

City of Greeley Terms & Conditions

These TERMS & CONDITIONS (this “**Agreement**”) by and between the City of Greeley (the “**City**”) and you (“**User**”) create a contract. Please read the Agreement carefully. By logging in, you confirm your understanding and acceptance of the Agreement.

RECITALS

A. The City entered into a certain Beacon AMA Managed Solution Master Agreement with Badger Meter, Inc. (“**Badger**”) whereby, Badger may provide to User, and other similarly-situated customers, advanced water metering infrastructure hardware, as well as water metering and usage service information (the “**Badger Goods & Services**”) through an online portal provided by WaterSmart Software, Inc. (“**WaterSmart**”).

B. As a condition and in consideration of allowing User to utilize the Badger Goods & Services, User hereby agrees to comply with the terms and conditions set forth herein.

AGREEMENT

For good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, User agrees as follows:

1. **Term.** This Agreement shall remain in effect for so long as the City makes the Badger Goods & Services available to User. In the event the Badger Goods & Services are no longer offered to User, this Agreement shall automatically terminate. In the event that User breaches any term of this Agreement, the City may immediately terminate the Badger Goods & Services and this Agreement, in addition to all other remedies available at law or equity. User may elect to stop accessing and using the Badger Goods & Services and terminate this Agreement at any time without cause upon 30 days’ written notice to the City.

2. **Terms and Conditions.** By logging in, User accepts the City’s offer to receive the Badger Goods & Services attached hereto as **Exhibit A** and, in consideration therefor, agrees to comply with the terms and conditions set forth in **Exhibit B** hereto. User acknowledges that it may take the City and/or WaterSmart an undefined amount of time to make the Badger Goods & Services available. User further acknowledges that User’s compliance with Exhibit B is an express condition of access and use of the Badger Goods & Services.

EXHIBIT A

ADVANCED METERING INFRASTRUCTURE HARDWARE

Pursuant to the Agreement and **Exhibit B**, the City shall install the following hardware components, or hardware similar thereto:

- Water Endpoint – Badger Meter ORION Series Cellular LTE Endpoint

EXHIBIT B

TERMS AND CONDITIONS

1. **Ownership.** User acknowledges and agrees that Badger owns all rights, title and interest in the Badger Goods & Services, including all associated intellectual property rights. User will not obtain any rights, title or interest in the Badger Goods & Services or any associated intellectual property rights, other than the right to access and use the Badger Goods & Services, subject to the terms of this Agreement.

2. **Password Protection.** User may be required to select and use certain usernames, passwords or codes through WaterSmart to access and use the Badger Goods & Services. User assumes sole responsibility for the selection, management and use of any such information. User shall be responsible for all activities that occur under User's username and password used to access the Badger Goods & Services. User will promptly notify the City in writing of any unauthorized use of User's password or any other security breach.

3. **Restrictions on Right to Use.** User shall **not**:

- a. Use or permit or assist another to use the Badger Goods & Services in violation of this Agreement;
- b. Sell, license, resell, sublicense, or otherwise permit any third parties to access or use the Badger Goods & Services;
- c. Remove patent, copyright, trademark or other intellectual property markings from the Badger Goods & Services;
- d. Modify, alter, tamper with, repair or otherwise create derivatives from the Badger Goods & Services;
- e. Copy, reverse engineer, disassemble or decompile the Badger Goods & Services or apply any other process or procedure to derive the source code from any software included in the Badger Goods & Services;
- f. Provide content that infringes on the intellectual rights of any person or entity or use the Badger Goods & Services in violation of the intellectual property rights of Badger or any third party;
- g. Use the Badger Goods & Services in a manner that violates any applicable international, federal, state or local laws, rules or regulations;
- h. Assert, or authorize, assist or encourage any third party to assert, against Badger, its affiliates, customers, vendors, business partners, servicers or licensors any intellectual property infringement claim regarding the Badger Goods & Services;
- i. Transmit content or messages that are illegal, fraudulent, threatening, abusive, defamatory, or obscene;
- j. Make any unauthorized connection to Badger's information technology architecture;
- k. Communicate any unsolicited commercial, voice, SMS, or other message;

- l. Upload or transmit any “virus,” “worm,” or malicious code or access, alter, or interfere with the communications of and/or information about another customer; and
- m. Take actions that could cause damage to or adversely affect Badger or Badger Goods & Services, or any of Badger’s cellular service aggregator and data-hosting service providers.

4. **Fraudulent Uses.** User will not abuse or make fraudulent use of the Badger Goods & Services and shall promptly report to the City any such abuse or fraudulent use of which they become aware. User will fully cooperate in any investigation or prosecution initiated by the City, Badger or Badger’s affiliates related to abuse or fraudulent use of the Badger Goods & Services.

5. **User Consents and Acknowledgements.** By signing this Agreement and/or using the Badger Goods & Services:

- a. User consents to the City and Badger’s right to host, access, store, copy, and use certain information, including the User’s address, meter reading information, water usage history, and account information, and any other information that is reasonably necessary to provide, maintain, repair and enhance the Badger Goods & Services.
- b. User acknowledges that User is solely responsible for any actions User may take with regards to the Badger Goods & Services.
- c. User acknowledges that security of cellular transmissions and transmissions over the internet cannot be guaranteed, and as such, the City and Badger are not responsible for (i) interception or unauthorized use of any data transmitted through the cellular network; (ii) User’s access to the Internet; (iii) interception, unauthorized use or interruptions of communications through the Internet; or (iv) changes or loss of data through the Internet.
- d. USER ACKNOWLEDGES THAT THE CITY WILL HAVE TO ACCESS THE PROPERTY AT THE SERVICE ADDRESS TO INSTALL THE BADGER GOODS & SERVICES AND CONSENTS TO SUCH ACCESS. USER REPRESENTS AND WARRANTS THE SAFETY OF THE PROPERTY AND THAT USER HAS THE RIGHT TO CONSENT TO SUCH ACCESS AND INSTALLATION.

6. **Compliance with City and Badger Policies.** User agrees to comply with Badger’s Privacy Policy (available at <https://www.badgermeter.com>), the Badger BEACON AMA Terms of Use and Privacy Policy (available at <https://beaconama.net>), and the City’s Beacon AMA Managed Solution Master Agreement with Badger (available at <http://greeleygov.com/beaconmeter>), as each may be amended from time to time.

7. **Compliance with the Law.** User will not access or use the Badger Goods & Services in any manner that violates any applicable international, federal, state or local laws and/or regulations, including but not limited to all applicable data protection, intellectual property and privacy laws.

8. **Disclaimer of Warranties.**

- a. THE BADGER GOODS & SERVICES ARE PROVIDED “AS IS.” THE CITY MAKES NO EXPRESS OR IMPLIED REPRESENTATIONS OR WARRANTIES AS TO THE BADGER GOODS & SERVICES.

- b. THE CITY EXPRESSLY DISCLAIMS ANY EXPRESS OR IMPLIED WARRANTIES WITH REGARD TO THE BADGER GOODS & SERVICES, INCLUDING, BUT NOT LIMITED TO, THE IMPLIED WARRANTIES OF MERCHANTABILITY, TITLE, NON-INFRINGEMENT, FITNESS FOR A PARTICULAR PURPOSE, QUIET ENJOYMENT, OR IMPLIED WARRANTIES ARISING FROM A COURSE OF DEALING, INDUSTRY PRACTICE OR USAGE OF TRADE.
- c. THE CITY EXPRESSLY DISCLAIMS THAT THE BADGER GOODS & SERVICES WILL BE UNINTERRUPTED, ERROR FREE OR FREE OF HARMFUL COMPONENTS, AND EXPRESSLY DISCLAIM ANY WARRANTIES AS TO THE RELIABILITY, QUALITY, SECURITY, CONDITION, DESIGN, SUITABILITY, INTER-OPERABILITY, AVAILABILITY, COMPLETENESS OF THE BADGER GOODS & SERVICES OR THAT ANY DATA OR CONTENT, INCLUDING ANY DATA OR CONTENT PROVIDED BY USER, WILL BE SECURE OR NOT OTHERWISE LOST OR DAMAGED.
- d. THE CITY EXPRESSLY DISCLAIMS ANY LIABILITY ARISING OR RESULTING FROM INSTALLATION OF THE BADGER GOODS & SERVICES, INCLUDING WITHOUT LIMITATION, ANY PHYSICAL PROPERTY DAMAGE OR IMPACT TO EXISTING NETWORKS OR SYSTEMS AT THE SERVICE ADDRESS.

9. **Limitation of Liability.** IN NO EVENT SHALL THE CITY OR ANY OF ITS CONTRACTORS OR AGENTS, OR ANY OF ITS OFFICERS, EMPLOYEES, SUCCESSORS, ASSIGNS, REPRESENTATIVES, ATTORNEYS, OR AGENTS BE LIABLE FOR ANY CLAIMS, DEMANDS, ACTIONS, LOSSES, DAMAGES, FINES, COMPENSATION, JUDGMENT SETTLEMENTS, COSTS, EXPENSES, ATTORNEY'S FEES, COURT COSTS, REIMBURSEMENT, EQUITABLE RELIEF, OR DECLARATORY RELIEF ARISING FROM OR RELATED TO ANY FAILURE OF PERFORMANCE, ERROR, OMISSION, INTERRUPTION, DEFECT, DELAY IN OPERATION OR TRANSMISSION, LOSS OF DATA, BREACH OF CONFIDENTIALITY, LACK OF COMPATIBILITY OR OPERABILITY, COMPUTER VIRUS, OR LINE/SYSTEM FAILURE RELATED TO USER'S USE OF THE BADGER GOODS & SERVICES OR ANY INDIRECT, INCIDENTAL, SPECIAL, CONSEQUENTIAL, EXEMPLARY, ENHANCED, OR PUNITIVE DAMAGES, LOST REVENUE OR PROFITS, DIMINUTION OF VALUE, OR OTHER ECONOMIC ADVERSITY, RELATED TO USER'S USE OF THE BADGER GOODS & SERVICES OR THE INFORMATION CONTAINED THEREIN OR THIS AGREEMENT. THESE EXCLUSIONS APPLY TO, BUT ARE NOT LIMITED TO, ANY CLAIMS REGARDLESS OF THE LEGAL OR EQUITABLE THEORY UPON WHICH SAID CLAIMS ARE BASED, EVEN IF THE CITY KNEW OR SHOULD HAVE KNOWN ABOUT THE POSSIBILITY OF POTENTIAL DAMAGES TO USER. USER'S SOLE AND EXCLUSIVE REMEDY AGAINST THE CITY FOR ANY CLAIM OR DISPUTE SHALL BE TO DISCONTINUE USE OF THE BADGER GOODS & SERVICES.

10. **Indemnity.** To the extent permitted by law, User agrees to defend, indemnify, and hold harmless the City, its officers, employees, and agents (the "**Indemnified Parties**"), against any and all losses, damages, liabilities, deficiencies, actions, judgments, interest, awards, penalties, fines, costs, or expenses of whatever kind, including reasonable attorneys' fees, the cost of enforcing any right to indemnification hereunder, and the cost of pursuing any insurance providers, against the Indemnified Parties by any third party in any claim, suit, action, petition, or proceeding arising out of or related to: (i) User's access and use of the Badger Goods & Services in breach of this Agreement; (ii) violation of applicable law by User; or (iii) data or content provided by User.

11. **Miscellaneous.**

- a. *Enforceability.* This Agreement together with all Exhibits constitutes the entire agreement between the parties with respect to its subject matter. This Agreement may not be amended or modified except in writing signed by the parties. The invalidity or unenforceability of any provision of this Agreement shall not affect the remaining portions hereof.
- b. *Choice of Law.* This Agreement will be governed by and construed in accordance with the internal laws of the State of Colorado without giving effect to any choice or conflict of law provision or rule (whether of the State of Colorado or any other jurisdiction) that would cause the application of laws of any jurisdiction other than those of the State of Colorado. Any legal suit, action, or proceeding arising out of, related to, or resulting from this Agreement will be instituted exclusively in the 19th Judicial District of the State of Colorado located in the County of Weld, City of Greeley, and each party irrevocably submits to the exclusive jurisdiction of such courts in any such suit, action, or proceeding. Any legal suit, action, or proceeding so commenced shall be maintained and remain exclusively in the aforementioned courts and any courts having appellate jurisdiction over them.
- c. *Prevailing Party.* In the event that any action, suit, or other legal or administrative proceeding is instituted or commenced by either party against the other party arising out of or related to this Agreement, the prevailing party will be entitled to recover its attorneys' fees and court costs from the non-prevailing party.
- d. *Assignment.* User shall not assign this Agreement without the written consent of the City and any such assignment by User without such written consent shall be null and void. This Agreement will be binding upon and will inure to the benefit of the parties and their respective successors and permitted assigns.
- e. *Waiver.* The failure of a party to insist upon strict adherence to any provision of this Agreement on any occasion shall not be considered a waiver of such party's right to insist upon strict adherence to such or any other provision thereafter. Any waiver shall be in writing signed by the party against whom such waiver is sought to be enforced.
- f. *Governmental Immunity.* No term or condition of this Agreement or any Exhibits thereto shall be construed or interpreted as a waiver, express or implied, of any of the immunities, rights, benefits, protections and limitations provided by common law or state statute, including the Colorado Governmental Immunity Act, C.R.S. § 24-10-101 et seq., as now or hereafter amended, which shall govern the City's obligations hereunder in the event of conflict with any other applicable law, and City hereby expressly reserves the same
- g. *Survival.* The rights and obligations of the Parties set forth in this Section 11, and Sections 1, 5, 8, 9, and 10 and any right or obligation of the Parties in this Agreement which, by its nature, should survive termination or expiration of this Agreement, will survive any such termination or expiration of this Agreement.
- h. *Notice.* All notices, requests, consents, claims, demands, waivers, and other communications ("Notices") hereunder will be in writing and will be deemed to have been given: (a) on the date and at the time of delivery if delivered personally to the party to whom notice is given; (b) on the date of delivery or attempted delivery shown on the return receipt if mailed to the party to whom notice is to be given by first class mail, sent by registered or certified mail, return receipt requested, postage prepaid and properly addressed; (c) on the date and at the time shown on the facsimile if telecopied; (d) on the date and at the time shown on the electronic mail (email) if emailed, with no bounceback received within two (2) days; or (e) on the date shown on the

delivery acknowledgment provided by the courier if sent by a nationally recognized overnight courier service that provides evidence of delivery.