conditions set forth in this Agreement, and as may be amended from time to time, in writing, as this cooperative relationship continues to contribute importantly to the success and well-being of both entities.

NOW, THEREFORE, in consideration of the premises and the performance of the covenants herein contained, the parties agree as follows:

- 1. Raw Water; Quantity Available for Purchase.** Beginning on the Effective Date of this Agreement, and subject to any limitations specified in this Agreement, El Dorado agrees to sell and deliver to Augusta and Augusta agrees to purchase raw, or untreated, water (“Raw Water”) at least 575 million gallons annually (the “Take or Pay Allocation”). Augusta shall pay El Dorado for the Take or Pay Allocation, at the rates established herein, whether such quantity of water is used or not, during any calendar year during the Effective Period of the Agreement.
- 2. Term.** This Agreement shall be in full force and effect from the Effective Date of the Agreement until December 31, 2062, unless otherwise amended, in writing, by both parties. The Agreement may be amended, extended, or renewed by mutual written consent of both parties under such terms and conditions agreeable to the parties. Either party may provide the other with notice of its desire to amend or extend the Agreement by giving notice of such intention, in writing, six months of its desire to negotiate provisions of this Agreement. Such negotiations shall not be considered to be a default of the Agreement, nor shall it necessarily prevent an extension of this Agreement. Said Agreement shall be renewed and extended under the same terms and conditions herein, except that the parties agree to negotiate and establish the price of raw water prior to the beginning of an extended term.
- 3. Raw Water Limitation.** Augusta may request to purchase water volumes in excess of 575 million gallons at any time during the Effective Period of this Agreement. El Dorado shall review any such request and provide a response within sixty days following receipt of the written request. Except as may be provided herein, Augusta shall not take any quantity of Raw Water in excess of 575 million gallons in any calendar year without the express written consent of the City Manager of El Dorado.

4. **Raw Water Rates.** Augusta agrees to pay, and El Dorado agrees to accept, for all Raw Water sold and delivered in any calendar month during the period beginning with the Effective Date of the Agreement the sum of \$0.72 per 1,000 gallons. Notwithstanding the other terms of this Agreement, the parties agree that every five (5) years, beginning on January 1, 2030, the parties shall review the price per thousand gallons for raw water under this Agreement. The price per thousand gallons charged for raw water shall be modified based on the formula as follows:

The parties will utilize the annual Midwest Region Consumer Price Index for all urban consumers (CPI-U) for rate adjustment purposes. The rate adjustment percentage for the next five (5) years will equal the percentage change between the CPI-U in the year immediately preceding and the CPI-U from the year five prior, multiplied by 50%. The current price per thousand gallons will then be multiplied by this factor to determine the price per thousand gallons for the next five (5) years.

$$\frac{CPI_5 - CPI_1}{CPI_1} (0.5) = P_I$$

$$R(P_I) + R = R_N$$

El Dorado will provide Augusta with written notice of any subsequent rate increases at least ninety (90) days prior to the effective date of the proposed increased rate, however, failure by El Dorado to provide such notice shall not otherwise invalidate the aforementioned rate increase.

5. **Operations and Maintenance; US Army Corps of Engineers.** Each year, El Dorado receives an invoice from the US Army Corps of Engineers for operations and maintenance costs (the "Corps Invoice"). The parties agree that once the Corps Invoice is received, El Dorado will, within sixty (60) days of its receipt, bill the City of Augusta for Augusta's share of operation and maintenance costs for any amount in excess of \$48,000. El Dorado shall include the outstanding amount owed for operations and maintenance costs on Augusta's next monthly bill and Augusta shall pay those additional costs. If the City of Augusta's share of operation and maintenance costs for the Corps Invoice is below \$48,000, El Dorado agrees to credit the City of Augusta for the difference on its next monthly bill.
6. **No Obligation to Serve.** El Dorado shall not be obligated to furnish the allocation of water described in this Agreement at times when there is less water available than might reasonably be expected to meet the needs of the citizens of El Dorado; however, El Dorado shall immediately notify Augusta of any such apparent shortage. El Dorado shall be not required to provide water to Augusta during conditions that are beyond the El Dorado's control and that prevent the allocation to be provided.

The parties recognize there may be certain circumstances in which discontinuance of the supply of Raw Water to Augusta may be necessary or the supply of Raw Water may be temporarily reduced, such as but not limited to:

- a. Severe Drought – In the event of a severe drought that reduces the amount of water available for human consumption from El Dorado Lake, and such supply requires that amount of water being taken from El Dorado Lake be rationed, then the amount of Raw Water supplied to Augusta will be proportionately reduced in the same ratio as El Dorado and other purchasers of water.

- b. Contamination – The supply of Raw Water to Augusta may be temporarily discontinued in the event the water supply in El Dorado Lake becomes contaminated to the point it is unusable for human consumption. Such discontinuance shall continue until such time as all conditions have been remedied to the satisfaction of the parties and the Kansas Department of Health and Environment.
 - c. Emergency – El Dorado may temporarily suspend the sale of Raw Water to Augusta during any emergency by reason of unforeseen catastrophe or disaster commonly referred to as “acts of God,” which interfere with or otherwise disrupt the use of water supplies at El Dorado Lake for human consumption. El Dorado also has the right to declare an emergency at any time in which the supply of Raw Water to Augusta might lead to contamination of the public water supply for El Dorado, and may continue to refuse delivery of water to Augusta until such time as all conditions have been remedied to the satisfaction of the parties and the Kansas Department of Health and Environment.
 - d. Non-Payment - The supply of Raw Water to Augusta may be discontinued for the non-payment of any fee required by this Agreement if payment is not received by El Dorado within sixty (60) days of the date of the invoice. El Dorado may continue to refuse delivery of water to Augusta until such time as all delinquent payments are received by El Dorado.
7. **New Customers.** El Dorado agrees that it will use due diligence and care in acquiring new customers or increasing allocations of existing customers for either untreated or treated water to avoid jeopardizing the water supply allocated to Augusta by this Agreement. As such, El Dorado agrees that it shall not contract to sell any amount of water that may impede or otherwise interfere with El Dorado’s ability to meet the annual allocation provided to Augusta as defined by this Agreement.
8. **Annual Demand Estimate.** Augusta agrees to notify El Dorado, in writing, of any anticipated increase to Augusta’s anticipated Raw Water demand, so El Dorado may make proper arrangements for its water withdraws to meet Augusta’s estimated demand.
9. **Point of Delivery.** All Raw Water sold to Augusta under this Agreement shall be delivered to and received by Augusta at Augusta’s Raw Water Transmission Main Terminal (“Terminal”) located at El Dorado’s Water Treatment Plant, located at 380 East Central Avenue in El Dorado, Kansas.
10. **Metering; Maintenance and Replacement.** Augusta shall be responsible for the construction and installation of metering equipment at a location agreeable to both parties (the “Terminal”), and Raw Water sold pursuant to this Agreement shall be measured through such equipment (the “Metering Equipment”). The Metering Equipment shall be read on the last working day of each month, or as soon thereafter as is practical and convenient, and each party may have, at their option, a representative present for such monthly reading.

Following completion of construction of the Metering Equipment, Augusta shall convey such Metering Equipment to El Dorado for its ownership and perpetual maintenance. El Dorado shall be responsible for the operation and maintenance of the aforementioned Metering Equipment, including replacement as needed, and shall provide for the necessary routine maintenance to ensure such Metering Equipment is kept in good working order to meet industry standards for similar Metering Equipment. The Standards and Specifications of the American Water Works Association (“AWWA”) effective as of the Effective Date of this Agreement shall govern

calibration and replacement of Metering Equipment. Any necessary replacement of the Metering Equipment shall meet or exceed the then-current Standards and Specifications of the AWWA for similar Metering Equipment.

Either party may, at any time and at its own expense, have such Metering Equipment tested to determine accuracy. In the event that either party determines the Metering Equipment are not performing within aforementioned industry standards, the other party shall be notified and a plan shall be coordinated to recalibrate or replace such Metering Equipment. Any such recalibration or replacement shall be at the sole expense of Augusta.

- 11. Transmission Main; Maintenance and Replacement.** Augusta will own and maintain the Raw Water Transmission Main (“Main”) that extends from the Terminal in El Dorado to the Augusta Water Treatment Plant. Augusta shall be responsible for all costs necessary to design, construct, and maintain its Main in good working order to accommodate the transmission of raw water as provided herein. Augusta shall retain exclusive control of the premises and agrees to hold El Dorado harmless from any claim or legal action against Augusta or El Dorado arising from the construction, operation, and maintenance by Augusta or any part thereof.

In the event it is necessary to stop the flow of water in the Main owned by Augusta due to the need of Augusta to make repairs on said Main, authorized representatives of Augusta shall be permitted to shut off the water supply by use of a valve located at an agreed upon point in the Main. In the event such discontinuance of service is necessary, Augusta shall notify El Dorado of the period during which the water supply will be discontinued and the purpose of said discontinuance.

El Dorado agrees to grant the easements necessary for Augusta to construct a Water Main to fulfill the terms of this Agreement. Such easements shall be provided to Augusta at no cost, provided the easements are located within the public right-of-way or such other real property owned by the City of El Dorado. El Dorado reserves the right to review and approve any easements necessary for this Agreement located within the corporate limits of El Dorado.

- 12. System Modifications.** Any significant modifications to the Main or Metering Equipment, which Augusta desires to make and which might affect El Dorado’s water system, must receive written approval from El Dorado’s City Manager prior to the commencement of construction-related activities. Augusta shall also provide notice to El Dorado when working on property owned by El Dorado.

El Dorado shall keep Augusta advised of any proposed modifications to its water system which may affect Augusta’s water utility operations or impede Augusta’s ability to receive water as provided in this Agreement. El Dorado shall give Augusta reasonable advance notice in the event that it becomes necessary to interrupt its performance under this Agreement for maintenance or repairs to the water system.

- 13. Indemnification.** The City of El Dorado covenants and warrants that it will exonerate, indemnify, and hold harmless the City of Augusta, its agents and employees, from and against any and all third-party claims, made or asserted against the City of Augusta, its agents or employees, arising out of or in any way connected with the performance of (or failure to perform) any duty or obligation of the City of El Dorado contained in this Agreement. The City of El Dorado reserves its rights to any direct action or to interplead or cross-claim against the City of Augusta in the event the City of Augusta be in breach of any of the terms of this Agreement.

The City of Augusta covenants and warrants that it will exonerate, indemnify, and hold harmless the City of El Dorado, its agents and employees, from and against any and all third-party claims, made or asserted against the City of El Dorado, its agents or employees, arising out of or in any way connected with the performance of (or failure to perform) any duty or obligation of the City of Augusta contained in this Agreement. The City of Augusta reserves its rights to any direct action or to interplead or cross-claim against the City of El Dorado in the event the City of El Dorado be in breach of any of the terms of this Agreement.

14. **Attorneys' Fees.** If any legal action or any other proceeding is brought for the enforcement of this Agreement, or because of an alleged dispute, breach, default, or misrepresentation in connection with any of the provisions of this Agreement, each party agrees that the successful or prevailing party or parties will be entitled to recover reasonable attorneys' fees and other costs incurred in that action or proceeding, in addition to any other relief to which it or they may be entitled.
15. **Notices.** Notices and communications required to be in writing pursuant to this Agreement shall be effective only if delivered personally, or sent by facsimile, electronic mail, or certified mail, to the following:

City of Augusta, Kansas
Attn: City Manager
PO Box 489
Augusta, KS 67010

City of El Dorado, Kansas
Attn: City Manager
220 E. First Avenue
El Dorado, KS 67042
16. **Successors and Assigns.** The covenants, terms and conditions of this Agreement shall extend to and be binding upon the successors and assigns of the parties.
17. **Applicable Law.** This Agreement shall be construed and enforced in accordance with the laws of the State of Kansas. Venue and jurisdiction for any interpretation or action arising hereunder shall be exclusively in the federal and state courts of Butler County, Kansas.
18. **Amendment.** This Agreement may only be amended by a written amendment executed by both parties.
19. **Non-Transferrable.** This Agreement may not be transferred or assigned, in whole or in part and without exception, without the written approval of the other party.
20. **Supersede.** This Agreement shall supersede and replace any existing Agreements between the parties concerning the sale and purchase of water.
21. **Entire Agreement.** This Agreement supersedes all prior and contemporaneous oral and written agreements and understandings pertaining to hereto. Any changes to this Agreement must be approved in writing by both parties.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement in duplicate, each copy to be treated as an original, the day and year first above written.

CITY OF AUGUSTA, KANSAS

CITY OF EL DORADO, KANSAS

Mike Rawlings, Mayor

Bill Young, Mayor

Attest:

Attest:

Erica Jones, City Clerk

Tabitha Sharp, City Clerk

Approved as to Form:

Ashlyn Lindskog, City Attorney