Southeastern Colorado Water Conservancy District
Special Board of Directors Meeting
Aurora Water Purchase
Action Report

Date: April 9, 2024
Agenda Item: IV. A.

STAFF RECOMMENDATIONS:
Staff recommends adoption of the Resolution.

BUDGET IMPLICATIONS:
None

PREVIOUS BOARD ACTION AND/OR ACTIVITY:
The Board met in Executive Session during the March 21, 2024 Board meeting to receive legal advice on whether the City of Aurora’s proposal to purchase 5,457 acres of land in Otero County, together with 4,095.178 shares of the Catlin Canal Company, and subsequently lease the water to itself for use in its municipal system in three of ten years through an interruptible water supply agreement (IWSA), violates the 2003 Intergovernmental Agreement between Aurora and the District (2003 IGA). As a result of the Executive Session, the Board directed that a special meeting be held on April 9, 2024 for further consideration of the issue, including inviting Aurora representatives to make a presentation on the proposal.

ISSUE SUMMARY DESCRIPTION:
The District understands that the Aurora City Council approved Resolution R2024-28 (“Resolution”) in the Council Meeting held on March 11, 2024. The Resolution approves a “Purchase and Sale Agreement for Water Rights and Real Property with Agricultural Lease” between Aurora and C&A Holding Company, Inc., and directs Aurora staff and legal counsel to “take all necessary steps to prosecute all necessary water court and ancillary proceedings allowing for Aurora Water’s use of the water as part of the municipal system.”

The District understands, based on the Purchase and Sale Agreement and Agricultural Lease attached to the Resolution, that Aurora intends to purchase 4,095.178 shares of stock in the Catlin Canal Company and other water rights (collectively, the “Subject Water Rights”), together with 5,475 acres of land in Otero County, including the existing structures and agricultural equipment. The Council Agenda Commentary for the Resolution states that after purchase, Aurora will lease the water to an agricultural partner in seven of ten years, and for “the remaining three of ten years, Aurora Water would use the water for municipal purposes.”
Aurora’s leasing and use of water from the Arkansas River Basin is the subject of the 2003 IGA between the District and Aurora. The 2003 IGA assisted in settling litigation between the District and Aurora regarding Aurora’s use of Fryingpan-Arkansas Project ("Project") facilities to convey Arkansas River water to Aurora for use in its municipal system.

Under the terms of the 2003 IGA, Aurora may use Project facilities, including Pueblo Reservoir, to facilitate the diversion, storage, and exchange of only the following categories of water for use in its municipal system:

1. Arkansas River Basin water rights decreed for Aurora’s use and owned by Aurora at the time of the IGA’s execution in 2003;
2. Rocky Ford Ditch and Lake County water rights that were the subject of Aurora’s Case Nos. 98CW137, 99CW169, and 99CW170, and exchange rights requested in Case No. 01CW145;
3. Water available to Aurora from water lease agreements that existed as of December 7, 2001 (including extensions or replacements without increasing the amounts leased);
4. “Water available to Aurora from interruptible supply agreements or water bank transactions that are authorized under Colorado law” and consistent with the IGA (Section III.B.1.d(iv));
5. Water that is traded to or exchanged with Aurora (provided such a trade does not increase the draft of water from the Arkansas River Basin); and
6. Water obtained by Aurora outside Water Division No. 2.

It appears that Aurora, in its transaction with C&A Holding Company, Inc. and subsequent Agricultural Lease, seeks to categorize the water rights that Aurora will own and use as water available from interruptible supply agreements under the fourth category.

The District and Aurora negotiated the 2003 IGA to balance Aurora’s reasonable use of Project facilities to assist in maintaining a reliable water supply for its municipal system with protection of the District’s constituents by preventing further purchase and permanent dry-up of irrigated lands in the Arkansas River Basin. To achieve that goal, the 2003 IGA separated water Aurora may use through Project facilities into two broad categories: (1) water Aurora already owned or leased at that time, and (2) other water that Aurora may lease and use on a temporary basis but ultimately must remain in the Arkansas River Basin. The second category (temporary water) that Aurora may use is repeatedly described as “leased water” and must be via lease, including an interruptible water supply agreement or water bank transaction, so the water is not owned by Aurora, and remains available for use primarily in the Arkansas River Basin. Southeastern and Aurora negotiated these terms with the clear understanding of the intent to prevent future further “buy and dry” in the Arkansas River Basin.

The intent of this category of allowable water was to give Aurora flexibility to continue to obtain water from new Arkansas River Basin supplies after 2003, with the conditions that such supplies must be leased, not owned, and used on a temporary basis. Therefore, the 2003 IGA does not allow Aurora to use Project facilities to enable it to divert, store, or exchange any water rights that it purchases after 2003.
Furthermore, the 2003 IGA defines “Interruptible Supply Agreement” as a “lease, option, or other agreement for the temporary cessation of the historic and decreed irrigation use of water and the temporary use of such water by Aurora . . . pursuant to Colorado law,” citing a few statutes, including the interruptible supply agreement statute, C.R.S. § 37-92-309, which became effective a few months before the parties signed the 2003 IGA.

This statute defines IWSA as “an option agreement between two or more water right owners whereby . . . the owner of the loaned water right agrees that, during the term of the agreement, it will stop its use of the loaned water right . . . and the borrowing water right owner may divert the loaned water right for such owner’s purposes.” C.R.S. § 37-92-309(2)(a) (emphasis added). The statutory language, and therefore the 2003 IGA terms, clearly contemplate an IWSA as being between two separate owners, not as a mechanism by which a single water right owner leases water that it owns to itself, for its own use.

The 2003 IGA further separates “leased water” into two categories: Category 1 water is that which was subject of long-term leases in existence in 2001, and Category 2 water is “water available from other sources.” Under the 2003 IGA, “Aurora will not divert Category 2 water when Aurora’s total system wide reservoir storage is above sixty percent (60%) of present capacity on March 15th of any given year except as may be required to exercise interruptible supply contracts within the total volumetric limits” as described in the 2003 IGA. We understand that Aurora proposes to lease the water to itself when conditions of the IGA are met, including “60% or below in total storage on March 1.”

The terms of the 2003 IGA make clear that the storage capacity restriction for diversions of Category 2 leased water pertains to Aurora’s “present capacity” as of 2003. Therefore, Aurora cannot expand the storage capacity restrictions by increasing its storage capacity and then calculating 60% of its expanded current total storage capacity. The restriction must be calculated based on 60% of Aurora’s total storage capacity at the time of the IGA’s execution in 2003.

Through the Purchase and Sale Agreement, Aurora will “build equity” in significant water rights in the Arkansas River Basin, a situation that the 2003 IGA prohibits. Despite the Agricultural Lease agreement, this transaction clearly involves Aurora purchasing water rights to divert and exchange out of the Arkansas River Basin for use in its municipal system, which Aurora will ultimately control. It will also remove irrigated lands from the property tax base that benefits Southeastern and local communities.

SUGGESTED MOTION:
I move that the Board of Directors adopt Resolution No. 2024-03D, A Resolution of the Board of Directors of the SECWCD Concerning the 2003 Intergovernmental Agreement with the City of Aurora.

ATTACHMENTS:
Resolution No. 2024-03D.
RESOLUTION – NO. 2024 – 03D
April 9, 2024

A RESOLUTION OF THE BOARD OF DIRECTORS
OF THE SOUTHEASTERN COLORADO WATER CONSERVANCY DISTRICT
CONCERNING THE 2003 INTERGOVERNMENTAL AGREEMENT WITH THE CITY
OF AURORA

WHEREAS, the Southeastern Colorado Water Conservancy District (the “District”) and the City of Aurora acting by and through its Utility Enterprise (“Aurora”) entered into an Intergovernmental Agreement in October 2003 (“2003 IGA”); and

WHEREAS, the 2003 IGA settled substantial litigation between the parties and contains terms and conditions allowing Aurora’s use of Fryingpan-Arkansas Project facilities to deliver water for use in its municipal system in exchange for Aurora’s agreement to restrict its future purchase of water rights to permanently transfer such water out of the Arkansas River Basin; and

WHEREAS, the 2003 IGA states that Aurora will not divert any of its leased water from the Arkansas River Basin for use in its municipal system when its “total system wide reservoir storage is above sixty percent (60%) of present capacity on March 15th of any given year”; and

WHEREAS, the District and Aurora negotiated the terms of the 2003 IGA with the understanding that its terms are intended to protect future agricultural water ownership and use in the Arkansas River Basin; and

WHEREAS, the 2003 IGA has helped foster the relationships between water rights owners in the Arkansas River Basin and provided the foundation for subsequent agreements involving Aurora and other entities in the Arkansas River Basin, including the November 2003 Intergovernmental Agreement between Aurora and the Upper Arkansas Water Conservancy District; the May 2004 Intergovernmental Agreement between Aurora, the District, the Cities of Colorado Springs, Pueblo, and Fountain, and the Board of Water Works of Pueblo; and the 2011 Intergovernmental Agreement between Aurora and the Lower Arkansas Valley Water Conservancy District.

NOW, THEREFORE, BE IT RESOLVED that:

1. The District Board reaffirms its understanding that a central purpose of the 2003 IGA is to prevent Aurora from purchasing any additional agricultural water rights and permanently transferring those water rights out of the Arkansas River Basin for municipal use.

2. The District Board reaffirms its understanding that the storage capacity restriction of the 2003 IGA refers to sixty percent of Aurora’s total storage capacity in existence at the time the IGA was executed in 2003.
3. The District Board believes that Aurora’s purchase of additional Arkansas River Basin water rights for its own municipal use violates the 2003 IGA, and the Board urges Aurora to refrain from or cease all such violations.

4. The District Board believes and reaffirms that the 2003 IGA is a foundational and beneficial document for the Arkansas River Basin, and that for the benefit of maintaining regional cooperation and relationships between water rights owners and entities in the Basin, both the District and Aurora must remain in compliance with the terms, conditions, and goals of the 2003 IGA.

Approved and adopted at the special Board of Directors meeting, Tuesday, April 9, 2024.

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President

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Secretary

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