

Resolution No. 2020-04-03

**DOUTHIT METROPOLITAN DISTRICT
ACCEPTANCE RESOLUTION PURSUANT TO FUNDING AND REIMBURSEMENT
AGREEMENT & APPROVAL OF CONVEYANCE OF COLORADO BIG-THOMPSON
UNITS TO LITTLE THOMPSON WATER DISTRICT
(10 COLORADO BIG-THOMPSON UNITS)
(April 29, 2020)**

WHEREAS, Douthit Metropolitan District, in the Town of Mead, Weld County, State of Colorado (the “**District**”), is a quasi-municipal corporation and political subdivision of the State of Colorado, duly organized and existing as a metropolitan district under §§ 32-1-101, et seq., C.R.S. (the “**Special District Act**”); and

WHEREAS, the District has the power to provide certain public infrastructure, improvements, facilities and services, specifically including, but not limited to, Colorado Big-Thompson Allotment Contracts (collectively, the “**Public Infrastructure**”), as described in the Special District Act, and as authorized in the Service Plan for the District approved by the Board of Trustees for the Town of Mead (the Town”) on September 11, 2017 (the “**Service Plan**”); and

WHEREAS, the District was organized for the purpose of providing for the acquisition, financing, construction, and installation of the Public Infrastructure serving the property located within its boundaries; and

WHEREAS, the District and Mark W. Schell Co., a Colorado corporation (the “**Developer**”) are parties to a Funding and Reimbursement Agreement for Capital Costs, dated April 29, 2020 (the “**Agreement**”); and

WHEREAS, capitalized terms used herein without definition shall have the meanings assigned to them in the Agreement; and

WHEREAS, the Agreement establishes the terms and conditions for the acquisition of certain Public Infrastructure financed, acquired, and constructed or caused to be constructed by the Developer that is to be owned by the District or such other applicable governmental entity, and the reimbursement of Capital Costs and/or Prior Capital Costs incurred by the Developer therefor; and

WHEREAS, the Developer wishes to convey 10 Colorado Big-Thompson Units (the “**Units**”) to the District for the District to subsequently convey to Little Thompson Water District (“**Little Thompson**”) for use within the District; and

WHEREAS, the District wishes to accept the Units and to reimburse the Developer therefor on the conditions stated herein and with the understanding that the Units will be conveyed to Little Thompson for use within the District; and

WHEREAS, pursuant to the Agreement, the District has received an Engineer's Certification of Value for the Units, which certification is attached hereto and incorporated herein as **Exhibit A** (the "**Engineer's Certification of Value**"); and

WHEREAS, the Engineer's Certification of Value certifies that the fair market value of the Units is \$62,000 per unit, for a total of \$620,000; and

WHEREAS, the Board desires to adopt this resolution declaring satisfaction of the conditions to acceptance as set forth in the Agreement, and with any reasonable conditions the Board may specify (hereinafter, the "**Acceptance Resolution**").

NOW, THEREFORE BE IT RESOLVED BY THE BOARD AS FOLLOWS:

1. Incorporation of Recitals. The above recitals are hereby incorporated into and made a part of this Acceptance Resolution.
2. Acknowledgment of Documents Received. With respect to the Units to be acquired by the District, and Funds Advanced therefor, the Board makes the following findings.
 - a. The Board has received and reviewed the Engineer's Certification of Value from MMI Water Engineers, LLC, a copy of which is attached hereto as Exhibit A.
 - b. MMI Water Engineers, LLC has reviewed the current fair market value for the Units and other material presented to substantiate the current fair market value for the Units and issued an Engineer's Certification of Value, attached hereto as Exhibit A, declaring the total amount of Capital Costs associated with the Units proposed for acquisition and/or reimbursement to be \$620,000.
 - c. The Board has received an opinion letter from Lawrence Jones Custer Grasmick, LLP, opining that the Units are allotment contracts and not real property rights, and, therefore, are eligible for reimbursement by the District with no statutory prohibitions therefor. A copy of the opinion letter is attached hereto and incorporated herein by this reference as **Exhibit B** (the "**Opinion Letter**").
 - d. The Board has confirmed with Kutak Rock, LLP, tax and bond counsel for the District, that provided that the District pays fair market value for the Units, that no interest accrues on the amount of the advance of the Units, that the Units are used within the District and that no system development fees are imposed by the District for the Units that there are no tax consequences to the reimbursement and the reimbursement is permissible under state and federal tax and securities laws.
3. Acceptance of Units. Subject to the conditions set forth in Paragraph 4, below, the Board, having reviewed the Developer's request for reimbursement, the Engineer's Certification of Value, and all other information as deemed necessary and appropriate, finds and determines that the Capital Costs to be accepted pursuant to this Acceptance Resolution is \$620,000. Based on the documentation received, the Board further finds that the applicable requirements set forth in the

Agreement have been satisfied, and that the Capital Costs are hereby accepted and approved for reimbursement by the District subject to the terms of the Agreement.

4. Conditions of Acceptance of Units. The District's acceptance of the Units and approval of reimbursement therefor are strictly contingent upon the following:

- a. The Units shall be conveyed by the District to Little Thompson or, alternatively, shall be conveyed by the District directly to Little Thompson, for the benefit of the District.
- b. The Units shall be used by Little Thompson to serve properties located within the boundaries of the District and shall not be used outside of the boundaries of the District.

5. Subject to Annual Appropriations. The obligations of the District pursuant to this Acceptance Resolution are subject to annual appropriation and shall not be deemed to be multiple fiscal year obligations for the purposes of Article X, Section 20 of the Colorado Constitution, and may not exceed amounts permitted by the District's electoral authorization and Service Plan.

[Signature Page Follows.]

ADOPTED this 29th day of April, 2020.

DISTRICT:

DOUTHIT METROPOLITAN DISTRICT a quasi-municipal corporation and political subdivision of the State of Colorado

By: Mark W. Schell, President
Mark W. Schell, President (Apr 30, 2020)

Officer of the District

Attest:

By: Deborah M. Schell
Deborah M. Schell (Apr 30, 2020)

APPROVED AS TO FORM:

WHITE BEAR ANKELE TANAKA & WALDRON

Jimmy D. Ankele

General Counsel to the District

Signature Page to Resolution No. 2020-04-03: Acceptance Resolution Pursuant to Funding and Reimbursement Agreement & Approval of Conveyance of Colorado Big-Thompson Units to Little Thompson Water District (10 Colorado Big-Thompson Units), dated April 29, 2020

EXHIBIT A

Engineer Certification of Value



April 21, 2020

Ms. Jennifer Tanaka, Esq.
White Bear Ankele Tanaka & Waldron
2154 East Commons Avenue, Suite 2000
Centennial, Colorado 80122
(via e-mail: jtanaka@wbapc.com)

Re: Douthit Metropolitan District – Fair Market Value of C-BT Water Units

Dear Ms. Tanaka:

In accordance with your request, I am documenting the fair market value of Colorado-Big Thompson (C-BT) water units. As ownership of C-BT water units have shifted from agricultural interests to municipal control, and since C-BT units can be bought, sold, and transferred between water users anywhere within the Northern Colorado Water Conservancy District's eight-county region without new uses having to be approved by a state water court, the units have been attractive to entities needing to dedicate raw water for utility service. With the attractiveness, the historical market price has increased considerably as depicted in the table below.

C-BT Units Market Price Historical Data*

Year	Price per Acre-Foot (annual average)
2010	\$7,175
2011	\$7,076
2012	\$8,370
2013	\$15,065
2014	\$21,600
2015	\$25,659
2016	\$26,488
2017	\$26,740
2018	\$28,600
2019	\$47,662

*Source: Sherri Rasmussen, Contracts Department Manager, Northern Colorado Water Conservancy District

On or about February 6, 2020, Mark and Deborah Schell sold 70 C-BT units to North Weld County Water District at a price of \$62,000.00 per unit.

According to recent communications with representatives of the North Weld County Water District (NWCWD), the cash-in-lieu of dedication of raw water for a Full Standard Tap is \$58,000 per acre-foot as of January 1, 2020. However, as noted on the NWCWD website (<https://nwcwd.org/tap-info-development/tap-fee-schedule/>), the fee may change at each monthly Board meeting and can be established based on current market contracts.

According to communications with Amber Kauffman, District Manager of the Little Thompson Water District, on April 7, 2020, the current value for cash-in-lieu dedication of raw water for the Little Thompson Water District (LTWD) is \$68,000 per acre-foot. This is reflective of a mix of water that LTWD will accept for dedication, including C-BT, Consolidated Home Supply Ditch shares, and Handy Ditch shares.

Based upon the information presented above, \$62,000 per unit of Colorado-Big Thompson water is a fair market value for the Douthit Metropolitan District to reimburse Mark and Deborah Schell.

Should you have any comments or questions, please contact me at 720-234-8398.

Sincerely,

MMI WATER ENGINEERS, LLC

A handwritten signature in blue ink, appearing to read 'BAS', with a long horizontal line extending to the right.

Bradley A. Simons, P.E.
Principal

EXHIBIT B

Opinion Letter

P. Andrew Jones • Bradley C. Grasmick • David P. Jones • Ryan M. Donovan
Wesley S. Knoll • Alyson K. Scott • Sheena M. Moran (Of Counsel)

April 28, 2020

VIA E-mail Only:

Douthit Metropolitan District
c/o Jennifer Gruber Tanaka
jtanaka@wbapc.com
White Bear Ankele Tanaka & Waldron
2154 E. Commons Avenue, Suite 2000
Centennial, CO 80122

RE: Opinion for Douthit Metropolitan District regarding C-BT Units characterization as contractual rights.

Dear Ms. Tanaka,

This Letter is intended to provide the Douthit Metropolitan District (the “District”) with the opinion that C-BT Units are not considered water rights in the State of Colorado and as an extension, are not real property rights. This opinion may be relied upon by the District in its anticipated acquisition of C-BT Units and by counsel of White Bear Ankele Tanaka & Waldron in their capacity as general counsel for the District to advise the District on the anticipated acquisition of C-BT Units.

According to you, this opinion is necessary for compliance with certain restrictions described in Title 32 of the Colorado Revised Statutes which pertain to the District’s authority to acquire real property. We have relied on your analysis regarding the Title 32 restrictions and provide no opinion as to such restrictions.

C-BT Units are so named for the Colorado-Big Thompson project that brings water from the upper Colorado River (from Lake Granby) through the Great Divide and delivers the water for use in the northern Front Range of Colorado. The project was conducted by the Bureau of Reclamation and is now managed by Northern. The project was originally designed and constructed primarily to bring additional water supplies for irrigation, but has become an increasingly popular source of municipal water in growing communities in the Front Range area. While Northern manages the project, the Bureau of Reclamation continues to hold the water rights used for the project.

Northern is a Colorado conservancy district governed by C.R.S. §37-45-101 *et seq.* A “C-BT Unit” is a reference to the number of acre-foot units allotted to a contract holder by Northern. The acre-foot unit is the amount of water available to the contract holder at full quota. The quota typically issued by Northern is between 50-70% of the full allotment.

Conservancy districts like Northern are authorized and empowered to issue allotment contracts, pursuant to C.R.S. §§37-45-121 through 125. These allotment contracts detail the type of use for which the water is allotted and the amounts so allotted. They also include a number of restrictions on the use of that water, including the rules and regulations that Northern imposes on specific types of uses (*see attached Policy Regarding Transfer of Colorado-Big Thompson Project Water Allotment Contracts to Special Districts for Municipal Water Supply Purposes*). Thus, while the holder of an allotment contract gets the benefit of having water delivered by Northern in the amounts allotted, those rights arise solely out of contract. The contract holder is neither the legal, nor equitable, owner of the water right from which their water is derived.

Water rights, while only a usufructuary right, are considered a real property right in Colorado. *Dallas Creek Water Co. v. Huey*, 933 P.2d 27, 39 (Colo. 1997). A holder of a water right has various rights that make up the water right “bundle of sticks.” In addition to the right to put the water to beneficial use, the “bundle of sticks” also includes a priority date (*see Empire Lodge Homeowners' Ass'n v. Moyer*, 39 P.3d 1139 (Colo. 2001)), the right to change the use of the water right (*see Public Service Co. of Colorado v. Meadow Island Ditch Co. No. 2*, 132 P.3d 333 (Colo. 2006)), the right to change the point at which the water is diverted (*see Burlington Ditch Reservoir and Land Co. v. Metro Wastewater Reclamation Dist.* 256 P.3d 645 (Colo. 2011)) and the right to freely convey the water right. While these rights are enjoyed by the owners of water rights, they are not enjoyed by water consumers that receive water pursuant to contractual rights. *See Green v. Chaffee Ditch Co.*, 371 P.2d 775, 779 (Colo. 1962) (holder of contractual right to receive water was limited to the amounts necessary to irrigate lands specified in contract, and such rights could not be changed), *also East Ridge of Fort Collins, LLC v. Larimer and Weld Irr. Co.*, 109 P.3d 969 (Colo. 2005) (rights derived from contract are bound by those contracts and not the relevant portions of the Water Right Determination and Administration Act of 1969).

Contractual rights to receive water are not real property interests because they lack the “bundle of sticks” enjoyed by the owners of water rights. The contractual rights are limited in scope by the instrument granting the right. C-BT Units are issued by allotment contracts and those contracts become dispositive in determining the holder’s right to use the C-BT Units. The allotment contract, Northern’s rules and policies and the Water Conservancy Act are all limitations that control the use of water from C-BT Units by the contract holder. *City of Thornton v. Bijou Irr. Co.*, 926 P.2d 1, 61 (Colo. 1996). The allotment contracts themselves include numerous restrictions that preclude the contract holder from possessing the “bundle” of rights held by a water right holder. The allotment contract does not include a priority date, a guarantee to the delivery of water (in priority) or a right to preclude others from such use. Northern also requires that it approve of (and issue a new contract for) any change in type of use, location of delivery or even owner of the C-BT Units allotted. Thus an allotment contract, like other contractual rights to receive water are “far different” than water rights. *Id.* at 60 (citing

Green 150 P.2d 779). It is our opinion that C-BT Units are contractual rights only, which arise from their conveyance instrument—the allotment contract—and are not real property rights.

The opinions described herein are specific to the District’s matters described herein and are not be generally applicable to other matters or clients other than the District. We express no opinion as to matters not specifically set forth herein and no opinion may be inferred or implied beyond the matters expressly stated in this letter, subject to all assumptions, limitations, exceptions and qualifications contained herein. Further, the opinions expressed herein are based only on the laws in effect and the facts in existence as of the date hereof and in all respects are subject to and may be limited by future legislation, developing case law, and any change in facts occurring after the date of this letter. We expressly undertake no responsibility or duty to inform any party, whether addressees hereof or not, as to any change in fact, circumstance or law occurring after the date hereof which may affect or alter any of the opinions, statements or information set forth above. This letter and the opinions expressed herein may not be quoted, reproduced, circulated or referred to in whole or in part without our express written consent

Sincerely,

LAWRENCE JONES CUSTER GRASMICK, LLP



Digitally signed by Wes Knoll
DN: cn=Wes Knoll, o=Lawrence Jones Custer
Grasmick, ou, email=wes@ljcglaw.com, c=US
Date: 2020.04.28 15:33:35 -06'00'

Wesley S. Knoll

Enclosures:

Policy Regarding Transfer of Colorado-Big Thompson Project Water Allotment Contracts to Special Districts for Municipal Water Supply Purposes









Douthit Execution Packet

Final Audit Report

2020-04-30

Created:	2020-04-29
By:	Abby Franz (afranz@wbapc.com)
Status:	Signed
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"Douthit Execution Packet" History

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