

Item # 4-3A

**CITY OF CARSON CITY
REQUEST FOR BOARD ACTION**

Date Submitted: January 23, 2009

Agenda Date Requested : February 5, 2009

Time Requested: Consent Agenda

To: Mayor and Supervisors

From: Public Works Department

Subject Title: Action to approve and authorize the Mayor to sign the Ash Canyon Creek Users Agreement.

Staff Summary: This users agreement replaces the 2007 agreement that was approved by the Board on January 18, 2007. The agreement has been modified to set the price for leased water at 37.5 cents per thousand gallons with an automatic annual increase per the U.S. Department of Labor, Consumer Price Index – All Urban Consumers, for a period of three years. The annual increase shall not be less than one (1) percent or more than five (5) percent in any given year during the three year term of this agreement.

The users agreement allows for ACRE, LLC (formerly Andersen) and Carson City to work out operational schedules on an annual basis utilizing the resource to its utmost capacity. It allows exchanges of water and a willingness to assist each other in times of emergency.

Type of Action Requested:

(Check one)

☐ Resolution

☐ Ordinance

☒ Formal Action/Motion

☐ Other (Informational)

Does This Action Require A Business Impact Statement: ☐ Yes ☒ No

Recommended Board Action: I move to approve and authorize the Mayor to sign the Ash Canyon Creek Users Agreement.

Explanation for Recommended Board Action: Currently, Carson City utilizes Ash Canyon Creek Water Rights. Carson City owns 66.8841% of the annual Ash Canyon flows and ACRE, LLC (formerly Andersen) owns 23.6005%.

Carson City enjoys an admirable working relationship with ACRE, LLC. Public Works recommends continuation of the Ash Canyon Creek Users Agreement in order to maintain a working relationship with them.

This users agreement replaces the 2007 agreement that was approved by the Board on January 18, 2007. The agreement has been modified to set the price for leased water at 37.5 cents per thousand gallons with an automatic annual increase per the U.S.

Department of Labor, Consumer Price Index – All Urban Consumers, for a period of three years. The annual increase shall not be less than one (1) percent or more than five (5) percent in any given year during the three year term of this agreement.

The users agreement allows for ACRE, LLC and Carson City to work out operational schedules on an annual basis utilizing the resource to its utmost capacity. It allows exchanges of water and a willingness to assist each other in times of emergency.

Public Works recommends approval of this agreement.

Applicable Statue, Code, Policy, Rule or Regulation: N/A

Fiscal Impact: Minimal increase in water cost.

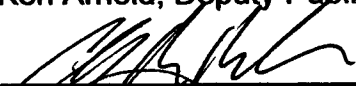
Explanation of Impact: Annual increases per the U.S. Department of Labor, Consumer Price Index – All Urban Consumers.

Funding Source: Water Fund

Alternatives: Do Not Approve

Prepared by: Ken Arnold, Deputy Public Works Director

Reviewed By:


(Department Head)

Date: 1/27/09

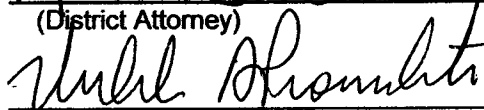
Concurrences:


(City Manager)

Date: 1/27/09


(District Attorney)

Date: 1/27/09


(Finance Director)

Date: 1/27/09

Board Action Taken:

Motion _____ **1:** _____
2: _____

Aye/Nay

(Vote Recorded By)

ASH CANYON CREEK ROTATION AGREEMENT

THIS AGREEMENT made this _____ day of _____, 2009 by and between CARSON CITY, a consolidated municipality and political subdivision of the State of Nevada, hereinafter referred to as CITY, and Andersen Colard Ranch Enterprises, LLC, hereinafter referred to as ACRE.

WHEREAS, the CITY holds a right to use approximately 66.485% of the annual Ash Canyon Creek flows as recognized by the State of Nevada Division of Water Resources as evidenced by the entitled Ash Canyon Decree, and

WHEREAS, ACRE holds a right to use 24% of the annual Ash Canyon Creek flows as recognized by the State of Nevada Division of Water Resources as evidenced by Decree, and

WHEREAS, both the CITY and ACRE recognize that coordinated management of Ash Canyon Creek water is mutually beneficial to both parties, and

WHEREAS, both the City and ACRE recognize that Ash Canyon Creek, a natural resource, is vital to agricultural, municipal and industrial uses.

NOW, THEREFORE, CITY AND ACRE agree as follows:

1. **REQUIRED APPROVAL.** This Agreement shall not become effective until and unless approved by appropriate official action of the governing body of each Party.
2. **FIRST RIGHT OF REFUSAL.** ACRE hereby grants CITY first right of refusal to use some or all of that Ash Canyon Creek water apportioned to ACRE as may be determined on an annual basis pursuant to the terms outlined herein.

3. BIANNUAL MEETINGS. The CITY and ACRE agree to meet in person or by teleconference twice each year to discuss the operational schedule of water use from Ash Canyon Creek. Items of discussion may include but are not limited to: the parties' anticipated water needs; water exchange or rotation; water conservation techniques, or; issues pertaining to water delivery structures.

- a. The first meeting shall be held within two weeks of the date the April 1st, U.S. Department of Agricultural, Soil Conservation Service, Snow survey is published in Ash Canyon Creek to discuss and determine the operational water use schedule during the spring and summer months.
- b. The parties shall meet again in October of each year to discuss the operational water use schedule for the then following fall and winter months.

4. WATER ROTATION. At each meeting described in Paragraph 3, ACRE may offer to forgo some or all of ACRE's portion of Ash Canyon Creek water to the benefit of CITY. If CITY opts to pick up some or all of ACRE's apportioned water for CITY's use, CITY and ACRE agree that ACRE may elect either paragraph (a) or (b) below:

(a) Financial Compensation: CITY shall pay ACRE 37.5 cents per thousand gallons of water CITY picks up from ACRE's apportioned share. Beginning the first day of January 2010 until the expiration of this Agreement on December 31, 2012, said rate shall annually increase in accordance the U.S. Department of Labor, Consumer Price Index – All Urban Consumer. Annual increases shall not be less than one (1) percent or more than

five (5) percent in any given year during the duration of this Agreement. Payments to ACRE will be based on decreed percentages applied to the monthly measurements taken at the Quill Ranch Treatment Plant measuring device in the Ash Canyon vault.

(b) Water Compensation: ACRE may elect to accept whole or partial payment in the form of an equivalent volume of water delivered to the ACRE property without charge. Water delivery will be measured at the U.S.G.S. Ash Canyon Creek Gauging Station. The CITY and ACRE will, by mutual Agreement, determine the schedule for the use of the compensation water provided to ACRE. Where ACRE elects to accept only partial payment in the form of compensation, the remainder shall be paid according to the financial compensation terms provided in paragraph (a) above.

5. PIPELINE LICENSE. The CITY agrees to grant ACRE the use of the 18" City pipeline from the CITY's point of diversion in Ash Canyon Creek to the 12" clean out valve on the south side of Ash Canyon Creek for the transportation of ACRE water during their rotation periods or at other mutually agreeable times.

6. MUTUAL REPRESENTATION/NON-WAIVER. By signing this Agreement, CITY and ACRE agree that the CITY or ACRE is not bound by the decreed percentages set out in this Agreement, if the State Division of Water Resources or a Court with competent jurisdiction changes the decreed allocation. In the event that the State Division of Water Resources, or a Court of competent jurisdiction, changes the allocation, the revised percentages will be applied for the remainder of this Agreement.

7. MUTUAL ASSISTANCE. The CITY and ACRE agree to assist each other in times of emergency when additional water may be needed including fire and drought. The protocol for emergency use may be developed by an additional writing by the parties. In the case of drought rotation, the parties shall develop the protocol and terms by an additional writing.
8. TERMINATION. The CITY and ACRE agree that ACRE may agree to terminate this Agreement at any time by providing written notification, signed by an authorized representative of ACRE not less than 90 days prior to the date of the proposed termination. The Board of Supervisors of Carson City may terminate this Agreement at any time by majority vote and providing written notification to ACRE, signed by the Mayor of Carson City, not less than 90 days prior to the date of the proposed termination. In addition, the parties may mutually agree to terminate by a date certain put in a writing.
9. RECORDATION. The CITY and ACRE agree that this Agreement shall be recorded in the office of the Recorder of Carson City, Nevada.
10. TERMINATION OF PREVIOUS AGREEMENTS. The CITY and ACRE hereby agree that the 2007 Agreement by and between the Parties and any and all other Agreements by and between the Parties on this matter whether oral or in writing are hereby terminated.
11. TERM OF THE AGREEMENT. This Agreement shall be effective from the date of execution by both Parties for a period of three years, unless terminated as set forth above.
12. NOTICE. All written notices under this Agreement shall be delivered to the following officials at the addresses stated:

CARSON CITY:
Andrew Burnham
3505 Butti Way
Carson City, NV 89701

ACRE:
Kim Colard
P.O. Box 1746
Carson City, NV 89702

13. LIMITED LIABILITY. CITY will not waive and intends to assert available NRS chapter 41 liability limitations in all cases. Contract liability of both parties shall not be subject to punitive damages. CITY agrees to hold harmless and indemnify ACRE against third party liability claims arising from CITY's distribution or use of water.

14. FORCE MAJEURE. No party to this Agreement shall be considered to be in default in the performance of any obligations under this Agreement when a failure of performance shall be due to uncontrollable forces. The Term "uncontrollable force" shall mean any cause beyond the control of the Party unable to perform such obligation, including but not limited to failure or threat of failure of facilities, flood, earthquake, storm, fire, lighting, and other natural catastrophes, epidemic, war, civil disturbance or disobedience, strike, labor dispute, labor or material shortage, sabotage, restraint by order of a court or regulatory body or agency of competent jurisdiction, and any non-action by, or failure to obtain the necessary authorization or approvals from, a Federal governmental agency or authority, which by the exercise of due diligence and foresight such Party could not reasonably have been expected to overcome. Nothing contained herein shall be construed to require a Party to settle any strike or labor dispute in which it is involved or accede to claims or conditions which it believes to be adverse to its business or other interests.

15. SEVERABILITY. If any provision contained in this Agreement is held to be unenforceable by a court of law or equity, this Agreement shall be construed as if such

provision did not exist and the non-enforceability of such provision shall not be held to render any other provision or provisions of this Agreement unenforceable.

16. PUBLIC RECORDS. Pursuant to NRS 239.010, information or documents may be open to public inspection and copying. ACRE recognizes CITY will have the duty to disclose this Agreement unless a particular record is made confidential by law or a common law balancing of interests.

17. CONFIDENTIALITY. Each party shall keep confidential all information, in whatever form, produced, prepared, observed or received by that party to the extent that such information is confidential by law or otherwise required by this Agreement.

18. PROPER AUTHORITY.

a) The parties hereto present and warrant that the person executing this Agreement on behalf of each party has full power and authority to enter into this Agreement and that the parties are authorized by law to perform the services set forth in this Agreement.

b) The parties are associated with each other only for the purpose and to the extent set forth in this Agreement, and in respect to performance of services and payment of costs pursuant to this Agreement, each party is and shall be a entity separate and distinct from the other party and, subject only to the terms of this Agreement, shall have the sole right to supervise, manage, operate, control, and direct performance of the details incident to its duties under this Agreement. Nothing contained in this Agreement shall be deemed or construed to create a partnership or joint venture, to create relationships of an employer-employee or principal-agent, or to otherwise create any liability for one agency whatsoever with

respect to the indebtedness, liabilities, and obligations of the other agency or any other party.

19. GOVERNING LAW: JURISDICTION. This Agreement and the rights and obligations of the parties hereto shall be governed by, and construed according to, the laws of the State of Nevada. The parties consent to the jurisdiction of the Nevada district courts for enforcement of this Agreement.

20. ATTORNEY FEES. The prevailing party in any legal proceedings arising from the enforcement, contest, or performance of this agreement shall be entitled to reasonable attorney fees.

21. ENTIRE AGREEMENT. This Agreement constitutes the entire Agreement of the parties and such is intended as a complete and exclusive statement of the promises, representations, negotiations, discussions, and other Agreements that may have been made in connection with the subject matter hereof. Unless an integrated attachment to this Agreement specifically displays a mutual intent to amend a particular part of this Agreement, general conflicts in language between any such attachment and this Agreement shall be construed consistent with the terms of this Agreement. Unless otherwise expressly authorized by the terms of this Agreement, no modification or amendment to this Agreement shall be binding upon the parties unless the same is in writing and signed by the respective parties hereto.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to
be executed as of the day and year first above written.

CARSON CITY

A Consolidated Municipality

BY: _____ Date: _____
Robert L. Crowell, Mayor

ATTEST: _____ Date: _____
Alan Glover, Clerk/Recorder

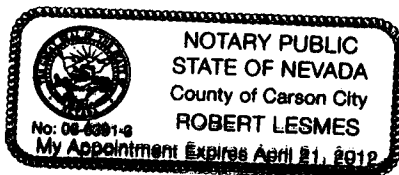
APPROVED AS TO FORM: _____ Date: _____
District Attorney

ANDERSEN FAMILY ASSOCIATES, a Nevada Limited Partnership
By Andersen-Colard Ranch Enterprises, a Nevada LLC, Its General Partner

Kim Colard Date: Jan. 9, 2009
Kim Colard, Member

State of Nevada
County of CARSON CITY

On January, 9, 2009, PERSONALLY APPEARED Kim Colard, who, being
duly sworn, did say that she is a member and (title) General Partner
of Andersen-Colard Ranch Enterprises, a Nevada Limited Liability Company, and did
say and acknowledge this instrument to be a voluntary act and deed of said company.



Robert Lesmes
(Signature of notarial officer)

(Title and rank (optional))