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DISTRICT COURT, LARIMER COUNTY, COLORADO 201 LaPorte Avenue, Suite 100 Fort Collins, CO 80521 Telephone: (970) 494-3500	
Plaintiff: LOVELAND EISENHOWER INVESTMENTS, LLC, a California limited liability company, v. **Defendants:** LOVELAND OF LOVELAND, THE GREELEY AND LOVELAND IRRIGATION COMPANY, a Colorado non-profit corporation and JOHN DOES 1 through 50.	▲ **COURT USE ONLY** ▲ Case No.: 2016 CV 30362 Courtroom: 4C
Darrell G. Waas, #10003 Kathryn I. Hopping, #35036 WAAS CAMPBELL RIVERA JOHNSON & VELASQUEZ LLP 1350 17th Street, Suite 450 Denver, CO 80202 Telephone: 720-351-4700 Facsimile: 720-351-4745 waas@wcrlegal.com hopping@wcrlegal.com	

PLAINTIFF'S REPLY IN SUPPORT OF PARTIAL MOTION FOR SUMMARY JUDGMENT

Plaintiff Loveland Eisenhower Investments, LLC, ("LEI"), through undersigned counsel, submits this Reply in Support of its Partial Motion for Summary Judgment ("Motion") as follows:

I. INTRODUCTION

The City of Loveland ("Loveland") is in this situation for one reason – it entered into a Settlement Agreement ("Settlement") promising not to convert future Chubbuck Inches for municipal use, but failed to revise its 2010 Code, which specifically allowed it. Four months later, Loveland entered into the Annexation Agreement ("Agreement"), which gave LEI a vested right

to develop under the 2010 Code, as well as the vested right to application of those code provisions in a uniform, consistent and non-discriminatory manner. This case was filed only because Loveland entered into contradictory agreements and failed to amend its 2010 Code to reflect the terms of the first-executed Settlement.

Under the Agreement, LEI has a vested right to develop its Project under the 2010 Code, which permits dedication and conversion of Chubbuck Inches, with conditions, standards and dedications that are no more onerous than those imposed by Loveland upon other developers on a uniform, non-discriminatory and consistent basis. ***LEI is not required to develop its Project in accordance with the Settlement*** – an agreement to which LEI was not a party and of which LEI was unaware. Because the 2010 Code was not amended to reflect the terms of the Settlement prior to the Agreement, LEI's right to develop its Project is not limited or affected by the Settlement.

In an effort to avoid this predicament, Loveland's Response to Plaintiff's Partial Motion for Summary Judgment ("Response") propounds arguments almost entirely duplicative of those set forth in its own Motion to Dismiss, or in the Alternative, Motion for Summary Judgment ("Loveland MSJ"). For the reasons stated in LEI's Response to Loveland MSJ, incorporated herein, and for the reasons stated below, those arguments fail.

II. REPLY TO MATERIAL UNDISPUTED AND ADDITIONAL FACTS

LEI has asserted Disputed and Undisputed Facts in its Response to Loveland MSJ, which are incorporated. Additionally, LEI states as follows:

Loveland was aware of LEI's Chubbuck Inches and LEI's intent to use them in connection with development of the Project prior to December of 2014. *See* Response at 4, 7. In 2009, LEI's engineer, Larry Owen, provided Loveland a "Water Adequacy Assessment Summary," (the

"Water Summary") which showed LEI's contractual right to 31.25 Chubbuck Inches to be used to satisfy its water requirements. *See* Affidavit of Larry Owen at 9, attached as **Exhibit A**; *see also* Water Adequacy Assessment Summary attached to **Exhibit A** as Attachment 1. Mr. Owen provided the Water Summary to Loveland representative Melissa Morin at a meeting in September/October of 2009. *See* Deposition of Larry Owen at 50:6-11; 64:1-8; 67:16-23; 86:16-87:1, relevant portions attached as **Exhibit B**. LEI provided the Water Summary for the sole purpose of demonstrating how LEI intended to satisfy its water dedication requirements – including its intention to use its Chubbuck Inches. *See* **Exhibit A** at 9-11; *see also* Affidavit of Greg Parker at ¶13, attached as **Exhibit D**. Ms. Morin did not deny she attended meetings discussing water rights, did not deny receiving the Water Summary and testified she may have received it from Mr. Owen and then passed it on to appropriate members of her team. *See* Deposition of Melissa Morin ("Morin Depo.") at 31:15-34:3, relevant portions attached as **Exhibit C**.

LEI was unaware of the nature of the dispute between GLIC and Loveland in Water Court. *See* Response at SUF 5. In connection with negotiations concerning a recreational trail, GLIC's attorney, Jeffrey Kahn, sent Loveland Parks Planner, Janet Meisel-Burns, and LEI's counsel, Keirstin Beck, a letter dated August 20, 2009, (the "August 20th Letter") informing them GLIC would no longer work on development issues until issues with a third party concerning return flows was resolved. *See* Affidavit of Keirstin Beck at 5, attached as **Exhibit E**; *see* August 20th Letter attached to **Exhibit E** as Attachment 1. Ms. Beck responded neither LEI's recreational trail nor its Project involved "return flow" issues. **Exhibit E** at 6 at Attachment 2. Neither Loveland nor GLIC suggested these third-party "return flow issues" would impede LEI's use of

Chubbuck Inches in the future. *Id*. at 7-8; *see also* C.R.C.P. 30(b)(6) Deposition of LEI at 31:18-33:14; 62:17-64:9, relevant portions attached as **Exhibit F**. In response, GLIC put a "hold" on all actions concerning development within Loveland, including the recreational trail easement. *See* Email dated September 26, 2009 attached to **Exhibit E**, as Attachment 4. Later, GLIC informed LEI the matter was simply released from its "hold." *See* emails dated October 8-9, 2009 attached to **Exhibit E**, as Attachment 5; **Exhibit E** at ¶¶9-10.

GLIC did not inform LEI it was negotiating a settlement with Loveland that would impact LEI's use of its Chubbuck Inches, nor did it inform LEI of the Settlement or its terms upon execution. **Exhibit E** at 13-14. Loveland did not inform LEI of the Settlement until December 2014. **Exhibit A** at 23; *see also* C.R.C.P. 30(b)(6) Deposition of Loveland at 32:17-33:22, attached as **Exhibit G.** As a result, LEI did not, nor did it believe it needed to, file a Statement of Opposition in Water Court.

Loveland misstates the testimony of LEI's representative Greg Parker in an effort to argue his statements support a potential misrepresentation claim. *See* Response at 5. In reality, Mr. Parker's statements were directly related to LEI's claims for breach of contract and breach of the implied covenant of good faith and fair dealing. *See* **Exhibit F** at 178:6-16.

While the Agreement does not contain a specific reference to Chubbuck Inches, it did not need to because it essentially incorporated the 2010 Code and required Loveland to apply it in a consistent, uniform, nondiscriminatory manner with other developers. *See* **Exhibit D**, at Attachment 1, Agreement at p. 1 and §§2.18, 2.3. The 2010 Code identified Chubbuck Inches as an acceptable source of water rights by Loveland to meet a developer's water dedication requirements and provided calculation of these "water rights owed" in accordance with ***all*** then-

existing Code provisions was a vested right. *See* **Exhibit A**, at Attachment 2, 2010 Code at §§19.04.080(C), 19.04.090. *See also* C.R.S. §24-68-103(c). Section 19.04.080(C) of the 2010 Code was specifically intended to identify and inform developers of the sources of water rights acceptable to Loveland. *See* **Exhibit G** at 165:16-166:13. This provision of the Code was not changed until 2016. **Exhibit G** at 177:8-10; 178:21-179:10.

Loveland does not have "complete discretion" to accept or reject Chubbuck Inches under the 2010 Code. *See* Response at 7. Under the Agreement, Loveland must apply the 2010 Code in a consistent, uniform, non-discriminatory fashion and it is undisputed that prior to entering into the Settlement, the Loveland utilities commission ("LUC") had approved, and Loveland historically had accepted, each and every request for conversion of Chubbuck Inches - 88.8% of all Chubbuck Inches in existence. **Exhibit G** at 46:4-47:6; 91:13-94:4.

III. ARGUMENT

LEI's claims are not barred by the Colorado Governmental Immunity Act ("CGIA"). Additionally, LEI's claims are proper and summary judgment should be granted.

A. The CGIA Does Not Apply.

Loveland argues LEI's contract claims are barred by the CGIA because they could have been asserted alternatively as claims for misrepresentation or fraud. Motion, pp. 11-13. This argument fails for two reasons.

First, different from claims for damages, claims asking a court for an order concerning water services "do not and cannot 'lie in tort.'" *Jones v. Northeast Durango Water Dist.*, 622 P.2d 92, 94 (Colo. App. 1980). "Instead, they constitute in effect a mandamus action, asking for the district and its agents to perform certain duties allegedly owed to the inhabitants of the district."

Id. In *Jones*, the owner/developer of subdivided land alleged he had properly applied for water services, but the district had refused to provide it to some lots and had imposed improper conditions on the granting of service to other lots. *Id*. at 93. The claims asserted by LEI are identical – they seek an order from this court directing Loveland to perform certain duties under the Agreement involving water services because Loveland has imposed improper conditions upon such service by refusing to accept Chubbuck Inches. Such claims cannot lie in tort.

Secondly, it is well established public entities are not immune under the CGIA from actions for damages arising in contract. *CAMAS Colorado, Inc. v. Board of County Commr's*, 36 P.3d 135, (Colo. App. 2001). LEI's claims are based solely in contract.

When determining whether a claim has a basis in contract or tort, the court must consider the nature of the injury and the relief sought - a determination made on a case by case basis. *See CAMAS*, 36 P.3d at 138. A court should examine whether the claim and the duty allegedly breached arise from the terms of the contract itself. *Id*. By contrast, certain common law tort claims are expressly intended to remedy economic loss such as fraud or misrepresentation exist independent of a contractual claim. *Robinson v. Colorado State Lottery Div*., 179 P.3d 998, 1004 (Colo. 2008).

Here, the parties entered into a negotiated, direct contract that imposed upon Loveland specific duties and obligations that do not exist in tort law, which could only be breached after execution, and for which the remedies available are solely contractual. Section 2.18 of the Agreement obligated Loveland to provide customary municipal services to the Project on an equivalent, uniform and non-discriminatory basis. *See* **Exhibit D**, at Attachment 1, Agreement at §2.18. Under Section 2.3, LEI obtained vested rights and Loveland is obligated to apply the 2010

Code on a uniform and non-discriminatory basis and must allow LEI to satisfy its water dedication requirements with conditions, standards and dedications no more onerous than those imposed by Loveland on other developers. *Id*. at §2.3. Under Section 2.2.19 of the Agreement, LEI's rights to development were vested under the 2010 Code. **Exhibit D** at Attachment 1, Agreement at §2.2.19. Thus, LEI has vested rights and Loveland has duties and obligations that do not exist in tort law – they arise exclusively from the Agreement.

Section 19.04.080 of the 2010 Code specifically identified Chubbuck Inches as water rights acceptable to Loveland at the time the Agreement was executed. **Exhibit A** at Attachment 2 at Section 19.04.080(C). Section 19.04.090 provided LEI a vested right to calculate and use its water rights owed as provided by the water rights provisions in effect at that time. *See* **Exhibit A**, at Attachment 2, 2010 Code at §19.04.090.

LEI has a vested right to calculate its water rights owed under the 2010 Code, which expressly allowed for dedication and conversion of Chubbuck Inches. Prior to the Settlement, every other developer holding Chubbuck Inches was permitted to dedicate their Chubbuck Inches for municipal credits. Loveland's failure to accept and exchange LEI's Chubbuck Inches, as Loveland had done for every applicant before LEI, fails to apply the 2010 Code to LEI on a uniform, consistent, nondiscriminatory basis with other applicants and developers, requires LEI to commence and complete development with more onerous water dedication requirements than other developers and constitutes a breach of the Agreement.

This breach did not occur prior to the Agreement and is not related to Loveland's failure to inform LEI of the Settlement prior to the Agreement. This breach ***could only occur once LEI's rights to develop under the 2010 Code were vested*** and, in fact, occurred years after execution.

Moreover, the only remedies for breach of the Agreement are contractual – they cannot be found in tort law. Under the Agreement, LEI's only remedies against Loveland are non-monetary forms of relief such as specific performance. *See* **Exhibit D** at Attachment 1, Agreement at Section 2.25. By contrast, a plaintiff fraudulently induced into entering into a contract has available to it a different set of remedies altogether – rescind the contract or affirm the contract and seek damages. *W. Cities Broad., Inc. v. Schindler*, 849 P.2d 44, 48 (Colo. 1993). Because the only remedies available to LEI are non-economic and based solely in contract, the CGIA is inapplicable.

Loveland's reliance upon *Robinson* is misplaced. In *Robinson*, plaintiffs alleged their injury – and resulting damages – were the direct result of the Lottery's misrepresentations concerning the availability of prizes which induced people to purchase scratch game tickets that had no chance of winning. *Robinson*, 179 P.3d at 1002. This is in stark contrast to the specific terms of the negotiated Agreement imposing on Loveland specific duties and obligations that do not exist in tort. The injury complained of in LEI's Complaint could not occur prior to vesting and in fact occurred years after the contract was formed. Because LEI's sole remedies are non-economic contractual remedies, LEI's contract claims could not lie in tort.

Because Loveland has raised the CGIA as a defense in this matter, all discovery must be stayed pursuant to C.R.S. §24-10-108.

B. Loveland has Breached the Agreement

Loveland asserts summary judgment should be denied on LEI's breach of contract claim because: (1) the Agreement does not specifically reference Chubbuck Inches; and (2) Loveland

has "complete discretion" to accept or reject the Chubbuck Inches. Response at 13-14. Both arguments fail.

The fact the Agreement does not specifically use the words "Chubbuck Inches" is irrelevant. Under the Agreement, LEI has a vested right to develop its Project under the 2010 Code with **"conditions, standards and dedications which are no more onerous than those imposed by Loveland upon other developers in Loveland on a uniform, non-discriminatory and consistent basis**." **Exhibit D** at Attachment 1, Agreement at §2.23 (emphasis added); *see also* **Exhibit A** at Attachment 2, 2010 Code at §19.04.090. The 2010 Code requires that Loveland accept LEI's Chubbuck Inches.

Loveland argues it has not breached the Agreement because it had "complete discretion" under Section 19.04.080 of the 2010 Code to accept or reject LEI's Chubbuck Inches. *Id*. at 14. This is untrue. Section 19.04.080 specifically identifies Chubbuck Inches as an acceptable source of water rights and lists three administrative criteria that must be met. **Exhibit A** at Attachment 2, 2010 Code at Section 19.04.080. Once these administrative steps are met, Loveland accepts an applicant's Chubbuck Inches. Historically, these steps were always met – until the Settlement, the LUC always approved and Loveland always accepted 100% of valid Chubbuck Inches. **Exhibit G** at 46:4-47:6; 91:13-94:4. The only reason the LUC will not now approve LEI's Chubbuck Inches is solely due to execution of the Settlement. However, because Loveland failed to promptly amend its 2010 Code and because the Agreement requires Loveland to apply the 2010 Code provisions consistently and uniformly with other holders of Chubbuck Inches, failure to accept LEI's Chubbuck Inches is necessarily a breach of the Agreement.

Simply put, Loveland ***cannot*** have "complete discretion" because it has ***no*** discretion in how it applies the 2010 Code provisions – it must apply them in a consistent, uniform and non-discriminatory manner. This means Loveland is required to treat LEI in the same manner it treated 100% of prior owners of Chubbuck Inches seeking conversion for municipal credits under the exact same code provisions.

Loveland argues the "Settlement Agreement's terms did not change or alter [its] discretionary authority" under the 2010 Code. Response at 15. This is demonstrably false. The Settlement ***required*** Loveland to "change or alter" the applicability of the 2010 Code to a certain set of applicants – holders of Chubbuck Inches - ***despite the fact the Code provisions remained unchanged until 2016***.

Finally, the Response wholly ignores Section 19.04.090, which provides **water rights owed** be calculated in accordance with **all code provisions** in existence as of the date of vesting. **Exhibit A** at Attachment 2, 2010 Code at §19.04.090. Loveland's complete omission of this section is purposeful – it establishes LEI's ***vested*** right to use its Chubbuck Inches to satisfy its water dedication requirements.

C. Loveland has Breached the Covenant of Good Faith and Fair Dealing.

Loveland argues, because the duty of good faith and fair dealing cannot contradict express terms of an agreement, and because the Agreement does not specifically mention Chubbuck Inches, LEI is forcing Loveland to exercise its discretion under the 2010 Code "in a new way" and accept LEI's Chubbuck Inches. Motion at 16. This argument misinterprets both the Agreement and LEI's claim.

Every contract contains an implied covenant of good faith and fair dealing. *City of Boulder v. Public Service Co. of Colorado*, 996 P.2d 198, 204 (Colo. App. 1999). "The implied covenant of good faith and fair dealing does not inject new substantive terms or conditions into a contract…but rather is invoked only to give effect to the intentions of the parties or to honor their reasonable expectations in entering into a contract." *Id*. (citations omitted). The doctrine is applied only when one party has discretionary authority to determine certain terms of the contract. *Id*.

As set forth above, Loveland is correct – the Agreement does not contain the words "Chubbuck Inches." However, it requires Loveland to consistently and uniformly apply the 2010 Code and provide its customary municipal services to the Project on an equivalent basis with other developers. These sections of the Agreement necessarily require Loveland to process and accept LEI's application for conversion of its Chubbuck Inches in satisfaction of its water dedication requirements consistently and uniformly with previous applicants under Loveland's 2010 Code, which have always been approved. *See also* LEI's MSJ at 18.

Loveland also asserts this claim fails because it has discretion under the 2010 Code to accept LEI's Chubbuck Inches if LEI does not meet the administrative requirements in Section 19.04.080. Response at 16. However, as set forth above, this is untrue. Loveland did not have complete discretion under the 2010 Code to accept or reject Chubbuck Inches – it made a contractual commitment to consistently and uniformly apply all provisions of the 2010 Code and provide its customary municipal services to the Project on an equivalent basis with other developers. As a result, Loveland has ***no discretion*** to apply those same code provisions in an inconsistent, discriminatory manner – it cannot. The implied covenant of good faith and fair

dealing requires Loveland accept LEI's Chubbuck Inches because: (1) they are an acceptable source of ditch water rights under the 2010 Code; (2) Loveland had historically accepted *all* such applications; and (3) LEI has a contractual *vested right* in consistent and uniform application of the Code.

Finally, Loveland asserts this court does not have jurisdiction to grant summary judgment in favor of LEI because a "court cannot compel a municipality such as [Loveland], to exercise its discretion in a particular way…," in other words, the court cannot order specific performance. Response at 18. In support, Loveland cites *Wheat Ridge Urban Renewal Authority v. Cornerstone Group XX11, LLC,* 176 P.3d 737 (Colo. 2007); *Thompson Creek Townhomes, LLC v. Tabernash Meadows Water and San. Dist.,* 240 P.3d 554 (Colo. App. 2010). However, neither case involved a contract that expressly required specific performance be the sole remedy. *See id*. Here, Section 2.25 of the Agreement provides such remedies as the only available forms of relief. *See* **Exhibit D** at Attachment 1, Agreement at Section 2.25.

In the event the Court determines specific performance is not an available remedy, then Section 2.25 is void. Pursuant to Section 2.22 of the Agreement:

> If any term, provision, covenant or condition of this Agreement is held by a court of competent jurisdiction to be invalid, void or unenforceable, the remaining provisions of this Agreement shall, unless amended or modified by mutual consent of the parties, continue in full force and effect so long as enforcement of the remaining provisions would not be ***inequitable*** to the party against whom they are being enforced under the facts and circumstances then pertaining.

See **Exhibit D** at Attachment 1, Agreement at Section 2.22 (emphasis added). If Section 2.25 is void, then equity would require damages as the remedy, which have already been calculated in this case. *See* Affidavit of Brett Bovee attached as **Exhibit H**, at Attachment 1.

D. LEI's Third Claim for Relief for Declaratory Relief is proper.

Loveland argues LEI's third claim fails for four reasons: (1) the holding in *Bennett Bear Creek Farm Water and San. Dist. v. City & County of Denver*, 928 P.2d 1254 (Colo. 1996) is not applicable to this case because it involved rate-setting; (2) the LUC has discretion in whether to accept certain ditch rights; (3) the LUC's actions in approving certain applications for conversion of water rights is quasi-judicial, not legislative; and (4) LEI's claim seeks to bypass the water court's jurisdiction. Response at 19. These arguments are without merit.

Colorado courts routinely hold that actions relating to subjects of a permanent or general character are legislative, while those which are temporary in operation and effect are not. *City of Aurora v. Zwedlinger*, 571 P.2d 1074, 1077 (Colo. 1977); *Vagneur v. City of Aspen*, 295 P.3d 493, 503 (Colo. 2013). Acts constituting a declaration of public policy are also legislative. *Id*. Moreover, cases such as *Bennet Bear* and *Cottrell v. City and County of Denver*, 636 P.2d 703 (Colo. 1981) establish that municipalities set rates for water services as part of a municipality's governmental legislative power. *Bennett Bear,* 928 P.2d at 1263. Specifically, where activities concern the setting of rate schedules for future city-wide application and require the balancing of questions of judgment and discretion, they are legislative in nature. *Cottrell v. City and County of Denver*, 636 P.2d 703 (Colo. 1981).

Here, Loveland's 2010 Code sets forth schedules and rates, including the particular water rights acceptable to Loveland, which are of a permanent or general character and have city-wide application. Establishment of the 2010 Code and any amendment to the code are legislative acts. By entering into the Settlement, Loveland improperly divested its legislative power to determine

independently which water rights it will acquire and set schedules and rates for their conversion. *Bennett Bear*, 928 P.2d at 1269-70.

Loveland argues that, because the LUC has "discretion" concerning which ditch rights to accept, this decision-making more quasi-judicial than legislative. Response at 20. Loveland seemingly refers to the "pre-Settlement" period when Chubbuck Inches were allowed ***as part of its general policy and under its 2010 Code***. During that time, the LUC would review applications for Chubbuck Inches and ***had the ability to approve*** such an application as long as valid Chubbuck Inches were established in each case. This discretion was robbed from the LUC when Loveland made the unlawful decision to divest its legislative powers to determine its own rates and guidelines through contract. ***That decision – the decision to enter into the Settlement and change Loveland's policy concerning acceptance of Chubbuck Inches - was legislative and forms the basis of LEI's claims***.

Finally, Loveland argues this claim fails because the Water Court has exclusive jurisdiction over water matters. Response at 21. However, LEI's request for declaratory judgment does not seek a change in use, it seeks a declaration concerning ownership of LEI's contractual rights to Chubbuck Inches and Loveland's obligation to provide municipal credits in exchange.

A dispute over ownership of decreed water rights is not a "water matter" within the exclusive jurisdiction of the water court; therefore, other district courts have the power to adjudicate such disputes. *Humphrey v. Southwestern Development Co.,* 734 P.2d 637, (Colo. 1987); *see also Kobobel v. State Dept. of Natural Res.,* 215 P.3d 1221 (Colo. App. 2009) (finding a claim involving the right to use water, not the ownership of it, is a water matter). Here, LEI is

not seeking to change the use of its Chubbuck Inches, it is seeking to enforce the provisions of its Agreement and the 2010 Code.

E. Summary Judgment on LEI's claim for permanent injunction is appropriate.

Because LEI has established a right to relief on its First, Second and Third Claims, LEI is entitled to summary judgment on its claim for permanent injunction. Moreover, a permanent injunction is particularly appropriate in this matter where monetary damages are unavailable under the Agreement.

CONCLUSION

For the reasons above, the Motion should be granted.

Respectfully submitted this 12th day of October, 2017.

WAAS CAMPBELL RIVERA JOHNSON & VELASQUEZ LLP

By: */s/ Kathryn I. Hopping*
Darrell G. Waas
Kathryn I. Hopping
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of October, 2017, a true and correct copy of **PLAINTIFF'S REPLY IN SUPPORT OF PARTIAL MOTION FOR SUMMARY JUDGMENT** was filed and/or served electronically via Colorado Courts E-Filing and/or sent via U.S. Mail, postage prepaid as follows:

Josh A. Marks
Mary Sue Greenleaf
Berg Hill Greenleaf Ruscitti LLP
1712 Pearl Street
Boulder, CO 80302

jam@bhgrlaw.com
msg@bhgrlaw.com

Attorneys for Defendant City of Loveland

Mark C. Overturf
McGath & Hull, P.C.
625 E. 16th Avenue, Suite 100
Denver, CO 80203

mco@omhlaw.com

Attorney for Defendant The Greeley and Loveland Irrigation Company

/s/Lori B. Crosby
Lori B. Crosby

In accordance with C.R.C.P. 121 §1-26(9), a printed copy of this document with original signature(s) is maintained by Waas Campbell Rivera Johnson & Velasquez LLP, and will be made available for inspection by other parties or the Court upon request.