

## Memorandum

To: Honorable Mayor Shetter and members of the Burleson City Council

From: Peter Krause, Director of Parks and Recreation

Date: November 2, 2009

Subject: Approval of Standard Form Contract and Volume Rate for Sale of Non-Potable Water from Bailey Lake for use in Gas Well Drilling Processes.

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### **Council Action Requested:**

Council is requested to:

1. Approve the attached standard form contract to be utilized in the sale of non-potable water to various gas well drilling companies for use in the gas well drilling process; and
2. Adopt a rate equal to \$8.92 per 1,000 gallons of water taken plus a penalty fee of 10% for any additional water usage beyond the amount stipulated by the contract.
3. Authorize the City Manager (or designee) to execute the agreement as required.

### **Background Information:**

On at least 13 previous occasions, the City Council has authorized agreements with various gas well drilling concerns to sell non-potable water from Bailey Lake for use in their gas drilling operations. Often, these routine requests are made with little advanced notice. Because past requests have required Council approval, it is often difficult to have the request written as an agenda item and posted on the agenda. Given the twice-per-month Council meeting schedule, some requests may take more than three (3) weeks to process.

To permit a more timely response to these routine requests, staff requests the City Council approve the attached standard form contract for use in these sales as well as a rate to charge for use of this water.

The standard form contract has been approved by the Council on numerous occasions. The contract includes the following conditions of sale to which the driller/operator must agree:

- To provide to the City at no charge an impact statement describing the amount of water required, its impact to the surface elevation of the Lake, and further agrees to provide the City with a pumping schedule (i.e. start/stop date, hours of operation).
- Provide the City with a plan for pipe stabilization for any creek crossing and work with the for any City road crossings.
- To refill Bailey Lake if the lake does not recover its normal water level within thirty (30) days from cessation of pumping. Should the refill process be necessary, to be responsible for any electrical costs the City incurs during this refill process and agree to indemnify the City's pipes, pumps and appurtenances against any damage or wear that may occur and pay for any repairs necessary to restore the City's system back to working order for a period of six months from the date of the contract's complete execution.
- To complete all operations by a determined date.
- To restore the lake's pump site, surrounding areas, and restoration of the lake's water level to their original conditions or to the City's satisfaction within 30 days from the date the last amount of water is withdrawn.
- To provide, at no cost to the City, a pre and post water quality test.
- To meter all water that is removed from Bailey Lake and to supply that meter reading to the City for each 48 hour period that the pumps are in operation.
- To prevent any "backflow" of water into the lake through its pipes, pumps and appurtenances and, should "backflow" occur, be responsible for any cost related to returning the lake's water quality to its pre use condition.

The driller/operator must also meet the City's insurance requirements and indemnification requirements.

**Board/Citizen Input:**

N/A

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**Financial Considerations:**

As has been done with all previous such sales, all futures revenues from any sales will be deposited equally between the Park Improvement Fund (Account 353 0000 383 9000) and Hidden Creek Golf Course (Account 402 0000 383 9000).

**Attachments:**

Standard Form Contract

**Staff Contact:**

**Peter Krause, Director of Parks and Recreation**

**(817)295-8168**

**[pkrause@burlesontx.com](mailto:pkrause@burlesontx.com)**

**Dave White, Director of Golf**

**(817)447-4444**

**[dwhite@burlesontx.com](mailto:dwhite@burlesontx.com)**

THE STATE OF TEXAS §

Water Purchase Agreement

COUNTY OF JOHNSON §

THIS CONTRACT is made and entered into this \_\_\_\_\_ day of \_\_\_\_\_, 2\_\_\_\_\_, by and between the CITY OF BURLESON, Texas, a municipal corporation, hereinafter called "City," acting by and through its duly authorized official and \_\_\_\_\_, hereinafter referred to as "Driller/Operator" whose address is:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**I. Conditions**

Driller/Operator wishes the right to purchase non potable water from the City-owned property known as Bailey Lake (Abstract 376, Tract 2C, 2F J W Henderson Survey) for the purposes of drilling and fracturing a gas well. This agreement is specific to the \_\_\_\_\_ gas wells. No additional wells may be assigned to this agreement. This sale is contingent upon the availability of water for sale, said availability determined solely by the City. In exchange for these rights, Driller/Operator agrees to the following conditions:

A. To provide to the City at no charge an impact statement describing the amount of water Driller/Operator requires and that impact to the surface elevation of the Lake. Driller/Operator further agrees to provide the City with a pumping schedule (i.e. start/stop date, hours of operation).

B. Driller/Operator further agrees to provide the City with a plan for pipe stabilization for any creek crossing. Driller/Operator will work in conjunction with City for any City road crossings.

C. Driller/Operator agrees to refill Bailey Lake if the lake does not recover its normal water level within thirty (30) days from cessation of pumping. Should the refill process be necessary, **Driller/Operator shall be responsible for any electrical costs the City incurs during this refill process and agrees to indemnify and pay the City for any damage or wear to the City's pipes, pumps and appurtenances that may occur during the refill process and to pay the City for any repairs necessary to restore the City's system back to working order for a period of six months from the date of completion of the Operations Termination Date.**

- D. All pumping operations must be completed before \_\_\_\_\_ (the "Operations Termination Date").
- E. To restore the pump site and areas surrounding the pump site, as well as Bailey Lake's water level, all to their original conditions or to the City's satisfaction no later than 30 days from the Operations Termination Date.
- F. To provide at no cost to the City, a pre and post water quality test.
- G. To meter all water that is removed from Bailey Lake using either a meter rented from the City or a meter approved by the City and to supply that meter reading to the City for each 48 hour period that the pumps are in operation.
- I. Driller/Operator shall prevent any "backflow" of water into the lake through its pipes, pumps and appurtenances. If any such "backflow" occurs, Driller/Operator shall be responsible for any cost related to returning the lake's water quality to its pre use condition.
- J. Driller/Operator agrees to withdraw from Bailey Lake no more than \_\_\_\_\_ gallons (\_\_\_\_\_barrels) of water (the "Maximum Quantity"). Driller/Operator further agrees to compensate the City in the amount of \$8.92 per 1,000 gallons taken from Bailey Lake and to pay an additional 10% (\$9.81 per 1,000 gallons) for any additional water usage in excess of the maximum quantity. Payment shall be made to the City by Driller/Operator within ten (10) days following the end of the month in which the water is withdrawn. Late payments shall bear interest at the highest legal rate.

## II. Insurance

- A. Driller/Operator shall, at Driller/Operator' own expense, purchase, maintain and keep in force during the term of this contract such insurance as set forth below. Driller/Operator shall not commence work under this contract until Driller/Operator has obtained all the insurance required under this contract and such insurance has been approved by City, nor shall Driller/Operator allow any subcontractor to commence work on his or her own subcontract until all similar insurance of the subcontractor has been obtained and approved. All insurance policies provided under this contract shall be written on an "occurrence" basis, except for professional liability. The insurance requirements shall remain in effect throughout the term of this contract. Professional liability insurance shall also be maintained for one year after completion of the project.
  - 1. Worker's Compensation as required by law, Employers Liability Insurance of not less than \$100,000.00 for each accident, \$100,000.00 disease-each employee, \$500,000.00 disease-policy limit.
  - 2. Commercial General Liability Insurance, including Independent Contractor's Liability, Completed Operations and Contractual Liability,

covering but not limited to the indemnification provisions of this contract, fully insuring Driller/Operator' liability for injury to or death of employees of City and third parties, extended to include personal injury liability coverage, and for damage to property of third parties, with a combined bodily injury and property damage minimum limit of \$1,000,000.00 per occurrence.

3. Comprehensive Automobile and Truck Liability Insurance, covering owned, hired and non-owned vehicles, with a minimum combined bodily injury and property damage limit of \$1,000,000.00 per occurrence.
4. Professional Liability Insurance: Standard comprehensive professional liability coverage in an amount of at least \$1,000,000.00 aggregate per year, covering the services provided under this contract, including contractual liability.

B. Each insurance policy to be furnished by Driller/Operator shall include the following conditions by endorsement to the policy:

1. Except for Worker's Compensation and professional liability insurance, the policy shall name City as an additional insured as to all applicable coverage;
2. Each policy will require that thirty (30) days prior to the expiration, cancellation, non-renewal or any material change in coverage, a notice thereof shall be given to City by certified mail to: Director of Parks and Recreation, City of Burleson, 141 West Renfro Street, Burleson, Texas 76028-4261. If the policy is canceled for nonpayment of premium, only ten (10) days advance written notice to City is required;
3. The term "Owner" or "City" shall include all authorities, boards, bureaus, commissions, divisions, departments and offices of City and the individual members, employees and agents thereof in their official capacities, and/or while acting on behalf of City.
4. The policy phrase "other insurance" shall not apply to City where City is an additional insured on the policy; and
5. All provisions of the contract concerning liability, duty and standards of care, together with the indemnification provision, shall be underwritten by contractual liability coverage sufficient to include such obligations within applicable policies.

C. Concerning insurance to be furnished by Driller/Operator, it is a condition precedent to acceptability thereof that:

1. All policies are to be written through companies duly approved to transact that class of insurance in the State of Texas; and
2. Insurance is to be placed with carriers with a Best rating of A:VII, or as otherwise acceptable to City.

D. Driller/Operator agrees to the following:

1. Except for professional liability, Driller/Operator hereby waives subrogation rights for loss or damage to the extent same are covered by insurance. Insurers shall have no right of recovery or subrogation against City, it being the intention that the insurance policies shall protect all parties to the contract and be primary coverage for all losses covered by the policies.
2. Companies issuing the insurance policies and Driller/Operator shall have no recourse against City for payment of any premiums or assessments for any deductible, as all such premiums and deductibles are the sole responsibility and risk of Driller/Operator.
3. Approval, disapproval or failure to act by City regarding any insurance supplied by Driller/Operator (or any subcontractors) shall not relieve Driller/Operator of full responsibility or liability for damages and accidents as set forth in the contract documents. Neither shall the insolvency or denial of liability by the insurance company exonerate Driller/Operator from liability.
4. Driller/Operator shall provide Certificates of Insurance completed on the ACORD form only and endorsements effecting coverage required by this section to City to by forwarding to: Department of Parks and Recreation, City of Burleson, ATTN: Peter Krause, 141 West Renfro, Burleson, Texas 76028-4261.
5. Any of the insurance policies required under this section may be written in combination with any of the others, where legally permitted, but none of the specified limits may be lowered thereby.

### **III. Successors and Assigns**

Neither City nor Driller/Operator shall assign or transfer its interest herein without the prior written consent of the other.

### **IV. Driller/Operator' Liability**

Acceptance of the final plans by City shall not constitute nor be deemed a release of the responsibility and liability of Driller/Operator, its employees, associates, agents or consultants for the accuracy and competency of their designs, working

drawings, specifications or other documents and work; nor shall such acceptance be deemed an assumption of responsibility or liability by City for any defect in the designs, working drawings, specifications, or other documents and work prepared by said Driller/Operator, its employees, subcontractor, agents and consultants.

#### **V. Indemnification**

**Driller/Operator shall indemnify and hold City and all of its officers, agents, servants, and employees harmless from any loss, damage, liability or expenses, on account of damage to property or injury, including death, to any and all persons, including but not limited to officers, agents, or employees of City or Driller/Operator and all other persons performing any act pursuant to this contract, which may arise out of any act, error, or omission by Driller/Operator, its officers, agents, employees, invitees, or other persons for whom it is legally liable, with regard to the performance of this contract; Driller/Operator shall defend at its own expense any suits or other proceedings brought against City or its officers, agents, servants, employees all expenses and satisfy all judgments which may be incurred by or rendered against City, its officers, agents, servants or employees or any of them, in connection with the foregoing described act, error, or omission.**

#### **VI. Severability**

If any of the terms, sections, subsections, sentences, clauses, phrases, provisions, covenants, or conditions of this contract are for any reason held to be invalid, void or unenforceable, the remainder of the terms, sections, subsections, sentences, clauses, phrases, provisions, covenants, or conditions of this contract shall remain in full force and effect and shall in no way be affected, impaired or invalidated.

#### **VII. Independent Contractor**

Driller/Operator covenants and agrees that he/she is an independent contractor, and not an officer, agent, servant or employee of City; that Driller/Operator shall have exclusive control of and exclusive right to control the details of the work performed hereunder, and all persons performing same, and shall be liable for the acts and omissions of its officers, agents, employees, contractors, subcontractors and consultants; that the doctrine of respondeat superior shall not apply as between City and Driller/Operator, its officers, agents, employees, contractors, subcontractors and consultants, and nothing herein shall be construed as creating a partnership or joint enterprise between City and Driller/Operator.

#### **VIII. Disclosure**

By signing this contract, Driller/Operator acknowledges to City that he/she has made a full disclosure in writing of any existing conflicts of interest or potential conflicts of interest, including personal financial interests, direct or indirect, in property abutting the proposed project and business relationships with abutting property owners.

Driller/Operator further agrees that he shall make disclosure in writing of any conflicts of interests which develop subsequent to the signing of this contract and prior to final payment under the contract.

### **IX. Venue**

The parties to this contract agree and covenant that this contract shall be enforceable in Burleson, Texas; and that if legal action is necessary to enforce this contract, exclusive venue shall lie in Johnson County, Texas.

### **X. Entire Agreement**

This contract embodies the complete agreement of the parties hereto, superseding all oral or written previous and contemporary agreements between the parties relating to matters herein; and except as otherwise provided herein, cannot be modified without written agreement of the parties.

### **XI. Applicable Law**

This contract is entered into subject to the Charter and ordinances of City, as they may be amended from time to time, and is subject to and is to be construed, governed, and enforced under all applicable State of Texas and federal laws. Situs of this contract is agreed to be Johnson County, Texas, for all purposes, including performance and execution.

### **XII. Headings**

The headings of this contract are for the convenience of reference only and shall not affect in any manner any of the terms and conditions hereof.

### **XIII. Remedies**

No right or remedy granted herein or reserved to the parties is exclusive of any other right or remedy herein by law or equity provided or permitted; but, each shall be cumulative of every other right or remedy given hereunder. No covenant or condition of this contract may be waived without consent of the parties. Forbearance or indulgence by either party shall not constitute a waiver of any covenant or condition to be performed pursuant to this contract.

### **XIV. Equal Employment Opportunity**

Driller/Operator shall not discriminate against any employee or applicant for employment because of race, age, color, religion, sex, ancestry, national origin, place of birth or disability. Driller/Operator shall take action to ensure that applicants are employed and treated without regard to their race, age, color, religion, sex, ancestry,

national origin, place of birth or disability. This action shall include, but not be limited to: employment, promotion, demotion or transfer, recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection of training, including apprenticeship.

**XV. Construction of Contract**

Both parties have participated fully in the review and revision of this contract. Any rule of construction to the effect that ambiguities are to be resolved against the drafting party shall not apply to the interpretation of this contract.

**XVI. Notices**

All notices, communications, and reports required or permitted under this contract shall be personally delivered or mailed to the respective parties by depositing same in the United States mail, postage prepaid, at the addresses shown below, unless and until either party is otherwise notified in writing by the other party, at the following addresses. Mailed notices shall be deemed communicated as of five (5) days after mailing regular mail.

If intended for City, to:

Mr. Peter Krause  
Director of Parks and Recreation  
City of Burleson  
141 West Renfro Street  
Burleson, Texas 76028-4261

If intended for Driller/Operator, to:

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November 2, 2009  
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IN WITNESS WHEREOF, the parties enter into this contract on the date first written above.

WITNESS:

DRILLER/OPERATOR:

BY: \_\_\_\_\_

BY: \_\_\_\_\_

\_\_\_\_\_  
Printed or Typed Name

\_\_\_\_\_  
Printed or Typed Name

\_\_\_\_\_  
Printed or Typed Title

\_\_\_\_\_  
Printed or Typed Title

\_\_\_\_\_  
Tax Identification No.

ATTEST:

CITY OF BURLESON, TEXAS:

BY: \_\_\_\_\_

BY: \_\_\_\_\_

AMANDA MCDOWELL  
CITY SECRETARY

NAME: \_\_\_\_\_  
TITLE: \_\_\_\_\_