

ORDINANCE 2009-26

AN ORDINANCE OF THE CITY OF FRUITA, COLORADO, ACTING BY AND THROUGH ITS SEWER FUND ENTERPRISE, APPROVING A LOAN FROM THE COLORADO WATER RESOURCES AND POWER DEVELOPMENT AUTHORITY TO FINANCE A NEW WASTEWATER TREATMENT FACILITY AND WASTEWATER CAPITAL IMPROVEMENTS; AUTHORIZING THE EXECUTION OF A LOAN AGREEMENT AND A BOND TO DOCUMENT THE LOAN; AND PROVIDING FOR PAYMENT OF THE BOND.

WHEREAS, the City of Fruita, Colorado, is a municipal corporation duly organized and operating as a home rule city under Article XX of the Constitution of the State of Colorado and the Charter of the City (unless otherwise indicated, capitalized terms used in this preamble shall have the meanings set forth in Section 1 of this Ordinance); and

WHEREAS, the City is the owner and operator of a public wastewater system, which system has historically been operated on a self-supporting basis by the City with all revenues of the system accounted for in a separate proprietary fund known as the “Sewer Fund” and such system is considered to be a government-owned business and an “enterprise” of the City; and

WHEREAS, the City is acting hereunder by and through its Sewer Fund Enterprise, which is a water activity enterprise under the provisions of Title 37, Article 45.1, C.R.S.; and

WHEREAS, pursuant to section 8.18 of the Charter, the City Council may, by ordinance, issue securities made payable from, among other things, the operation of the project or capital improvement acquired or bettered with the proceeds; and

WHEREAS, to finance interim estimated costs of the Project, pursuant to Ordinance No. 2009-06 duly passed and adopted on July 21, 2009, the City Council approved the Project and entered into an “Interim Loan Agreement” with the Colorado Water Resources and Power Development Authority, a body corporate and political subdivision of the State; and

WHEREAS, to finance the Project and provide for repayment of draws under the Interim Loan Agreement, the City has previously applied and been approved for a long-term loan from the Colorado Water Resources and Power Development Authority, a body corporate and political subdivision of the State, the provisions of which are set forth in the Loan Agreement and the repayment obligations of which will be evidenced by the issuance of a bond of the City; and

WHEREAS, the City’s repayment obligation under the Loan Agreement will be evidenced by governmental agency bond to be issued by the City to the Authority, which Bond shall constitute a special revenue obligation of the City which is to be paid from all income and revenues earned by the City from or attributable to the ownership of the System less all actual maintenance and operations costs of the System (all as more completely defined as the “Pledged Property” and set forth in Exhibit A to the Loan Agreement) and, after consideration, the City Council has determined that the execution of the Loan Agreement and the issuance of the Bond to the Authority is to the best advantage of the City; and

WHEREAS, voter approval in advance is not required under Article X, Section 20 of the Colorado Constitution or pursuant to section 8.18 of the Charter for the execution of the Loan Agreement or the issuance of the Bond; and

WHEREAS, the City has outstanding loans which are secured by the Pledged Property (as defined in the Loan Agreement) and which generally consist of (i) a loan agreement with the Authority, dated April 27, 1995, in the original principal amount of \$224,000 and (ii) an Energy/Mineral Impact Assistance Loan from the State of Colorado, made pursuant to a contract dated May 22, 2002, in the original principal amount of \$123,000; and

WHEREAS, the form of the Loan Agreement and the Bond, have been presented to the City and made available to the City Council; and

WHEREAS, as provided in the Laws, which include but are not limited to Title 11, Article 57, Part 2, C.R.S., by this Ordinance the City authorizes the execution of the Loan Agreement and the Bond, and delegates to the Mayor of the City (the “Mayor”), for a period not to exceed ninety days, the authority to approve, among other things, the principal amount of the Bond; therefore,

BE IT HEREBY ORDAINED BY THE CITY COUNCIL OF THE CITY OF FRUITA, COLORADO:

Section 1. Definitions. The following terms shall have the following meanings as used in this Ordinance:

“*Authority*” means the Colorado Water Resources and Power Development Authority.

“*Bond*” means the governmental agency Bond to be issued by the City to the Authority pursuant to the Loan Agreement, the form of which is set forth in Exhibit D to the Loan Agreement.

“*Charter*” means the home rule Charter of the City.

“*City*” means the City of Fruita, Colorado, acting by and through its Sewer Fund Enterprise.

“*City Council*” means the City Council of the City, acting as the governing body of the Sewer Fund Enterprise of the City.

“*C.R.S.*” means the Colorado Revised Statutes, as amended and supplemented as of the date hereof.

“*Financing Documents*” means the Loan Agreement and the Bond.

“*Laws*” means the Charter, Title 37, Article 45.1, Part 1, C.R.S. and Title 11, Article 57, Part 2, C.R.S. and all other laws of the State establishing the power of the City to complete the financing contemplated by this Ordinance.

“*Loan Agreement*” means that certain Loan Agreement currently dated November 1, 2009 between the City and the Authority pursuant to which the Authority is to loan the proceeds of the Authority’s Clean Water Revenue Bonds, 2009 Series A, sold by competitive public sale, and to use moneys on deposit in the Authority’s Water Pollution Control Revolving Fund to assist the City in the financing of the Project Costs.

"*Prime Rate*" means the prevailing commercial interest rate announced by the Trustee (as defined in the Loan Agreement) from time to time as its prime lending rate.

“*Project*” means the construction of a new approximately 2.33 MGD wastewater treatment facility, approximately two miles of interceptor sewer lines, a new lift station, and other system appurtenances as set forth in the Loan Agreement and as the Project may be later modified by determination of the City Council.

“*Project Costs*” means the City’s costs properly attributable to the Project, or any parts thereof, and permitted by the provisions of the Laws.

“*Sewer Fund Enterprise*” means the government owned business of the City for wastewater services which is authorized to issue its own revenue bonds and which receives under 10% of annual revenue in grants from all Colorado state and local governments combined.

“*State*” means the State of Colorado.

“*System*” means the sewer system of the City, as more particularly described in the Loan Agreement.

Section 2. Approval of Loan Agreement and Authorization of Bond. Pursuant to and in accordance with the State Constitution and the Laws, the Bond shall be issued by the City acting by and through its Sewer Fund Enterprise. The form of the Loan Agreement setting forth the terms, conditions and details of the Bond and the procedures relating thereto, is incorporated herein by reference and is hereby approved; all City officials and employees are hereby directed to take such actions as are necessary and appropriate to fulfill the obligations of the City under the Financing Documents. The City shall enter into the Loan Agreement and deliver the Bond in substantially the form presented to the City at or prior to this meeting of the City Council with only such changes as are not inconsistent herewith; provided that such documents may be completed, corrected, or revised as deemed necessary by the parties thereto in order to carry out the purposes of this Ordinance. The accomplishment of the Project and City Council hereby reaffirms its authorization, approval and ordering of the payment of Project Costs.

Section 3. Bond Details. The Bond shall be in an aggregate principal amount not to exceed \$28,000,000, shall mature within thirty-years from their date of issuance, and shall bear at a maximum net effective interest rate not to exceed six percent (6.0%) per annum; provided that the Bond may also provide for a penalty rate in an amount equal to the greater of twelve percent (12%) per annum or the Prime Rate plus one half of one percent per annum on late payments. Pursuant to the delegation of authority permitted pursuant to the Laws, the Mayor (or in the Mayor’s absence the Mayor Pro Tem) is hereby delegated for a period of ninety days following the date of adoption of this Ordinance the authority to determine, within the parameters established pursuant to this Ordinance, the following: (i) the rate of interest on the

Bond, (ii) the aggregate principal amount and annual maturing principal amounts for the Bond, (iii) the dates on which principal and interest will be paid on the Bond..

Section 4. Pledge for Payment of the Bond. The principal of and interest on the Bond shall be payable solely from the Pledged Property (which term consists of System Net Revenues and is specifically defined in the Loan Agreement). The City irrevocably pledges the Pledged Property for the payment of the Bond and the amounts due under the Loan Agreement. The Authority may not look to any general or other fund of the City for the payment of the principal of or interest on the Bond, except the funds and accounts pledged thereto pursuant to authority of this Ordinance, and the Bond shall not constitute a debt or an indebtedness of the City within the meaning of any constitutional or statutory provision or limitation; nor shall they be considered or held to be a general obligation of the City.

Section 5. Maintenance of Enterprise Status. The City Council hereby determines that the Sewer Fund Enterprise is currently an enterprise within the meaning of Article X, Section 20 of the Colorado Constitution and hereby reaffirms the establishment of the System as a “water activity enterprise” within the meaning of Title 37, Article 45.1, C.R.S. The City has and will continue to maintain the System as an “enterprise” within the meaning of Article X, Section 20 of the Colorado Constitution; provided, however, after the current calendar year the City may disqualify the System as an “enterprise” in any year in which said disqualification does not materially, adversely affect the enforceability of the covenants made in the Financing Documents. In the event that the System is disqualified as an enterprise and the enforceability of the covenants made by the City in the Financing Documents are materially, adversely affected, the City covenants to (i) immediately take all actions necessary to qualify the System as an enterprise within the meaning of Article X, Section 20 of the Colorado Constitution and (ii) permit the enforcement of the covenants made in the Financing Documents.

Section 6. Approval of Miscellaneous Documents. The Mayor (or in the Mayor’s absence the Mayor Pro Tem) is hereby authorized and directed to execute the Loan Agreement and all documents and certificates necessary or desirable to effectuate the issuance of the Bond and the financing contemplated by this Ordinance.

Section 7. Amendment of Ordinance. This Ordinance may be amended only with the prior written consent of the Authority.

Section 8. Limitation of Actions. The City Council elects to apply all of the provisions of Title 11, Article 57, Part 2, C.R.S. to the execution of the Loan Agreement and to the issuance of the Bond. Pursuant to Section 8.18 of the Charter and in accordance with Section 11-57-212, Colorado Revised Statutes, no action or proceeding concerning the issuance of the Bonds shall be maintained against the City unless commenced within 30 days after the date of passage of this Ordinance.

Section 9. Ratification of Prior Actions. All actions heretofore taken (not inconsistent with the provisions of this Ordinance) by the City Council or by the officers and employees of the City directed toward the issuance of the Bond for the purposes herein set forth are hereby ratified, approved and confirmed.

Section 10. Headings. The headings to the various sections and paragraphs to this Ordinance have been inserted solely for the convenience of the reader, are not a part of this Ordinance, and shall not be used in any manner to interpret this Ordinance.

Section 11. Ordinance Irrepealable. After any Bond has been issued, this Ordinance shall constitute a contract between the Authority and the City, and shall be and remain irrepealable until the Bond and the interest accruing thereon shall have been fully paid, satisfied, and discharged, as herein provided.

Section 12. Severability. It is hereby expressly declared that all provisions hereof and their application are intended to be and are severable. In order to implement such intent, if any provision hereof or the application thereof is determined by a court or administrative body to be invalid or unenforceable, in whole or in part, such determination shall not affect, impair or invalidate any other provision hereof or the application of the provision in question to any other situation; and if any provision hereof or the application thereof is determined by a court or administrative body to be valid or enforceable only if its application is limited, its application shall be limited as required to most fully implement its purpose.

Section 13. Repealer. All orders, bylaws, resolutions and ordinances of the City, or parts thereof, inconsistent or in conflict with this Ordinance are hereby repealed to the extent only of such inconsistency or conflict.

**PASSED AND ADOPTED BY THE FRUITA CITY COUNCIL
THIS 3RD DAY OF NOVEMBER, 2009.**

ATTEST:

CITY OF FRUITA, COLORADO

City Clerk

H. Kenneth Henry, Mayor