

**CITY OF SALIDA, COLORADO
RESOLUTION NO. 2017-11**

**A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF SALIDA, COLORADO,
APPROVING A SETTLEMENT AGREEMENT AND MUTUAL RELEASE WITH
NANCY DOMINICK:**

WHEREAS, the City and Ms. Dominick currently are parties to certain Division 2 Water Court matters known by Case Numbers 04CW125 and 09CW131 (collectively, the “Water Court Litigation”); and

WHEREAS, the City and Ms. Dominick participated in a mediation with former Colorado Supreme Court Justice Gregory Hobbs regarding the Water Court Litigation and related matters on November 9, 2016 and November 10, 2016; and

WHEREAS, the Mayor and City Council subsequently directed the City Attorney and the City’s outside water counsel to pursue additional settlement discussions with Ms. Dominick and her counsel regarding the Water Court Litigation and related matters, with the mediator’s assistance; and

WHEREAS, the City Attorney and the City’s outside water counsel have finalized a Settlement Agreement and Mutual Release with respect to the Budget Litigation that is acceptable to Ms. Dominick and her counsel (the “Settlement Agreement”).

**NOW THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE
CITY OF SALIDA, COLORADO THAT:**

Section 1. The aforementioned Recitals are incorporated herein and adopted as findings and determinations of the City Council.

Section 2. The Salida City Council approves the terms of the Settlement Agreement attached as **Exhibit A** and authorizes the Mayor to execute the Settlement Agreement on behalf of the City.

Section 3. The Salida City Council directs the City Administrator and City Attorney to implement the Settlement Agreement terms with the assistance of the City’s outside water counsel, the mediator and the Mayor.

RESOLVED, APPROVED and ADOPTED this 7th day of February, 2017.

CITY OF SALIDA, COLORADO



[SEAL]
ATTEST:

By:

James LiVechhi
Mayor James LiVechhi

Betty Schwidger
City Clerk/Deputy City Clerk

SETTLEMENT AGREEMENT AND MUTUAL RELEASE

This Settlement Agreement and Mutual Release ("Agreement") is made and entered into by and between the City of Salida (the "City") and Nancy Dominick ("Ms. Dominick") (each a "Party" and together the "Parties").

RECITALS

WHEREAS, the City and Ms. Dominick are Parties to that certain "Stipulation Between Applicant and Opposer Nancy Dominick" dated and filed May 7, 2009, in Case No. 04CW125, District Court, Water Division No. 2 (the "Original Stipulation").

WHEREAS, the City and Ms. Dominick also are Parties to that certain "Amended Stipulation Between Applicant City of Salida and Opposer Nancy Dominick" dated and filed January 27, 2014, in Case No. 04CW125, District Court, Water Division No. 2 (the "Amended Stipulation").

WHEREAS, the Original Stipulation and the Amended Stipulation are referred to collectively herein as the "04CW125 Stipulations."

WHEREAS, Ms. Dominick is the owner of a 1/32 interest in water rights decreed to the Tensassee Ditch, as more fully described in the 04CW125 Stipulations ("Dominick's Tensassee Ditch Interest"), and real property that has historically been irrigated by this water right interest based on water deliveries using the Tensassee Ditch.

WHEREAS, the 04CW125 Stipulations were entered into by the Parties to settle Ms. Dominick's opposition in Case No. 04CW125 and to provide for the continued delivery of Dominick's Tensassee Ditch Interest to her property; they describe the rights and obligations of the City and Ms. Dominick related to the delivery and use of Dominick's Tensassee Ditch Interest as that delivery and use may be affected by the City's use of its water rights in the Tensassee Ditch in accordance with the terms and conditions of the decree entered in Case No. 04CW125, the design and construction of an alternate means to provide for delivery of Dominick's Tensassee Ditch Interest, and the completion of required water court and related water proceedings to allow the ongoing delivery and use of Dominick's Tensassee Ditch Interest.

WHEREAS, Ms. Dominick and the City are currently co-applicants in the water court change of water rights proceeding concerning Dominick's Tensassee Ditch Interest filed with and pending before the District Court, Water Division No. 2, in Case No. 09CW131.

WHEREAS, the City and Ms. Dominick wish to enter into a settlement to resolve their dispute over the method by which the City may meet its obligations to Ms. Dominick under the 04CW125 Stipulations.

NOW, THEREFORE, in consideration of the mutual promises and covenants set forth herein and for other good and valuable consideration, the receipt and adequacy of which are hereby acknowledged, the Parties hereby covenant and agree as follows:

1. Settlement terms

- A. The City shall pay to Ms. Dominick the sum of **\$415,000.00** (the "Settlement Payment"), as follows:
- i. The City shall pay to Ms. Dominick the sum of **\$50,000.00** within thirty (30) days following the final date of execution of this Agreement; and
 - ii. The City shall pay to Ms. Dominick the additional sum of **\$365,000.00** within sixty (60) days following the final date of execution of this Agreement, *or* within seven (7) days of the Court's approval of both the 04CW125 Stipulation and Agreement and the 09CW131 Stipulated Withdrawal, as described in paragraph 1.B, below (with whichever period is longer applying).
 - iii. The purpose of the Settlement Payment is to provide Ms. Dominick with funds that represent the Parties' estimate of the costs and expenses that the City will avoid and that Ms. Dominick will instead incur with respect to her property interests and the actions and outcomes described in the 04CW125 Stipulations, as a result of the settlement described herein and the termination of the City's obligations described in the 04CW125 Stipulations; such costs and expenses including, but not limited to, the design and construction of an alternate means of delivery for Dominick's Tennessee Ditch Interest, related maintenance and property restoration obligations, and completion of required water court and related water proceedings to allow the ongoing delivery and use of Dominick's Tennessee Ditch Interest.
 - iv. The Parties agree that the Settlement Payment is not intended in any manner to reflect a penalty or other punitive damages assessment against the City.
 - v. The Parties further agree that this Settlement Agreement and Mutual Release, and the actions agreed to by the Parties as described herein, including but not limited to the Settlement Payment, are not intended to and do not create any employer-employee relationship between the City and Ms. Dominick, or any other relationship whereby Ms. Dominick or her consultants or agents are acting as independent contractors, consultants, or vendors on behalf of or for the benefit of the City or providing contracting or consulting labor or services to the City.
- B. The following documents will be filed in the District Court for Water Division No. 2 along with motions for Court approval within three (3) days of the final date of execution of this Agreement:
- i. In Case No. 04CW125, a Stipulation and Agreement terminating the Parties' rights and obligations under the 04CW125 Stipulations. A copy of the fully executed Stipulation and Agreement is attached as **Exhibit A** (the "04CW125 Stipulation and Agreement"); and

- ii. In Case No. 09CW131, the City's stipulated withdrawal as a co-applicant with Ms. Dominick. A copy of the signed pleading is attached as **Exhibit B** (the "09CW131 Stipulated Withdrawal").
- C. The Parties' rights and obligations under the 04CW125 Stipulations will be terminated as described in the 04CW125 Stipulation and Agreement as of the "Settlement Effective Date," which shall be the date upon which the City has completed its payment of the Settlement Payment.
- D. Ms. Dominick will retain ownership of Dominick's Tennesse Ditch Interest and all appurtenances thereto, including without limitation any existing easement rights for use of the Tennesse Ditch infrastructure, including rights obtained by prescription.
- E. Ms. Dominick will retain ownership of all water infrastructure installed by the City on Ms. Dominick's property and in the Arkansas River under the 04CW125 Stipulations.
- F. As of the Settlement Effective Date, and except as specifically provided herein, the City will bear no continuing or future obligation to operate Dominick's Tennesse Ditch Interest or the appurtenant Tennesse Ditch infrastructure, or to deliver to Ms. Dominick any portion of water available to Dominick's Tennesse Ditch Interest.
- G. The City shall re-install on the Alternate Delivery System at Ms. Dominick's property the flow meter that was removed from the system in 2016. The City shall complete this re-installation no later than March 19, 2017.
- H. The City shall provide up to four (4) hours of Lonnie Oversole's or other City employee's time to Ms. Dominick in late March 2017 to assist Ms. Dominick in turning on the Alternate Delivery System at Ms. Dominick's property.
- I. The City will not file a statement of opposition to any new or amended application filed by Ms. Dominick in Case No. 09CW131 or other case concerning a change in point of diversion for Dominick's Tennesse Ditch Interest, provided that such application makes no claims that are inconsistent with this Agreement or the 04CW125 Stipulation and Agreement.

2. **Mutual release**

- A. By Ms. Dominick. Ms. Dominick, and her predecessors, successors, assigns, agents, representatives, and vendors, agrees to fully, finally, and forever release, quit claim, and discharge the City and its predecessors, successors, affiliates, and related entities, and its past or present attorneys, assigns, agents, representatives, officers, elected officials, current/former employees, insurers, and any or all of them, from any and all claims that Ms. Dominick has asserted or could assert in any

litigation arising from or pertaining to the substance or form of the 04CW125 Stipulations or Case No. 09CW131.

- B. **By the City.** The City, and its assigns, agents, representatives, officers, elected officials, and current/former employees, agrees to fully, finally, and forever release, quit claim, and discharge Ms. Dominick and her predecessors, successors, affiliates, and related entities, and her past or present attorneys, assigns, agents, representatives, vendors, and any or all of them, from any and all claims that the City has asserted or could assert in any litigation arising from or pertaining to the substance or form of the 04CW125 Stipulations or Case No. 09CW131.

3. **Tax consequences**

Each Party has conferred with its individual counsel regarding the potential tax consequences of this Agreement and the 04CW125 Stipulation and Agreement. Ms. Dominick does not enter into this Agreement in reliance on tax advice or representations provided by the City, and the City does not enter into this Agreement in reliance on tax advice or representations provided by Ms. Dominick.

4. **Full resolution of dispute**

The Parties understand, acknowledge, and agree that the terms of this Agreement are sufficient to resolve all claims that have been or could be asserted by either Party in any litigation arising from or pertaining to the substance or form of the 04CW125 Stipulations or Case No. 09CW131.

5. **No admission of liability**

The Parties understand, acknowledge, and agree that this Agreement represents the settlement of disputed claims, and that neither this Agreement nor any of its provisions is to be deemed or construed at any time, in any forum, or for any purpose as an admission of liability on the part of either Party.

6. **Binding effect; successors in interest**

The Parties agree that this Agreement binds and benefits the Parties and will bind and benefit their heirs, executors, administrators, dependents, predecessors, successors, affiliates, and related entities, and their past or present attorneys, assigns, agents, representatives, officers, elected officials, current/former employees, insurers, and any or all of them. Nothing herein limits or otherwise alters the scope of release outlined above.

7. **No third-party beneficiaries**

There are no third-party beneficiaries of this Agreement.

8. Voluntarily entered

Each Party represents and warrants that this Agreement is executed voluntarily and by such Party with the full knowledge of the consequences and implications of the terms and obligations contained herein. Each Party also represents and warrants that such Party has had the opportunity to be represented by counsel of its choice throughout the negotiations which preceded the execution of this Agreement, and in connection with the preparation and execution of this Agreement, and that each Party has carefully and thoroughly reviewed this Agreement in its entirety.

9. Interpretation

This Agreement has been negotiated at arm's length and between and among persons sophisticated and knowledgeable in the matters dealt with in this Agreement. Accordingly, neither of the Parties shall be presumptively entitled to have any provisions of the Agreement construed against the other Party in accordance with any rule of law, legal decision, or doctrine that would require interpretation of any ambiguities in this Agreement against the Party that has drafted it.

10. Expenses and attorney fees

The Parties understand and agree that each Party shall bear its own attorney fees and costs arising from the actions of its own counsel in connection with the negotiation and preparation of this Agreement, the 04CW125 Stipulation and Agreement, and the 09CW131 Stipulated Withdrawal. EXCEPT that, if legal action is commenced in connection with the enforcement, interpretation, or breach of any provision of this Agreement, the court as part of its judgment shall award reasonable attorney fees and costs to the prevailing Party.

11. Applicable law, jurisdiction, and venue

This Agreement shall be construed under the substantive laws of the State of Colorado, without regard to its choice of law rules. The Parties agree to submit to the personal jurisdiction of the courts of the State of Colorado regarding any disputes arising out of this Agreement. The Parties further agree that venue for resolving any disputes shall be either the Water Court for Water Division 2, or the District Court for Chaffee County.

12. Severability

Unless otherwise provided herein, if any provision of this Agreement is invalid, illegal, or unenforceable, the validity, legality, and enforceability of the remaining provisions shall not be affected or impaired thereby.

13. Time of the essence

Time shall be of the essence with respect to all provisions of this Agreement.

14. Modifications

No modification of this Agreement shall be effective unless in writing and signed by the Parties to this Agreement.

15. Merger

There are no representations or warranties between the Parties related to the subject of this Agreement other than those contained within this Agreement, the 04CW125 Stipulation and Agreement, and the 09CW131 Stipulated Withdrawal. This Agreement supersedes, merges, and replaces all prior or contemporaneous oral understandings, negotiations, offers, promises, and representations between the Parties. Extrinsic evidence is not admissible in any proceeding to vary or contradict the terms of this Agreement. All Exhibits hereto are hereby incorporated as though set forth at length herein.

16. Headings

The headings of the paragraphs in this Agreement are for convenience and reference only, and shall not affect the meaning or construction of any of the terms or provisions in this Agreement.

17. Cooperation

The Parties to this Agreement shall cooperate as reasonably necessary to effectuate both the intent and terms of this Agreement, including but not limited to executing such further documents as may be reasonably necessary.

18. Counterparts

This Agreement may be executed in any number of counterparts, each of which when executed and delivered shall be an original, but all such counterparts shall constitute one and the same instrument. Executed copies hereof may be delivered by facsimile or email of a PDF document, and, upon receipt, shall be deemed originals and binding upon the Parties hereto. Without limiting or otherwise affecting the validity of executed copies hereof that have been delivered by facsimile or email of a PDF document, the Parties will use commercially reasonable efforts to deliver originals as promptly as possible after execution. Signature pages may be detached and reattached to physically form one document.

[Signature page immediately follows]

PLEASE READ CAREFULLY.

**THIS AGREEMENT
INCLUDES A RELEASE OF CLAIMS.**

THE SIGNATORIES HAVE CAREFULLY READ THIS ENTIRE AGREEMENT. ITS CONTENTS HAVE BEEN FULLY EXPLAINED TO THEM BY THEIR ATTORNEYS. THE SIGNATORIES FULLY UNDERSTAND THE FINAL AND BINDING EFFECT OF THIS AGREEMENT. THE ONLY PROMISES MADE TO ANY SIGNATORY ABOUT THIS AGREEMENT ARE CONTAINED IN THIS AGREEMENT. THE SIGNATORIES ARE SIGNING THIS AGREEMENT VOLUNTARILY.

NANCY DOMINICK:



Nancy Dominick

As to form:

 (2/02/17)

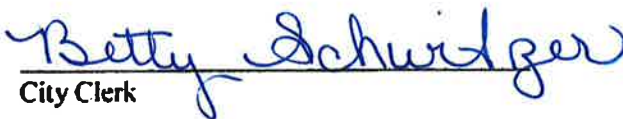
Stuart B. Corbridge

CITY OF SALIDA:



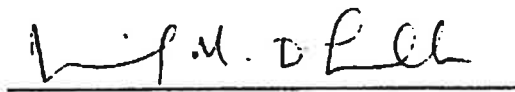
James L. LiVecchi, Mayor

Attest:



City Clerk

As to form:



Jennifer M. DiLalla

EXHIBIT A
(Fully Executed 04CW125 Stipulation and Agreement)

[see attached]

DISTRICT COURT, WATER DIVISION NO. 2,
COLORADO

501 North Elizabeth Street
Pueblo, Colorado 81003

CONCERNING THE APPLICATION FOR WATER
RIGHTS OF CITY OF SALIDA

IN CHAFFEE COUNTY

Jennifer M. DiLalla, #40319
Moses, Wittemyer, Harrison and Woodruff, P.C.
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Facsimile: (303) 443-8796
jdilalla@mwhw.com

Stuart B. Corbridge, Atty. Reg. # 33355
Vranesh and Raisch, LLP
1720 14th Street, Suite 200
Boulder, CO 80302
Telephone: (303) 443-6151
Facsimile: (303) 443-9586
sbc@vrlaw.com

▲ COURT USE ONLY ▲

Case Number: 04CW125

**STIPULATION AND AGREEMENT BETWEEN APPLICANT, CITY OF SALIDA,
AND OPPOSER NANCY DOMINICK**

Applicant, City of Salida (the "City"), and Opposer Nancy Dominick ("Ms. Dominick"), each a "Party" or collectively the "Parties," by and through undersigned counsel, enter into the following Stipulation and Agreement:

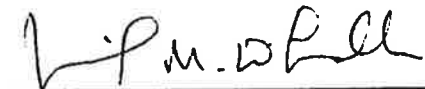
1. The City and Ms. Dominick are Parties to that certain "Stipulation Between Applicant and Opposer Nancy Dominick" dated and filed May 7, 2009 (the "Original Stipulation").
2. The City and Ms. Dominick also are Parties to that certain "Amended Stipulation Between Applicant City of Salida and Opposer Nancy Dominick" dated and filed January 27, 2014 (the "Amended Stipulation").

3. The Original Stipulation and the Amended Stipulation are referred to collectively herein as the "04CW125 Stipulations."
4. Ms. Dominick is the owner of a 1/32 interest (0.24375 cfs) in the water rights decreed to the Tenassee Ditch ("Dominick's Tenassee Ditch Interest").
5. By Order dated July 29, 2016, in Case No. 09CW131, the Court authorized the City and Ms. Dominick to engage in mediation to discuss issues related to that case and the 04CW125 Stipulations. Following mediation, the City and Ms. Dominick reached a settlement that resolved their disputes with respect to the 04CW125 Stipulations and Case No. 09CW131. The terms of that settlement are described in a Settlement Agreement and Mutual Release between the City and Ms. Dominick, dated _____, which Settlement Agreement and Mutual Release is incorporated into this Stipulation and Agreement as if fully set forth.
6. The City and Ms. Dominick stipulate and agree that, as of the "Settlement Effective Date" described in the Settlement Agreement and Mutual Release, the Parties' rights and obligations under the 04CW125 Stipulations will terminate and the 04CW125 Stipulations will have no further effect; provided, however, that Ms. Dominick's consent to the form of final decree entered in this case on June 30, 2009 (the "Final Decree") remains in effect; and in addition, each Party shall be responsible for its own costs and attorney fees related to the prosecution of this case.
7. The City and Ms. Dominick further stipulate and agree that, as of the Settlement Effective Date, Ms. Dominick waives her right to invoke and no longer will be entitled to invoke the Court's retained jurisdiction under paragraph 35 of the Final Decree with respect to claims of injury to Dominick's Tenassee Ditch Interest and any associated property rights in the Tenassee Ditch owned or claimed by Ms. Dominick that relate to or would result from the substance or form of the 04CW125 Stipulations, or any right or obligation of either the City or Ms. Dominick pursuant to the 04CW125 Stipulations. Ms. Dominick retains her right to invoke the Court's retained jurisdiction to raise claims of injury that arise from actions or situations not related to the substance, form, rights, or obligations under the 04CW125 Stipulations.
8. The City and Ms. Dominick further agree that this Stipulation and Agreement will bind and benefit them and will be binding upon and benefit any assigns and successors in interest.
9. The City and Ms. Dominick agree that there are no third-party beneficiaries of this Stipulation and Agreement.

10. The City and Ms. Dominick represent and affirm that the signatories to this Stipulation and Agreement are legally authorized to bind the Parties.
11. This Stipulation and Agreement is enforceable both as an agreement and as an order of the Water Court.

Respectfully submitted this ____ day of February, 2017.

MOSES, WITTEMYER, HARRISON AND VRANESH AND RAISCH, LLP
WOODRUFF, P.C.



Jennifer M. DiLalla, #40319

ATTORNEYS FOR APPLICANT,
CITY OF SALIDA



Stuart B. Corbridge, # 33355

ATTORNEYS FOR OPPOSER
NANCY DOMINICK

***E-FILED PURSUANT TO C.R.C.P. 121. Duly signed original on file at the law offices of
Moses, Wittemyer, Harrison and Woodruff, P.C.***

EXHIBIT B
(Signed 09CW131 Stipulated Withdrawal)

[see attached]

DISTRICT COURT, WATER DIVISION NO. 2,
COLORADO

501 North Elizabeth Street, Suite 116
Pueblo, Colorado 81003

CONCERNING THE APPLICATION FOR WATER
RIGHTS OF NANCY DOMINICK AND CITY OF
SALIDA

IN CHAFFEE COUNTY

Attorneys for Co-Applicant City of Salida:
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Boulder, Colorado 80306-1440
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Facsimile: (303) 443-8796
jdilalla@mwhw.com

▲ COURT USE ONLY ▲

Case Number: 09CW131

STIPULATED WITHDRAWAL OF CITY OF SALIDA AS CO-APPLICANT

Co-Applicant the City of Salida ("City"), by and through its undersigned counsel, files this Stipulated Withdrawal of City of Salida as Co-Applicant ("Stipulated Withdrawal") and in support thereof states as follows:

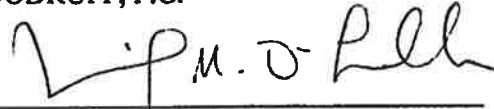
1. The City and Nancy Dominick ("Ms. Dominick") jointly filed their Application for Change of Water Rights ("Application") in this case on December 1, 2009.
2. The City and Ms. Dominick filed the Application to implement a stipulation between them in Case No. 04CW125, in which the City changed its majority interest in the Tenassee Ditch water rights and proposed to discontinue operation of the lower half of the ditch, which historically delivered water to Ms. Dominick's land. In accordance with that stipulation, the Application proposed a change of water rights to allow Ms. Dominick to continue her historical use of her interest in the Tenassee Ditch.
3. By Order dated July 29, 2016, the Court authorized the City and Ms. Dominick to engage in mediation to discuss issues related to this case and the original stipulation and amended stipulation between the City and Ms. Dominick in Case No. 04CW125 ("04CW125 Stipulations"). Following mediation, the City and Ms. Dominick reached a

settlement that resolved their disputes with respect to this case and the 04CW125 Stipulations. The terms of that settlement are described in a Settlement Agreement and Mutual Release between the City and Ms. Dominick dated _____, 2017 ("Settlement Agreement").

4. The Settlement Agreement requires that within three days of its final execution, the City will file a pleading withdrawing as a co-applicant in this case. The City therefore files this Stipulated Withdrawal in partial satisfaction of its obligations under the Settlement Agreement.
5. Ms. Dominick will continue as the sole Applicant in this case.
6. The City will no longer be party to this case and should be removed from the service list.

Respectfully submitted this _____ day of February, 2017.

MOSES, WITTEMYER, HARRISON AND
WOODRUFF, P.C.



Jennifer M. DiLalla, #40319

ATTORNEYS FOR CO-APPLICANT
CITY OF SALIDA

E-FILED PURSUANT TO C.R.C.P. 121. Duly signed original on file at the law offices of Moses, Wittemyer, Harrison and Woodruff, P.C.

CERTIFICATE OF SERVICE
(Case No. 09CW131)

I HEREBY CERTIFY that the foregoing **STIPULATED WITHDRAWAL OF CITY OF SALIDA AS CO-APPLICANT** was served electronically through **Colorado Courts E-Filing** this _____ day of February, 2017, on the following:

Party Name	Party Type	Party Status	Attorney Name
Division Engineer	Division Engineer	Active	Division 2 Water Engineer (State of Colorado DWR Division 2)
Nancy Dominick	Applicant	Active	Stuart B Corbridge (Vranesh and Raisch)
Poncha Springs Town of	Opposer	Active	Christopher Dale Cummins (Felt, Monson & Culichia, LLC) Steven Thomas Monson (Felt, Monson & Culichia, LLC)
State Engineer	State Engineer	Active	Colorado Division Of Water Resources (State of Colorado - Division of Water Resources)

Kathryn H. Weinstein