



## ***SOUTH FEATHER WATER & POWER***

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**TO:** Board of Directors

**FROM:** Michael Glaze, General Manager

**DATE:** June 22, 2005

**RE:** Termination of Agreement with Optimal Water, Inc.  
Agenda Item for 6/28/05 Board of Directors Meeting

On April 22, 2003 the Board approved a Professional Services Agreement with Optimal Water, Inc. with respect to marketing the Agency's (OWID at that time) conserved water. Eric Robbins was the president and CEO at that time, and Jennifer Hunt-Harris was the firm's vice-president. By the following August, Optimal had developed a conserved-water marketing program that identified potential and opportunities for the Agency to market water that would be conserved by ditch piping and sealing projects.

In 2004, Eric Robbins left the firm and Jennifer Hunt-Harris became the chief operating officer. Attorney Warren Felger assumed the positions of president and CEO.

Since Mr. Robbins left Optimal there has not been significant activity, other than two meetings that Ms. Hunt-Harris set up with a potential buyer of water that might be conserved. She and Mr. Felger attended those two meetings, but I was the lead for the Agency in the substantive elements of the meetings, with assistance from Matt Colwell and Jeff Meith.

And, as of this morning, I received official notice that Jennifer Hunt-Harris has also left Optimal.

Ms. Hunt-Harris had been the lead in developing the conserved-water marketing program in 2003 and our relationship with Optimal continued to have value with her there after Eric Robbins left because of her familiarity with our facilities and their juxtaposition with the State water project. However, now that both Mr. Robbins and Ms. Hunt-Harris are no longer with Optimal Water, it can no longer add value to our water-marketing efforts.

We have paid Optimal Water for all invoiced services to date and it is my recommendation that our agreement be terminated. A copy of the agreement is attached, and Article 2.03 covers the issues of termination, as follows:

...the [Agency] may terminate this Agreement, with or without cause, upon written notice specifying the effective date of termination; provided, that such written notice shall be given at least thirty (30) days before the date of termination; and provided further that in

the event of termination by the [Agency] without cause, Optimal Water shall be paid for all satisfactory work.

My recommendation is that the Board take the following action:

**"I move that the Professional Services Agreement with Optimal Water, Inc., as approved by the Board on April 22, 2003 be terminated, with Optimal Water provided the written 30-day notice thereof, as specified in said Agreement."**

## PROFESSIONAL SERVICES AGREEMENT

(Oroville-Wyandotte Irrigation District / Optimal Water, Inc.)

This Professional Services Agreement (“Agreement”) is effective as of \_\_\_\_\_, 2003 (the “Effective Date”), between Optimal Water, Inc. (“Optimal Water”) and Oroville-Wyandotte Irrigation District (the “District”). District and Optimal Water are sometimes referred to herein individually as “Party” or collectively as “Parties.”

### RECITALS:

- A. The District was organized on November 6, 1919 under the provisions of the California Irrigation District Act (California Water Code Sections 20500, et seq.), and has been in continuous operation since that date.
- B. The District provides water to a gross area of over 31,000 acres in Butte County and supplies water for domestic and agricultural uses, produces electricity, and provides recreational activities for the public.
- C. The District has initiated a program of reducing losses from its raw water conveyance facilities by lining, piping, and other measures designed to conserve water, which methods are very expensive.
- D. The District desires to market its conserved water supplies, including but not limited to the conserved water resulting from the District’s canal-lining project, and from other such projects that the District may undertake if feasible.
- E. Optimal Water is a California corporation authorized to conduct business in the State of California. Optimal Water is a professional services firm focused exclusively on providing water-related strategic management, valuation and transaction services within the State of California.
- F. The District desires to retain Optimal Water, and Optimal Water is willing to render certain professional services to the District, with respect to the marketing of the District’s conserved water.

**NOW, THEREFORE**, in consideration of the foregoing Recitals and the mutual agreements and covenants set forth in this Agreement, the Parties agree as follows:

### ARTICLE 1. GENERAL

**1.01 Definitions.** As used in this Agreement, the following definitions shall apply:

(a) **“District Water”** shall mean the District’s conserved water, derived from canal lining and other improvement projects, identified by Task Order, to be undertaken by the District that the Board determines is available for marketing.

(b) **“Task Order”** shall mean an authorization of the District’s Board to Optimal Water to proceed with the provision of services under this Agreement in connection with the sale of identified District Water.

(b) **“Transaction”** shall mean the sale of District Water to a Buyer for any purpose by lease or permanent transfer entered into by the District, in accordance with California law, during the Term of this Agreement or within one (1) year following the expiration of the Term, or any extension thereof.

(f) **“Transaction Contract”** shall mean the binding agreement setting forth the terms and conditions of a Transaction that has been executed by the District and the Buyer.

(f) **“Buyer”** shall mean the purchaser of District Water under a Transaction Contract, who has executed such Transaction Contract and is bound by the terms thereof.

**1.02 Engagement of Optimal Water.** The District hereby engages and retains Optimal Water to render the professional services described in Section 1.03 (the “Services”) as may be required from time to time by the District. Optimal Water shall use its reasonable best efforts to perform such Services in the time frame and manner mutually agreed to by the Parties. This Agreement shall apply to all Services provided by Optimal Water to the District.

**1.03 Description of Services.** During the Term, as defined in Section 2.01 hereof, Optimal Water shall consult with and advise the District from time to time at the District’s request and direction and Optimal Water’s reasonable convenience. Optimal Water’s Services shall include, without limitation, (1) economic valuation and marketability analysis of the District Water, (2) development and implementation of a marketing plan for the District Water, (3) identification and prequalification of potential Buyers, and (4) structuring, negotiating and completing one or more successful Transactions as defined in Section 1.01 hereof.

In rendering Services to the District, Optimal Water shall be entitled to rely on the accuracy and completeness of information provided by the District, its consultants and attorneys, without independent investigation or verification.

**1.04 Scope of Services and Schedule.** Upon execution hereof and in consultation with the District, Optimal Water shall prepare an estimated Scope of Services to be performed under this Agreement and a projected Schedule for the performance of such Services. Prior to the commencement of any services hereunder by Optimal Water, the District shall review such Scope of Services, and if approved by its Board, shall issue a Task Order in connection with such approval authorizing Optimal Water to proceed.

Prior to the issuance of a designated Task Order, the District may negotiate with Optimal Water and approve reasonable modifications in the Scope of Services and Schedule, to be incorporated within said Task Order, so long as such modifications are within the general parameters set forth in Section 1.03 hereof and are determined to be in the best interest of the District.

Optimal Water shall immediately notify the District in writing of any work that the District requests to be performed that Optimal Water believes is outside of the original Scope of Services covered by this Agreement. If it is determined that said request is outside of the Scope of Services, such work shall not be performed unless and until the District approves such request in writing.

## ARTICLE 2. TERM

**2.01 Term.** The term of this Agreement (the “Term”) shall commence on the Effective Date and shall end on the third anniversary thereof unless earlier terminated in accordance with Section 2.03 hereof.

**2.02 Extension of Term.** The Term may be extended for a mutually agreeable period by written consent of the Parties.

**2.03 Termination.** Either Optimal Water or the District may terminate this Agreement, with or without cause, upon written notice specifying the effective date of termination; provided, that such written notice shall be given at least thirty (30) days before the date of termination; and provided further that in the event of termination by the District without cause, Optimal Water shall be paid for all satisfactory work.

## ARTICLE 3. PAYMENT FOR SERVICES

As compensation for the Services, the District hereby agrees to pay Optimal Water in the following manner throughout the Term of this Agreement.

**3.01 Labor and Expenses.** The District shall pay Optimal Water for Optimal Water’s actual time spent in performance of the Services and out-of-pocket costs expended on District’s behalf. Optimal Water’s labor and expenses shall be invoiced on a monthly basis, payable in arrears, in accordance with Optimal Water’s Professional Fee Schedule (attached as Exhibit A). Optimal Water’s total labor and expenses shall not exceed the estimate provided in the Scope of Services without prior written authorization from the District. District’s obligation to pay Optimal Water shall not arise until authority to proceed by District has been granted via an approved Task Order.

Absent breach hereof by Optimal Water, any payments made by the District to Optimal Water pursuant to this Section 3.01 shall be non-refundable to the District. Optimal Water hereby agrees to use its reasonable best efforts to keep the District informed of accrued time and expenses as may be requested by the District from time to time.

**3.02 Success Fee.** In the event a Transaction is identified during the Term and subsequently approved by the District as provided in Sections 3.03 and 4.01 hereof, the District hereby agrees to pay to Optimal Water a fee (the “Success Fee”) for each Transaction entered into by the District and a Buyer. Subject to the provisions of Section 3.04 hereof, the Success Fee shall be an amount determined by the following formula:

$$(a \times b) - c = \text{Success Fee}$$

where:

“a” is the total Transaction consideration payable over the term of the Transaction Contract, including renewal periods,

“b” is the fee of three percent (3%), and

“c” is the total sum of compensation paid to Optimal Water under Section 3.01 and has not been previously applied to any other Success Fee for a Transaction under this Section 3.02.

**3.03 Performance for Success Fee.** The Success Fee shall be paid by the District to Optimal Water in the amounts and at the times specified in Sections 3.02 and 3.04, respectively, upon the successful closing of a Transaction, as defined in the Transaction Contract, where:

(a) Optimal Water, or any other person, secures a Buyer who is ready, willing and able to execute a Transaction Contract during the Term, or any extension thereof; or

(b) Within one (1) year after expiration of the Term or any extension thereof, the District executes a Transaction Contract with any Buyer secured for the District by Optimal Water or a cooperating broker, agent or finder for Optimal Water during the Term;

provided that the Success Fee shall not be due or paid until all necessary approvals and permits required under the Transaction Contract are obtained (other than by the District) and all conditions of the Transaction Contract have been satisfied.

**3.04 Payment of Success Fee.** Unless otherwise arranged by mutual written agreement of the Parties, the Success Fee shall be due from the District to Optimal Water immediately upon the successful closing of the Transaction, as defined in the Transaction Contract, subject to the following conditions:

(a) In the event that the term of the Transaction Contract is ten (10) years or more, the Success Fee (as calculated in Section 3.02 hereof) will be discounted at an annual rate of five percent (5.0%).

(b) If calculation of the Success Fee for a specific Transaction yields a negative value after deduction of compensation paid to Optimal Water under Section 3.01 hereof, then any such negative value shall be credited against the Success Fee earned in the next Transaction completed during the Term. In no event shall a negative Success Fee be charged back to Optimal Water or applied against compensation earned and payable under Section 3.01 hereof.

(c) Success Fees shall only be payable from amounts received by the District from a Transaction, or from the consideration derived therefrom under 3.04 (c) above. The District shall have no obligation to pay the Success Fee from other revenues or reserves of the District.

**3.05 Conditions for Success Fee.** **The District acknowledges that California law does not fix Optimal Water's Success Fee and that the amount of the Success Fee has been negotiated between the District and Optimal Water. Optimal Water acknowledges that it shall not be entitled to any Success Fees under this Agreement until a Transaction Contract is executed by the District and the Buyer and the conditions precedent for the Transaction Contract to become effective are satisfied, including but not limited to the receipt by District of amounts due from the Buyer.**

**3.06 Frustration of Transaction Contract.** If completion of the Transaction set forth in the Transaction Contract is prevented by a Buyer other than the District, or by intervening of a third party or a government entity or court, the Success Fee shall be paid to Optimal Water only if and when the District collects damages by suit, settlement, or otherwise. The District shall not be required to initiate or defend any litigation that the District, in its reasonable discretion and in good faith, believes is neither meritorious nor economically feasible.

**3.07 Cooperating Agent.** Optimal Water is hereby authorized to cooperate with other agents, brokers and finders, and divide with other brokers, agents or finders, the Success Fee in any manner, acceptable to Optimal Water. The District shall have no liability for any such fees and Optimal Water shall hold the District harmless from any claims brought against Optimal Water or the District by any such cooperating broker, agent or finder. Any such cooperation agreement shall not relieve Optimal Water from its obligations to the District under this Agreement.

## ARTICLE 4. SCOPE OF OPTIMAL WATER'S AUTHORITY

**4.01 Representation.** When requested by the District, Optimal Water shall act exclusively as the District's representative in any Transaction authorized by District during the Term of this Agreement. It is understood that each contractual action of the District is nondelegable and must be authorized by the District's Board of Directors, and Optimal Water will not be authorized hereby to contract for the District.

**4.02 Scope of Optimal Water's Authority.** Optimal Water agrees to exercise reasonable effort and due diligence to achieve the purposes of this Agreement, and is authorized to market the District Water that has been identified as marketable by the District in any medium selected by Optimal Water in its sole and absolute discretion. The District agrees to consider Transaction offers presented by Optimal Water and, if determined to be acceptable, to act in good faith to consummate the Transaction Contract(s); provided, however, that it is understood that approval of all such Transactions shall be within the sole discretion of the District's Board of Directors. The District further agrees, regardless of responsibility, to indemnify, defend and hold Optimal Water harmless from all claims, disputes, litigation, judgments and attorneys' fees arising from any incorrect information supplied by the District, whether contained in any document, omitted therefrom, or otherwise, or from any material facts that the District knows but fails to disclose to Optimal Water.

**4.03 Optimal Water's Representations and Warranties.** Optimal Water represents and warrants that it is a California corporation engaged in the business of providing valuation, marketing and transaction services, among other things; and that it will comply with all applicable federal, state and local laws and regulations governing its duties and covenants under this Agreement during the Term. Optimal Water further represents and warrants that it will assist the District, at the District's direction, in obtaining all permits required by the District under any Transaction Contract executed during the Term.

## ARTICLE 5. DISPUTE RESOLUTION

**5.01** If any dispute arises between the Parties regarding this Agreement, the Parties will endeavor to resolve the dispute through non-binding arbitration as provided in this Section 5.01. The Parties may agree on a retired judge to serve as sole arbitrator. In the absence of such agreement, the Parties agree to choose a three-member panel, to be selected as follows:

- (a) One member shall be selected by Optimal Water;
- (b) One member shall be selected by the District; and
- (c) The third member shall be selected by the other two members of the panel.

**5.02** Each Party shall be responsible for any fees and expenses of the member of the panel appointed by that Party, and the fees and expenses of the third member of the panel (or of the sole arbitrator if there is only one) shall be shared fifty percent by Optimal Water and fifty percent by the District.

**5.03** If a Party asserts that another Party has breached obligations under this Agreement, it may request that the arbitration panel order the other Party to comply with this Agreement. Subject to the provisions of Section 5.04, upon the panel finding that a Party has in fact breached this Agreement, the panel may order compliance or it may order payment of damages for breach of this Agreement. If termination of this Agreement is sought by a Party pursuant to the terms hereof, the panel may determine, among other things, the issues of whether a substantial breach of the Agreement has occurred and the

panel may issue an award accordingly. Notwithstanding the foregoing, the panel shall have no authority to order or to impose exemplary, punitive, or indirect or consequential damages from said breach, nor shall the panel award any damages in tort.

**5.04** The decision of the panel becomes final within sixty (60) days, unless either Party affirmatively rejects the decision of the panel by written notice to the other Party and seeks legal or equitable relief in a court of law of competent jurisdiction, in which case the matter shall be heard and decided anew and the proceedings and decisions in the non-binding arbitration between the Parties shall be of no force or effect. If the Parties accept the decision of the panel, which decision shall be deemed accepted if not rejected in writing with sixty (60) days of issuance, the judgment upon the award rendered in any such arbitration shall be final and binding upon the Parties and may be entered in any court having jurisdiction thereof.

## **ARTICLE 6. MISCELLANEOUS PROVISIONS**

**6.01 Confidentiality.** Optimal Water hereby agrees not to disclose to any other person, firm, or corporation, nor use for its own benefit, during or after the Term of this Agreement, any trade secrets or other confidential information of the District that is acquired by Optimal Water in the course of performing the Services. For purposes of this Agreement, a “trade secret” is information not generally known to the public which gives the District an advantage over its competitors, including products or services under development, production methods and processes, subscriber or customer lists and marketing plans. Any information that (i) at or prior to the time of disclosure by the District to Optimal Water was generally available to the public through no breach of this Agreement, (ii) was available to the public on a non-confidential basis prior to its disclosure by the District to Optimal Water, or (iii) was made available to Optimal Water from a third party (provided that Optimal Water did not know that such party obtained or disseminated such information in breach of any legal obligation to the District) shall not be deemed confidential information of the District for purposes hereof. This Section 6.01 shall survive the termination of this Agreement.

**6.02 Intellectual Property.** All documents, records, work-product, discoveries and information (the “Work”) developed by Optimal Water, solely or with others, resulting from the performance of Services shall be the property of the District. Optimal Water shall and does hereby irrevocably grant and assign to the District all rights in and to the Work during the performance of this Agreement and thereafter, including but not limited to exclusive rights to reproduce, distribute, prepare derivative works, display and perform the Work. This Section 6.02 shall survive the termination of this Agreement.

**6.03 Independent Contractor.** For purposes of compensation paid to Optimal Water by the District under this Agreement, Optimal Water shall act as an independent contractor for the District and not as an agent or employee of the District. Nothing in this Agreement shall be construed to create the relationship of principal and agent, partnership, joint venture or any other relationship between the Parties hereto other than the relationship of an independent contractor. Optimal Water shall pay any and all taxes and all other payments required to be made under any federal, state or local laws or regulations, including, but not limited to, payments for unemployment insurance, social security, income taxes, and disability, health and worker’s compensation insurance.

**6.04 Integration.** This Agreement contains the entire agreement and understanding between the Parties and supersedes any prior understandings and agreements among them, whether written or oral respecting the subject matter of this Agreement.

**6.05 Amendments; Waiver.** No amendment to this Agreement shall be valid unless such amendment is in writing and is signed by both of the Parties to this Agreement. Any of the terms and

conditions of this Agreement may be waived at any time in writing by the Party entitled to the benefit thereof, but a waiver in one instance shall not be deemed to constitute a waiver in any other instance. A failure to enforce any provision of this Agreement shall not operate as a waiver of the provision or of any other provision hereof.

**6.06 Severability.** In the event that any provision of this Agreement shall be held to be invalid, illegal or unenforceable, the remaining provisions shall nevertheless remain in full force and effect and shall be construed as if the unenforceable provisions were deleted.

**6.07 Governing Law; Construction.** This Agreement shall be governed by and construed and enforced in accordance with the laws of the State of California. The language in all parts of this Agreement shall be construed simply according to its fair meaning and not strictly for or against any of the Parties hereto, and Section 1654 of the Civil Code shall have no application to interpretation of this Agreement.

**6.08 Remedies Limited.** Notwithstanding anything to the contrary set forth herein, the Parties remedies, in the event of breach hereof, are limited to those remedies in contract, arising from said breach. The Parties waive punitive, exemplary, indirect and consequential damages arising from any claimed breach of this Agreement, whether claimed in tort or contract. Damages arising from any breach hereof shall be limited to those direct monetary damages that the injured Party would have been entitled hereunder but for said breach, and shall not include attorneys and consultants fees.

**6.09 Assignment.** This Agreement shall be binding upon and inure to the benefit of the Parties and their respective successors and assigns: provided, however, that the duties of Optimal Water hereunder shall not be assignable or delegable by Optimal Water.

**6.10 Further Assurances.** Each Party hereto, upon the request of the other, agrees to perform such further acts and to execute and deliver such other documents as are reasonably necessary to carry out the provisions of this Agreement.

**6.11. Counterparts.** This Agreement may be executed by the Parties in counterparts, each of which when so executed and delivered shall be deemed to be an original and all of which when taken together shall constitute one and the same agreement.

**6.12 Notices.** All notices, requests and demands hereunder (“Notices”) shall be in writing and shall be deemed to have been duly given when delivered (or, if mailed by certified mail, postage prepaid, on the third business day after mailing, if that date is earlier than actual delivery). Notices shall be sent to a Party at the address of that Party set forth below or, if such Party has furnished notice of a change of that address as herein provided, to the address of that Party most recently so furnished.

To the District: Oroville-Wyandotte Irrigation District  
2310 Oro-Quincy Highway  
Oroville, CA 95966  
Attn: Mr. Michael C. Glaze, General Manager

To Optimal Water: Optimal Water, Inc.  
27201 Puerta Real, Suite 230  
Mission Viejo, CA 92691-8537  
Attn: Mr. Eric R. Robbins, President & CEO

**6.13 Authority of Signatories.** Each of the signatories hereto represents that he has been appropriately authorized to execute this Agreement on behalf of the Party for whom he is executing this Agreement. Notwithstanding the foregoing, no Task Order or Transaction shall be effective unless and until authorized by the Board of Directors of the District.

IN WITNESS WHEREOF, the Parties hereto have caused this Agreement to be executed as of the date first set forth above.

OROVILLE-WYANDOTTE IRRIGATION DISTRICT

By: \_\_\_\_\_  
Michael C. Glaze  
Its General Manager

OPTIMAL WATER, INC.

By: \_\_\_\_\_  
Eric R. Robbins  
Its President & Chief Executive Officer