



SOUTH FEATHER WATER & POWER AGENCY

TO: Board of Directors

FROM: Michael Glaze, General Manager

DATE: November 19, 2008

**RE: Proposed Water Transfer - 2009
Agenda Item for 11/25/08 Board of Directors Meeting**

After receiving the Board's direction in closed session last month, Jeff Meith, Dustin Cooper, Kathy Petersen and I worked with San Diego County Water Authority representatives to develop a mutually acceptable agreement for transfer of up to 10,000 acre-feet of water in 2009. The resulting document is attached, and conforms to the terms you authorized.

The proposed agreement specifies that SDCWA would have to pay SFWPA \$100,000 to initiate the processing of the 2009 transfer permit application. Regardless of whether or not a transfer gets regulatory approval, the \$100,000 is non-refundable.

The transfer amount would be up to 10,000 acre-feet, as specified by SDCWA

The transfer methodology would be the same as the transfer completed earlier this year: water deposited from Ponderosa Reservoir into Lake Oroville during June, July and possibly August, then a 10,000 acre-foot draw-down below historical minimum pool of the combined storage in Little Grass Valley and Sly Creek reservoirs at the end of the year. However, SDCWA will have to acquire the consent of DWR "and any other entity with jurisdiction, authority or control," in order for the 2009 transfer to move forward.

The delivery price in 2009 would be \$240/acre-foot (in addition to the initial \$100,000 deposit, and SDCWA would pay the first \$50 of the PG&E generation-impact fee (\$70 in 2004, and \$30 in 2008).

The following action is recommended:

"I move authorization for the General Manager to execute the exclusive agreement with San Diego County Water Authority for a one-time transfer of up to 10,000 acre-feet of water in 2009 ."

**PURCHASE AGREEMENT FOR WATER TRANSFER
BETWEEN SOUTH FEATHER WATER AND POWER AGENCY
AND SAN DIEGO COUNTY WATER AUTHORITY**

This Purchase Agreement for Water Transfer ("Agreement") establishes the terms and conditions of a short term water transfer by and between (1) South Feather Water and Power Agency ("SFWPA") and (2) San Diego County Water Agency ("SDCWA") pursuant to Water Code § 1725 *et seq.*

RECITALS

- A. SFWPA is a public agency water district formed and operating pursuant to Division 11 of the California Water Code (Cal. Water Code §§ 20500 *et seq.*), and is empowered to sell water to SDCWA as provided for in this Agreement.
- B. SDCWA is a public agency formed and operating under the County Water Authority Act (West's Cal. Water Code Appendix §§ 45-1 *et seq.*) and is empowered to purchase water from SFWPA as provided for in this Agreement.
- C. This Agreement allows for SDCWA, a willing purchaser, to acquire from SFWPA, a willing seller, water supplies that SDCWA has determined are needed for use in SDCWA's service area. The water supplies to be transferred under this Agreement will be a portion of the water available to SFWPA under its State Water Resources Control Board Applications Nos. 1651 and 2778, and associated Permit Nos. 1267 and 2492.

D. The water made available for transfer under this Agreement will be water normally stored by SFWPA under its water rights permits described in Recital C and surplus to the needs of SFWPA's customers and released to SDCWA as set forth in this Agreement.

E. On October 28, 2008, SDCWA submitted a proposal for this 2009 water transfer that included, among other terms, the nonrefundable initial payment of \$100,000.00 to SFWPA to enter into an option agreement for the possible transfer of 10,000 acre feet of water in 2009. The Parties wish to memorialize their agreement in principle by this Agreement.

OPERATIVE PROVISIONS

NOW, THEREFORE, in consideration of the foregoing Recitals and the mutual covenants and conditions contained herein, the Parties agree as follows:

1. **Definitions.** The following terms shall have the following meanings as used herein:
 - (a) "Contract Interest Rate" is the rate of interest paid monthly by the Local Agency Investment Fund (LAIF), calculated from the date payment is due to the date payment was made.
 - (b) "Parties" are the SDCWA listed above and SFWPA.
 - (c) "Effective Date" means the date upon which this Agreement has been executed by both Parties.
 - (d) "Transfer Water" means any acre foot increment up to and including a maximum of 10,000 acre feet of water made available by SFWPA pursuant to this Agreement for transfer to SDCWA in 2009.
 - (e) "Delivery Price" means \$240 per acre foot of Transfer Water delivered by SFWPA to

- SDCWA in 2009 in accordance with this agreement.
- (f) “Initial Payment” means the nonrefundable \$100,000 payment made by SDCWA to SFWPA within ten (10) days of the Effective Date of this Agreement.
 - (g) “Option” is the grant, upon the Effective Date of this Agreement, of SFWPA to SDCWA of an exclusive and irrevocable option to purchase the Transfer Water.
 - (h) “Generation Impact Fee” shall have the meaning described in Section 6(b) of this Agreement.
 - (i) Terms otherwise indicated or designated in this agreement as having a specific meaning shall have the meaning established by this Agreement.
 - (j) Undefined terms shall be construed according to their ordinary or commonly understood meaning.
3. ***Term.*** This Agreement shall be from the Effective Date through December 31, 2009, except to the extent that either SDCWA or SFWPA have outstanding obligations the performance of which extends beyond December 31, 2009, including, but not limited to, (i) SDCWA’s requirement to reimburse SFWPA for payment of the “power generation fee” pursuant to Section 6(b); (ii) SDCWA’s obligation to pay litigation defense costs and fees pursuant to Section 8(h); and (iii) SFWPA’s obligation to comply with reservoir refill criteria that may be required by DWR. Notwithstanding anything to the contrary, the term of this Agreement shall not be extended beyond December 31, 2009, to impose upon SFWPA the obligation to transfer water under this Agreement to SDCWA. No right of renewal or right to enter into extensions of this Agreement or to enter into any new water transfer agreement is

expressly granted hereunder, nor may such a right be implied from the execution of this Agreement.

4. Agreement to Transfer Water; Initial Payment and Option.

(a) As of the Effective Date, SFWPA grants SDCWA an exclusive and irrevocable option to purchase the Transfer Water.. SFWPA agrees to sell, and, subject to exercise of the Option, SDCWA agrees to buy, the Transfer Water at the Delivery Price. Subject to section 8(g) of this agreement, SFWPA will invoice SDCWA, and SDCWA will make the required payments as provided in Section 5. SDCWA shall pay the Delivery Price for water actually delivered pursuant to Section 7 and shall not be required to pay for water not delivered because of SDCWA's failure to exercise the Option or other circumstances as provided in this Agreement.

(b) Within 10 days after execution of this Agreement, SDCWA shall deliver the Initial Payment to SFWPA. The Initial Payment shall be nonrefundable and it shall not be credited to the Delivery Price. The Initial Payment shall be used by SFWPA for, among other things, the processing costs of the transfer, including regulatory and permitting costs. If the Initial Payment is exhausted due to regulatory or permitting costs, then SDCWA shall reimburse SFWPA within 30 days of invoice for the additional costs. If SDCWA exercises the Option, any payments for regulatory or permitting costs in excess of the Initial Payment will be credited against the Delivery Price. Regulatory or permitting costs include, without limitation, costs incurred to obtain SWRCB approval pursuant to Water Code §§ 1725 et seq. and DWR approval.

5. SDCWA's Exercise of Option

(a) SDCWA shall provide written notice to SFWPA of SDCWA's intent to exercise or terminate its Option on or before April 15, 2009. Failure to provide the aforementioned notice

on or before April 15, 2009 shall constitute SDCWA's election to terminate its Option. Unless the SDCWA specifies a lesser quantity, the notice shall be deemed to include the full 10,000 acre-feet of Transfer Water. If the SDCWA specifies a lesser quantity, the Option to the remainder shall be forfeited at 5:01 p.m. on April 15, 2009. The notice must be received at the offices of SFWPA no later than 5:00 p.m. on the date indicated.

(b) If SDCWA timely exercises the Option, SDCWA shall purchase and Seller shall sell the Transfer Water to SDCWA at the Delivery Price.

(c) If SDCWA does not provide notice of intent to exercise the Option on or before April 15, 2009, the Option shall terminate forthwith, and SFWPA shall have no obligation to transfer any water to SDCWA under this Agreement or to any other person, agency, or entity claiming an interest in water under this Agreement. SDCWA shall have no obligation to make any additional payment to SFWPA and SFWPA shall retain the Initial Payment.

6. *Payments for Transfer Water.SDCWA*

(a) Within 30 days after SFWPA delivers the transfer water into Lake Oroville, SFWPA shall invoice SDCWA, and SDCWA shall make the Delivery Payment within 30 days from the date of the invoice. Payments not made within said 30-day period shall accrue interest at the Contract Interest Rate, compounded monthly.

(b) Under an existing agreement with Pacific Gas and Electric (PG&E), SFWPA may be required to pay a "generation impact fee" for power generation if SFWPA's Little Grass Valley and Sly Creek reservoirs do not refill in 2010. The generation fee is estimated to be approximately \$70 per acre-foot of water not available due to non-refill, but could be higher. In the event payment of the generation fee is required, SDCWA shall make an additional payment

to SFWPA to reimburse SFWPA in an amount not exceeding \$50 per acre foot, within 30 days of receipt of an invoice including documentation supporting the amount of the required payment. SFWPA shall use its best efforts in negotiations with PG&E to minimize the generation impact fee.

(c) It is understood by SDCWA that once SFWPA releases water into Lake Oroville under the terms of this Agreement, that water cannot be feasibly returned to SFWPA, and therefore, in the event of failure to pay the amounts due in accordance with this Agreement, SDCWA shall not claim that damages must be mitigated by SFWPA by attempting to reacquire that water or acquiring other water in its place or seeking another buyer.

7. *Delivery Conditions; Point of Delivery.*

(a) Upon SDCWA's exercise of the Option, SFWPA agrees to release up to 10,000 acre-feet, above any required releases, into Lake Oroville consistent with Appendix A.

(b) Other than as appropriate to confirm SFWPA's release of water from Little Grass Valley and Sly Creek Reservoirs consistent with Section 7(a), this Agreement places no requirement or restriction on SFWPA's management, storage, and use of its water, beyond the requirement that SFWPA comply with the transfer water delivery described in Appendix A.

(c) The point of delivery of water made available by SFWPA to SDCWA under this Agreement shall be at the Ponderosa Dam spillway into Lake Oroville. SDCWA shall assume ownership of, and be responsible for and shall bear all risks of conveyance, storage and loss thereof occurring past the point of delivery, including losses related to the inability of SDCWA or DWR to convey the water from the point of delivery to SDCWA, and for any carriage water losses assessed against SDCWA by DWR, or any other agency or court exercising jurisdiction.

(d) With the invoice for the transferred water described in Section 6(a), SFWPA shall attach a report that accounts for all water released and made available to SDCWA under this Agreement.

(e) The water made available by SFWPA's releases pursuant to Section 7(a) of this Agreement shall be for the exclusive use of the SDCWA, and SFWPA shall take no actions that would reduce the water made available. SFWPA will have no claim to any power generation revenues once the transfer water is released at the delivery point to the SDCWA.

8. *Obtaining Approvals, Environmental Compliance and Related Costs.*

(a) Upon receipt of the Initial Payment, SFWPA shall apply for and diligently process all regulatory, environmental or other agency approvals required to be performed by SFWPA under this Agreement and to accomplish the water transfer to SDCWA. Regulatory, environmental, or other agency approvals include, but is not limited to approval from the State Water Resources Control Board pursuant to Water Code §§ 1725 *et seq.*, including additional review under the California Environmental Quality Act ("CEQA") to the extent that the exemption of Water Code § 1729 is found inapplicable to this transfer contemplated by this Agreement. SDCWA agrees to cooperate with and assist SFWPA as necessary in obtaining such approvals.

(b) Upon execution of this Agreement, SDCWA shall begin the process of obtaining the agreement or consent of DWR, Metropolitan Water District of Southern California, and any other entity with jurisdiction, authority or control, to store the transferred water in Lake Oroville and to transport the water to SDCWA. SFWPA agrees to cooperate with and assist SDCWA as necessary in obtaining such approvals.

(c) SDCWA and SFWPA, jointly, shall seek an exemption from, or acceptable modification of, reservoir refill requirements as were imposed by DWR as a condition of the 2008 transfer by SFWPA to the State Water Contractors Authority buyers group, it being understood that the criteria imposed by DWR on SFWPA in 2008 are not acceptable. SDCWA understands and acknowledges that SFWPA, in its sole and absolute discretion, may find DWR's reservoir refill requirements unacceptable and, in such an event, this Agreement shall be terminated, and SFWPA shall retain the Initial Deposit and SDCWA shall have no right to delivery or receipt of water under this Agreement, nor shall SDCWA have any further obligations in connection therewith.

(d) The Parties will use their respective and mutual reasonable efforts to obtain all required approvals before April 15, 2009.

(e) SDCWA will seek DWR's agreement that: (i) the quantity of water made available by SFWPA at the point of delivery under this Agreement, calculated as described in this Agreement, is transferable to SDCWA; and (ii) DWR will divert the quantity of water calculated pursuant to Section 7(a), less carriage water and storage losses assessed by DWR, at the H.O. Banks Pumping Plant and Barker Slough Pumping Plant for delivery to SDCWA. SFWPA will cooperate with and assist SDCWA as necessary to obtain DWR's agreement. .

(f) Except as otherwise provided in this Agreement, each of the Parties shall be responsible for their own expenses, including their respective administrative, legal, engineering and other consultants' fees and expenses incurred in obtaining these approvals. SDCWA

(g) Except for the obligation to make the Initial Payment, the rights, obligations and commitments described in this Agreement shall not be effective (i) unless the SWRCB approval and any other approvals, agreements and consents required in this Section 8 of this Agreement have been obtained by June 1, 2009, unless any such approval, agreement or consent is waived in writing by both SFWPA and SDCWA, or (ii) if litigation seeking to enjoin performance under this Agreement is pending in any state or federal court as of June 15, 2009. If the approvals, agreements and consents required in this Section 8 are not obtained in a manner satisfactory to either SFWPA or SDCWA by June 1, 2009, or if litigation seeking to enjoin performance is pending on June 15, 2009, either Party may terminate this Agreement without damage or recourse by the other party.

(h) If litigation is brought by any third party challenging the Option, the transfer of water from SFWPA to SDCWA, the regulatory permits, or any and all other matters related to or arising out of this Agreement, Parties shall mutually defend such litigation, using defense counsel mutually selected by the Parties, but SDCWA shall be solely responsible for the Parties' defense costs, including reasonable attorney's fees. Each Party shall bear their respective administrative costs, including, without limitation, costs or fees of a Party's general or other counsel regularly retained by the Party unless such counsel is the defense counsel mutually selected by the Parties. If litigation is pending after June 15, 2008, and before delivery of Transfer Water, SDCWA may terminate its obligation to purchase the Transfer Water without damage or recourse by SFWPA except as to SDCWA's obligation to pay defense costs incurred up to the date of termination.

9. *Water Rights Not Affected.* No transfer of water pursuant to this Agreement shall confer any appropriative, public trust or other right to water on any person or entity. Nothing in this Agreement shall act as a forfeiture, diminution or impairment of any rights of SFWPA

to its full deliveries of water after the expiration of the Agreement, and shall in no way prejudice any of SFWPA's rights thereto. Consistent with the provisions of California Water Code sections 109, 475, 1011, 1244, and 11961, the Parties agree that no transfers under this Agreement, nor the Agreement itself, is evidence of the availability of surplus water beyond the term of the Agreement, nor evidence of lack of beneficial use of the water involved in the transfer, and they shall not contend otherwise. The only rights granted to the Parties as a result of this Agreement are those expressly set forth herein.

10. General Indemnity. Each Party agrees to protect, defend, indemnify, and hold harmless the other Party, its directors, officers, agents, servants, employees and consultants from and against any and all losses, claims, liens, demands and causes of action of every kind and character, without limitation by enumeration, occurring or in any way incident to, connected with, or arising directly or indirectly out of the performance or non-performance by the indemnifying Party hereunder.

11. Construction and Interpretation. It is agreed and acknowledged by the Parties that this Agreement has been arrived at through negotiation, and that each Party has had a full and fair opportunity to revise the terms of this Agreement. Consequently, the normal rule of construction that any ambiguities are to be resolved against the drafting Party shall not apply in construing or interpreting this Agreement.

12. Obligations Prior to Termination. Notwithstanding any other provision hereof, the obligations of the Parties incurred pursuant to this Agreement prior to the termination of this Agreement, including without limitations the obligations to make payment for transfer water and to make refunds or reimbursements as required, shall survive the termination.

- 13. Severability.** The invalidity, illegality or unenforceability of any provision of this Agreement shall not render the other provisions unenforceable, invalid or illegal.
- 14. Governing Law.** This Agreement shall be interpreted and enforced pursuant to the laws of the State of California.
- 15. Modifications.** This Agreement can only be modified by a written instrument executed by both Parties.
- 16. Entire Agreement.** This Agreement contains the entire understanding of the Parties related to their interests, obligations, and rights in connection with the subject matter set forth herein. All prior communications, negotiations, stipulations, and understandings, whether oral or written, are of no force or effect, and are superseded, except as referenced herein.
- 17. No Third Party Beneficiary.** The Parties to this Agreement do not intend to create any third party beneficiaries to this Agreement, and expressly deny the creation of any third party beneficiary rights hereunder toward any person or entity.
- 18. Time.** Time is of the essence in the performance of each and every term of this Agreement.
- 19. Waiver.** The waiver or failure to declare a breach as a result of the violation of any term of this Agreement shall not constitute a waiver of that term or condition and shall not provide the basis for a claim of estoppel, forgiveness or waiver by any Party to that term or condition.
- 20. Captions.** The section and subsection captions in this Agreement are for convenience only and shall not be used in construing the Agreement.
- 21. Additional Documents.** Each Party agrees to make, execute, and deliver any and all

documents and to join in any application or other action reasonably required to implement this Agreement.

22. Notice. Any and all communications and/or notices in connection with this Agreement shall be either hand-delivered or sent by United States first class mail, postage prepaid, and addressed as follows:

To: South Feather Water and Power Agency

Michael C. Glaze
South Feather Water and Power Agency
2310 Oro-Quincy Highway
Oroville, CA 95966
Fax No.:
email:

To: San Diego County Water Authority

Dennis A. Cushman
San Diego County Water Authority
4677 Overland Avenue
San Diego, CA 92123
Fax No.:
email:

Notwithstanding the foregoing, notice of exercise of the Option may be delivered by facsimile transmission or email sent prior to the time stated in paragraph 5(b) to the facsimile number or email address stated above. Further, any payment required by this Agreement from SDCWA to SFWPA may be made by wire transfer according to instructions provided by SFWPA.

IN WITNESS WHEREOF, the Parties hereto have executed this Agreement as of
the day and year first written above.

South Feather Water and Power Agency

By _____

Dated: _____

Title: _____

By: _____

Dated: _____

Title: _____

San Diego County Water Authority

By _____

Dated: _____

Title: _____

By: _____

Dated: _____

Title: _____

APPENDIX A

Transfer Water Delivery

SFWPA shall deliver the Water at the Ponderosa Dam spillway into Oroville Reservoir and will make reasonable efforts to schedule the delivery so that it will reduce the risks identified by SDCWA of inability to take delivery of the Water due to regulatory, environmental, or SWP operational requirements, and also will not adversely impact State Water Project (SWP) operations, SWP water acquisitions, SWP water deliveries, environmental permits, water rights or other SWP purposes as determined by DWR.

The availability of the 10 TAF of Water will result from a reduction in end-of-month (EOM) target storage in Little Grass Valley and/or Sly Creek Reservoirs. On or about March 10, 2009, PG&E (the present purchaser – through 2010 – of SFWPA’s hydropower) will provide a forecast of reservoir operations for SFWPA’s South Feather Power Project (SFPP) absent a water transfer, assuming median precipitation. By way of example, that forecast for 2008 was as follows:

	Little Grass Valley	Sly Creek	Ponderosa Spill
May 08 EOM	78.8 TAF	62.0 TAF	6.2 TAF
June 08 EOM	71.8 TAF	62.0 TAF	5.9 TAF
July 08 EOM	70.0 TAF	38.0 TAF	14.2 TAF

To effect the transfer in 2009, assuming a similar without-transfer forecast in 2009, the combined storage in Little Grass Valley and Sly Creek will be brought to 10 TAF below the forecast EOM storage at the end of July, and 10 TAF of water over and above the July without-transfer spill amount will be released at Ponderosa Dam to Lake Oroville (this would constitute delivery of the water to SDCWA). It is possible that the transfer could begin in June 2009, in which case 10 TAF above the combined June-July without-transfer spill amount will be released at Ponderosa Dam. To ensure that the Water is “new” water, the 2009 end-of-year combined storage in Little Grass Valley and Sly Creek Reservoirs will be drawn down to 50 TAF (10 TAF less than the without-transfer end-of-year storage volume of 60 TAF).

During the period in which the Water is spilled to Lake Oroville, SFWPA’s Kelly Ridge Powerhouse will maintain normal operations, releasing at least 15.5 TAF each month (verified by flow records).