

Rule Governing the Subcontracting of Beneficial Use of Colorado-Big Thompson Project Allotment Contracts

(Effective Date: August 11, 2016)

Historical Background

Since 1938 the Northern Colorado Water Conservancy District (Northern Water) has issued Allotment Contracts to provide for the beneficial use of water yielded from the Colorado-Big Thompson (C-BT) Project by water users located within Northern Water boundaries. Those beneficial uses include irrigation, domestic, municipal, and industrial uses. The Northern Water Board of Directors (Board) issues Allotment Contracts in accordance with Northern Water's defined rules, regulations, policies and procedures. C-BT Project water is intended to supplement an Allottee's existing non-C-BT Project water supply portfolio.

The finite water supply available to meet future water needs within Northern Water boundaries, when combined with the ever-increasing demands for water, requires that water users strive to accomplish the maximum beneficial use of all available water supplies in the region. These factors, coupled with the recognized ability to transfer C-BT Project water contribute to the functionality, utility, and value of C-BT Project water. As pressures on existing water supplies increase, various water users are entering into innovative water sharing agreements such as interruptible water supply contracts. These agreements, when entered into by an Allottee utilizing water yielded from a C-BT Project Allotment Contract, represent the subcontracting of beneficial use of the water yielded from that Allotment Contract.

Further complicating these transactions is Northern Water's requirement that the beneficial use of water yielded from the C-BT Project be accomplished in full compliance with the terms and conditions of the Allotment Contract, the Water Conservancy Act, the terms and conditions of the contractual documents between Northern Water and the United States Bureau of Reclamation that govern the operation and administration of the C-BT Project, and Northern Water's rules, regulations, policies, and procedures.

It has become apparent to Northern Water that there are instances when the beneficial use of C-BT Project Allotment Contracts may be subcontracted by the Allottee to one or more water users. As such, it is the responsibility of the Board to assure that these Subcontracts result in C-BT Project water being used in accordance with all controlling rules, regulations, policies, procedures, statutes, and contractual requirements while also meeting the responsibilities, and obligations of Northern Water. To assure compliance with statutes, the terms and conditions of the contractual documents associated with the C-BT Project, and the terms and conditions of the involved Allotment Contract(s), and to assure the Board is meeting its obligations and responsibilities, the Subcontracting of the beneficial use of C-BT Project water yielded from the Allotment Contract by an Allottee must be done only with the full knowledge and approval of the Board.

This Rule is promulgated to clearly state the Board's requirements associated with existing, currently proposed, and future Subcontracts for the beneficial use of C-BT Project water yielded from an Allotment Contract.

Rule

1.0 Rule Purpose

- 1.1 This Rule defines the requirements of Northern Water pertaining to the Subcontracting of the beneficial use of water yielded by a C-BT Project Allotment Contract by the Allotment Contract owner (referred to herein as the Allottee) to another water user (referred to herein as the Subcontractor).

2.0 Rule Definitions

- 2.1 Account Entity - An Account Entity may be comprised of a single C-BT Project water user, or multiple C-BT Project water users. In most instances, one or more Allotment Contracts have been certified for delivery through an Account Entity's respective quota account. An Account Entity may have multiple physical delivery points from the C-BT Project. For some agricultural Water Users, a "C-BT carrier" may be synonymous with an Account Entity having the same name.
- 2.2 Acre Foot Unit (AFU) - Unit of measurement used for the allocation of C-BT Project water to an Allottee in an Allotment Contract. An AFU receives 1/310,000th of the water annually declared to be available from the C-BT Project by the Board. Historically, an AFU annually yields 0.5 to 1.0 acre feet per AFU.
- 2.3 Allotment Contract - The contract between the Allottee and Northern Water that allocates C-BT Project water to the Allottee for a specified beneficial use. Allotment Contracts are issued on an AFU basis.
- 2.4 Allottee - An entity (person, corporation, company, or otherwise) that owns one or more Allotment Contracts for C-BT Project Water as issued by Northern Water. For purposes of this Rule, the Allottee is the entity subcontracting water to another water user (the Subcontractor).
- 2.5 Base Supply - Any permanent non-C-BT Project water supply held and/or controlled by a water user or an Allottee.
- 2.6 Board – Northern Colorado Water Conservancy District Board of Directors
- 2.7 C-BT - Colorado-Big Thompson
- 2.8 Forfeiture – As stated in 37-45-134 (c) C.R.S.

- 2.9 Irrigation – The application of water for beneficial use, without waste for the primary purpose of growing and producing crops to be harvested, or consumed by livestock, including pasture lands, and for uses incidental to the primary production of such crops.
- 2.10 Northern Water - Northern Colorado Water Conservancy District
- 2.11 Quota Water - The amount of C-BT Project water declared available each year by the Board from the yield of the C-BT Project to an Allottee through the determination of the annual quota. The declared quota represents the percentage of an acre-foot of C-BT Project water made available for each AFU owned by the Allottee.
- 2.12 Rule 11 Charge - The payment due to Northern Water resulting from some Seasonal Transfers in accordance with Northern Water Rule 11.
- 2.13 Seasonal Transfer - The transfer of Quota Water through Northern Water’s administrative process. This transfer may be done electronically through Northern Water’s accounting system Allottee interface or through the use of a CD-4 card.
- 2.14 Subcontract – For purposes of this Rule, any type of agreement (contract, lease, or otherwise) or concurrent agreements that transfer the beneficial use of an Allottee’s C-BT Project water to a Subcontractor for an aggregate time period of two years or longer. The Subsections to this Section provide additional definition concerning Subcontracts.
- 2.14.1 Bridge Supply Subcontract - This type of Subcontract provides the Subcontractor C-BT Project water for a predetermined and definite period of time. As an example, a Subcontractor might need the interim water supply in anticipation of a new water supply project becoming operational, as an emergency supply in response to failed infrastructure or water quality issues, or as a supply to meet a temporary demand.
- 2.14.2 Interruptible Supply Subcontract - This type of Subcontract provides the Subcontractor C-BT Project water under certain conditions for the duration of the Subcontract. As an example, an Interruptible Supply Subcontract may provide water to a municipal or industrial supplier during a drought period or during certain years following a drought. For the purposes of this Rule, an Interruptible Supply Subcontract is not to provide yield from the C-BT Project to the Subcontractor each and every year.
- 2.14.3 Other Subcontract - Any Subcontract that provides the Subcontractor C-BT Project water that is not either an Interruptible Supply or Bridge Supply Subcontract.

- 2.15 Subcontractor - An entity (person, corporation, company, partnership, limited liability company or other legally defined entity) that is Subcontracting for the beneficial use of C-BT Project water from an Allottee. The Subcontractor may or may not be an Allottee. However, a Subcontractor must have a defined beneficial use of C-BT Project water within the boundaries of Northern Water and comply with all applicable rules, regulations, guidelines, policies and procedures of Northern Water.
- 2.16 Tract - A unit of land identified by Northern Water in a Class D Allotment Contract.

3.0 Required Approval of Subcontracts

- 3.1 All Subcontracts, as defined in Section 2.14, entered into after the effective date of this Rule are prohibited without the approval of the Board pursuant to this Rule. Subcontracts representing internal trades of C-BT Project water for other water of similar value or arrangements where a water supplier provides treated water service in exchange for receiving C-BT Project water from an Allottee resulting in the beneficial use of C-BT Project water being primarily made by the Allottee will be exempt from this Rule subsequent to Northern Water making such a determination after its review of the Subcontract.
- 3.2 Subcontracts that are in existence as of the effective date of this Rule shall be exempt from this Rule if: (A) the Allottee provides a copy of the executed Subcontract to Northern Water within nine months of the effective date of this Rule, and (B) Northern Water determines the Subcontract does not contain terms or conditions that violate statutes, rules that existed at the time of the Subcontract, or applicable contract conditions associated with the beneficial use of C-BT Project water. Northern Water will take no enforcement action regarding a Subcontract that has been provided pursuant to this Rule until Northern Water's review of the Subcontract is complete and Northern Water either: confirms in writing that the Subcontract is exempt from this Rule, or informs the Allottee in writing of the violation(s). Northern Water will only consider a Subcontract exempt from this Rule if Northern Water has affirmatively stated so in writing. Once notified by Northern Water of a violation(s), the Allottee shall have six months to amend the Subcontract to correct the violation(s).

4.0 Request for Exemption From or Approval of a Subcontract(s)

- 4.1 An Allottee seeking exemption from or approval of a Subcontract(s) must follow the Procedures for this Rule. The administrative fee assessed by Northern Water to review a Subcontract shall be determined as described in the Procedures to this Rule.

5.0 Criteria Used for Subcontract Review and Approval

- 5.1 The Board's review and approval of Subcontracts shall be limited and applicable only to those terms and conditions of the Subcontract which pertain to the

beneficial use of water yielded by an Allotment Contract, shall be on a specific case-by-case basis, and shall incorporate consideration of all rules, regulations, policies and procedures that govern, or are related to, the approval and issuance of an Allotment Contract.

- 5.2 The Board may approve or deny approval of any Subcontract for the beneficial use of water yielded by an Allotment Contract. In the event the Board of Directors denies approval of such a Subcontract, the Board shall state the bases for the denial.
- 5.3 The Board may approve a Bridge Supply Subcontract or Other Subcontract for a maximum term of five years except as provided below. The Board will consider requests to reapprove a Subcontract if its previous approval has expired or will expire. The Board is not obligated to reapprove a Subcontract. However, if a Subcontractor identifies a specific water supply project that is under development and will provide a future water supply for the Subcontractor, the Board may approve a Bridge Supply Subcontract for a term longer than five years. The term for any such Subcontract approved for longer than five years may be for: (A) a fixed term reasonably anticipated to coincide with the completion of the water supply project; or (B) an indefinite term to terminate upon completion of the water supply project. In any event, a Subcontract shall not exceed five years following the denial of an indispensable permit approval for said water supply project, or the Subcontractor's decision not to move forward with or continue its participation in the water supply project. Completion of a water supply project shall mean completion of project infrastructure and operation of the project as necessary to produce the anticipated water supply yield of the Project.
- 5.4 The Board will only consider approval of a Subcontract if the Subcontractor meets the following minimum requirements:
 - 5.4.1 The C-BT Project water described in the Subcontract will be considered in calculations of AFU ownership limitations for the Subcontractor if water will be used for non-irrigation purposes. The Subcontractor cannot exceed its limitation for the ownership of Allotment contracted AFUs when considering both AFUs owned through its Allotment Contract(s) and the water represented by the Subcontract. In the case of a water supply emergency which temporarily affects the Subcontractors' base supply, the Board may choose to consider a proposed Subcontract of specified and limited duration disregarding AFU ownership limitations.
 - 5.4.2 The Northern Water 1995 Interim Ownership Limitation Guidelines, or whatever then existing Northern Water ownership limitation policy or rule, will be used as the primary criteria in evaluating Subcontractor ownership limitations when the Subcontractor is using water for purposes other than irrigation. A simplified example of a C-BT ownership limitation calculation is included in Appendix A to this Rule. C-BT ownership limitations shall

not be applied when the beneficial use of the C-BT Project water by the Subcontractor is for irrigation.

5.4.3 The Subcontractor must be in compliance with the conditions in the Northern Water 1997 Base Water Supply Policy, or with whatever then existing Northern Water base water supply policy or rule that is in place.

5.5 A Subcontract will only be considered for approval if the Subcontract meets the following minimum requirements:

5.5.1 Requires C-BT Project water only be placed to beneficial use on land situated within the boundaries of Northern Water.

5.5.2 Assures use will be for a beneficial use(s) approved by Northern Water.

5.5.3 Requires that C-BT Project water not be reused, and any return flows resulting from its initial use, if and when they occur, must be returned within the boundaries of Northern Water.

5.5.4 The Subcontract is based on AFUs.

5.5.5 The AFUs associated with the proposed Subcontract plus the aggregated sum of AFUs associated with all previous Subcontracts associated with a specific Allotment Contract do not exceed the total number of AFUs associated with that Allotment Contract.

5.5.6 Does not create a joint or undivided interest or other form of concurrent property interest in a C-BT Project Allotment Contract beyond that which is provided in the Allotment Contract.

5.5.7 Does not include a provision requiring the Allotment Contract be transferred to the Subcontractor unless such transfer is contingent upon the review and approval by the Board.

5.5.8 Limits the sale of the Subcontractor's base supply to a maximum of 15% during the pendency of the Subcontract and, furthermore, provides that no base supply be sold or transferred outside the boundaries of Northern Water.

5.5.9 Recognizes Northern Water's authority to prevent the annual certification of C-BT Project water to the Allottee's designated Account Entity if an Allottee is not in good standing with the Allotment Contract or this Rule.

5.5.10 Recognizes Northern Water will not arbitrate any disputes, if such occur, between the Allottee and Subcontractor.

- 5.5.11 Provides adequate terms and conditions needed to address existing or future encumbrances on the subject Allotment Contract and specifically eliminates any and all liability to Northern Water resulting from the enforcement of those encumbrances by the Allottee, the Subcontractor, or other parties that may hold or have interest in such encumbrances.
- 5.5.12 Does not create liability for Northern Water.
- 5.5.13 Does not contain terms or conditions that violate rules, regulations, policies and procedures of Northern Water.
- 5.6 In addition, the Board will only consider an Interruptible Supply Subcontract that meets the following additional minimum requirements:
 - 5.6.1 When the Allottee's use is irrigation and the Subcontract use is non-irrigation, the Subcontract must limit the Subcontractor's use of the associated C-BT Project water to a maximum of 3 out of 10 years (rolling 10-year period) except as provided for as follows: On a case by case basis, the Board may consider approval of a Subcontract that allows the Subcontractor's use of the associated C-BT Project water more than a maximum of 3 out of 10 years if the Subcontract contains additional requirements prior to the Subcontractor's usage more than a maximum of 3 out of 10 years. These requirements may include, but are not limited to: (A) restrictions on lawn watering to less than 3 days per week; (B) a Governor-issued drought declaration for the water supplier's geographical region; or (C) a C-BT quota based upon supply limitations rather than anticipated demand. However, when the Allottee is using water for non-irrigation purposes and Subcontracting for irrigation purposes, there will not be a limit on the number of years water can be used for irrigation purposes.
 - 5.6.2 Is the only Subcontract between the Allottee and Subcontractor associated with a specific tract of irrigated land.
 - 5.6.3 Confirms that the Allottee issuing the Subcontract will not rent C-BT Project water to the Subcontractor outside the terms of the proposed Subcontract or through previously entered Subcontracts.

6.0 Enforcement Action

- 6.1 In the event Northern Water learns of a Subcontract for the beneficial use of water yielded by an Allotment Contract that has not been previously exempted or approved by the Board in accordance with Section 3.1 or been exempted within the allowable period of time described in Section 3.2 of this Rule, Northern Water shall deny delivery of C-BT Project water to the Subcontractor or beneficiary of the Subcontract. Further, Northern Water will deny the transfer and delivery of C-BT Project water that would result in the Subcontractor receiving the benefits of the

Subcontract by any other means of transfer, including but not limited to, two-party or multiple-party transfers that may utilize the annual rental or lease program administered by Northern Water.

7.0 Other Considerations Associated with Subcontracts

- 7.1 The C-BT Project water associated with a Subcontract will not be considered a demand or commitment to serve in the calculations to determine the ownership limitations for C-BT Project water for the Allottee.
- 7.2 Use of water by the Subcontractor shall be subject to a Northern Water Rule 11 Charge if applicable.
- 7.3 The Board will not approve transfer of an Allotment Contract or any of the associated AFUs of an Allotment Contract until any and all encumbrances represented by the Subcontract are either released, or the new Allottee accepts the encumbrances represented by the Subcontract.
- 7.4 Northern Water shall notify the Subcontractor of any Allotment Contract Transfer applications received from the Allottee that are connected to the Subcontract. In the event all or a portion of an Allotment Contract associated with a Subcontract is being considered for forfeiture by the Board, Northern Water shall notify the Subcontractor of the hearing and subsequent decision concerning forfeiture, but will not recognize the Subcontract as an encumbrance on the Allotment Contract when disposing of forfeited AFUs.
- 7.5 C-BT Project water seasonally transferred from an Allottee to a Subcontractor (as described by a Subcontract) must use the same administrative procedures as seasonally transferred “rental” water. The transfer request must be accompanied by adequate documentation indicating that the seasonal transfer is associated with the specified Subcontract. The Subcontract will be considered as having been fully operated even if only a portion of the water under a Subcontract is seasonally transferred.

**Appendix A - Simplified Example of A C-BT Ownership Limitation
Calculation For A Hypothetical Water Supplier Who Owns 200 Units and
Has a Subcontract for 100 units 3 in 10 Years**

Water Supplier Information

	Average Yield (AF/YR)	Firm Yield (AF/YR)
Ditch A	100	40
Ditch B	<u>200</u>	<u>100</u>
Total	300	140

- **Current C-BT Unit Ownership is 200 units.**
- **Subcontract for 100 units 3 in 10 years. This results in 30 units available in average years and 100 units in dry years.**
- **Total Water Demand is 500 AF/YR.**

Ownership Limitation Calculation

Row	<u>Average Yield Method</u>	Formula	
A	Total Water Demand X 2		1000
B	Average Yield of Native Supplies		<u>-300</u>
C	Maximum Number of C-BT Units	A - B	700
D	Currently Owned C-BT Units		-200
E	Subcontracted C-BT Units Available on Average		<u>-30</u>
F	Additional C-BT Units	C - D - E	470

Row	<u>Firm Yield Method</u>	Formula	
A	Total Water Demand		500
B	Firm Yield of Native Supplies		<u>-140</u>
C	Maximum Volume of C-BT	A - B	<u>360</u>
D	Maximum Number of C-BT Units	C X 2	720
E	Currently Owned C-BT Units		-200
F	Subcontracted C-BT Units Available During a Dry Year		<u>-100</u>
G	Additional C-BT Units	D - E- F	420

**Additional C-BT Units Available - Use the
Smaller of the Average and Firm Yield Method** **420**

Procedures for the Rule Governing the Subcontracting Of Beneficial Use of Colorado-Big Thompson Project Allotment Contracts

(Effective Date: August 11, 2016)

1.0 Purpose of Procedures and Potential Future Modifications to the Procedures

- 1.1 To provide additional direction for implementing the Rule Governing the Subcontracting of Beneficial Use of Colorado-Big Thompson Project Allotment Contracts (Rule) (Effective Date: August 11, 2016).
- 1.2 To assist Allottees and other water users in understanding the administration of the Rule.
- 1.3 The Board may modify the provisions of the Procedures by a resolution or motion duly adopted at any regular Board meeting.

2.0 Definitions – Terms used in the Procedures shall have the same meaning as in the Rule governing the Subcontracting of Beneficial Use adopted concurrently with the Procedures.

3.0 Allottee Submittal Requirements and Fees

- 3.1 To facilitate the review and, if applicable, the approval of a Subcontract, adequate information and documentation must be submitted to Northern Water. Needed information and documentation include:
 - 3.1.1 Allottee name, address, contact name, contact telephone number, and contact e-mail address.
 - 3.1.2 A copy of the proposed or signed Subcontract. The Allottee may redact financial arrangements and other proprietary information from the Subcontract provided sufficient information is retained for the Board to make a determination as to whether the Subcontract is in compliance with the Rule or is exempt from the Rule.
 - 3.1.3 In accordance with Rule Section 3.2, the Allottee may submit a proposed amended draft of an existing Subcontract entered into prior to the adoption of the Rule that corrects known violations of the existing Subcontract pursuant to Rule requirements.
- 3.2 All Subcontract information and documentation shall be submitted to:

Northern Water
c/o General Manager
220 Water Avenue
Berthoud, CO 80513

3.3 Fee to Review

3.3.1 There will be no fee to review the request for exemption from the Rule.

3.3.2 The fee to review a proposed Subcontract under the Rule shall be two and one half times the fee charged for the transfer of an allotment contract or such future fee as the Board may adopt from time to time.

4.0 Request for Exemption from the Rule

4.1 Northern Water Staff Evaluation

4.1.1 Staff will assure that all necessary information has been submitted in accordance with Section 3 of the Procedures.

4.1.2 Within 30 business days following submittal staff will consider compliance with the Rule criteria. If Northern Water staff believes there is a term(s) in the Subcontract which would bar or delay the Board from a determination that the Subcontract is exempt from the Rule, staff will notify the Allottee of such term(s) and suggest or allow the Allottee to propose an alternative Subcontract term(s) to correct the violation(s). The Allottee will make the final decision as to the Subcontract (original or modified) that is submitted to the Board for consideration for exemption.

4.2. Board Consideration

4.2.1 Not later than 60 days after an initial submittal of an existing (or modified) Subcontract entered into prior to the adoption of the Rule, staff shall provide a recommendation to the Board at a regularly scheduled Board meeting whether the existing Subcontract submitted: 1) should be considered exempt from the Rule; or 2) should not be considered exempt from the Rule.

4.2.2 The Allottee or any other person or entity may make written or verbal comments to the Board concerning why the Subcontract should or should not be considered exempt from the Rule.

4.2.3 Upon review of the information and documentation provided by the Allottee, the Board shall make a determination whether the existing Subcontract is exempt from the Rule. If the Board determines the Subcontract is not exempt and violations may be corrected, it will provide direction concerning what violations of the Rule must be corrected for the Subcontract to be exempt from the Rule.

4.2.4 The Allottee shall have six months from the date of Northern Water's notice as to the exempt status to amend or modify the Subcontract to correct violations identified by the Board and resubmit a request for a Board determination that the Subcontract is exempt.

- 4.2.5 If the Subcontract that the Board exempts under the Rule has not been signed by the parties at the time of approval, the Allottee will provide Northern Water a copy of the fully executed Subcontract with all required signatures.

5.0 Request for Approval of a Subcontract in Accordance with the Rule

5.1 Northern Water Staff Evaluation

- 5.1.1 Staff will assure that the administrative fee has been paid and all necessary information has been submitted in accordance with Section 3 of these Procedures. The proposed Subcontract will not be reviewed until the administrative fee has been paid.
- 5.1.2 Within 30 business days following submittal staff will evaluate compliance with Rule and Procedures requirements. If staff believes there are violations of Rule or Procedures requirements, staff will notify the Allottee of such violations and propose, or allow the Allottee to propose, new draft language to correct the violations. The Allottee will make the final decision concerning Subcontract language that is submitted to the Board for consideration and approval.

5.2 Board Consideration

- 5.2.1 Not later than 60 days after an initial submittal staff will make recommendations to the Board concerning approving or the bases for denying approval of the Subcontract as submitted.
- 5.2.2 The Allottee or any other person or entity may make written or verbal comments to the Board concerning why the Subcontract should be approved or denied.
- 5.2.3 In accordance with the Rule the Board may approve or not approve the Subcontract. If the Board does not approve the Subcontract, it will provide the bases why the Subcontract was not approved. The Allottee may address the Board concerns and resubmit a Subcontract for approval. No additional fees will be assessed for resubmitted, modified proposed Subcontracts.
- 5.2.4 If the Subcontract that the Board approves under the Rule has not been signed by the parties at the time of approval, the Allottee will provide Northern Water a copy of the fully executed Subcontract with all required signatures.

6.0 Future Violation of the Rule and Enforcement Actions

- 6.1 Within 10 days after becoming aware of a violation, or potential violation, of the Rule Northern Water staff will provide notice of such a violation to the Allottee

and Subcontractor via certified mail. The Allottee shall respond to Northern Water in writing within 10 days of receipt of such notification describing the action the Allottee and/or Subcontractor will undertake to correct the violation. If the violation is not corrected, Northern Water staff will recommend to the Board the enforcement of the Rule. Consideration of the violation shall be placed on the agenda of the next regularly scheduled Board meeting or as soon thereafter as can be scheduled with the Allottee and other affected parties, and the Board may take action concerning staff's recommendation at that Board meeting.