

ORIGINAL

**AGREEMENT BETWEEN
ORANGE COUNTY WATER DISTRICT AND
CITY OF SAN BERNARDINO CONCERNING WATER RIGHTS**

THIS AGREEMENT, dated as of September 1, 2004 is by and between ORANGE COUNTY WATER DISTRICT ("OCWD") and CITY OF SAN BERNARDINO, by and through its Board of Water Commissioners ("CITY") (collectively, the "Parties").

EXPLANATORY RECITALS

- A. In 1969, the Orange County Superior Court entered a stipulated judgment in *Orange County Water District v. City of Chino, et al.*, Orange County Superior Court No. 117628 (the "1969 Judgment") declaring rights in the Santa Ana River Watershed (the "Watershed") as between the water users located in the area shown on Exhibit A to the Judgment which lies upstream from Prado Dam (the "Upper Area") and the water users located in the area shown on Exhibit A to the Judgment which lies downstream from Prado Dam (the "Lower Area"). OCWD and the City were parties in that case and to certain stipulations that led to the 1969 Judgment.
- B. Pursuant to the 1969 Judgment and the stipulations leading to it, "water users and other entities in Lower Area have rights, as against all Upper Area claimants, to receive an average annual supply of 42,000 acre feet of Base Flow at Prado, together with the right to all Storm Flow reaching Prado Reservoir. Water users and other entities in Upper Area have rights in the aggregate, as against all Lower Area claimants, to divert, pump, extract, conserve, store and use all surface and ground water supplies originating within Upper Area without interference or restraint by Lower Area claimants, so long as Lower Area receives the water to which it is entitled under this Judgment and there is compliance with all of its provisions."
- C. In addition, pursuant to the 1969 Judgment and the stipulations leading to it, "OCWD and the Lower Area Users are enjoined and restrained from pumping, producing and exporting or directly or indirectly causing water to flow from Upper to Lower Area, except as to salvage of evapo-transpiration losses The acquisition by Upper Districts or other Upper Area entities of Lower Area water rights shall in no way affect or reduce Lower Area's entitlement; and the acquisition of Upper Area water rights by OCWD or other Lower Area entities shall be deemed to be included within the aggregate entitlement of Lower Area and shall not increase said entitlement."
- D. Further, pursuant to the 1969 Judgment and the stipulations leading to it, "[i]nsofar as Lower Area claimants are concerned, Upper Area water users and other entities may engage in unlimited water conservation activities, including spreading, impounding and other methods, in the area above Prado Reservoir, so long as Lower Area receives the water to which it is entitled under the Judgment and there is compliance with all of its provisions. Lower Area water users and other entities may make full conservation use of Prado Dam and reservoir, subject only to flood control use."

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RECORD NO. 5263
OCWD DOC. RCS-04-9-1

- E. Further pursuant to the Stipulation for Judgment filed concurrently with the 1969 Judgment, "Water quality requirements, objectives and policy are a function of the Santa Ana River Basin Regional Water Quality Control Board and such other governmental agencies now in existence or as may be hereafter created or vested with such regulatory power. The provisions in the Judgment relating to quality are not to be construed or deemed to affect, or in any way detract from the right of any party hereto to urge such Board or other appropriate agency to take action designed to change or enforce water quality requirements, objectives and policy."

"Any of the undersigned defendants who participate directly in the management or control of sewage or other water treatment facilities agree that any water or effluent deposited by them into the Santa Ana River or its stream bed will not be of a lesser quality than will meet the present requirements of Santa Ana River Basin Regional Water Quality Control Board."

- F. On September 3, 1999, OCWD petitioned the State Water Resources Control Board ("SWRCB") to modify the Declaration of Fully Appropriated Stream Status to allow the SWRCB to accept a water right application, later numbered Application 31174, that had been submitted previously by OCWD to the SWRCB (the "OCWD Application"). After evidentiary hearings on September 21, 2000, the SWRCB issued Order WR 2000-12, *In the Matter of the Petitions to Revise Declaration of Fully Appropriated Streams to Allow Processing of Specified Applications to Appropriate Water From the Santa Ana River*. That Order amended the Declaration of Fully Appropriated Streams, as adopted by SWRCB Order WR 98-08, to allow for processing of the OCWD application and other applications. On January 11, 2002, the SWRCB thereupon publicly noticed the OCWD Application. The City protested the OCWD Application alleging inter alia that in the application OCWD sought water rights in contravention of the 1969 Judgment. On August 9, 2002, the SWRCB accepted the City's protest and on October 18, 2002 OCWD responded to the City's protest. OCWD contends and the City disputes that OCWD's application is consistent with the rights and obligations declared under the 1969 Judgment.
- G. In furtherance of the OCWD Application, OCWD has drafted an Environmental Impact Report ("OCWD's EIR") and has made such draft available for City's review.
- H. The City and the City of Colton formed a joint powers authority to own and operate a facility known as the Rapid Infiltration and Extraction ("RIX") Facility. The City represents that it has spent in excess of \$37 million for engineering, construction management, and the actual construction of the RIX facility. Additionally, the City represents that it has spent approximately \$3 million on land acquisition and on post-construction improvements. The RIX Facility has been operating since May of 1996. The RIX Facility is a tertiary treatment facility that discharges to the Santa Ana River. The City represents that it currently sends approximately 26 million gallons per day (mgd) of wastewater to the RIX Facility from its secondary treatment plant.
- I. The City desires to market the flows from its RIX Facility (the "RIX Sales Program"). The City has prepared a Draft Program Environmental Impact Report concerning the RIX

Sales Program ("City's DEIR"). The City is preparing a Final Program Environmental Impact Report in order to market up to 16,000 acre feet per year (AFY) of water under the RIX Sales Program ("City's FEIR"). The City's DEIR indicates, and its Board of Water Commissioners and its management staff believe, that its RIX Sales Program, including sale, diversion, transportation and use of RIX water will not have any material, adverse impacts on the quality of water in the Santa Ana River watershed and will not cause violations of the water quality objectives and requirements of the California Regional Water Quality Control Board, Santa Ana Region ("RWQCB"), or of the Water Quality Control Plan, Santa Ana River Basin. OCWD was among the parties that commented on the DEIR. OCWD contends and City disputes that insofar as the RIX Sales Program may include the export of water native to the Watershed for use outside of the Watershed, the RIX Sales Program would be in violation of law and OCWD's rights. This disagreement over the export of native water is called the "Export Dispute".

- J. The City anticipates that it may make applications to other agencies prior to embarking upon or in the course of its RIX Sales Program.
- K. Separate and aside from the RIX facility, the City operates the Newmark Groundwater Remediation Superfund Project ("Superfund Project"). The Superfund Project consists of several inhibitor wells and treatment facilities designed to capture and treat volatile organic compounds ("VOCs") in the Bunker Hill Basin. An expansion of the Superfund Project is expected to be constructed by 2005, at which time the City will operate the Superfund Project facilities pursuant to an agreement with the United States Environmental Protection Agency ("USEPA") and the United States. The City generally uses the treated water in its water system, to meet demand within the City. The City represents that the Superfund Project requires continuous pumping to capture and treat the VOCs and, as a result, during certain conditions, the City could be required by USEPA and/or the California Department of Toxic Substances Control ("DTSC") (the lead oversight agency) to produce more water from the Superfund Project than it can use internally ("Excess Water"). The City anticipates that these specific conditions would be of short duration, during periods of wet weather or low demand, and solely for the purpose of controlling contaminated groundwater, and that the amount of water that would be "excess" to be sold to markets outside the Watershed would be a maximum of 10,000 AFY. In such event, the City may wish to sell this Excess Water.
- L. The Parties have met and discussed their claims of right to divert, extract, use, conserve, store, or sell waters, including reclaimed waters. The Parties seek by this Agreement to resolve the City's protest to the OCWD Application and OCWD's concerns about the RIX Sales Program, with the exception of the Export Dispute, which is excluded from this Agreement, except for the limited terms and unique circumstances specifically set forth herein.
- M. The Parties agree that conjunctive use of water and utilization of reclaimed water to the maximum extent feasible within the SAR watershed are important measures to maximize the water resources of the People of California.

AGREEMENTS

NOW THEREFORE the Parties agree as follows:

1. AFFIRMATION OF THE 1969 JUDGMENT

The Parties each acknowledge and affirm their respective rights and obligations, and those of the other Party, as set forth in the 1969 Judgment. Nothing in this Agreement is intended to diminish or abridge those rights and obligations.

OCWD also represents that nothing in the OCWD Application is intended to diminish rights of the Upper Area parties as they are set forth in the 1969 Judgment and OCWD agrees that it will not seek to compel City to continue to release flows in excess of those required under the 1969 Judgment. OCWD will ask the SWRCB to incorporate the entire 1969 Judgment into any permit/license to divert water resulting from its application. OCWD agrees that it will comply with all applicable provisions of the 1969 Judgment and that specifically as to the City it will not in any proceeding assert or argue status as a "legal user" of any water in excess of that to which it is entitled under the 1969 Judgment or to which the City is entitled under the 1969 Judgment.

The City similarly represents that nothing in its RIX Sales Program or Superfund Project is intended to diminish rights of the Lower Area parties as they are set forth in the 1969 Judgment. The City agrees that it will comply with all applicable provisions of the 1969 Judgment.

2. DISMISSAL OF CITY'S PROTEST

Within 21 days after the effective date of this Agreement, the City will notify the SWRCB that the City withdraws its protest to the OCWD Application, subject to the request that the SWRCB's final order on the OCWD Application and any permit or license issued pursuant thereto incorporate the 1969 Judgment and this Agreement.

3. FEIR

As long as the City is in material compliance with this agreement, OCWD will not bring, or join in, or assist in any court or administrative action to challenge the City's FEIR, subject to the express condition that City will not contend in any forum, now or in the future, that OCWD's forbearance on the FEIR operates to bar, preclude or otherwise undermine OCWD's position on the Export Dispute in any proceedings. Nothing herein prevents OCWD from challenging future environmental documentation or future projects. The parties will timely meet and confer in good faith with respect to any such challenges.

4. OCWD'S EIR

As long as OCWD is in material compliance with this Agreement, City will not bring or join in or assist in any court or administrative action to challenge OCWD's EIR. Within ten (10) days after the effective date of this Agreement, the City will rescind and withdraw its June/July 2004 letter(s) commenting upon OCWD's EIR, and will not make any other comments on OCWD's EIRs, draft or final, for OCWD's Application.

5. RIX SALES PROGRAM

As long as: (1) water exported under the RIX Sales Program is limited to the export from the Watershed of no more than 16,000 AFY of water, and (2) also is limited to water imported and released into the Watershed by or for the City, or as otherwise provided herein, and (3) the RIX Sales Program does not adversely affect water quality in the SAR, and (4) the City is in material compliance with this Agreement, OCWD does not object to the City's sale of RIX water, and will not bring, join in, or assist in any court or administrative action to challenge the RIX Sales Program or any sale of reclaimed water thereunder, or any permit, license or approval incident thereto. Further, and also subject to those conditions, OCWD will not assert, directly or indirectly, in any court or administrative proceeding, that the City's RIX Sales Program or any sale or use of reclaimed water thereunder, or any related permit, license or approval directly related to such RIX Sales Program transaction, adversely affects OCWD in any manner, as a "legal user" of water. This Agreement does not preclude OCWD from challenging any attempt by the City to use the storage capacity of Prado Dam, or of the Orange County groundwater basin, or any OCWD facilities or property in such a sale or otherwise. By this agreement as to the RIX Sales Program, both parties expressly acknowledge and agree that OCWD is not agreeing or conceding that export from the Watershed is lawful or appropriate, and both parties further agree that this Agreement shall not be used in any proceeding to support any such argument against OCWD.

6. NO CHALLENGE TO CITY'S CONSERVATION EFFORTS.

Subject to and without waiving OCWD's rights to protect water quality as set forth herein and in the Stipulations mentioned in the Recitals hereto, OCWD will not object to or bring, join in, or assist in any court or administrative action to challenge the City on projects to conserve and use recycled water within the Watershed.

7. SUPERFUND PROJECT EXCESS WATER.

Given the remedial nature of the Superfund Project, for the next ten (10) years, OCWD will not challenge the City's export of Excess Water produced by the Superfund Project outside of the Watershed to the extent that the City is producing Excess Water at the direction of the Superfund Project's Lead Oversight Agency to control the flow of contaminated groundwater, provided that such export is of short duration, i.e. for no more than a total of sixty (60) days in any one calendar year and is restricted to periods of wet weather or low demand, and does not exceed 10,000 AFY. Prior to any such export, the parties will meet and confer concerning the amount of export and any objections by OCWD thereto. OCWD reserves the right to challenge the export of Excess Water on the basis that the Excess Water was produced for a purpose other than to control the flow of contaminated groundwater or does not meet the other terms and conditions in this Agreement. If, after the ten (10) year period provided herein, the City wishes to continue the export of Excess Water, the City and OCWD shall meet and confer in a good faith attempt to continue such export and resolve any issues relating thereto. By this agreement as to the Superfund Project, both parties expressly acknowledge and agree that OCWD is not agreeing or conceding that export from the Watershed is lawful or appropriate, and both parties further agree that this Agreement shall not be used in any proceeding to support any such argument against OCWD.

8. ACCOUNTING

The City expects to provide reports to USEPA, DTSC and the Board of Directors of the City of San Bernardino Municipal Water Department, which will describe sales of RIX water, how much water was imported in the City's name, the status of the Superfund Project, and the volume of production and the disposition of Superfund Project Water. The City also will provide to the RWQCB reports of sales of RIX water, pursuant to a master reclamation permit. Purchase of State Water Project water by the City will be documented by delivery information from San Bernardino Valley Municipal Water District. The City believes that these records, reports and documents will enable OCWD to verify City's compliance with this Agreement, and City will supply such records, reports and documents to OCWD on an ongoing basis as they become available to City. The City will transmit an annual letter to OCWD by December 31 of each year, confirming that all applicable reports mentioned in this Paragraph have been transmitted to OCWD.

9. SPECIFIC ENFORCEMENT

The Parties agree that violation of the provisions of this Agreement cannot be adequately compensable in damages, and that the Parties lack an adequate remedy at law, and therefore agree that in any action to enforce this Agreement, this Agreement may be specifically enforced by any court of competent jurisdiction and any violation or threatened violation thereof may be enjoined.

The undersigned covenant and represent that they are duly and properly authorized to execute this Agreement and thereby bind the Party for whom they sign.

ORANGE COUNTY WATER DISTRICT

CITY OF SAN BERNARDINO
MUNICIPAL WATER DEPARTMENT

By: Denis Bilodeau
Denis Bilodeau, President

By: B. Warren Cocke
B. Warren Cocke, President

Date: 9-2-04

Date: 9/14/04

By: Virginia Grebbien
Virginia Grebbien, General Manager

By: Stacey R. Aldstadt
Stacey R. Aldstadt, Secretary

Date: _____

Date: 9-14-04

By: Joe Kuperberg
Joe Kuperberg, General Counsel

By: Bernard C. Kersey
Bernard C. Kersey, General Manager

Date: 9/1/04

Date: 9-15-04