



SOUTH FEATHER WATER & POWER AGENCY

TO: Board of Directors

FROM: Michael Glaze, General Manager

DATE: April 5, 2010

RE: Agreement for Surplus Water Sale – North Yuba Water District to Yuba City
Agenda Item for 4/27/10 Board of Directors Meeting

NYWD has been selling 4,500 acre-feet of water to Yuba City for many years. This 4,500 acre-feet of water was allocated to NYWD in the original 1959 three-party agreement between OWID, PG&E and YCWD for delivery out of Miners Ranch Reservoir, down the Bangor Canal to storage or irrigation facilities that YCWD was supposed to construct but, ultimately, never did. Although contested by OWID for many years, YCWD ultimately prevailed before the State Water Resources Control Board (with OWID's support, eventually) in getting a permit for the transfer of this block of water to Yuba City. The water-sale agreement between NYWD and Yuba City is about to expire and they have negotiated a new 30-year term agreement.

Attached is a copy of the final draft (dated 3/19/10) of the proposed surplus-water sale agreement between North Yuba Water District and the City of Yuba City. The term of the agreement is 25 years, with the price of the water being \$55/AF in 2011, \$70/AF in 2012, and indexed thereafter through 2025 with the Consumer Price Index as the inflator. Prices after 2025 will be negotiated with the intent "to reflect the market prices for similar long-term water sales during these periods."

Although SFWPA is not a party to the proposed agreement, some of the language in it was included at Jeff Meith's request. Items 3(c), 7(b) and all of 8 include language especially important to the Agency's interests.

The agreement is between Yuba City and NYWD. Therefore, SFWPA is not being asked to approve the agreement, but rather to take the following action:

"I move approval of the sale of surplus water by North Yuba Water District to the City of Yuba City, and authorization for the General Manager to provide written notification of said approval to interested parties, including North Yuba Water District and the City of Yuba City."

DRAFT (03-19-10)

AMENDED AGREEMENT FOR SALE OF SURPLUS WATER

THIS AGREEMENT, is made and entered into by and between the North Yuba Water District, a county water district organized and existing under the laws of California, formerly called the “Yuba County Water District” and referred in this Agreement to as the “District,” and the City of Yuba City, an incorporated city organized and existing pursuant to the laws of California and referred to in this Agreement as the “City.”

RECITALS

A. The District holds amended water-right Permit 11518 (“Amended Permit 11518”), which was issued by the State Water Resources Control Board (the “SWRCB”) on April 27, 2006 on Application 14113, and which authorizes the diversion of water from the South Fork Feather River, Lost Creek and the Feather River at specified points of diversion, for domestic, municipal and industrial purposes of use within the boundaries of the District and the City and for irrigation purposes of use within the District.

B. Term 6 of Amended Permit 11518 limits the total combined authorized diversions under amended water-right Permit 11516 (which was issued on Application 13957 and is held by the District) and Amended Permit 11518 to 23,700 acre-feet per year (“af/yr”).

C. Although the District anticipates that it ultimately will require this entire authorized 23,700 af/yr of water for beneficial uses within the District’s boundaries, the District anticipates that it will not need this entire authorized 23,700 af/yr during of the term of this Agreement, and that the District therefore will be able to make up to 4,500 af/yr of surplus water available to the City during the term of this Agreement, for diversion and use by the City under Amended Permit 11518 and pursuant to the terms of this Agreement.

D. On May 27, 2005, the District and the South Feather Water and Power Agency (“SFWPA”) executed an agreement (the “2005 SFWPA/District Agreement”), which, among other things, specifies the amounts of water from the South Feather Power Project (the “SFPP”) that the District may require SFWPA to deliver to the District at the SFPP’s Turnout SF-14. On

[*** insert date ***], the District and SFWPA executed an amendment to the 2005 SFWPA/District Agreement.

E. Paragraph III.7 of the 2005 SFWPA/District Agreement authorizes the District, in lieu of receiving some or all of the 4,500 af/yr of SFPP water that it is authorized to receive under paragraph III.6 of that agreement at Turnout SF-14, instead to request that all or the remaining portion of this 4,500 af/yr of SFPP water be passed through the Kelly Ridge Powerhouse to the Feather River for delivery to Yuba City.

F. The City needs a supplemental supply of water for domestic, municipal and industrial purposes.

G. The City and the District entered into an agreement on December 1, 1980, under which the District agreed to furnish 4,500 acre-feet of water per year to the City until December 31, 2010.

H. The City and the District desire to continue the water sales that have occurred and are occurring under the 1980 agreement for an additional 25 years. To continue these sales, the City and the District desire to execute this Amended Agreement For Sale of Surplus Water (the "Agreement"), which will become effective on January 1, 2011, and which will supersede the December 1, 1980 agreement.

NOW, THEREFORE, in consideration of these recitals and the mutual promises made in this Agreement, the District and the City (collectively referred to as the "Parties") agree as follows:

1. The preceding recitals are true.
2. This Agreement will become effective on January 1, 2011, and will remain in effect through December 31, 2035, unless sooner terminated pursuant to any the provisions of this Agreement. When this Agreement becomes effective on January 1, 2011, it will supersede the agreement that the Parties entered into on December 1, 1980. Representatives of the District and City will meet some time between December 31, 2030 and June 1, 2031 to discuss the potential to further extend this Agreement on terms and conditions acceptable to City and District at that time. However, nothing in this Agreement will be construed to create any obligation on either party to extend this Agreement beyond December 31, 2035.

3. (a) The water that the District will make available to the City under this Agreement will be water that will be surplus to the needs of the District at the time of the sale. The City will not acquire any permanent right to divert any water under Amended Permit 11518 or any permanent right to receive any water from the District. The District does not have and will not have any public-service obligation to the City or any of the City's customers. The District will be the sole holder and owner of any appropriative right that is created, expanded or perfected by the City's diversions or use of water made available by the District to the City under this Agreement, and the District's making water available to the City under this Agreement will not confer any appropriative, public-trust, public-service or other right to the City or any of the City's customers.

(b) The only rights granted to the City under this Agreement are those expressly set forth in this Agreement. Nothing in this Agreement is intended to or will be construed to act as a forfeiture, diminution or impairment of any water right of the District. Consistent with Water Code sections 109, 475, 1011, 1014 through 1017 and 1244, the District's making water available to the City under this Agreement will not be evidence of or used to demonstrate either the existence of surplus water after this Agreement expires or the lack of beneficial use by the District or its customers of the water supplies referred to in this Agreement, and the City will not contend otherwise. In accordance with Water Code section 1016 and other applicable provisions of California law, at the conclusion of the term of this Agreement, all rights in, and the rights to use, the water supplies referred to in this Agreement will revert back to the District, and the City will not: (a) bring any claim for a continuation of the water supply that will be made available by this Agreement; or (b) claim any right to a continued supply of the water that will be made available by this Agreement, based on reliance, estoppel, intervening public use, prescription, water shortage emergency, unforeseen or unforeseeable increases in demand, or any other cause.

(c) The water that is provided to the City under this Agreement will be provided pursuant to Amended Permit 11518 and the water right associated with that permit. No water will be provided to the City under this Agreement pursuant to any other water-right permit or license or any other water right. The City acknowledges that no water will be provided under this Agreement pursuant to Amended Permit 11516 or any water right associated with that permit, or pursuant to any water-right permit or license held by SFWPA or any water right associated with any such permit or license, and the City waives any claim that it has any right under this

Agreement to receive water pursuant to any of these water-right permits or licenses or any of these water rights.

4. Starting with the 2011 calendar year and during each calendar year thereafter through 2035, and subject to the terms of this Agreement, the District will make available to the City the 4,500 acre-feet of water that the District is authorized to receive under paragraph III.6 of the 2005 SFWPA/District Agreement. The maximum amount of water that the City may receive from the District under this Agreement during any year will be 4,500 acre-feet.

5. (a) The District will make this water available to the City according to the following monthly schedule:

April	181 acre-feet
May	492 acre-feet
June	893 acre-feet
July	922 acre-feet
August	922 acre-feet
September	714 acre-feet
October	<u>376 acre-feet</u>
Total	4,500 acre-feet

Provided, however, the District will meet with the City during March of each year to discuss whether or not any changes should be made to this monthly delivery schedule, and to discuss the appropriate monthly delivery schedule if the total amount of water to be made available by the District to the City during that year is less than 4,500 acre-feet. Any such changes will be made if authorized by the District. The District will use its best efforts to accommodate City's requests for changes in this monthly delivery schedule, but nothing in this sentence will be construed: (i) to require the District to make such changes, if doing so would result in any additional costs to the District or in any reduction in the amounts of any water supplies available to the District; or (ii) to affect the annual amounts of water specified in paragraph 4 above.

(b) The water made available by the District to the City under this Agreement will be used or furnished by the City only for domestic, municipal and industrial purposes and only for uses at locations that are both within the City's service area and within the authorized place of use specified in Amended Permit 11518.

(c) The character or quality of the water that the District will make available to the City under this Agreement may vary from time to time, and the District does not guarantee in any respect the character or quality of this water.

(d) The City will not sell or transfer of any water that the District makes available to the City under this Agreement, or of the right to use any such water, without the District's prior written consent. However, the preceding sentence does not apply to sales to or uses by retail customers within both the City's water service area and the authorized place of use specified in Amended Permit 11518.

(e) The City will promptly provide the District with all of the information that is necessary for the District to comply with the reporting requirements in term 12 of Amended Permit 11518.

(f) The City will comply with any provision of Amended Permit 11518 that is applicable to the City.

6. (a) The City will pay the District for the water that the District makes available to the City under this Agreement during 2011 at the rate of \$55.00 per acre-foot. The City will pay the District for the water that the District makes available to the City under this Agreement during 2012 at the rate of \$70.00 per acre-foot. For 2013 through 2025, the City will pay the District for the water that the District makes available to the City under this Agreement at the rate of \$70.00 per acre-foot times the Consumer Price Index for the December preceding the year during which the District makes the water available to the City divided by the Consumer Price Index for December 2012. The per-acre-foot rate in the preceding sentence for each year will be rounded to the nearest cent. For these calculations, the United States Department of Labor (Bureau of Labor Statistics) All Urban Consumers San Francisco 1982-1984=100 index will be used. If this index no longer is available, then the City and District will meet and confer and attempt to reach agreement on the index that will be used to calculate these water rates. If the parties do not reach agreement on the appropriate substitute index, then the appropriate substitute index will be determined pursuant to the arbitration provisions of sections 1280 through 1294.2 of the California Code of Civil Procedure, with the arbitrator to select the index that is available and is most comparable to the index described in this paragraph. This paragraph will not be construed to give any arbitrator any jurisdiction to make a decision or order on any issue other than the appropriate substitute index.

(b) The District and the City intend that the prices that the City pays the District for water made available under this Agreement during 2026 through 2035 will be set to reflect the market prices for similar long-term water sales during these periods. The District and the City will meet during 2024 to attempt to reach agreement on the prices that will apply to water made available under this Agreement during 2026 through 2035. If, during 2024, the parties do not reach agreement on the appropriate prices for water to be made available during 2026 through 2035, then the appropriate prices will be determined pursuant to the arbitration provisions of sections 1280 through 1294.2 of the California Code of Civil Procedure, with the arbitrator to select the prices that best reflect the market prices for similar long-term water sales during the same or a similar period. “Similar long-term water sales” will mean sales of water under agreements with terms greater than one year to municipal water purveyors, where the agreements were executed some time between January 1, 2015 and December 31, 2024, and where both the seller and the buyer are located in the Sacramento Valley or the service area of the North Bay Aqueduct. Such sales will not include sales of water to the East Bay Municipal Utilities District, regardless of the point of diversion for such sales. In determining the market prices for such similar long-term water sales, adjustments will be made for any costs or fees paid by the sellers for compliance with the California Environmental Quality Act, the federal Endangered Species Act or the Water Code, so that the prices received by sellers under such sales are as comparable as possible to the prices to be received by the District for sales of water during 2026 through 2035 under this Agreement. This paragraph will not be construed to give any arbitrator any jurisdiction to make a decision or order on any issue other than the appropriate price or prices that are described in this paragraph, unless the District and the City agree in writing that the arbitrator may consider and decide any other issue or issues.

(c) The City will pay the District on or before July 31 of each year for all water made available by the District to the City under this Agreement between November 1 of the preceding year and June 30 of that year. The City will pay the District on or before November 30 of each year for all water made available by the District to the City under this Agreement between July 1 and October 31 of that year. Except as provided in paragraph (d) below, the City will make these payments to the District regardless of the amounts of this water that the City actually diverts or uses. However, the City will not be obligated to pay the District for any water that the District does not make available to the City under this Agreement for any reason. If any payment by the

City to the District under this Agreement is not made in full within 30 days of its due date, then the City also will pay the District interest on the payment or any unpaid portion of the payment. This interest will be calculated at the rate of 1½ percent per month from the due date specified in the first or second sentence of this paragraph (whichever is applicable) until the date of the payment, prorated to the nearest day.

(d) If the City notifies the District in writing that the City does not plan to take delivery of all of the water it is authorized to receive under this Agreement during any year, then the District may transfer this water to another buyer. The District will not be obligated to make any such transfer and instead may require the City to make the payments specified in paragraph (c) above for such water. However, if the District does transfer such water, then the City will not be obligated to pay for the water thus transferred, and the District will be authorized to receive and retain all of the proceeds of such transfer.

7. (a) The water to be made available by the District to the City pursuant to this Agreement will be made available to the City at the outlet of the Kelly Ridge Powerhouse on the Feather River as part of the total flow of water at this point at the time of delivery. The District will not be responsible for the control, carriage, handling, use, disposal, or distribution, beyond this point of delivery, of any water that the District makes available to the City under this Agreement.

(b) The City will indemnify, hold harmless, protect and defend the District and SFWPA and their officers, agents and employees from and against any and all liabilities, claims, demands, damages, losses, disabilities and expenses (including attorney fees and litigation costs) arising from any actions taken by the City in connection with implementation of this Agreement, except for liabilities, claims, demands, damages, losses, disabilities and expenses that are based on the District's or SFWPA's sole negligence, willful misconduct or violation of law.

8. (a) There may be a temporary or permanent discontinuance or reduction of water that the District makes available to the City under this Agreement because of: (i) operations, maintenance, repairs and replacements of South Feather Power Project facilities; (ii) orders of the SWRCB, its Division of Water Rights, some other regulatory agency or a court; (iii) droughts; or (iv) other conditions beyond the District's control. If any such action reduces the amount of water available for diversion and use by Yuba City under Amended Permit 11518 to less than 4,500 acre-feet during any year, then the amount of water that the District makes

available to Yuba City under this agreement during that year will be reduced by the same amount. If any such action reduces the total amount of water available for diversion and use under Amended Permit 11516 and Amended Permit 11518 to less than 23,700 acre-feet during any year, then the District, in its sole but reasonable discretion, may reduce the amount of water that the District makes available to the City during that year by the amount by which the total amount of water available for diversion and use under these amended permits is less than 23,700 acre-feet. For example, if only 21,000 acre-feet is available for diversion and use under these amended permits during a year, then the District may reduce the amount of water that the District makes available to the City during that year by 2,700 acre-feet ($23,700 - 21,000 = 2,700$), and thus make only 1,800 acre-feet ($4,500 - 2,700 = 1,800$) of water available to the City under this Agreement during that year, if the District actually needs for reasonable and beneficial uses all 19,200 acre-feet ($21,000 - 1,800 = 19,200$).

(b) The City acknowledges that: (i) term 7 of Amended Permit 11518 specifies that complete application of water to the authorized use shall be prosecuted with reasonable diligence and completed by December 31, 2004; (ii) on November 30, 2004, NYWD filed a petition with the SWRCB to extend this deadline; (iii) neither the SWRCB nor the SWRCB's Division of Water Rights has issued any order yet on this petition; and (iv) when such an order is issued, it could reduce the amount of water available for diversion and use under Amended Permit 11518 or the amount of water that will be available to the City under this Agreement. The District will actively oppose any proposed or actual reduction by the SWRCB or the SWRCB's Division of Water Rights in the amount of water available for diversion and use under Amended Permit 11518, or in the amount of water that will be available to the City under this Agreement, but the District in its sole discretion may make strategic decisions regarding any Division of Water Rights, SWRCB or related court proceeding concerning any such proposed or actual reduction.

(c) The City acknowledges that: (i) term 12 of Amended Permit 11518 requires NYWD to prepare, implement, and possibly amend, certain water-rights accounting plans; (ii) because of revenue limitations, NYWD has not yet fully complied with this term 12; and (iii) because of this lack of full compliance, the SWRCB or the SWRCB's Division of Water Rights may issue an order that could reduce the amount of water available for diversion and use under Amended Permit 11518 or the amount of water that will be available to this City under this Agreement. Beginning on January 1, 2011, the District will promptly prepare, implement and if necessary

amend those water-right accounting plans. The District will actively oppose any proposed or actual reduction by the SWRCB or the SWRCB's Division of Water Rights in the amount of water available for diversion and use under Amended Permit 11518, or in the amount of water that will be available to the City under this Agreement, but the District in its sole discretion may make strategic decisions regarding any Division of Water Rights, SWRCB or related court proceeding concerning any such proposed or actual reduction.

(d) The District will not be obligated to provide any water under this Agreement that cannot first be used at the Kelly Ridge Powerhouse for hydroelectric power generation. The City acknowledges that SFWPA presently shuts the Kelly Ridge Powerhouse down for maintenance for approximately two weeks each October and that, during such shutdowns, the District cannot provide any water under this Agreement, except possibly as provided under the following sentence of this paragraph. If the District, the City and SFWPA can reach agreement on the amount of additional compensation that the City will pay to the District under this Agreement for the deliveries of water under this Agreement during times when such water cannot first be used at the Kelly Ridge Powerhouse for hydroelectric power generation, then deliveries of such water may occur.

(e) No liability will accrue against District or SFPWA or any of their directors, officers, agents or employees for any damage, direct or indirect, arising from any discontinuance or reduction in the amounts of water that the District makes available to the City under this Agreement. However, the City will not be obligated to pay the District for any water that the District does not make available to the City under this Agreement for any reason.

9. (a) The District will not be obligated to make any water available to the City under this Agreement during any time when the City is in arrears in payment of any amount that the City is obligated to pay the District under this Agreement.

(b) The District may, at its option, terminate this Agreement on 60 days' written notice to the City after any failure of the City to make any payment to the City that is required by this Agreement within three months of the date on which such payment is due. If such a termination occurs, then all future obligations of District and all future rights of City under this Agreement will cease, but such termination shall not relieve the City of its obligation to pay the District all amounts due under this Agreement before its termination.

(c) If the District does not deliver to the City substantially all of the amounts of water that the District is required by this Agreement to deliver to the City, then the City may, in its discretion, terminate this Agreement on 60 days' written notice to the District. If such a termination occurs, then all future rights and obligations of the District and the City on this Agreement will terminate, but such termination will not affect the City's obligation to pay the District for all amounts that are due from the City to the District under this Agreement on the date of termination.

10. This Agreement will apply to and bind any successors or assigns of both Parties, but no assignment or transfer of this Agreement, any part of it or any interest in it by the City will be valid unless and until approved in writing by the District.

11. Each person signing this Agreement represents that he or she is authorized to sign it on behalf of the Party for whom he or she is signing the Agreement and to bind that Party to this Agreement.

12. If any dispute regarding this Agreement arises, then the Parties will make reasonable and good-faith attempts to resolve the dispute before filing any legal action regarding the dispute. Such reasonable and good-faith attempts will include at least one meeting, and, if the Parties agree, hiring a mutually agreeable mediator (with each Party bearing one-half of the mediator's costs) and submitting the dispute to the mediator for non-binding mediation. Both Parties will make all reasonable good-faith efforts to promptly schedule and to participate in mediation meetings and to devote the necessary time and resources to attempt to resolve to dispute. If such efforts are not successful, then either Party may pursue any available legal remedies. Nothing in this paragraph will be construed to create any right to arbitration.

13. This Agreement is entered into freely and voluntarily. The Parties acknowledge that they have been represented by attorneys of their own choice in the negotiations that preceded the execution of this Agreement and in connection with its preparation and execution.

14. This Agreement constitutes the entire agreement between the Parties pertaining to the settlement of disputes and obligations between them. This Agreement supersedes all prior and contemporaneous agreements, representations and obligations concerning those obligations, which are merged into this Agreement. This Agreement is made on the understanding that each term is in consideration and support of every other term, and each term is a necessary part of the entire Agreement.

15. This Agreement is the product of negotiation and preparation by and among the Parties and their attorneys. Therefore, the Parties acknowledge and agree that this Agreement will not be deemed to have been prepared or drafted by any one Party. Accordingly, the normal rule of construction to the effect that any ambiguities are to be resolved against the drafting party will not be employed in the interpretation of this Agreement.

16. No supplement, modification, waiver, or amendment of this Agreement will be binding unless executed in writing by the Party against whom enforcement of such supplement, modification, waiver or amendment is sought.

17. This Agreement may be signed in two counterparts by the Parties, each of which will be deemed to be an original, and both of which together will be deemed one and the same instrument. Counterpart executions may be made by facsimile.

18. Except as otherwise provided, all notices required under or regarding this Agreement will be made in writing addressed to the Party at the address listed here:

North Yuba Water District
Attention: General Manager
P. O. Box 299
8691 La Porte Road
Brownsville, California 95919
Fax: 530-675-0462

Yuba City
Attention: Director
701 Northgate Drive
Yuba City, California 95991
Fax: 530-822-4739

Any Party may send such notice to the other Party by first-class mail or comparable method of distribution. For purposes of this Agreement, a notice will be effective five days after the date on which it is mailed or otherwise distributed. When this Agreement requires notice in less than five days, notice will be provided by personal service or facsimile and will be effective when provided.

19. Except as otherwise expressly set forth herein, this Agreement does not and will not be deemed to make any Party the agent for or partner of any other Party.

CITY OF YUBA CITY

NORTH YUBA WATER DISTRICT

By _____

By _____

President

Its _____

Attest: _____

Secretary

Date _____

Date _____

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DRAFT