

Memorandum

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

From: Peter Krause, Director of Parks and Recreation

Date: March 16, 2009

Subject: Minute Order MO-09-58, Consideration of Agreement with Chesapeake Energy for the sale of non-potable water from Bailey Lake and authorizing the City Manager to Execute the Agreement

Council Action Requested:

Council is requested to approve MO-09-058, authorizing the City Manager to enter into an agreement with Chesapeake Energy for the sale of non-potable water from Bailey Lake.

Background Information:

This information has been presented to and approved by Council on numerous occasions. It has been amended to reflect the current request.

The City of Burleson has once again been approached by Chesapeake Energy to purchase non-potable water from Bailey Lake for the purpose of "frac-ing" the Donna Ray 1H & A1H gas well. Chesapeake Energy estimates that the time frame for the pumping will be 5 - 7 days and that the water surface of the lake will be temporarily reduced by 5 - 6 feet. In addition to purchasing the water, Chesapeake Energy agrees to refill Bailey Lake from the park's own water well at no charge to the city if the lake does not recover its normal water level within thirty (30) days from the cessation of pumping. Should the refill process be necessary, **Chesapeake Energy shall be responsible for any electrical costs the city incurs during this refill process and agrees 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.**

Chesapeake Energy also agrees to prevent any “backflow” of water into the lake through its pipes, pumps and appurtenances. If such a “backflow” occurs, Chesapeake Energy shall be responsible for any costs related to returning the lake’s water quality to its pre-use condition.

Chesapeake Energy must also meet the insurance requirements of the contract prior to the commencement of pumping from the lake.

Board/Citizen Input: N/A

Financial Considerations: Chesapeake Energy will pay the City \$123,631.00 for the first 12,600,000 gallons (300,000 barrels) of water. This compensation also includes a penalty charge of 10% based upon the initial water consumption of 12,600,000 (300,000 barrels). This penalty results from Chesapeake’s need to advance the pumping schedule by 2 weeks. Chesapeake Energy agrees to pay \$8.92 per 1,000 gallons plus the penalty fee of 10% for any additional water usage beyond the initial usage.

Revenues from the sale 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: Water Sale Agreement between the City of Burleson and Chesapeake Energy.

Staff Contact: Peter Krause, Director of Parks and Recreation
(817)295-8168
pkrause@burlesontx.com

Dave White, Director of Golf
(817)447-4444
dwhite@burlesontx.com

THE STATE OF TEXAS §

Water Purchase Agreement

COUNTY OF JOHNSON §

THIS CONTRACT is made and entered into this 16th day of March, 2009, by and between the CITY OF BURLESON, Texas, a municipal corporation, hereinafter called "City," and Chesapeake Energy, whose address is Production Company L.P. ("Chesapeake Energy") P.O. Box 18496, Oklahoma City, OK 73154.

I. Conditions

Chesapeake Energy wishes the right to purchase non potable water from the city owned property henceforth 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 Donna Ray 1H & A1H gas wells. No additional wells may be assigned to this agreement. In exchange for these rights, Chesapeake Energy agrees to the following conditions:

- A. To provide to the city at no charge an impact statement describing the amount of water Chesapeake Energy requires and that impact to the surface elevation of the Lake. Chesapeake Energy further agrees to provide the city with a pumping schedule (i.e. start/stop date, hours of operation).
- B. Chesapeake Energy further agrees to provide the city with a plan for pipe stabilization for any creek crossing. Chesapeake Energy will work in conjunction with City for any City road crossings.
- C. Chesapeake Energy 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, **Chesapeake Energy shall be responsible for any electrical costs the city incurs during this refill process and agrees 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.**
- D. To restore the lake pump site and surrounding areas to their original condition or to the city's satisfaction no later than April 23, 2009.
- E. All pumping operations and/or restoration of the lake's water level must be completed before April 23, 2009.
- 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 and to supply that meter reading to the city for each 48 hour period that the pumps are in operation.

I. Chesapeake Energy shall prevent any "backflow" of water into the lake through its pipes, pumps and appurtenances. If any such "backflow" occurs, Chesapeake Energy shall be responsible for any cost related to returning the lake's water quality to its pre use condition.

J. Chesapeake Energy agrees to compensate the City in the amount of \$123,631.00 and is limited to 12,600,000 gallons (300,000 barrels) of water. This compensation includes a penalty charge of 10% based upon the agreed upon water consumption of 12,600,000 (300,000 barrels). Chesapeake Energy agrees to pay \$8.92 per 1,000 gallons plus the penalty fee of 10% for any additional water usage.

II. Insurance

A. Chesapeake Energy shall, at Chesapeake Energy' own expense, purchase, maintain and keep in force during the term of this contract such insurance as set forth below. Chesapeake Energy shall not commence work under this contract until Chesapeake Energy has obtained all the insurance required under this contract and such insurance has been approved by City, nor shall Chesapeake Energy 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 Chesapeake Energy' 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 Chesapeake Energy 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 Chesapeake Energy, 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. Chesapeake Energy agrees to the following:

1. Except for professional liability, Chesapeake Energy 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 Chesapeake Energy 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 Chesapeake Energy.

3. Approval, disapproval or failure to act by City regarding any insurance supplied by Chesapeake Energy (or any subcontractors) shall not relieve Chesapeake Energy 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 Chesapeake Energy from liability.
4. Chesapeake Energy 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 Chesapeake Energy shall assign or transfer its interest herein without the prior written consent of the other.

IV. Chesapeake Energy' Liability

Acceptance of the final plans by City shall not constitute nor be deemed a release of the responsibility and liability of Chesapeake Energy, 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 Chesapeake Energy, its employees, subcontractor, agents and consultants.

V. Indemnification

Chesapeake Energy 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 Chesapeake Energy and all other persons performing any act pursuant to this contract, which may arise out of any act, error, or omission by Chesapeake Energy, its officers, agents, employees, invitees, or other persons for whom it is legally liable, with regard to the performance of this contract; Chesapeake Energy 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

Chesapeake Energy covenants and agrees that he/she is an independent contractor, and not an officer, agent, servant or employee of City; that Chesapeake Energy 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 Chesapeake Energy, its officers, agents, employees, contractors, subcontractors and consultants, and nothing herein shall be construed as creating a partnership or joint enterprise between City and Chesapeake Energy.

VIII. Disclosure

By signing this contract, Chesapeake Energy 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. Chesapeake Energy 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

Chesapeake Energy 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. Chesapeake Energy 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 Chesapeake Energy, to:

Chesapeake Energy Production Company
P.O. Box 18496, Oklahoma City, OK 73154.

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

WITNESS:

CHESAPEAKE ENERGY:

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

CURTIS E. HAWK
CITY MANAGER