

City of Garden Grove

INTER-DEPARTMENT MEMORANDUM

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|----------|--|-------|-------------------|
| To: | Matthew J. Fertal | From: | William E. Murray |
| Dept: | City Manager | Dept: | Public Works |
| Subject: | AGREEMENT FOR LIMITED TERM PARTIAL BASIN EQUITY ASSESSMENT EXEMPTION BETWEEN ORANGE COUNTY WATER DISTRICT AND THE CITY OF GARDEN GROVE FOR WELL NO. 28 LOCATED AT 11301 JERRY LANE, GARDEN GROVE | Date: | May 22, 2012 |

OBJECTIVE

To recommend that the City Council authorize the Mayor to execute an agreement for limited term partial basin equity assessment exemption between the Orange County Water District (OCWD) and the City of Garden Grove.

BACKGROUND

In 1988, the City and OCWD entered into an agreement entitled "Nitrate Project Agreement" and added a supplement to the agreement in 1989 where a shallow well high in nitrates (known as Well 28) would be constructed and blended with Well 23 that had a much lower nitrate concentration. In 2005, Well 28 was shut down due to higher nitrate concentrations, causing excessive energy costs to operate the well at a lower flow rate. OCWD subsequently determined that the previous agreement and supplement had expired.

During the past 2 years, Well 28 has been modified with an energy-efficient variable frequency drive and nitrate analyzer allowing Garden Grove to re-commence Well 28 operation.

DISCUSSION

Following the completion of Well 28 modifications, staff discussed the status of Well 28 and requested a new agreement with OCWD. Staff's intent was to re-establish the aforementioned agreement and supplement.

On May 16, 2012, the OCWD Board authorized its General Manager to sign and execute a new agreement that allows Garden Grove to over pump for a period of 1 to 2 years until 4,000 acre-feet of water has been pumped from Well 28. The 4,000 acre-feet of water will be at a cost savings of approximately \$716,000. The savings

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are intended to reimburse Garden Grove for the recent Well 28 modifications and to pay for the maintenance and monitoring costs to operate Well 28 over the next ten years.

FINANCIAL IMPACT

The Water Budget for fiscal year 2012/2013 will save approximately \$716,000. There is no impact to the General Fund.

RECOMMENDATION

It is recommended that the City Council:

- Approve a Limited Term Partial Basin Equity Assessment Exemption Agreement with the Orange County Water District for Well No. 28, located at 11301 Jerry Lane, Garden Grove;
- Authorize the City Manager to make modifications as appropriate; and
- Authorize the Mayor to execute the agreement on behalf of the City.


WILLIAM E. MURRAY, P.E.
Public Works Director/City Engineer


By: David E. Entsminger
Water Services Manager

Attachment: Agreement

Recommended for Approval


Matthew Fertal
City Manager

**LIMITED TERM PARTIAL BASIN EQUITY ASSESSMENT
EXEMPTION AGREEMENT BETWEEN ORANGE COUNTY WATER DISTRICT
AND CITY OF GARDEN GROVE
(Garden Grove Well No. 28)**

This LIMITED TERM PARTIAL BASIN EQUITY ASSESSMENT EXEMPTION AGREEMENT (the "Agreement") is entered as of June __, 2012 by and between the ORANGE COUNTY WATER DISTRICT, a special governmental district organized and existing pursuant to the Orange County Water District Act, Chapter 924, Statutes of 1933, as amended ("OCWD"), and the CITY OF GARDEN GROVE, a municipal corporation organized and existing under the laws of the State of California ("City").

RECITALS

A. Approximately two-thirds of all drinking water currently used within OCWD is provided from groundwater. Inasmuch as Orange County is located in a semi-arid area, it is essential that all reasonable efforts be put forth to protect the quality of groundwater supplies and to provide for maximum utilization of that resource.

B. The United States Environmental Protection Agency ("USEPA") and the State of California Department of Public Health ("CDPH") have adopted primary drinking water standards, which include limits for nitrate. Water containing nitrate concentrations in excess of 45 mg/L (expressed as NO₃) have been determined by USEPA and CDPH not to be suitable for municipal or domestic purposes without treatment.

C. The City operates a public water system for the purpose of delivering potable water to its customers, and obtains most of its water by pumping groundwater from wells for delivery to its customers. The City, as well as other groundwater producers within the boundaries of OCWD, has lost the use of some of its groundwater wells due to the presence of nitrate in quantities exceeding USEPA and CDPH drinking water standards. City Well No. 28, located at 11301 Jerry Lane in Garden Grove ("Well 28") has the capacity to produce up to 4,000 acre feet per year of groundwater; however, the City discontinued production of groundwater from Well 28 in 2005 due to the excessive operational cost to produce and treat the water to meet USEPA and CDPH drinking water standards.

D. On September 21, 1988, OCWD and the City entered into a written agreement entitled "Nitrate Project Agreement" for the design, construction and operation of a wellhead treatment facility remove nitrates from the groundwater produced from Well 28, and allow the groundwater produced from Well 28 to be distributed to City customers for domestic uses. On November 15, 1989, OCWD and the City entered into a "Supplement to Nitrate Project Agreement," for the blending of Well 28 groundwater with other City groundwater, in lieu of the construction and operation of wellhead treatment facilities. The 1989 Supplement to Nitrate Project Agreement terminated and rescinded the 1988 Nitrate Project Agreement.

E. The City recently expended approximately \$348,000 to refurbish and upgrade Well 28 in order to resume production of groundwater containing high levels of nitrate. The City intends to blend that groundwater with water produced from City Well No. 23 located adjacent to

Well 28 in Garden Grove (“Well 23”) to produce groundwater with nitrate levels below the USEPA and CDPH drinking water standards; and the City will distribute that blended groundwater to the City’s domestic water customers (the “Project”). The City anticipates that, to conduct the Project for ten years, the City will incur additional operational, maintenance and monitoring costs of approximately \$368,000 over that ten-year time period. The aggregate of the \$348,276 in Well 28 refurbishment costs and the \$368,000 in operations, maintenance and monitoring costs are hereinafter collectively referred to as the “Project Cost”. OCWD has determined that the City’s conduct of the Project will remove contaminants from the groundwater basin and increase available groundwater supplies within OCWD’s boundaries.

F. The Legislature of the State of California has vested in OCWD the statutory responsibility to manage, regulate, replenish and to protect the quality of the groundwater supplies within the boundaries of OCWD.

G. On April 18, 2012, the Board of Directors of OCWD acted in accordance with Section 31.5 of the Orange County Water District Act (“OCWD Act”) to find, determine and establish the basin production percentage at 68 percent for the period from July 1, 2012 through June 30, 2013 (the “Initial Project Year BPP”).

H. On October 18, 2011, the City filed a petition in accordance with Section 38.1 of the OCWD Act for a partial, limited term exemption from the payment of the basin equity assessment on up to 4,000 acre feet of water produced from Well 28 above the Initial Project Year BPP. On May 16, 2012, the Board of Directors of OCWD conducted a public hearing, made certain findings and adopted a resolution in accordance with Section 38.1(d), granting the City’s petition for such partial, limited term exemption from the basin equity assessment to which such production would otherwise be subject under Section 31.5(j) of the OCWD Act (the “Project BEA Exemption”).

I. Section 2(6)(l) of the OCWD Act authorizes OCWD to enter into an agreement with the owner operating a groundwater production facility within OCWD’s boundaries to increase the production of groundwater in lieu of water from an alternative non-tributary source for the purpose of removing contaminants or pollutants from the groundwater basin, and paying from OCWD funds that portion of the cost of groundwater production that will encourage the production for beneficial use of the polluted or contaminated groundwater that is impairing the quality of the water supplies within OCWD.

J. OCWD and the City mutually desire to enter into this Agreement pursuant to Section 2(6)(l) of the OCWD Act, both to terminate the Supplement to Nitrate Project Agreement described in Recital D above, and to set forth the specific terms and conditions under which the City will conduct the Project and remove nitrate-impaired groundwater from the Orange County groundwater basin by producing groundwater from Well 28 and blending that groundwater with non-impaired groundwater produced from the Well 23 for ultimate distribution to City customers for potable beneficial uses, with the City recovering the Project Cost by means of the Project BEA Exemption.

EXECUTORY AGREEMENTS

NOW, THEREFORE, in consideration of the facts recited above and the covenants, conditions and promises contained herein, OCWD and the City hereby agree as follows:

SECTION 1. TERMINATION OF NITRATE PROJECT AGREEMENT AND SUPPLEMENT

By this Agreement, OCWD and the City hereby rescind and terminate the Supplement to Nitrate Project Agreement described in Recital D above.

SECTION 2. LIMITED TERM NITRATE REMOVAL PROJECT

2.1. During the Initial Project Year (*i.e.*, July 1, 2012 through June 30, 2013) the City shall produce groundwater in an amount equal to the Initial Project Year BPP plus up to an additional 4,000 acre feet, provided that all of the groundwater production during the Initial Project Year above the Initial Project Year BPP (but not exceeding 4,000 acre feet) shall be produced from Well 28.

2.2. The City shall blend all groundwater produced from Well 28 with groundwater produced from Well 23 in such proportions that the blended groundwater does not exceed the primary drinking water standard for nitrate established by USEPA and CDPH, and the City shall deliver the blended groundwater to its customers or to City facilities for potable beneficial uses.

2.3. The City shall be responsible for all costs incurred in the operation and maintenance of Well 28, Well 23, and all ancillary facilities used for the blending of groundwater produced from such wells and the distribution of that blended groundwater to City customers or facilities for potable beneficial use, including but not limited to labor, materials and power.

2.4. The City shall take out and maintain in effect at all times during the term of this Agreement comprehensive general liability insurance in an amount not less than \$2 million per occurrence, for bodily injury, death and property damage, naming OCWD as an additional insured under such policy. An endorsement evidencing this insurance coverage shall be furnished to OCWD prior to July 1, 2012. If the City is, or becomes, partially or fully self-insured for its public liabilities, a letter executed by the City's Mayor or City Manager stating the City's self-insured status and acknowledging its responsibility to respond to the indemnification of OCWD as provided in Paragraph 5.5 below, may be furnished in lieu of the insurance endorsement. The City shall provide written notice to OCWD of any change in the City's insured or self-insured status during the Initial Project Year within 30 days of the effective date of such change.

SECTION 3. INITIAL PROJECT YEAR BASIN EQUITY ASSESSMENT AND REPLENISHMENT ASSESSMENT PAYMENTS

3.1. The City shall file water production statements and a basin equity assessment statement in strict compliance with Sections 29(a) and 31.5(j) of the OCWD Act, respectively,

for all groundwater produced by the City during the Initial Project Year, including all groundwater produced from Well 28 and Well 23.

3.2. On or before the 15th day of each month, during the Initial Project Year, the City shall file with OCWD a monthly report reflecting the quantity of groundwater produced by Well 28 during that month, and the total quantity of groundwater produced by Well 28 to date (through the end of the preceding calendar month) during the Initial Project Year (a “Monthly Project Production Report”).

3.3. Concurrently with the filing of the City’s basin equity assessment report pursuant to Section 31.5(j) of the OCWD Act, the City shall file with OCWD a statement, verified by a written declaration under penalty of perjury, setting forth the total amount of groundwater produced from Well 28 during the Initial Project Year (the “Project Production Statement”).

3.4. The City shall pay the replenishment assessment and additional replenishment assessment levied and imposed pursuant to Sections 27 and 27.1 of the OCWD Act on all groundwater produced by the City during the Initial Project Year, including all groundwater produced from Well 28 and Well 23, in accordance with Section 29(a) of the OCWD Act.

3.5. To the extent that the City’s production of groundwater during the Initial Project Year does not exceed an amount equal to the Initial Project Year BPP plus an additional 4,000 acre feet, and all of the groundwater produced during the Initial Project Year in excess of the Initial Project Year BPP was produced from Well 28, the City shall be exempt from paying a portion of the basin equity assessment or any surcharge on such groundwater production above the Initial Project Year BPP during the Initial Project Year to allow the City to recoup the Project Cost, as described in the Attached Exhibit A attached hereto and by this reference incorporated herein. Notwithstanding the foregoing, the City shall pay the applicable basin equity assessment and any surcharge for the following:

3.5.1. The City shall pay the applicable basin equity assessment and surcharge on all groundwater produced by the City during the Initial Project Year that exceeds an amount equal to the Initial Project Year BPP plus 4,000 acre feet produced from Well 28; and

3.5.2. The City shall pay the applicable basin equity assessment and surcharge on all groundwater produced by the City during the Initial Project Year in excess of the Initial Year Project Year BPP, if such groundwater in excess of the Initial Project Year BPP is produced from any water production facility other than Well 28.

SECTION 4. CITY GROUNDWATER PRODUCTION DURING THE PROJECT REMAINDER TERM

4.1. Beginning July 1, 2013, and for nine consecutive years thereafter, *i.e.*, through June 20, 2023 (such nine-year period is hereinafter referred to as the “Project Remainder Term”), the City shall make its best efforts to continue to operate Well 28 throughout the Project Remainder Term.

4.2. Beginning July 1, 2013, and each fiscal year thereafter during the Project Remainder Term, the City shall pay the then-applicable replenishment assessment, additional replenishment assessment and, if applicable, the basin equity assessment and surcharge, on all groundwater produced by the City during that fiscal year, including all groundwater produced from Well 28, in strict compliance with Sections 29 and 31.5 of the OCWD Act.

4.3. Notwithstanding Paragraphs 4.1 and 4.2 above, in the event that the City was unable to produce sufficient groundwater from Well 28 during the Initial Project Year to allow the City to achieve a total Initial Project Year groundwater production equal to the Initial Project Year BPP plus 4,000 acre feet so as to recover the Project Cost, the City and OCWD shall meet and confer to implement the program described in Exhibit A to allow the City to increase production from Well 28 during the period from July 1, 2013 through June 30, 2014 (“FY 2013-14”) to allow the City to achieve the total amount of Well 28 groundwater production that had been intended for the Initial Project Year and thereby recover the entirety of the Project Cost (the “FY 2013-14 Make-Up Production”). In the event that the City undertakes FY 2013-14 Make-Up Production:

4.3.1. The City shall receive a partial basin equity assessment exemption on the FY 2013-14 Make-Up Production in accordance with Exhibit A.

4.3.2. The City shall file Monthly Project Production Reports (as described in Paragraph 3.2) for the Make-Up Production during each calendar month during FY 2013-2014.

4.3.3. In addition to all groundwater production reports and statements required under the OCWD Act, the City shall file a Project Production Statement (as described in Paragraph 3.3) for the Make-Up Production concurrently with the filing of the City’s basin equity assessment report pursuant to Section 31.5(j) of the OCWD Act.

SECTION 5. MISCELLANEOUS

5.1. Term. This Agreement shall continue for a term of ten years, until June 30, 2023.

5.2. Notices. Any notice, instrument, payment or document required to be given or delivered under this Agreement shall be given or delivered by personal delivery or by depositing the same in a United States Mail depository, first class postage prepaid, and addressed as follows:

If to OCWD:

Orange County Water District
18700 Ward Street
Fountain Valley, CA 92708
Attn: General Manager

If to City:

City of Garden Grove
11391 Acacia Parkway
P.O. Box 3070
Garden Grove, CA 92642
Attn: City Manager

or such other address as either party may direct in writing to the other. Service of any instrument or document given by mail shall be deemed complete upon receipt if delivered personally, or 48 hours after deposit of such instrument or document in a United States mail depository, first class postage prepaid, and addressed as set forth above.

5.3. Compliance with Laws. The City shall keep itself informed of all existing and future state and federal laws and all county, municipal ordinances and regulations, which in any manner effect its performance of this Agreement. The City shall at all times observe and comply with all such laws, ordinances and regulations.

5.4. Records and Review. The City shall keep and maintain all records, accounts and reports relating to this Agreement and its performance hereunder for a period of three years following the expiration of this Agreement. OCWD shall have access to such records at any time during normal business hours upon 48 hours notice to the City. At its cost, OCWD shall have the right to audit the books, records and accounts of the City relating to its performance of this Agreement no more than once annually, and the City shall provide reasonable cooperation to OCWD in this regard.

5.5. Indemnification.

The City shall defend, indemnify and hold OCWD, its officers, directors, employees and representatives, harmless from and against any and all actions, suits, claims, demands, judgments, attorney's fees, costs, damages to personal property, losses, penalties, obligations, expenses or liabilities (collectively, "Costs") that may be asserted or claimed by any person or entity arising out of the performance or implementation of this Agreement by City or its officers, directors, employees or representatives, or the distribution or use of any water produced from Well 28 or Well No. 23. The City shall also defend, indemnify and hold OCWD, its officers, directors, employees and representatives harmless from and against any and all Costs that may be asserted or claimed by any person in any administrative or judicial challenge to the legality or validity of the Project BEA Exemption or this Agreement, or to any act or determination (including any finding under Section 38.1 of the OCWD Act or the California Environmental Quality Act) leading up to or in connection with the Project BEA Exemption or this Agreement .

5.6. Successors and Assigns. All of the terms, conditions and provisions of this Agreement shall inure to the benefit of, and be binding upon, OCWD, the City, and their respective successors and assigns.

5.7. No Implied Waivers. In the event that any term, condition or provision of this Agreement should be breached by either party and thereafter waived by the other party, such waiver shall be limited to the specific breach so waived, and shall not be deemed either to be a continual waiver or to waive any other breach under this Agreement.

5.8. No Representation or Warranty. OCWD and the City each acknowledges that neither party, nor any of its respective officers, employees, agents or representatives, has made any written or oral representation, promise or warranty, express or implied, regarding any matter that is the subject of this Agreement, other than as expressly set forth herein.

5.9. No Obligation to Third Parties. The approval, execution and performance of this Agreement shall not be deemed to confer any rights upon any person or entity other than OCWD and the City. There are no third party beneficiaries to this Agreement.

5.10. Nature of Relationship. This Agreement shall not create, and shall not be construed or deemed to create, any agency, partnership, joint venture, landlord-tenant or other relationship between OCWD and the City.

5.11. Integration, Construction and Amendment. This Agreement represents the entire understanding of OCWD and the City as to those matters contained herein. No prior oral or written understanding shall be of any force or effect with respect to those matters covered by this Agreement. This Agreement shall be construed as if drafted by both OCWD and the City. This Agreement may not be modified, altered or amended except in writing signed by authorized representatives of both OCWD and the City.

IN WITNESS WHEREOF the parties have executed this Agreement as of the date first written above.

APPROVED AS TO FORM:

ORANGE COUNTY WATER DISTRICT

RUTAN & TUCKER, LLP

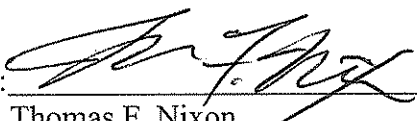
By: _____
President

By: _____
Joel D. Kuperberg
General Counsel, OCWD

By: _____
General Manager

APPROVED AS TO FORM:

CITY OF GARDEN GROVE

By:  _____
Thomas F. Nixon
City Attorney, City of Garden Grove

By: _____
Mayor

Attest:

City Clerk

Exhibit A

1. Applicable Facts

- Garden Grove's capital cost to modify Well #28 = \$348,276.
- Garden Grove's assumed operational and maintenance cost for 10 years = \$368,000
- Total Project cost and water savings to be provided to Garden Grove = \$716,000
- The savings will be achieved by receiving a \$179/af BEA reduction on 4,000 af of Well #28 pumping above the Basin Production Percentage (BPP).
- Garden Grove's Basin Equity Assessment (BEA) in FY12-13 = \$547/af and was established by Resolution of the OCWD Board following a public hearing held on April 18, 2012.

2. Project Limits

- A maximum of 4,000 af of Well #28 production above the BPP will receive a BEA reduction. This production is expected to occur in FY12-13 but could spill into future years.
- After the 4,000 af target and \$716,000 of savings is achieved, the BEA reduction provided by OCWD will be terminated.

3. Project Implementation

- Garden Grove's FY 12-13 BEA of \$547/af will be reduced by the following amounts in FY12-13:
 - \$87/af to recover the \$348,276 capital investment ($\$348,276 / 4,000 \text{ af}$)
 - \$92/af to recover approximately \$368,000 of total additional maintenance and monitoring cost of Well #28 for the next 10 years.
 - Total BEA reduction = \$179/af
 - Garden Grove will pay \$368/af of BEA to OCWD or \$1,472,000 ($\$368/\text{af} \times 4,000 \text{ af}$)
- Thus, Garden Grove would save approximately \$716,000 ($4,000 \text{ af} \times \$179/\text{af}$) on its water supply cost for FY12-13 which would be used to recover its capital costs and fund 10 years of additional maintenance costs (the "Project Cost").
- Any pumping by well #28 above 4,000 af in FY12-13 or in all subsequent years will not receive any BEA reduction.

- If Garden Grove is unable to pump the full 4,000 af above the BPP in FY12-13 in order to recoup the Project Cost of \$716,000 , then some pumping above the BPP (Make-Up Production) would be allowed in FY13-14 to allow Garden Grove to recoup the total amount of the Project Cost, as shown in the example below.

| | FY12-13 Actual | FY12-13 Goal |
|--|------------------|------------------|
| Well 28 pumping above the BPP | 3,000 af | 4,000 af |
| Total BEA Exemption | \$179/af | \$179/af |
| Total savings achieved by Garden Grove | \$537,000 | \$716,000 |
| Desired savings | <u>\$716,000</u> | <u>\$716,000</u> |
| Difference | \$179,000 | 0 |

In the above example, Well #28 would receive a \$179/af BEA reduction for 1,000 af of pumping above the BPP in FY13-14 to achieve the remaining \$179,000 of savings and thereby recover the total amount of the Project Cost.