# NOTICE OF SPECIAL CITY COUNCIL MEETING

**PURSUANT** to Texas Government Code §551.041, notice is hereby given that the City Council of the City of Midland, Texas, will meet in special session in the Council Chamber at City Hall, 300 North Loraine, Midland, Texas on May 30, 2012 at 9:00 AM for the following purposes:

1. Consider a resolution ratifying and approving revisions to the Amended and Restated Interlocal Agreement between the City of Midland and the Midland County Fresh Water Supply District No. 1 regarding the delivery of water from the T-Bar Ranch; the T-Bar Ranch is located in Winkler County and Loving County, Texas.

2. Consider a resolution ratifying and approving revisions to the Wholesale Water Delivery Agreement between the City of Midland and the Midland County Fresh Water Supply District No. 1 regarding the delivery of water from the T-Bar Ranch; the T-Bar Ranch is located in Winkler County and Loving County, Texas.

3. Consider a resolution approving a Remittance Agreement between the City of Midland and the Midland Development Corporation regarding the delivery of water from the T-Bar Ranch; the T-Bar Ranch is located in Winkler County and Loving County, Texas.

**WITNESS** my hand and seal of office on May 25, 2012.

_____

**Amy M. Turner, City Secretary**

**SEAL**:

# City Council Agenda

Approved for Agenda:

City Manager's Office

**MEETING DATE:** **Tuesday, May 30, 2012**

**TO:** **CITY COUNCIL**

**FROM:** **COURTNEY SHARP**

**SUBJECT:** **RESOLUTION(S) – Ratifying and Approving Three (3) Resolutions Regarding the T-Bar Project**

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**Purpose:**

(1) Ratifying and approving revisions to the Amended and Restated Interlocal Agreement between the City of Midland and the Midland County Fresh Water Supply District No. 1 regarding the delivery of water from the T-Bar Ranch.
(2) Ratifying and approving revisions to the Wholesale Water Delivery Agreement between the City of Midland and the Midland County Fresh Water Supply District No. 1 regarding the delivery of water from the T-Bar Ranch.
(3) Approving a Remittance Agreement between the City of Midland and the Midland Development Corporation regarding the delivery of water from the T-Bar Ranch.

**Recommended City Council Action**

☒ Approve ☐ Deny ☐ Direction/Informational

**Discussion:**

The Midland County Fresh Water Supply District No. 1 (District) and City Staff have been working with our legal and financial advisors to obtain approval from the Attorney General's Office on the Amended and Restated Interlocal Agreement and the Wholesale Water Delivery Agreement. Both agreements must be approved by the AG in order for the District to issue the bonds for the T-Bar project.

The first two resolutions you will be considering for ratification is to the existing agreements. Revisions have been made to both agreements at the request of the AG's office.

The third resolution is a Remittance Agreement between the City and MDC. The AG's Office is requiring the City to show proof that funds will be available to cover (backstop) the $70 million loan the District will receive from the local banks (interim financing).

**RESOLUTION NO.**

**RESOLUTION RATIFYING AND APPROVING REVISIONS TO THE AMENDED AND RESTATED INTERLOCAL AGREEMENT BETWEEN THE CITY OF MIDLAND AND THE MIDLAND COUNTY FRESH WATER SUPPLY DISTRICT NO. 1. REGARDING THE DELIVERY OF WATER FROM THE T-BAR RANCH; THE T-BAR RANCH IS LOCATED IN WINKLER COUNTY AND LOVING COUNTY, TEXAS**

**WHEREAS,** the City Council finds it to be in the public interest to ratify and approve revisions to the Amended and Restated Interlocal Agreement between the City of Midland and the Midland County Fresh Water Supply District No. 1 regarding the delivery of water from the T-Bar Ranch;

**NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF MIDLAND, TEXAS:**

**SECTION ONE.** That the revisions to the Amended and Restated Interlocal Agreement between the City of Midland and the Midland County Fresh Water Supply District No. 1 regarding the delivery of water from the T-Bar Ranch are hereby ratified and approved.

**SECTION TWO.** That the Mayor and the City Secretary are hereby authorized and directed to execute and attest, respectively, on behalf of the City of Midland, said agreement in substantially the form as shown on Exhibit "A", which is attached hereto and incorporated herein for all purposes.

On motion of Council member _____, seconded by Council member _____, the above and foregoing resolution was adopted by the City Council of the City of Midland at a regular meeting on the _____ day of _____, A.D., 2012, by the following vote:

Council members voting "AYE":

Council members voting "NAY":

_____
W. Wesley Perry, Mayor

ATTEST:

_____
Amy M. Turner, City Secretary

RECOMMENDED AND APPROVED:

_____
Courtney Sharp, City Manager

APPROVED AS TO FORM:

_____
Keith Stretcher, City Attorney

**AMENDED AND RESTATED**
**INTERLOCAL AGREEMENT REGARDING**
**T-BAR RANCH GROUNDWATER DELIVERY**

THE STATE OF TEXAS §
§ KNOW ALL BY THESE PRESENTS:
COUNTY OF MIDLAND §

**THIS AMENDED AND RESTATED INTERLOCAL AGREEMENT REGARDING T-BAR RANCH GROUNDWATER DELIVERY** (the "***Agreement***") is entered into between the City of Midland, Texas, a Texas home-rule city (the "***City***"), and the Midland County Fresh Water Supply District No. 1 (the "***District***"). In this Agreement, the City and District are sometimes individually referred to as a "***Party***" and collectively referred to as the "***Parties***".

**WHEREAS**, the City owns approximately 22,149 acres of land in Winkler and Loving Counties, Texas as more particularly described on **Exhibit A** attached hereto (the "***T-Bar Ranch***") and the groundwater rights and groundwater associated therewith; and

**WHEREAS**, the City desires a contract with the District for the delivery of such water (the "***Water***" as further defined below) from the T-Bar Ranch for sole delivery to the City; and

**WHEREAS,** the District desires to acquire, design, construct, install, finance, own, operate, maintain, and repair the Infrastructure (as defined below) necessary to produce and deliver the Water from the T-Bar Ranch to the City at the Delivery Point (as defined below) (the "***Project***" as further defined below); and

**WHEREAS,** the City requires the commencement of delivery of Water from the T-Bar Ranch to the City not later than May 31, 2013 (the "***Delivery Date***" as further defined below); and

**WHEREAS**, the City and District desire to negotiate and enter into a wholesale water delivery contract (the "***Wholesale Water Delivery Contract***" as further defined below) whereby the District shall acquire, design, construct, install, finance, own, operate, maintain, and repair the Infrastructure to deliver the Water from the T-Bar Ranch to the City's Delivery Point, and the City shall pay costs and water rates as further described herein; and

**WHEREAS**, during the Interim Period (as defined below) prior to entering into the Wholesale Water Delivery Contract, the Parties intend to: (i) refine specific aspects of the Project, such as the exact location of the Delivery Point; (ii) develop a wholesale delivery rate structure that is as favorable as possible to the City,is intended to produce an initial rate $2.78 per 1,000 gallons based on the delivery of 10 million gallons per dayas otherwise provided herein,and simply covers all of the costs of the District; and (iii) fully negotiate, refine, and finalize the terms of the Wholesale Water Delivery Contract, including those addressed herein; and

**WHEREAS**, the Parties intend to execute the Wholesale Water Delivery Contract not later than May 31, 2012; and

**WHEREAS**, the Parties desire to enter into this Agreement to: (i) provide a deadline by which the Parties will complete and execute the Wholesale Water Delivery Contract; (ii) memorialize certain general concepts of agreement relative to the Wholesale Water Delivery Contract, including the deadline by which the delivery of Water must begin; (iii) summarize certain terms necessary for the District to secure the Interim Loan (as defined below); and (iv) evidence the ultimate obligation of the City to provide funds for the right to receive Water pursuant to the Wholesale Water Delivery Contract.

**NOW, THEREFORE**,in consideration of the foregoing premises and the mutual promises and agreements of the Parties contained in this Agreement, the Parties agree as follows:

## I.
## DEFINITIONS

When used in this Agreement, capitalized terms not otherwise defined shall have the meanings set forth below:

**1.01** "***Agreement***" means this "Interlocal Agreement Regarding T-Bar Ranch Groundwater Delivery".

**1.02** "***Average Daily Amount***"means the average daily amount of water delivered by the Infrastructure to the Delivery Point, which shall be ten million gallons per day (10 MGD) unless otherwise decided by the City, agreed to by the District, and set forth in the Wholesale Water Delivery Contract.

**1.03** "***City***" means the City of Midland, Texas.

**1.04** "***City Payment***" shall have the meaning assigned in Section 5.01(d) of this Agreement.

**1.05** "***Construction Documents***" means the plans and specifications for the design and construction of the Infrastructure.

**1.06** "***Delivery Date***" means that date when the District will commence transporting Water from the T-Bar Ranch for delivery to the City at the Delivery Point, which date shall not be later than May 31, 2013, unless otherwise set forth in the Wholesale Water Delivery Contract.

**1.07** "***Delivery Point***" means the location for the point of delivery for the Water transported through the Infrastructure to the City as further described in Section 2.02(a)(viii) herein.

**1.08** "***District***" means the Midland County Fresh Water Supply District No. 1.

**1.09** "***District Debt***" means bonds or notes issued by the District pursuant to the Wholesale Water Delivery Contract and applicable law for the purpose of paying or reimbursing

Project Costs and refunding the Interim Loan. The Interim Loan does not constitute District Debt.

**1.10** "***District Notes***" means revenue notes of the District issued to evidence its obligation to repay the Interim Loan.

**1.11** "***Easements***" means all necessary easements, leases, licenses, and other rights of access and/or real property interests obtained by the District for the purpose of construction installation, operation, maintenance, and repair of the Infrastructure.

**1.12** "***Effective Date***" means the last date of execution of this Agreement by the Parties as indicated on the signature pages; provided each of the Parties must execute this Agreement for it to be effective.

**1.13** "***Expanded Infrastructure Capacity***" means any additional Infrastructure needed to produce and/or transport more than the Maximum Daily Amount up to the Pipeline Design Capacity.

**1.14** "***Infrastructure***" means all capital items used in the production and transport of Water from the T-Bar Ranch to the City at the Delivery Point, including the wells, pumping facilities, disinfection facilities, easements, pipelines, storage reservoirs, pump stations, meters.

**1.15** "***Interim Lender***" means the financial institution(s) advancing the Interim Loan to the District to pay or reimburse Interim Project Costs.

**1.16** "***Interim Loan***" means a loan from the Interim Lender to the District for the purpose of paying or reimbursing Interim Project Costs not to exceed Seventy Million and 00/100 Dollars ($70,000,000.00) in principal amount. The Interim Loan may be evidenced by separate notes to each financial institution acting as Interim Lender so long as the aggregate principal amount of all such notes shall not exceed the foregoing limitation.

**1.17** "***Interim Period***" means the period of time comprising the Term of this Agreement.

**1.18** "***Interim Project Costs***" means Project Costs financed using proceeds of an Interim Loan.

**1.19** "***Maximum Daily Amount***" means the maximum daily amount of water delivered by the Infrastructure at the Delivery Point, which shall be twenty million gallons per day (20 MGD) unless otherwise decided by the City, agreed to by the District, and set forth in the Wholesale Water Delivery Contract.

**1.20** "***Operation and Maintenance Expense***" means all direct and indirect costs of operation, maintenance, and repair of the Infrastructure, which will be further defined in the Wholesale Water Delivery Contract.

**1.21** "***Party***" or "***Parties***" means City and/or District, individually or collectively, as applicable.

**1.22** "***Pipeline***" means the pipeline or pipelines used by the District to transport Water from the T-Bar Ranch for delivery to the City at the Delivery Point.

**1.23** "***Pipeline Design Capacity***" means the capacity of the initial Pipeline, which capacity will be thirty-eight million gallons per day (38 MGD), unless otherwise decided by the City, agreed to by the District, and set forth in the Wholesale Water Delivery Contract.

**1.24** "***Project***" means, collectively, the District acquiring, designing, constructing, installing, financing, owning, operating, maintaining, and repairing the Infrastructure to deliver Water from the T-Bar Ranch to the City at the Delivery Point.

**1.25** "***Project Contractor***" means collectively Garney Companies, Inc. and Black and Veatch Corporation.

**1.26** "***Project Costs***" means all direct and indirect costs associated with acquiring, designing, constructing, installing, financing, owning, operating, maintaining, and repairing the Infrastructure to deliver Water from the T-Bar Ranch to the City at the Delivery Point, including the payment of District Debt and Operation and Maintenance Expenses.

**1.27** "***T-Bar Ranch Easements***" means the easements that shall be granted from the City to District to allow for the construction and operation of the Infrastructure by the District, which easements shall be term easements to run concurrent with the term of the Wholesale Water Delivery Contract.

**1.28** "***Term***" means the term of this Agreement, which, subject to Section 7.18, shall commence on the Effective Date and terminate the earlier of (i) the effective date of the Wholesale Water Delivery Contract, or (ii) May 31, 2012.

**1.29** "***Water***" means groundwater from the T-Bar Ranch which shall be delivered through the Infrastructure to the Delivery Point, and which shall be disinfected by District prior to entering the Pipeline.

**1.30** "***Wholesale Water Delivery Contract***" means the contract contemplated to be executed hereafter by the City and the District pursuant to Section 791.026 and Chapter 1502, Texas Government Code, whereby the District agrees to acquire, design, construct, install, finance, own, operate, maintain, and repair the Infrastructure to deliver Groundwater from the T-Bar Ranch to the City at the Delivery Point and the City agrees to pay the District's costs associated with the fulfillment of its duties, obligations, representations, warranties, and commitments under such contract.

## II.
## DESIGN, CONSTRUCTION AND OPERATION OF INFRASTRUCTURE

### 2.01 General.

(a) **Responsibility for the Project.** The Parties acknowledge and agree that the District shall be solely responsible for the Project.

(b) **Contracts and Agreements**. The Parties acknowledge and agree that District shall unilaterally enter into any and all agreements necessary to effectuate the Project. Notwithstanding the foregoing, District shall not place any restrictions into such agreements or contracts that restricts the contractors from contracting directly with the City should the Parties not enter into the Wholesale Water Delivery Contract.

**2.02 Construction of Infrastructure.**

(a) **General.**

(i) **Construction of Infrastructure & Acquisition of Right-of-Way**. District shall be solely responsible for constructing, or causing to be constructed, the Infrastructure, and for acquiring all related Easements, equipment, materials and supplies. District agrees that it will commence and/or has commenced the Project upon the Effective Date.

(ii) **City Review of Plans**. The Parties hereby acknowledge that the District will deliver final engineering and construction plans to the City for its review and comment, and the District and the City will discuss any comments that the City provides within Seventy-Two (72) hours after receiving the plans. However, if no comments are provided by the City within the indicated period, the City will be deemed to approve of the plans and no follow up discussion(s) will be necessary.

(iii) **Weekly Project Meetings.**Throughout the design and construction of the Infrastructure, District shall hold weekly meetings regarding the design and construction of the Project. District shall provide reasonable notice to City Manager of the time and location of such meetings and City Manager and/or his designee may attend such meetings.

(iv) **Design Capacity of Pipeline**. District shall ensure that the Pipeline that shall transport Water from the T-Bar Ranch to the Delivery Point meets the Design Capacity upon completion.

(v) **Amount of Water Delivered**. District shall ensure that by the Delivery Date, the Infrastructure is capable of delivering the Average Daily Amount and the Maximum Daily Amount of Water.

(vi) **Expanded Infrastructure Capacity**. District shall ensure that the Infrastructure is designed and constructed in accordance with the Expanded Infrastructure Capacity set forth in the Wholesale Water Delivery Contract.

(vii) **T-Bar Ranch Easements**. After execution of the Wholesale Water Delivery Contract, the City will convey to the District the T-Bar Ranch Easements for temporary and term easements over, across, and under the T-Bar Ranch as necessary for the construction and on-going operation of the Infrastructure, which term easements shall run concurrently with the term of the Wholesale Water Delivery Contract.

(viii) **Delivery Point**.The City shall have the right in its sole discretion to determine the Delivery Point, the location of which Delivery Point shall be determined and defined in the Wholesale Water Delivery Contract. Notwithstanding the foregoing, if the final determination of the Delivery Point extends beyond one-half (1/2) mile of the intersection of Highway 191 and FM 1788, the Project Costs, and the water rate as described in Section 3.02 herein shall be adjusted as necessary to accommodate any additional costs incurred in extending the Pipeline.

(b) **Timing**.

(i) **Delivery Date**. No later than the Delivery Date, District shall complete the Infrastructure and commence delivery of Water from the T-Bar Ranch to the City at the Delivery Point as further determined, quantified, and specified by the Parties in the Wholesale Water Delivery Contract.

(ii) **Penalties for Failure to Deliver**.District agrees to use its best efforts to ensure provisions are included in its contract(s) with the Project Contractor that require the Project Contractor to pay penalties to the City or that will enure fully to its benefitfor failure to deliver Water by the Delivery Date in the amount of One Hundred Fifty Thousand and 00/100 Dollars ($150,000.00) per month of delay, pro-rated per day of delay. The District agrees that the payment of such penalties may be recovered by the City through the rate(s) charged to the City under the Wholesale Water Delivery Contract.

(iii) **Incentives for Early Completion**. City agrees that it shall pay to the District bonus payments if District completes the Infrastructure and commences delivery of Water to the Delivery Point prior to May 31, 2013, in the amount of One Hundred Fifty Thousand and 00/100 Dollars ($150,000.00) per month of early completion, pro-rated per day of early completion. The City agrees that the payment of such bonus payments may be recovered through the rate(s) charged to the City under the Wholesale Water Delivery Contract.

(c) **Access andExamination**.

(i) District shall be responsible for inspecting or managing the inspection of the construction of the Infrastructure. City has the reasonable right to access and examine the construction of the Infrastructure throughout the term of the Project, at City's sole cost and expense. If City notes any problem or discrepancy when examining such construction, City shall promptly notify the District thereof, and the District shall respond to City within Seventy-Two (72) hours of receiving such notice.

(ii) Each Party shall have a reasonable right to access and examine the Infrastructure as construction progresses, and no Party shall interfere with such access or examination by any other Party or its designated representative(s).

(d) **Insurance**. The District shall require the contractors to procure and

maintain insurance policies and coverages with regard to the Project in amounts not less than the following:

(i) **Worker's Compensation**:

| | | |
|---|---|---|
| (1) | Worker's Compensation: | Statutory |
| (2) | Employer's Liability: | $1,000,000 |

(ii) **Commercial General Liability,** including Premises/Operations; Explosion, Collapse and (Underground Property Damage); Products/Completed Operations; Broad Form Contractual; Independent Contractors; Broad Form Property Damage; and Personal Injury Liabilities:

| | | |
|---|---|---|
| (1) | Bodily Injury: | $1,000,000 Each Occurrence<br>$2,000,000 Annual Aggregate |
| (2) | Property Damage: | $5,000,000 Each Occurrence<br>$5,000,000 Annual Aggregate |
| (3) | Personal Injury: | $1,000,000 Annual Aggregate |

(iii) **Comprehensive Automobile Liability,** including all owned (private and others), hired and non-owned vehicles:

| | | |
|---|---|---|
| (1) | Bodily Injury: | $1,000,000 Each Person<br>$1,000,000 Each Accident |
| (2) | Property Damage: | $5,000,000 Each Occurrence |

With respect to the policies and coverages referenced above, the District shallensure (i) the City is named as an additional insured under such policies (except for Worker's Compensation); (ii) a waiver of subrogation is included; and (iii) copies thereof are provided to the City prior to the commencement of construction and are kept current throughout construction activities.

(e) **Lien Waivers**. District shall expressly waive and release any and all liens and lien rights against the T-Bar Ranch as described on **Exhibit A** attached hereto and that are related to the T-Bar Ranch Easements. Further, District shall require all of its contractors and subcontractors to execute specific releases and/or waivers of liens and lien rights against the T-Bar Ranch. In the event that liens are filed by anyone in relation to the labor and/or material being furnished in conjunction with the Project, District agrees to require the same to be discharged, by posting a bond with the appropriate authorities, or otherwise, within five (5) days of notice.

**2.03 Payment of Project Costs and Performance/Payment Bonds.**

(a) **Payment of Project Costs**. District shall pay all Project Costs, and shall issue any debt necessary to fund such Project Costs.

(b) **Performance Bond and Payment Bond**. The District shall ensure that the Project Contractor furnishes a Performance Bond and a Payment Bond, each in the full amount of the Project Costs, and each naming the City as co-obligee.

**2.04 Acceptance.**

(a) Within thirty (30) days after completion of construction and prior to final payment to the engineers for the Infrastructure, District will cause the Project engineers to provide to each Party a concurrence letter from the Project engineers certifying that the construction of the Infrastructure has been completed in accordance with the approved plans, specifications and change orders, that the Infrastructure has been tested and approved for use in accordance with the approved contract documents, and that all such Infrastructure are properly located within easements or public rights-of-way, as specified in the Project plans.

(b) Within sixty (60) days after substantial completion of construction of the Infrastructure, District will cause the Project engineers to provide to each Party a copy of half-size drawings and the final "record" drawings of the completed system and facilities in an electronic format requested by such Party. Each Party shall be responsible for payment of any costs associated with obtaining such copies.

**2.05 Warranties**. District shall require that the Project Contractor repair, replace, or otherwise remedy as may be provided in any applicable warranty all warranted defects in materials, equipment or workmanship appearing and known to District within one (1) year from the date of acceptance of the Infrastructure.

**2.06 Dispute or Litigation**. In the event of any dispute between any contractors and District relating to the Project, or in the event of any claim by or against any third person arising out of or relating to the Project and/or the operation of the Infrastructure, the Parties agree as follows:

(a) District will provide written notice of the details of such dispute or litigation to City as soon as reasonably practicable, and shall continue to provide timely status reports to City as such dispute or litigation progresses; and

(b) Except as provided in Section 7.03 below, District will not initiate litigation for any matter that pertains to the Infrastructure or that may impact the Delivery Date without first seeking the written consent of City.

**2.07 Delivery of Water Solely to City**. The Parties hereby acknowledge that Water delivered through the Infrastructure is for the sole use of the City.

**2.08 Local Office of District and Emergency Response**.Throughout the construction of the Project and throughout the term of the Wholesale Water Delivery Contract, District shall

maintain a local office in Midland, Texas. District shall provide direct contact information to City such that City is able to reach a District representative twenty-four (24) hours per day, seven (7) days per week in case of emergency. If there shall be a break in a water line or a material malfunction in the Infrastructure, District shall respond and begin remediation and/or repairs immediately and in no case more than two (2) hours after notification.

## III.
## WHOLESALE WATER DELIVERY CONTRACT

**3.01 Generally.**

(a) City and District shall use their best efforts to enter into the Wholesale Water Delivery Contract with terms consistent with this Agreement not later than May 31, 2012.

(b) The Wholesale Water Delivery Contract shall include terms that all payments made by the City under such contract shall constitute reasonable and necessary operating expenses of the City's water utility system, as provided in Section 791.026 and Chapter 1502, Texas Government Code.

(c) The Wholesale Water Delivery Contract shall obligate the City to pay a rate for the delivery of Water to the City at the Delivery Point that is sufficient to pay all Project Costs, including costs associated with District Debt and Operations and Maintenance Expenses, as provided in Section 3.02(b) below.

(d) The term of the Wholesale Water Delivery Contract shall be for forty (40) years; provided that the Wholesale Water Delivery Contract shall remain in effect as long as any District Debt remains outstanding. Notwithstanding the foregoing, if the groundwater supplying the Project diminishes during the term of the Wholesale Water Delivery Contract such that, in City's sole discretion, it is not possible, cost-effective, or practicable to continue pumping, City shall have the right to pay the District as provided in Section 4.03 below and terminate the Wholesale Water Delivery Contract.

(e) The Wholesale Water Delivery Contract shall also include all provisions typical of such an agreement including, but not limited to, provisions of Force Majeure, remedies for breach, and representations and warranties of the Parties. Such provisions shall include the City's agreement to pay such amounts as shall be necessary to pay all Project costs, including costs associated with District Debt and Operations and Maintenance Expenses, as provided in Section 3.02(b) below.

(f) The Wholesale Water Delivery Contract shall provide that, throughout the term of such contract, the City may not obtain the services being provided by the District regarding the development and delivery of groundwater from the T-Bar Ranch from any other entity, however this is no way limits the rights of the City to secure a separate water supply from any other third party or source. The City expressly retains its absolute right to secure water from any other sources outside the T-Bar Ranch; provided, however, that such right shall not relieve the City of its obligations under Section 3.02(b) hereof.

### 3.02 Wholesale Water Delivery Rate.

(a) The wholesale water delivery rate to be paid to District by City shall be sufficient to cover all the Project Costs and shall exclude any rate of return or other form of profit for the District. Based upon the Project criteria set forth in the City's Request for Proposal regarding the Project, the Parties acknowledge that such rate should not exceed Two and 78/100 Dollars ($2.78) per one thousand (1,000) gallons and should be maintained without increase for the first three (3) years of the Wholesale Water Delivery Contract. Upon the expiration of the first three (3) year period, and thereafter every three (3) years, the rate should be automatically adjusted by the lesser of (a) an adjustment based on the Consumer Price Index - All Urban Consumers (CPI-U, Dallas-Fort Worth, TX, 1982-1984=100) published by the Bureau of Labor Statistics of the U. S. Department of Labor (or if such index shall cease to be published, then a regularly published index derived by using the same or substantially the same data and methodologies) for the preceding three (3) year period; or (b) five percent (5%) (the "***Rate Adjustment***"). Notwithstanding the foregoing, the City Manager may approve an increase in the rate greater than the Rate Adjustment at his sole discretion. Commencing April 30, 2029, the rate shall be renegotiated between the Parties, and such rate shall be sufficient to cover all Project costs, including costs associated with District Debt and Operation and Maintenance Expenses.

Notwithstanding any limitation imposed by Section 3.02 or any provision of the Wholesale Water Delivery Contract, the City shall agree to pay amounts which shall be received by the District at such times and in such amounts as shall be necessary to pay all Project costs, including costs associated with District Debt and Operations and Maintenance Expenses, as such costs arise and become due, and notwithstanding any default by the District.

(c) Until the Parties otherwise agree in the Wholesale Water Delivery Agreement, the City shall have the authority to terminate this Agreement consistent with the provisions of Article 5 and Section 7.18 below,if the City, in its sole discretion, determines that the Project Costs will exceed the City's ability to make payments as provided above.

## IV.
## OWNERSHIP AND OPERATION

### 4.01 Ownership Interests.

(a) The Parties hereby acknowledge that the ownership of and title to the Water is and shall remain vested in the City, even after it is produced and transported by the District from the T-Bar Ranch to the City at the Delivery Point.

(b) The Parties hereby acknowledge that the District shall own the entire Infrastructure unless and until its conveyance to the City under Section 5.01(e).

### 4.02 Infrastructure Operation and Maintenance.

(a) District shall be responsible for the on-going operation, maintenance, and repair of the Infrastructure after it is put into service.

(b) Water shall be delivered through the Infrastructure solely to the City.

(c) District shall manage, operate, and maintain the Infrastructure in accordance with accepted good business and engineering practices and in accordance with current and future requirements of federal and state law, including without limitation the Texas Water Code, and any current and future rules and regulations issued and to be issued by appropriate agencies in the administration of such laws.

(d) District shall be responsible for electricity costs for operation of the Infrastructure.

**4.03 Purchase Option**. At any time prior to the defeasance of all District Debt, the City shall have the right to pay the District an amount sufficient to fund a defeasance escrow for all then-outstanding District Debt and either (i) receive ownership of the Infrastructure under Section 5.01(e) and terminate the Wholesale Water Delivery Contract; or (ii) revoke and rescind the T-Bar Ranch Easements and direct the District to cease pumping groundwater from the T-Bar Ranch and terminate the Wholesale Water Delivery Contract. Upon either (i) or (ii) above, the District will covenant with holders of District Debt that amounts received from the City will be used to established a defeasance escrow to defease all then outstanding District Debt.

**4.04 Right of First Refusal**. Should the District receive a bona fide offer from a third party to purchase the Infrastructure, District shall provide written notice to City of the material terms thereof and provide the City the right to purchase the Infrastructure upon substantially the same material terms.

## V.
## INTERIM FINANCING

**5.01 Interim Financing**. The Parties hereby acknowledge that District intends to secure the Interim Loan from the Interim Lender solely for the Interim Project Costs. To evidence its obligation to repay the Interim Loan, the District may issue one or more revenue note(s) payable from revenues derived from the District's facilities, which shall consist of the Infrastructure. Payments received under this Agreement shall be deemed to be revenues of the Infrastructure.

(a) **District Debt**. If the Parties enter into the Wholesale Water Delivery Contract as contemplated herein and District Debt is issued, any outstanding principal and interest from the Interim Loan shall be refunded and paid in full from and retired by the proceeds of the District Debt.

(b) **First TermCity Responsibility**. If, for any reason whatsoever the Parties do not enter into the Wholesale Water Delivery Contract on or before May 31, 2012, the City shall pay Interim Project Costs incurred prior to May 31, 2012, as follows:

(i) City shall pay one hundred percent (100%) of costs associated with acquiring Easements for the Project, including, but not limited to, surveying costs and interest incurred by District associated directly with financing such costs. All Easements for the Project will be

acquired in a way that they are fully assignable to City, and all such Easements, documentation, and records shall be transferred, assigned and conveyed to City upon payment of such costs.

(ii) City shall pay one hundred percent (100%) of costs associated with the ordering, purchase and/or receipt of pipe or other Infrastructure and interest incurred by District associated directly with financing such costs. All such pipe and/or other Infrastructure that has been purchased and received shall be transferred and conveyed to City upon payment of such costs. For any such pipe that has been ordered and a deposit placed (but when such pipe has not yet been received), City may either take delivery of the pipe and pay the full costs thereof or the City may cancel such pending orders and take receipt of any deposits placed.

(iii) City shall pay one hundred percent (100%) of costs associated with drilling any well on the T-Bar Ranch, including any test well and interest incurred by District associated directly with financing such costs. All such wells and any data, reports, and records therefrom shall be transferred and conveyed to City upon payment of such costs.

(iv) City shall pay one hundred percent (100%) of professional fees associated with the Project and professional fees and costs associated with the Interim Loan up to a maximum of Three Million and 00/100 Dollars ($3,000,000.00). All Construction Documents shall be transferred and conveyed to City upon payment of costs in accordance with this provision.

(v) City shall pay one hundred percent (100%) of the accrued interest on the Interim Loan as of the date the amounts set forth in clause (i) – (iv) above are paid in full by the City, which payments shall be made by the City on or before the maturity date of the Interim Loan.

The City hereby recognizes and agrees that its obligation under Section 5.01(b) to pay the costs specified therein shall be pledged and assigned by the District to the Interim Lender to secure payment of the Interim Loan. The City acknowledges and agrees that its obligations under this Section 5.01(b) will remain if the Wholesale Water Delivery Contract is not entered into by May 31, 2012. The City further agrees to waive any right of set-off in connection with its obligations under this Section 5.01(b).

(c) **Second Term City Responsibility**.In the event the Wholesale Water Delivery Contract is entered into, but if for any reason whatsoever the bonds and/or notes constituting the District Debt have not been issued by October 31, 2012, the City shall pay Interim Project Costs incurred prior to October 31, 2012, as follows:

(i) City shall pay one hundred percent (100%) of costs associated with acquiring Easements for the Project, including, but not

limited to, surveying costs and interest incurred by District associated directly with financing such costs. All Easements for the Project will be acquired in a way that they are fully assignable to City, and all such Easements, documentation, and records shall be transferred, assigned and conveyed to City upon payment of such costs.

(ii) City shall pay one hundred percent (100%) of costs associated with the ordering, purchase and/or receipt of pipe or other Infrastructure and interest incurred by District associated directly with financing such costs. All such pipe and/or other Infrastructure that has been purchased and received shall be transferred and conveyed to City upon payment of such costs. For any such pipe that has been ordered and a deposit placed (but when such pipe has not yet been received), City may either take delivery of the pipe and pay the full costs thereof or the City may cancel such pending orders and take receipt of any deposits placed.

(iii) City shall pay one hundred percent (100%) of costs associated with drilling any well on the T-Bar Ranch, including any test well and interest incurred by District associated directly with financing such costs. All such wells and any data, reports, and records therefrom shall be transferred and conveyed to City upon payment of such costs.

(iv) City shall pay one hundred percent (100%) of professional fees associated with the Project and professional fees and costs associated with the Interim Loan upto a maximum of Nine Million and 00/100 Dollars ($9,000,000.00). All Construction Documents shall be transferred and conveyed to City upon payment of costs in accordance with this provision.

(v) City shall pay one hundred percent (100%) of the accrued interest on the Interim Loan as of the date the amounts set forth in clauses (i) – (iv) above are paid in full by the City, which payments shall be made by the City on or before the maturity date of the Interim Loan.

The City hereby recognizes and agrees that its obligation under Section 5.01(c) to pay the costs specified therein shall be pledged and assigned by the District to the Interim Lender to secure payment of the Interim Loan. The City acknowledges and agrees that its obligations under this Section 5.01(c) will remain if the bonds and/or notes constituting the District Debt have not been issued by October 31, 2012. The City further agrees to waive any right of set-off in connection with its obligations under this Section 5.01(c).

(d) **Timing and Sources of City Payment**. City shall pay all amounts due and owing pursuant to Section 5.01(b) and (c) on or before the maturity date of the Interim Loan or the date on which such amounts must be prepaid, which is anticipated to be January 29, 2013; provided that such amount shall not to exceed Seventy Three Million Two Hundred Sixty-Six Thousand Eight Hundred Thirty and 00/100 Dollars ($73,266,830.00) (the "***City Payment***").

City's obligation to pay City Payment constitutes an operating expense of the City's Water and Wastewater System secured by pledge of City Water and Wastewater System revenues.

To the extent that the revenues of the City's Water and Wastewater System are insufficient to pay the City Payment on or before January 29, 2013, the portion of the City Payment that is not paid from revenues of the City's Water and Wastewater System, subject to annual appropriation by the City, shall be payable solely from lawfully available funds of the City.

(e) **Acquisition and Conveyance of Infrastructure**. Upon City's payment of all amounts due and owing pursuant to Section 5.01(b) and (c), District shall transfer and convey to City all right, title and ownership of the Infrastructure, including any Easements, wells, pipes, other equipment, data, reports and records.

**5.02 District Debt**. District shall ensure that the District Debt is issued in a way that (i) permits City at its option the ability to either defease or assume such District Debt in conjunction with the exercise of its Purchase Option in Section 4.03 above; and (ii) permits the District to escalate repayment of the debt or issue an optional call for early paydown without penalties. City shall be responsible for any costs associated with assuming such District Debt according to (i) above.

## VI.
## DISTRICT BOARD MEETINGS

**6.01** Upon the Effective Date of this Agreement and throughout the term of the Wholesale Water Delivery Contract, City may designate three (3) individuals to whom the District shall directly provide copies of all public notices of all meetings of the District's board of supervisors and copies of all publicly available reports from such meetings, and such individualsshall be permitted to attend all such meetings. City shall have sole discretion in the selection of each of the three (3) referenced individuals. District shall post notice of all of its meetings on the City's bulletin boards in addition to any other postings it may make.

## VII.
## GENERAL PROVISIONS

**7.01 Exclusive Negotiations**.During the Term of this Agreement, the Parties agree to work together to develop and execute the Wholesale Water Delivery Contract.

**7.02 Compliance with Laws**.All activities of the Parties under this Agreement and the Wholesale Water Delivery Contract shall be in compliance with all applicable Federal, State and Local rules, laws, and regulations. The Parties agree and acknowledge that time is of the essence in the completion of the obligations hereunder, and each Party shall pursue with best efforts any permits or authorizations required for performance hereunder.

**7.03 Agreement Regarding Remedies**. The Parties agree that their respective obligations under this Agreement are unique and the failure by any Party to perform its obligations under this Agreement would not be capable of being appropriately remedied by

award of damages to any other affected Party to this Agreement and in any event, such damages would be difficult, if not impossible, to determine because of the unique nature of the Parties' obligations to each other hereunder. Further, the Parties agree that the remedy of termination of this Agreement by any Party is inappropriate and not in the public interest. Therefore, the Parties agree that they shall be entitled, and limited, to the remedies of specific performance, mandamus and injunction in the event of any breach of any obligation by any Party under this Agreement. The Parties hereby waive any requirement that they be required to provide any bond or other surety in order to obtain any of the agreed upon remedies

**7.04 Authority**. This Agreement is made in part under the authority conferred in Section 791.026 and Chapter 1502, Texas Government Code.

**7.05 Severability**. The provisions of this Agreement are severable and, if any provision of this Agreement is held to be invalid for any reason by a court or agency of competent jurisdiction, the remainder of this Agreement will not be affected and this Agreement will be construed as if the invalid portion had never been contained herein.

**7.06 Assignment**. Except as provided by Section 5.01 of this Agreement, the assignment of this Agreement by any Party is prohibited without the prior written consent of the other Parties. All of the respective covenants, undertakings, and obligations of each of the Parties will bind that Party and will apply to and bind any successors or assigns of that Party.

**7.07 Source of Payment; Limited Pledge to Secure Payment**.

(a) The City represents and covenants that all payments to be made by it under this Agreement and under the Wholesale Water Delivery Contract shall constitute reasonable and necessary "operating expenses," as defined in Chapter 1502, as amended, Texas Government Code, of the City's Water and Wastewater System, but only to the extent of payments in respect of District Debt, Operation and Maintenance Expenses, and Interim Project Costs. The City shall not be obligated to make payments under this Agreement or under the Wholesale Water Delivery Contract from any source other than the gross revenues of its Water and Wastewater System or, in the case of the Interim Project Costs, to the extent such revenues are insufficient and subject to annual appropriation by the City, from lawfully available funds of the City as provided in Section 5.01(b) and (c) above. The City further represents that its governing body has determined that the services to be provided by the Project are absolutely necessary and essential to provide water to the City.

(b) The City will agree throughout the term of this Agreement and the Wholesale Water Delivery Contract to fix and collect such rates and charges for services to be supplied by its System as will produce gross revenues at all times during the term of this Agreement and the Wholesale Water Delivery Contract in an amount at least equal to (i) all of the expenses of operation and maintenance of the City's System, including specifically its payments under the Wholesale Water Delivery Contract (but exclusive of amounts paid pursuant to Section 12.2 of the Wholesale Water Delivery Contract) and (ii) all other amounts as required by law and the provisions of the ordinances or resolutions authorizing the City's utility system bonds or other obligations now or hereafter outstanding payable, in whole or in part, from the net revenues of the City's utility system, including the amounts required to pay all principal of and

interest on the City's utility system bonds and other obligations.

(c) No ad valorem tax revenues of any of the City shall be pledged to the payment of any amounts to be paid by the City to the District under this Agreement, nor shall the District have the right to demand payment of any amounts to be paid by the City under this Agreement from funds raised or to be raised from ad valorem taxation. The obligations under this Agreement shall never be construed to be a debt or pecuniary obligation of the City of such kind as to require the City to levy and collect an ad valorem tax to discharge its obligations.

(d) The City hereby pledges the gross revenues of its Water and Wastewater System to the payment of its obligations under this Agreement, and recognizes that the District will, and authorizes the District to, pledge the amounts owing to the District by the City under this Agreement to the payment of the District Notes. To the extent that the revenues of the City's Water and Wastewater System are insufficient to pay the City Payment on or before January 29, 2013, the portion of the City Payment that is not paid from revenues of the City's Water and Wastewater System shall, subject to annual appropriation by the City, be payable solely from lawfully available funds of the City. The District agrees to make the payments for the District Notes when and as required by the District Notes and this Agreement from and to the extent of payments made by the City.

(e) The City acknowledges that, as of the date of this Agreement, the District's sole source of revenues to discharge its obligations to the City, to the Interim Lender and to any other person shall consist of amounts received from the City pursuant to this Agreement.

**7.08 Cooperation**. The Parties agree to cooperate at all times in good faith to effectuate the purposes and intent of this Agreement.

**7.09 Third Party Beneficiaries**. Except as expressly provided for herein, nothing in this Agreement, express or implied, is intended to confer upon any person or entity, other than the Parties, any rights, benefits, or remedies under or by reason of this Agreement.

**7.10 Entire Agreement**. This Agreement contains the entire agreement of the Parties regarding the subject matter hereof and supersedes all prior or contemporaneous understandings or representations, whether oral or written, regarding the subject matter. The Parties confirm that further agreements regarding the supply of Water in accordance with the Wholesale Water Delivery Contract are contemplated and will not be affected or limited by this Agreement. City shall not be obligated to purchase Water from the District until obligated by the terms of a fully-executed Wholesale Water Delivery Contract.

**7.11 Interpretation and Reliance**. No presumption will apply in favor of either Party in the interpretation of this Agreement or in the resolution of any ambiguity of any provisions hereof.

**7.12 Relationship of Parties**. This Agreement is based upon the active participation of the Parties. Neither the execution nor the delivery of this Agreement shall create or constitute a partnership, joint venture, or any other form of business organization or arrangement between

the Parties, except for the contractual arrangements specifically set forth in this Agreement. No Party shall have any power to assume or create any obligation on behalf of the other Party.

**7.13 Amendments**. Any amendment of this Agreement must be in writing and will be effective if: (i) it is signed by the authorized representatives of the Parties; and (ii) the Parties obtain the written consent of the Interim Lender.

**7.14 Applicable Law; Venue**. This Agreement will be construed in accordance with Texas law. Venue for any action arising hereunder will be exclusively in Midland County, Texas, and the Parties hereby agree that Midland County is the proper venue for any such action since the place for performance of the obligations hereunder, including, but not limited to the Delivery of Water and payment by City of obligations incurred is in Midland County.

**7.15 Notices**. Any notices given under this Agreement will be effective if (i) forwarded to a Party by hand-delivery; (ii) transmitted to a Party by confirmed telecopy; or (iii) deposited with the U.S. Postal Service, postage prepaid, certified, to the address of the Party indicated below:

| | |
|---|---|
| **CITY:** | City of Midland<br>City Hall<br>300 N. Loraine<br>Midland, Texas 79701<br>Attn: Courtney Sharp<br>Telephone: (432) 685-7202<br>Facsimile: (432) 686-1600<br>Email: csharp@midlandtexas.gov |
| with copy to: | Lloyd Gosselink Rochelle & Townsend, PC<br>816 Congress Ave., Suite 1900<br>Austin, Texas 78701<br>Attn: Cathleen Slack<br>Telephone: (512) 322-5809<br>Facsimile: (512) 874-3909<br>Email: cslack@lglawfirm.com |
| **DISTRICT:** | Midland County Fresh Water Supply District No. 1<br>1700 West Wall Street<br>Midland, Texas 79701<br>Attn: Jose Cuevas, President<br>Telephone: (432) 697-1447<br>Facsimile: (432) 697-9758<br>Email: jcuevas@h2otx.net |
| with copy to: | Stubbeman, McRae, Sealy, Laughlin & Browder, Inc.<br>550 West Texas Ave. Suite 800 |

Midland, Texas 79701
Attn: Robert Rendall
Telephone: (432) 688-0246
Facsimile: (432) 682-4884
Email: rrendall@stubbemanlawfirm.com

**7.16 Counterparts; Effect of Partial Execution**. This Agreement may be executed simultaneously in multiple counterparts, each of which will be deemed an original, but all of which will constitute the same instrument.

**7.17 Authority**. Each Party represents and warrants that it has the full right, power and authority to execute this Agreement.

**7.18 Survival**. The Parties agree and acknowledge that should the Parties fail to enter into the Wholesale Water Delivery Contract by May 31, 2012, and this Agreement should terminate by its terms, the provisions of Section 5.01(b) and Section 5.01(c) relating to the City's obligation to pay certain costs shall survive termination of this Agreement. The parties agree and acknowledge that upon the execution of the Wholesale Water Delivery Contract, the provisions of Section 5.01 relating to the City's obligation to pay certain costs shall continue to be effective and survive termination of this Agreement.

*(Signature Pages Follow)*

**CITY:**

**ATTEST:**

**CITY OF MIDLAND, TEXAS:**

_____
Amy M. Turner, City Secretary

By:_____
Printed Name: W. Wesley Perry
Title: Mayor

Date: _____

STATE OF TEXAS §
§
COUNTY OF MIDLAND §

This instrument was acknowledged before me on this _____ day of_____, 2012, by W. Wesley Perry, Mayor of the City of Midland, Texas, on behalf of said City.

_____
Notary Public - State of Texas

**Approved as to Content:**

By:_____
Printed Name: Courtney B. Sharp
Title: City Manager
Date: _____

**Approved as to Form:**

By:_____
Printed Name: Keith Stretcher
Title: City Attorney
Date: _____

**ATTEST:**

_____

**DISTRICT:**

**MIDLAND COUNTY FRESH WATER SUPPLY DISTRICT NO. 1:**

By:_____
Printed Name: Jose Cuevas
Title: President

Date: _____

STATE OF TEXAS §
§
COUNTY OF _____ §

This instrument was acknowledged before me on this _____ day of_____, 2012, by Jose Cuevas, President of Midland County Fresh Water Supply District No. 1, on behalf of said District.

_____
Notary Public - State of Texas

# EXHIBIT A

## Description of T-Bar Ranch

Those certain tracts of land in Winkler County and Loving County, Texas acquired by the City by Warranty Deed on August 25, 1965 and recorded in Volume 35, Page 472, Deed Records of Winkler County, Texas and those certain groundwater rights acquired by the City by Deed recorded on June 23, 1966 and January 16, 1967 and recorded in Volume 217, Page 515 and Volume 222, Page 638, respectively, Deed Records of Winkler County, Texas and as further described as follows:

| Section | Block | Survey | Acreage |
|---|---|---|---|
| 7 | C-23 | PSL | 292 |
| 10 | C-23 | PSL | 640 |
| 11 | C-23 | PSL | 640 |
| 12 | C-23 | PSL | 496 |
| 13 | C-23 | PSL | 701 |
| 14 | C-23 | PSL | 640 |
| 17 | C-23 | PSL | 640 |
| 18 | C-23 | PSL | 640 |
| 19 | C-23 | PSL | 266 |
| 20 | C-23 | PSL | 471 |
| 21 | C-23 | PSL | 640 |
| 22 | C-23 | PSL | 640 |
| 23 | C-23 | PSL | 640 |
| 24 | C-23 | PSL | 640 |
| 25 | C-23 | PSL | 640 |
| 26 | C-23 | PSL | 640 |
| 27 | C-23 | PSL | 676 |
| 1 | C-24 | PSL | 640 |
| 2 | C-24 | PSL | 640 |
| 3 | C-24 | PSL | 640 |
| 4 | C-24 | PSL | 640 |
| 5 | C-24 | PSL | 687 |
| 6 | C-24 | PSL | 640 |
| 7 | C-24 | PSL | 640 |

| | | | |
|---|---|---|---|
| 12 | C-24 | PSL | 640 |
| 17 | C-24 | PSL | 640 |
| 18 | C-24 | PSL | 640 |
| 8 | 74 | PSL | 640 |
| 9 | 74 | PSL | 640 |
| 10 | 74 | PSL | 640 |
| 11 | 74 | PSL | 640 |
| 27 | 74 | PSL | 640 |
| 1 | 75 | PSL | 640 |
| | | Total Acreage | 20,229 |

| Section | Block | Survey | Acreage |
|---|---|---|---|
| 15 | C-23 | PSL | 640 |
| 16 | C-23 | PSL | 640 |
| 7 | 74 | PSL | 640 |
| | | Total Acreage | 1,920 |

# City Council Agenda

Approved for Agenda:

City Manager's Office

**MEETING DATE:** **Tuesday, May 30, 2012**

**TO:** **CITY COUNCIL**

**FROM:** **COURTNEY SHARP**

**SUBJECT:** **RESOLUTION(S) – Ratifying and Approving Three (3) Resolutions Regarding the T-Bar Project**

---

**Purpose:**

(1) Ratifying and approving revisions to the Amended and Restated Interlocal Agreement between the City of Midland and the Midland County Fresh Water Supply District No. 1 regarding the delivery of water from the T-Bar Ranch.
(2) Ratifying and approving revisions to the Wholesale Water Delivery Agreement between the City of Midland and the Midland County Fresh Water Supply District No. 1 regarding the delivery of water from the T-Bar Ranch.
(3) Approving a Remittance Agreement between the City of Midland and the Midland Development Corporation regarding the delivery of water from the T-Bar Ranch.

**Recommended City Council Action**

☒ Approve ☐ Deny ☐ Direction/Informational

**Discussion:**

The Midland County Fresh Water Supply District No. 1 (District) and City Staff have been working with our legal and financial advisors to obtain approval from the Attorney General's Office on the Amended and Restated Interlocal Agreement and the Wholesale Water Delivery Agreement. Both agreements must be approved by the AG in order for the District to issue the bonds for the T-Bar project.

The first two resolutions you will be considering for ratification is to the existing agreements. Revisions have been made to both agreements at the request of the AG's office.

The third resolution is a Remittance Agreement between the City and MDC. The AG's Office is requiring the City to show proof that funds will be available to cover (backstop) the $70 million loan the District will receive from the local banks (interim financing).

**RESOLUTION NO.**

**RESOLUTION RATIFYING AND APPROVING REVISIONS TO THE WHOLESALE WATER DELIVERY AGREEMENT BETWEEN THE CITY OF MIDLAND AND THE MIDLAND COUNTY FRESH WATER SUPPLY DISTRICT NO. 1. REGARDING THE DELIVERY OF WATER FROM THE T-BAR RANCH; THE T-BAR RANCH IS LOCATED IN WINKLER COUNTY AND LOVING COUNTY, TEXAS**

**WHEREAS,** the City Council finds it to be in the public interest to ratify and approve revisions to the Wholesale Water Delivery Agreement between the City of Midland and the Midland County Fresh Water Supply District No. 1 regarding the delivery of water from the T-Bar Ranch;

**NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF MIDLAND, TEXAS:**

**SECTION ONE.** That the revisions to the Wholesale Water Delivery Agreement between the City of Midland and the Midland County Fresh Water Supply District No. 1 regarding the delivery of water from the T-Bar Ranch are hereby ratified and approved.

**SECTION TWO.** That the Mayor and the City Secretary are hereby authorized and directed to execute and attest, respectively, on behalf of the City of Midland, said agreement in substantially the form as shown on Exhibit "A", which is attached hereto and incorporated herein for all purposes.

On motion of Council member _____, seconded by Council member _____, the above and foregoing resolution was adopted by the City Council of the City of Midland at a regular meeting on the _____ day of _____, A.D., 2012, by the following vote:

Council members voting "AYE":

Council members voting "NAY":

_____
W. Wesley Perry, Mayor

ATTEST:

_____
Amy M. Turner, City Secretary

RECOMMENDED AND APPROVED:

_____
Courtney Sharp, City Manager

APPROVED AS TO FORM:

_____
Keith Stretcher, City Attorney

# WHOLESALE WATER DELIVERY AGREEMENT

THE STATE OF TEXAS §
§ KNOW ALL BY THESE PRESENTS:
COUNTY OF MIDLAND §

**THIS WHOLESALE WATER DELIVERY AGREEMENT** (the "***Agreement***") is entered into between the CITY OF MIDLAND, TEXAS, a Texas home-rule city (the "***City***"), and the MIDLAND COUNTY FRESH WATER SUPPLY DISTRICT NO. 1, a fresh water supply district created pursuant to Chapter 53 of the Texas Water Code and the provisions of Article XVI, Section 59 of the Texas Constitution (the "***District***"). In this Agreement, the City and District are sometimes individually referred to as a "***Party***" and collectively referred to as the "***Parties***".

**WHEREAS**, the City owns approximately 22,149 acres of land in Winkler and Loving Counties, Texas as more particularly described on **Exhibit A** attached hereto (the "***T-Bar Ranch***") and the groundwater rights and groundwater associated therewith; and

**WHEREAS**, the City desires that the District develop the groundwater under T-Bar Ranch and deliver it solely to the City; and

**WHEREAS,** the District desires to acquire, design, construct, install, finance, own, operate, maintain, and repair the Infrastructure (as defined below) necessary to produce and deliver the groundwater from the T-Bar Ranch to the City at the Delivery Point (as defined below); and

**WHEREAS**, the District desires to acquire, design, construct, install, finance, and own the Extended Infrastructure (as defined below); and

**WHEREAS**, the City shall pay to the District the Water Rates as further described herein; and

**WHEREAS,** the City requires the commencement of delivery of Water from the T-Bar Ranch to the City not later than May 31, 2013 (the "***Delivery Date***" as further defined below); and

**WHEREAS**, the City and the District entered into that certain Interlocal Agreement Regarding T-Bar Ranch Groundwater Delivery on February 23, 2012 as modified by that certain Amended and Restated Interlocal Agreement Regarding T-Bar Ranch Groundwater Delivery on May 30, 2012, which reflected the Parties agreements as to certain provisions herein; and

**WHEREAS,** the District shall issue and sell District Debt (as defined below) for the purpose of financing the Infrastructure and Extended Infrastructure; and

**WHEREAS**, such District Debt shall be secured by and payable from the payments from the City under this Agreement; and

**WHEREAS**, for as long as any District Debt is outstanding, the City has an unconditional obligation to make payments under this Agreement in amounts sufficient to pay the debt service on such District Debt.

**NOW, THEREFORE**, in consideration of the foregoing and the mutual agreements hereinafter set forth, and for other good and valuable consideration, the receipt and adequacy of which are hereby acknowledged, the Parties agree as follows:

## ARTICLE I.
## DEFINITIONS AND CONSTRUCTION OF AGREEMENT

When used in this Agreement, capitalized terms not otherwise defined shall have the meanings set forth below:

**1.01** *"**Administrative Expenses**"* means administrative expenses of the District related solely to the Project.

**1.02** "***Agreement***" means this Wholesale Water Delivery Agreement.

**1.03** *"**Annual Budget**"* means the budget of the District stating the expected expenses of the District for the following calendar year.

**1.04** *"**Annual Audit**"* means the annual reconciliation of amounts paid to the District by the City to the amount of Operations and Maintenance Expenses and District Debt payments of the District in such year.

**1.05** "***Average Daily Amount***" means the average daily amount of Water delivered by the Infrastructure to the City at the Delivery Point, which shall be ten million gallons per day (10 MGD).

**1.06** *"**Business Day**"* means any Day other than Saturdays, Sundays, and Days on which banks in the City of New York, New York, or the City of Midland, Texas are required or permitted to be closed for all or part of their customary hours of operation.

**1.07** *"**Calendar Year**"* means January 1 through December 31 of any given year.

**1.08** "***City***" means the City of Midland, Texas.

**1.09** "***City Payment***" shall have the meaning assigned in Section 12.2 of this Agreement.

**1.10** "***City's Fiscal Year***" shall mean the fiscal year of the City.

**1.11** "***Construction Documents***" means the plans and specifications for the design and construction of the Infrastructure and Extended Infrastructure.

**1.12** "***Day***" means a 24-hour period commencing at 0:00:00 hours each day and ending at 23:59:59 hours on the same day, determined by reference to prevailing Central time.

**1.13** "***Debt Service Fund***" mean the fund by that name created pursuant to the Trust Indenture under which the District Debt is issued.

**1.14** "***Delivery Date***" means that date when the District will commence transporting Water from the T-Bar Ranch for delivery to the City near the intersection of State Highway 191 and FM 1788 at the Delivery Point, which date shall not be later than May 31, 2013 subject to the provisions of this Agreement.

**1.15** "***Delivery Point***" means the location for the point of delivery for the Water transported through the Infrastructure to the City as further described on **Exhibit B** attached hereto.

**1.16** "***District***" means the Midland County Fresh Water Supply District No. 1.

**1.17** "***District Debt***" means bonds, notes or other obligations issued by the District pursuant to this Agreement and applicable law for the purpose of financing the Infrastructure and Extended Infrastructure and any bonds, notes or other obligations issued to refund same or to refund any such refunding bonds, rates or other obligations.

**1.18** "***District's Fiscal Year***" shall mean the fiscal year of the District.

**1.19** "***Easements***" means all necessary easements, leases, licenses, and other rights of access and/or real property interests obtained by the District for the purpose of construction installation, operation, maintenance, and repair of the Infrastructure and Extended Infrastructure.

**1.20** "***Effective Date***" means the last date of execution of this Agreement by the Parties as indicated on the signature pages; provided each of the Parties must execute this Agreement for it to be effective.

**1.21** "***Expanded Infrastructure***" means the additional Infrastructure required to meet the Expanded Infrastructure Capacity and as described on **Exhibit E** attached hereto.

**1.22** "***Expanded Infrastructure Capacity***" means any additional Infrastructure needed to produce and/or transport more than the Maximum Daily Amount up to the Pipeline Design Capacity as required by the City.

**1.23** "***Expansion Fund***" means the fund by that name created pursuant to the Trust Indenture under which the District Debt is issued. Such fund shall not be pledged to payment of the District Debt and shall be held by the Trustee outside the trust estate for the District Debt.

**1.24** "***Extended Infrastructure***" means that certain right-of-way, pipeline, elevated storage tank, and injection station which shall be constructed and located as further described on **Exhibit C** attached hereto.

**1.25** "***Extended Pipeline***" means that certain forty-eight inch (48") pipeline as described and shown on **Exhibit C** attached hereto that is a part of the Extended Infrastructure.

**1.26** "***Force Majeure***" means and shall be limited to any event or circumstance which is beyond the reasonable control of, without the fault or negligence of, and should not, in the exercise of reasonable caution, have been foreseen and avoided or mitigated by, the Party asserting Force Majeure (the "***Affected Party***"), and which delays or prevents the Affected Party from timely performing any obligation hereunder, including, without limitation: (i) acts of God, earthquakes, fire, storms, severe droughts, washouts, land subsidence, floods, lightning, hurricanes, tornadoes, and severe snow storms; (ii) explosions, wars, civil insurrections, acts of the public enemy, sabotage, or terrorism; (iii) strikes, lockouts or other labor disputes with respect to which the Affected Party has not been determined by the National Labor Relations Board to have engaged in any unfair labor practices; (iv) any change in any Requirement of Law or the interpretation thereof by a responsible Governmental Authority which shall in any circumstances under this Subsection impact a Party's ability to perform its obligations of the Agreement; and (v) delays caused by compliance with any Requirement of Law related to an endangered species as such term is defined in the Endangered Species Act of 1973 as amended, which the Parties acknowledge could not have been avoided or mitigated; provided, a "Force Majeure" shall not include economic conditions that render a Party's performance of this Agreement unprofitable or otherwise uneconomic, or the inability of Party to make payment when due under this Agreement, unless the cause of such inability is an event that physically prevents payment and that would otherwise constitute Force Majeure as described above.

**1.27** "***Governmental Authority***" includes any federal, state, local or other governmental body; any governmental or quasi-governmental, regulatory or administrative agency commission, body or other authority exercising or entitled to exercise any administrative, executive, judicial, legislative, policy, regulatory or taxing authority or power; or any court or other governmental tribunal.

**1.28** "***Infrastructure***" means all capital items used in the production and transport of Water from the T-Bar Ranch to the City at the Delivery Point, including the wells installed at the T-Bar Ranch, pumping facilities, disinfection facilities, easements, pipelines, storage reservoirs, pump stations, and the Master Meter.

**1.29** "***Master Meter***" means the metering equipment, including a meter house or pit, rate of flow control device, and any other required devices of standard type, for properly measuring the quantity of Water traveling through the Infrastructure to the Delivery Point.

**1.30** "***Maximum Daily Amount***" means the maximum daily amount of Water delivered by the Infrastructure to the Delivery Point, which shall be twenty million gallons per day (20 MGD).

**1.31** *"**Maximum Delivery Rate**"* means the maximum rate at which District may deliver Water to the Delivery Point under this Agreement. The Maximum Delivery Rate is 17,400 gallons per minute.

**1.32** *"**Minimum Delivery Rate**"* means the minimum rate at which District is obligated to deliver Water to the Delivery Point under this Agreement. The Minimum Delivery Rate is zero gallons per minute.

**1.33** *"**Minimum PSI**"* means the minimum rate of pressure for Water delivered by the District to the Delivery Point, measured in pounds per square inch, which shall be sixty-five (65) psi.

**1.34** "***Operation and Maintenance Expense***" means all direct and indirect costs of operation, maintenance, and repair of the Infrastructure and the reasonable Administrative Expenses of the District related solely to the Project.

**1.35** "***Operation and Maintenance Fund***" means the fund by that name created pursuant to the Trust Indenture under which the District Debt is issued.

**1.36** "***Party***" or "***Parties***" means City and/or District, individually or collectively, as applicable.

**1.37** *"**Pipeline**"* means the pipeline or pipelines used by the District to transport Water from the T-Bar Ranch for delivery to the City at the Delivery Point.

**1.38** "***Pipeline Design Capacity***" means the capacity of the initial Pipeline, which capacity will be thirty-eight million gallons per day (38 MGD).

**1.39** "***Project***" means, collectively, the District acquiring, designing, constructing, installing, financing, owning, operating, maintaining, and repairing the Infrastructure to deliver Water from the T-Bar Ranch to the City at the Delivery Point and the District acquiring, designing, constructing, installing, financing, and owning the Extended Infrastructure.

**1.40** "***Project Contractor***" means collectively Garney Companies, Inc. and Black and Veatch Corporation.

**1.41** "***Project Costs***" means (i) all direct and indirect costs associated with acquiring, designing, constructing, installing, financing, owning, operating, maintaining, and repairing the Infrastructure to deliver Water from the T-Bar Ranch to the City at the Delivery Point, (ii) all direct and indirect costs associated with acquiring, designing, constructing, installing, financing, and owning the Extended Infrastructure, including all costs associated with District Debt, (iii) all direct and indirect costs associated with acquiring, designing, constructing, installing, financing, owning, operating, maintaining, and repairing the Expanded Infrastructure; and (iv) all Operation and Maintenance Expenses for the Infrastructure and Expanded Infrastructure, and all other payments and deposits required to be made by the City under the Trust Indenture pursuant to which District Debt is issued and secured.

**1.42** *"Rate(s)"* means the price to be paid by City to District under this Agreement, which shall be adjusted in accordance with the provisions of Section 4.3 herein.

**1.43** *"Repair and Replacement Fund"* means fund by that name created pursuant to the Trust Indenture under which the District Debt is issued.

**1.44** *"Requirement of Law"* means any statute, ordinance, code, rule or regulation, tariff or policy, and judicial or administrative order, request or judgment, any common law doctrine or theory, any provision or condition of any permit or any other binding determination of any Governmental Authority.

**1.45** *"System"* means the City's Water and Sewer System.

**1.46** *"T-Bar Ranch Easements"* means the easements that shall be granted in the form substantially as attached hereto as **Exhibit D** from the City to District to allow for the construction and operation of the Infrastructure on the T-Bar Ranch by the District, which easements shall be term easements to run concurrent with the term of this Agreement.

**1.47** *"TCEQ"* means the Texas Commission on Environmental Quality, and its predecessor and successor agencies.

**1.48** *"Term"* means the term of this Agreement, which shall commence on the Effective Date and terminate upon the expiration of forty (40) years thereafter, or as otherwise provided in this Agreement.

**1.49** *"Trustee"* means a national banking association to be selected by District and approved by City as trustee for the District Debt.

**1.50** *"Trust Indenture"* means the trust indenture or trust indentures between the District and the Trustee pursuant to which District Debt is issued, and any supplements or amendments thereto.

**1.51** *"Water"* means groundwater from the T-Bar Ranch which shall be delivered through the Infrastructure to the Delivery Point.

## ARTICLE II.
## DESIGN, CONSTRUCTION AND OPERATION OF INFRASTRUCTURE

**2.1 Responsibility for the Project.** Except as otherwise provided herein, the Parties acknowledge and agree that the District shall be solely responsible for the Project; provided however, all payments for the Project Costs, including all costs associated with District Debt, all Operation and Maintenance Expenses and all other payments and deposits required to be made by the City under the Trust Indenture pursuant to which District Debt is issued and secured, shall be payable solely from the payments made by the City to the District under this Agreement.

**2.2 Contracts and Agreements.** The Parties acknowledge and agree that District shall unilaterally enter into any and all agreements necessary to effectuate the Project.

Notwithstanding the foregoing, District shall not place any restrictions into such agreements or contracts that restrict the contractors from contracting directly with the City should the District fail to complete the Infrastructure for any reason, and each contract shall be fully assignable to the City in the case of default by District.

**2.3 Construction of Infrastructure.**

(a) **Construction of Infrastructure & Acquisition of Right-of-Way**. District shall be solely responsible for constructing, or causing to be constructed, the Infrastructure and Extended Infrastructure, and for acquiring all related Easements, equipment, materials and supplies. District agrees that it will commence and/or has commenced the Project upon the Effective Date.

(b) **City Review of Plans**. The Parties hereby acknowledge that the District will deliver engineering and construction plans to the City for its review and comment, and the District and the City will discuss any comments that the City provides within Seventy-Two (72) hours after receiving the plans. However, if no comments are provided by the City within the indicated period, the City will be deemed to approve of the plans and no follow up discussion(s) will be necessary.

(c) **Weekly Project Meetings**. Throughout the design and construction of the Infrastructure and Extended Infrastructure, District shall hold weekly meetings regarding the design and construction of the Project. District shall provide reasonable notice to City Manager of the time and location of such meetings and City Manager and/or his designee may attend such meetings.

(d) **Design Capacity of Pipeline**. District shall ensure that the Pipeline that shall transport Water from the T-Bar Ranch to the Delivery Point meets the Design Capacity upon completion.

(i) **Amount of Water Delivered**. District shall ensure that by the Delivery Date, the Infrastructure is capable of delivering the Average Daily Amount and the Maximum Daily Amount of Water.

(ii) **Expanded Infrastructure Capacity**. District shall ensure that the Infrastructure is designed and constructed in accordance with the Expanded Infrastructure Capacity set forth in **Exhibit E** attached hereto. The commencement of design or construction of the Expanded Infrastructure shall be at City's sole discretion.

(e) **Delivery Point**. The Delivery Point shall be approximately at the intersection of Highway 191 and FM 1788 as further described on **Exhibit B** attached hereto.

**2.4 T-Bar Ranch Easements.** Upon execution of this Agreement, the City will convey to the District the T-Bar Ranch Easements for temporary and term easements over, across, and under the T-Bar Ranch as necessary for the construction and on-going operation of the Infrastructure, which term easements shall run concurrently with the term of this Agreement.

**2.5 Timing.**

(a) **Delivery Date.**

(i) **Infrastructure Completion**: No later than the Delivery Date, District shall complete the Infrastructure and commence delivery of Water from the T-Bar Ranch to the City at the Delivery Point and delivered into the City's System.

(ii) **Extended Pipeline Completion**: No later than the Delivery Date, District shall complete the Extended Pipeline. The obligation to complete the Extended Pipeline by the Delivery Date does not extend to the other portions of Extended Infrastructure such as the elevated storage tank and chlorine injection station.

(b) **Penalties for Failure to Deliver**. District shall ensure provisions are included in its contract(s) with the Project Contractor that require the Project Contractor to pay penalties to the City for failure to deliver Water by the Delivery Date in the amount of One Hundred Fifty Thousand and 00/100 Dollars ($150,000.00) per month of delay, pro-rated per day of delay.

(c) **Incentives for Early Completion of Infrastructure**. City agrees that it shall pay to the District, from lawfully available funds, bonus payments if District completes the Infrastructure and commences delivery of Water to the Delivery Point prior to May 31, 2013, in the amount of One Hundred Fifty Thousand and 00/100 Dollars ($150,000.00) per month of early completion, pro-rated per day of early completion. The District shall direct the Trustee to make bonus payments to the Project Contractor in accordance with the terms of the construction contracts.

**2.6 Access and Examination**. District shall be responsible for inspecting or managing the inspection of the construction of the Infrastructure and Extended Infrastructure. City has the reasonable right to access and examine the construction of the Infrastructure and Extended Infrastructure throughout the term of the Project, at City's sole cost and expense. If City notes any problem or discrepancy when examining such construction, City shall promptly notify the District thereof, and the District shall respond to City within Seventy-Two (72) hours of receiving such notice. Each Party shall have a reasonable right to access and examine the Infrastructure and Extended Infrastructure as construction progresses, and no Party shall interfere with such access or examination by any other Party or its designated representative(s) so long as such access and examination is conducted in compliance with the safety programs of the Project Contractor.

**2.7 Insurance.** The District shall require the contractors to procure and maintain insurance policies and coverages with regard to the Project in amounts not less than the following:

**Worker's Compensation**:

| | | |
|---|---|---|
| (1) | Worker's Compensation: | Statutory |
| (2) | Employer's Liability: | $1,000,000 |

**Commercial General Liability,** including Premises/Operations; Explosion, Collapse and (Underground Property Damage); Products/Completed Operations; Broad Form Contractual; Independent Contractors; Broad Form Property Damage; and Personal Injury Liabilities:

| | | |
|---|---|---|
| (1) | Bodily Injury: | $1,000,000 Each Occurrence<br>$2,000,000 Aggregate |
| (2) | Property Damage: | $5,000,000 Each Occurrence<br>$5,000,000 Aggregate |
| (3) | Personal Injury: | $1,000,000 Aggregate |

**Comprehensive Automobile Liability,** including all owned (private and others), hired and non-owned vehicles:

| | | |
|---|---|---|
| (1) | Bodily Injury: | $1,000,000 Each Person<br>$1,000,000 Each Accident |
| (2) | Property Damage: | $5,000,000 Each Occurrence |

With respect to the policies and coverages referenced above, the District shall ensure (i) the City is named as an additional insured under such policies (except for Worker's Compensation); (ii) a waiver of subrogation is included; and (iii) copies thereof are provided to the City prior to the commencement of construction and are kept current throughout construction activities.

**2.8 Lien Waivers.** District shall expressly waive and release any and all liens and lien rights against the T-Bar Ranch as described on **Exhibit A** attached hereto and that are related to the T-Bar Ranch Easements. Further, District shall require all of its contractors and subcontractors to execute specific releases and/or waivers of liens and lien rights against the T-Bar Ranch. In the event that liens are filed by anyone in relation to the labor and/or material being furnished in conjunction with the Project, District agrees to require the same to be discharged, by posting a bond with the appropriate authorities, or otherwise, within five (5) days of notice.

**2.9 Payment of Project Costs and Performance/Payment Bonds.**

(a) **Payment of Project Costs**. District shall pay all Project Costs, and shall issue any debt necessary to fund such Project Costs; provided, however, all Project Costs, including all costs associated with District Debt, all Operation and Maintenance Expenses and all other payments or deposits required to be made by the City under the Trust Indenture pursuant to

which District Debt is issued and secured, shall be payable solely from payments of the City to the District pursuant to this Agreement.

(b) **Performance Bond and Payment Bond**. The District shall ensure that the Project Contractor furnishes a Performance Bond and a Payment Bond, each in the full amount of the Project Costs, and each naming the City as co-obligee.

**2.10 Acceptance.**

(a) **Certification of Completion**. Within thirty (30) days after completion of construction and prior to final payment to the engineers for the Infrastructure and the Extended Infrastructure, District will cause the Project engineers to provide to each Party a concurrence letter from the Project engineers certifying that the construction of the Infrastructure has been completed in accordance with the approved plans, specifications and change orders, that the Infrastructure has been tested and approved for use in accordance with the approved contract documents, and that all such Infrastructure are properly located within easements or public rights-of-way, as specified in the Project plans.

(b) **Record Drawings**. Within sixty (60) days after substantial completion of construction of the Infrastructure and Extended Infrastructure, District will cause the Project engineers to provide to each Party a copy of half-size drawings and the final "record" drawings of the completed system and facilities in an electronic format requested by such Party. Each Party shall be responsible for payment of any costs associated with obtaining such copies.

**2.11 Warranties.** District shall require that the Project Contractor repair, replace, or otherwise remedy as may be provided in any applicable warranty all warranted defects in materials, equipment or workmanship appearing and known to District within one (1) year from the date of acceptance of the Infrastructure.

**2.12 Dispute or Litigation.** In the event of any dispute between any contractors and District relating to the Project, or in the event of any claim by or against any third person arising out of or relating to the Project and/or the operation of the Infrastructure or Extended Infrastructure, the Parties agree as follows:

(a) District will provide written notice of the details of such dispute or litigation to City as soon as reasonably practicable, and shall continue to provide timely status reports to City as such dispute or litigation progresses; and

(b) District will not initiate litigation for any matter that pertains to the Infrastructure or that may impact the Delivery Date without first taking reasonable steps to acquire the written consent of City.

**2.13 Local Office of District and Emergency Response.** Throughout the construction of the Project and throughout the Term of this Agreement, District shall maintain a local office in Midland, Texas. District shall provide direct contact information to City such that City is able to reach a District representative twenty-four (24) hours per day, seven (7) days per week in case of emergency. If there shall be a break in a water line or a material malfunction in

the Infrastructure, District shall respond and begin remediation and/or repairs immediately and in no case more than two (2) hours after notification if in any way reasonably practicable.

## ARTICLE III.
## EXTENDED INFRASTRUCTURE

**3.1 Construction of Extended Infrastructure.** The Extended Infrastructure as described in **Exhibit C** attached hereto shall be acquired, designed, constructed, installed, financed, and owned under the same terms and conditions as the Infrastructure as more particularly described in Article II above. Notwithstanding the foregoing, (a) the completion of the Extended Infrastructure shall be excepted from the timing requirements of the Delivery Date (except as to the Extended Pipeline which shall be completed according to the provisions of Section 2.5) ; and (b) the Extended Infrastructure shall be operated and maintained by City in accordance with the provisions of Section 3.3 herein.

**3.2 Completion of Extended Infrastructure.** The Extended Infrastructure shall be completed not later than December 31, 2013. The Extended Pipeline shall be completed according to the provisions of Section 2.5.

**3.3 Operation and Maintenance of Extended Infrastructure.** After completion of construction of the Extended Infrastructure by the District, the City shall solely operate and maintain the Extended Infrastructure under the terms and conditions of a Lease and Operating Agreement in a form substantially similar to that as attached hereto as **Exhibit F**, which shall be executed upon completion of the construction of the Extended Infrastructure.

## ARTICLE IV.
## DELIVERY CHARGES; WHOLESALE WATER DELIVERY RATE

**4.1 Minimum Monthly Charge.** On the first day of each month set forth below, the City shall be unconditionally obligated to pay a minimum monthly charge to the District for service hereunder based upon the minimum amount of Water set forth below and the Rate in effect during the prior month, regardless of the amount of Water actually delivered to the City during the prior month and regardless of whether any Water was actually delivered to the City during the prior month:

(a) the minimum monthly charge the City shall be unconditionally obligated to pay to the District on the first day of each month commencing August 1, 2013 and ending July 1, 2028 (both inclusive) shall be calculated based upon a minimum of 300 million gallons of Water times the Rate in effect during the prior month; and

(b) the minimum monthly charge the City shall be unconditionally obligated to pay to the District on the first day of each month commencing August 1, 2028 through the remaining Term shall be calculated based upon a minimum of 840 million gallons of Water times the Rate in effect during the prior month.

**4.2 Wholesale Water Delivery Rate.** The Rate to be paid to District by City shall be sufficient to produce minimum monthly payments (calculated pursuant to Section 4.1 above) that cover all the Project Costs and shall exclude any rate of return or other form of profit for the District. Based upon the Project criteria set forth in the City's Request for Proposal regarding the Project, the Parties acknowledge that such rate should not exceed Two and 78/100 Dollars ($2.78) per one thousand (1,000) gallons and should be maintained without increase up to and until September 30, 2016. Upon closing on any District Debt, an initial Rate shall be established sufficient to cover all annual Project Costs.

**4.3 Rate Adjustments.** Beginning October 1, 2016, the portion of the Rate associated with District Debt will be adjusted annually to fully cover the annual Project Costs, including the debt service requirements of the District Debt, and the portion of the Rate associated with the Operation and Maintenance Expenses shall be adjusted by:

(a) the lesser of (i) an adjustment based on the Consumer Price Index - All Urban Consumers (CPI-U, Dallas-Fort Worth, TX, 1982-1984=100) published by the Bureau of Labor Statistics of the U. S. Department of Labor (or if such index shall cease to be published, then a regularly published index derived by using the same or substantially the same data and methodologies) for the preceding year; or (ii) five percent (5%) increase; or

(b) Subject to making provision for the payment of all annual Project Costs, the City may adjust the Rate at its sole discretion.

**4.4 Payment Obligation.** Notwithstanding any limitation imposed by Section 4.2 or any other provision of this Agreement, the City unconditionally agrees to pay amounts which shall be received by the District at such times and in such amounts as shall be necessary to pay all Project Costs, including costs associated with District Debt and Operations and Maintenance Expenses as such costs arise and become due, and notwithstanding any default by the District or any Force Majeure.

**4.5 Excess Charge.** Within thirty (30) days from the expiration of each City's Fiscal Year, the District shall make an accounting of total Water delivered to the City at the Delivery Point. In the event that the amount of Water actually delivered to the City at the Delivery Point during any such City's Fiscal Year exceeds the minimum monthly quantity as set forth in Section 4.1(a) or 4.1(b) above multiplied by twelve (12) months, the City shall pay the District for the excess amount of Water so delivered at the Rate in effect during such previous City's Fiscal Year. Payment for excess Water shall be paid within thirty (30) days of receipt by City of invoice for such excess Water.

## ARTICLE V.
## BILLING AND PAYMENT

**5.1 Payment Generally.** For the purposes of this Agreement, City shall be billed for all the Water delivered to the Delivery Point as recorded by the Master Meter. Payments for all charges arising under this Agreement shall be due and payable to the Trustee at the address as shown in Section 12.18 of this Agreement or at such other address as the Trustee shall specify in

writing to the City and the District. All payments made by City under this Agreement shall constitute reasonable and necessary operating expenses of the City's water utility system, as provided in Section 791.026 and Chapter 1502, Texas Government Code.

**5.2 Billing Generally**. For purposes of billing for excess Water actually delivered to the City as described in Section 4.5 hereof, District shall read the Master Meter on or about the last Business Day of each month (or more frequently if necessary as determined by District) and shall report the total quantity of Water taken for that month to City on or before the tenth ($10^{th}$) day of the next calendar month.

**5.3 Invoicing.** District shall render to City at the address shown in Section 12.18 herein (or such other place as designated by City), on or before the tenth ($10^{th}$) day of each calendar month, an itemized statement (each statement, an invoice), showing the minimum monthly charge (calculated pursuant to Section 4.1 above) and any other charges and fees incurred by District and payable by City hereunder on the first day of the following month in accordance with this Agreement. There shall be no penalties charged by District for any late payments made by City; provided, however, that the foregoing does not in any way relieve the City of its unconditional payment obligations under this Agreement.

**5.4 Disputes.** If City at any time disputes the amount to be paid to District, City shall nevertheless timely make the disputed payment or payments, but if it is subsequently determined by agreement or court decision that the disputed amount paid by City should have been less, or more, District shall promptly revise the next invoice amount in a manner that City or District will recover such amount due.

**5.5 Annual Budget.** Not less than ninety (90) days before the commencement of each District's Fiscal Year while this Agreement is in effect, the District shall prepare and provide to City an Annual Budget itemizing the expected costs of the District for the following calendar year.

**5.6 Annual Audit.** Not later than one hundred eighty (180) days after the end of the District's Fiscal Year, District shall prepare an audit showing the actual total Operation and Maintenance Expenses and service on District Debt incurred by the District for the prior year against the total amount collected from the City for that year. City shall have the right upon written notice to District to review District documentation used in preparation of the Annual Audit. If the Annual Audit shows that the City paid more than the prior year's actual expenses, that amount shall be credited against the City's next bill(s) until fully credited. If the Annual Audit shows that the City underpaid the prior year's actual expenses, City shall remit payment to District for such amount within sixty (60) days of receipt and confirmation of such amount.

## ARTICLE VI.
## ISSUANCE OF DEBT/FLOW OF FUNDS

**6.1 Trustee.** A Trustee shall be appointed by the District for the issuance of the District Debt and to serve as a depository for all payments from the City to the District under this Agreement. A Trustee shall be in place for as long as this Agreement is in effect.

**6.2 Contract Revenue Obligations.** The District Debt issued by the District shall be contract revenue obligations payable solely from and secured solely by payments as described in Section 12.3 from the City to the District pursuant to this Agreement and the City is obligated to make such payments as long as the District Debt is outstanding. The District Debt shall be issued pursuant to the Trust Indenture between the Trustee and the District. The City acknowledges that any District Debt issued shall be sold and rated based on the unconditional obligation of the City to make payments under this Agreement sufficient to pay the debt service on the District's Debt and to cover all other Project Costs as the same arise and come due.

**6.3 Flow of Funds.**

The Trustee shall apply payments from the City pursuant to this Agreement on the date such payments are received in the amounts and in the order set forth below:

First: To the Debt Service Fund, pursuant to the schedule of debt service payments under the Trust Indenture, the sum of 1/6 of the amount required to pay interest coming due on the District Debt on the next succeeding interest payment date plus 1/12 of the amount required to pay principal coming due on the District Debt on the next succeeding principal payment date;

Second: To the Operation and Maintenance Fund, such amounts necessary to maintain the fund balance at the amount specified in the Trust Indenture;

Third: To the Repair and Replacement Fund, such amounts necessary to maintain the fund balance at the amount specified in the Trust Indenture; and

Fourth: To the Expansion Fund to the extent directed by the City; and

Fifth: All remaining amounts to be deposited as directed by City.

On the first Business Day of the month following the payments described above, the Trustee shall notify both the District and the City whether the payments from the City are sufficient to fund the amounts required in First through Third above. If there is a deficiency, the City shall within two (2) Business Days make additional payments to the Trustee from lawfully available funds to cure such deficiency.

**6.4 Continuing Disclosure Agreement/Offering Documents.** The City hereby agrees to enter into a continuing disclosure agreement for District Debt in the form required by bond market standards and to provide annual and periodic information updates in accordance with any continuing disclosure agreement entered into for District Debt. The City agrees to assist in the preparation of any offering document prepared for District Debt.

## ARTICLE VII.
## METERING FACILITIES

**7.1 Master Meter.** As a part of the Infrastructure, District shall furnish, install, test, operate, and maintain at the Delivery Point the necessary Water tap and Master Meter for properly measuring and recording the quantity of Water taken by City at the Delivery Point and

the rate at which it is taken. The measuring and recording devices and appurtenances shall be sufficient to prevent City from taking Water at a rate greater than the Maximum Delivery Rate. All maintenance and/or repairs to the Master Meter shall be made by the District or a contractor on behalf of the District, at District's sole expense. District shall provide repairs to the Master Meter in a prompt and timely manner. If District cannot make such repairs in a timely manner, then City shall have the option of making such repairs, and District shall pay City for all costs of such repairs, which shall be deducted from the subsequent invoice sent by District to City for the prior months' cost of Water.

**7.2 City Access to Meter.** The properly authorized officers, agents and representatives of City shall have access to the Master Meter, other metering equipment, and all other facilities of District associated with this Agreement during regular business hours when accompanied by District's licensed operator; provided, however, that if District does not provide a licensed operator within forty-eight (48) hours of receiving a request from City for access, then City shall have access to the Master Meter, other metering equipment, and all other facilities of District associated with this Agreement during regular business hours without a licensed operator of District. All facilities required for City to take Water under this Agreement, including but not limited to the Master Meter, shall be appropriately marked and lighted in the interest of the safety of City's officers, agents, and representatives.

**7.3 Meter Testing.** District shall test the Master Meter for accuracy once each twelve (12) month period, with such periods commencing on the Effective Date and each anniversary of the Effective Date thereafter, and shall promptly provide written copies of results of such tests to City. In the event that the percentage of accuracy of such metering equipment is found to be within the tolerance of five percent (5%), such meter shall be deemed to have correctly measured the quantity of Water taken under this Agreement. District shall give City five (5) days' notice of its intent to test metering equipment and City shall have the right to be present when such testing is conducted. If, however, upon any test (by District or City) of the percentage of accuracy tolerance, such tolerance is found to be in excess of five percent (5%), then such meter shall be adjusted at once to register correctly and accurately, and the amount paid by City to District for the three (3) month period immediately preceding such test shall be adjusted in accordance with the percentage of inaccuracies found by such test. District shall afford City at least five (5) days' notice of its intent to make any adjustment to the Master Meter such that City is afforded the opportunity to observe any adjustments that are made to the Master Meter in case any adjustments shall be necessary; provided, either Party can waive such right to observe such adjustments. Notwithstanding the foregoing, City shall have the right to independently test the accuracy of the Master Meter at any time upon forty-eight (48) hours prior written notice to District.

**7.4 Meter Malfunction.** In the event such metering equipment is out of service or out of repair and the amount of Water taken cannot be ascertained or computed by reading the Master Meter, the amount of Water taken during this period shall be estimated by District based upon the amount of Water sold in the corresponding period in the year immediately prior to such failure, and adjusted for current conditions at the Parties' mutual agreement.

## ARTICLE VIII.
## OWNERSHIP AND OPERATION OF INFRASTRUCTURE

**8.1 Ownership Interests in Water.** The Parties hereby acknowledge that the ownership of and title to the Water is and shall remain vested in the City, even after it is produced and transported by the District from the T-Bar Ranch to the City at the Delivery Point.

**8.2 Ownership Interests in Infrastructure.** Parties hereby acknowledge that the District shall own the entire Infrastructure.

**8.3 Delivery of Water.** At all times upon completion of the Infrastructure, District shall deliver Water to the City at the Delivery Point at least at the Minimum PSI and between the Minimum Delivery Amount and Maximum Delivery Amount.

**8.4 Infrastructure Operation and Maintenance.** Subject to the provisions of Section 3.2, the District shall be responsible for the on-going operation, maintenance, and repair of the Infrastructure after it is put into service. District shall manage, operate, and maintain the Infrastructure in accordance with accepted good business and engineering practices and in accordance with current and future requirements of federal and state law, including without limitation the Texas Water Code, and any current and future rules and regulations issued and to be issued by appropriate agencies in the administration of such laws.

**8.5 Electricity.** At City's option, City may contract with an electric utility provider for the electric needs of the Project, Infrastructure, and Extended Infrastructure. If City so elects, City shall pay directly to such electric provider all charges that become due and payable, and such costs shall be excluded from any calculation of Operations and Maintenance Expenses.

**8.6 Purchase Option.** At any time prior to the defeasance of all District Debt, the City shall have the right to pay the District an amount sufficient to fund a defeasance escrow for all then-outstanding District Debt and either (i) receive ownership of the Infrastructure and terminate this Agreement; or (ii) revoke and rescind the T-Bar Ranch Easements and direct the District to cease pumping groundwater from the T-Bar Ranch and terminate this Agreement. Upon either (i) or (ii) above, the District will covenant with holders of District Debt that amounts received from the City will be used to establish a defeasance escrow to defease all then outstanding District Debt. Upon City's payment of all amounts due and owing hereunder, District shall transfer and convey to City all right, title and ownership of the Infrastructure, including any Easements, wells, pipes, other equipment, data, reports and records.

**8.7 Prohibition on Sale.** The District shall not sell the Infrastructure, Extended Infrastructure, or Expanded Infrastructure without the prior written consent of the City, which consent shall be at the sole discretion of City.

## ARTICLE IX.
## DISTRICT BOARD MEETINGS

Upon the Effective Date of this Agreement, City may designate three (3) individuals to whom the District shall directly provide copies of all public notices of all meetings of the District's board of supervisors and copies of all publicly available reports from such meetings,

and such individuals shall be permitted to attend all such meetings. City shall have sole discretion in the selection of each of the three (3) referenced individuals whom shall have no policy-making nor voting rights. District shall post notice of all of its meetings on the City's bulletin boards in addition to any other postings it may make.

## ARTICLE X.
## REPRESENTATIONS AND WARRANTIES

**10.1 Representations and Warranties of City.** As of the Effective Date, City represents and warrants to District that:

(a) City is a home-rule city organized and in good standing under the laws of the State of Texas, is authorized to conduct business in Texas, and has all requisite power and authority to enter into and to perform its obligations hereunder, and to carry out the terms hereof and the transactions contemplated hereby.

(b) When this Agreement has been duly executed and delivered on behalf of City, it shall constitute the legal, valid and binding obligation of City, enforceable against City in accordance with its terms except as the enforceability thereof may be limited by applicable law.

**10.2 Representations and Warranties of District.** As of the Effective Date and throughout the Term of this Agreement, District represents and warrants to the City that:

(a) District is a fresh water supply district formed under Chapter 53 of the Texas Water Code and the provisions of Article XVI, Section 59 of the Texas Constitution and is in good standing under the laws of the State of Texas, is authorized to conduct business in Texas, and has all requisite power and authority to enter into and to perform its obligations hereunder, and to carry out the terms hereof and the transaction contemplated hereby.

(b) When this Agreement has been duly executed and delivered on behalf of District, it shall constitute the legal, valid and binding obligation of District, enforceable against District in accordance with its terms except as the enforceability thereof may be limited by applicable law.

(c) District shall use its best efforts to maintain careful inspection of its Infrastructure, and shall construct adequate Infrastructure and Extended Infrastructure sufficient to meet any Requirement of Law.

(d) District shall exercise diligence and care in the maintenance of its Water lines, Water mains and distribution facilities.

(e) District shall comply with any Requirement of Law and all applicable rules and regulations of the Texas Department of Health, TCEQ, and any other agency or department that has jurisdiction over the installation or operation of the Infrastructure and installation of the Extended Infrastructure. The District shall secure all necessary authorizations from any Governmental Authority as required to install or operate the Infrastructure or install the Extended Infrastructure.

(f) District shall notify City as promptly as possible of all emergency and other conditions of which it becomes aware which may directly or indirectly affect the quality of the Water delivered through the Infrastructure by District and shall provide City a copy upon receipt, of all notices received from state or federal agencies or departments having jurisdiction over the Infrastructure.

## ARTICLE XI.
## FORCE MAJEURE

**11.1 Notice of Force Majeure.** The Affected Party shall give prompt notice to the other Party of any event or circumstance of Force Majeure as soon as reasonably practicable after becoming aware of such event or circumstance. Each notice served by an Affected Party to the other Party pursuant to this Section 11.1 shall specify the event or circumstance of Force Majeure in respect of which the Affected Party is claiming relief. Noncompliance by the Affected Party with the procedure specified in this Section 11.1 shall relieve the other Party from accepting the Affected Party's claim of Force Majeure until the Affected Party so complies, and the Affected Party shall not be excused from performance of any obligation under this Agreement until it so complies.

**11.2 Obligations During Pendency of Force Majeure.** The Affected Party shall, by reason of any event or circumstance of Force Majeure in respect of which it has claimed relief under this Article 11:

(a) use its best efforts to mitigate the effects of such Force Majeure and to remedy any inability to perform its obligations hereunder due to such event or circumstance as promptly as reasonably practicable;

(b) furnish weekly reports to the other Party regarding the progress in overcoming the adverse effects of such event or circumstance of Force Majeure; and

(c) resume the performance of its obligations under this Agreement as soon as is reasonably practicable after the event or circumstance of Force Majeure is remedied or such event or circumstance, or the effect thereof on the Affected Party, ceases to exist.

**11.3 Resumption of Performance.** When the Affected Party is able, or would have been able if it had complied with its obligations under this Article 11, to resume the performance of any or all of its obligations under this Agreement affected by the occurrence of an event or circumstance of Force Majeure, then the period of Force Majeure relating to such event or circumstance shall be deemed to have ended.

**11.4 Relief from Obligation of Performance.** Except as provided in Section 11.2 of this Agreement, provided it has complied with its obligations under Article 11, the Affected Party shall be relieved from any liability for the non-performance of its obligations under this Agreement where and to the extent that such non-performance is attributable directly to the event or circumstance of Force Majeure asserted.

**11.5 Relief From Obligation of Counterperformance.** Except as provided in Section 11.2 of this Agreement, the non-Affected Party shall not be required to perform or resume performance of its obligations to the Affected Party corresponding to the obligations of the Affected Party excused by reason of Force Majeure.

**11.6 Limitations on Force Majeure**

(a) **Scope and Duration**. No event or circumstance of Force Majeure shall relieve the Affected Party of any obligation that accrued prior to the commencement of such event or circumstance of Force Majeure.

(b) **No Extension of Term**. Except as agreed by the Parties, no suspension, delay or failure of performance caused by a Force Majeure event shall extend this Agreement beyond the Term.

(c) **No Intentional Events of Force Majeure**. At no time may either Party establish any law, rule, or regulations which would place that either Party in breach of this Agreement nor permit such Party to claim any events of Force Majeure under this Agreement.

(d) **Continuing Responsibility to Make Payments**. Regardless of the occurrence or continuation of an event or circumstance of Force Majeure, City shall not be relieved of its responsibility to make payments as required under this Agreement.

## ARTICLE XII.
## MISCELLANEOUS

**12.1 Restrictions on Delivery of Water to City**. Throughout the Term of this Agreement, the City may not obtain the services being provided by the District regarding the development and delivery of groundwater from the T-Bar Ranch from any other entity, however this is no way limits the rights of the City to secure a separate water supply from any other third party or source. The City expressly retains its absolute right to secure water from any other sources outside the T-Bar Ranch.

**12.2 City Back-Stop**. In the event the Agreement is entered into, but if for any reason whatsoever the bonds and/or notes constituting the District Debt have not been issued by October 31, 2012, the City shall pay Project Costs incurred prior to October 31, 2012:

(i) City shall pay one hundred percent (100%) of costs associated with acquiring Easements for the Project, including, but not limited to, surveying costs and interest incurred by District associated directly with financing such costs. All Easements for the Project will be acquired in a way that they are fully assignable to City, and all such Easements, documentation, and records shall be transferred, assigned and conveyed to City upon payment of such costs.

(ii) City shall pay one hundred percent (100%) of costs associated with the ordering, purchase and/or receipt of pipe or other

Infrastructure and interest incurred by District associated directly with financing such costs. All such pipe and/or other Infrastructure that has been purchased and received shall be transferred and conveyed to City upon payment of such costs. For any such pipe that has been ordered and a deposit placed (but when such pipe has not yet been received), City may either take delivery of the pipe and pay the full costs thereof or the City may cancel such pending orders and take receipt of any deposits placed.

(iii) City shall pay one hundred percent (100%) of costs associated with drilling any well on the T-Bar Ranch, including any test well and interest incurred by District associated directly with financing such costs. All such wells and any data, reports, and records therefrom shall be transferred and conveyed to City upon payment of such costs.

(iv) City shall pay one hundred percent (100%) of professional fees associated with the Project and professional fees and costs associated with the District's financing up to a maximum of Twelve Million and 00/100 Dollars ($12,000,000.00). All Construction Documents shall be transferred and conveyed to City upon payment of costs in accordance with this provision.

(v) City shall pay one hundred percent (100%) of the accrued interest on any district debt as of the date the amounts set forth in clauses (i) – (iv) above are paid in full by the City, which payments shall be made by the City on or before the maturity date of such district debt.

Costs as described in (i)-(iv) above shall not exceed Seventy Million and 00/100 Dollars ($70,000,000.00) in principal amount. The City hereby recognizes and agrees that its obligations under this Section 12.2 to pay cost specified therein shall be pledged and assigned by the District to the note holders pursuant to the Note Purchase Agreement between Community National Bank, et al and the Midland County Fresh Water Supply District No. 1 dated May 30, 2012 to secure payment of the District's interim notes. The City acknowledges and agrees that its obligations under this Section 12.2 will remain if the bonds and/or notes constituting the District Debt have not been issued by October 31, 2012. The City further agrees to waive any right of set-off in connection with its obligations under this Section 12.2.

City shall pay all amounts due and owing pursuant to this Section 12.2 on or before the maturity date of the interim notes or the date on which such amounts must be prepaid, which is anticipated to be January 29, 2013; provided that such amount shall not to exceed Seventy Three Million Two Hundred Sixty-Six Thousand Eight Hundred Thirty and 00/100 Dollars ($73,266,830.00) (the "***City Payment***"). City's obligation to pay City Payment constitutes an operating expense of the City's Water and Wastewater System secured by pledge of City Water and Wastewater System revenues.

To the extent that the revenues of the City's Water and Wastewater System are insufficient to pay the City Payment on or before January 29, 2013, the portion of the City Payment that is not paid from revenues of the City's Water and Wastewater System shall, subject

to annual appropriation by the City, be payable solely from lawfully available funds of the City appropriated for the purpose of paying the City Payment.

Upon City's payment of all amounts due and owing pursuant to this Section 12.2, District shall transfer and convey to City all right, title and ownership of the Infrastructure, including any Easements, wells, pipes, other equipment, data, reports and records.

**12.3 Source of Payment; Pledge to Secure Payment.** The City represents and covenants that all payments to be made by it under this Agreement (with the exception of payments appropriated, if any, pursuant to Section 12.2) shall constitute reasonable and necessary "operating expenses," as defined in Chapter 1502, as amended, Texas Government Code, of the City's Water and Wastewater System, but only to the extent of payments in respect of District Debt and Operation and Maintenance Expenses. The City shall not be obligated to make payments under this Agreement from any source other than the gross revenues of its System. The City further represents that its governing body has determined that the services to be provided by the Project are absolutely necessary and essential to provide water to the City.

(a) The City will agree throughout the term of this Agreement to fix and collect such rates and charges for services to be supplied by its System as will produce gross revenues at all times during the term of this Agreement in an amount at least equal to (i) all of the expenses of operation and maintenance of the City's System, (ii) all other amounts as required by law and the provisions of the ordinances or resolutions authorizing the City's utility system bonds or other obligations now or hereafter outstanding payable, in whole or in part, from the net revenues of the City's utility system, including the amounts required to pay all principal of and interest on the City's utility system bonds and other obligations, and (iii) all payments due under this Agreement including payments sufficient to pay debt service on District Debt and to cover all other Project Costs as the same arise and come due.

(b) No ad valorem tax revenues of any of the City shall be pledged to the payment of any amounts to be paid by the City to the District under this Agreement, nor shall the District have the right to demand payment of any amounts to be paid by the City under this Agreement from funds raised or to be raised from ad valorem taxation. The obligations under this Agreement shall never be construed to be a debt or pecuniary obligation of the City of such kind as to require the City to levy and collect an ad valorem tax to discharge its obligations.

(c) The City acknowledges that, as of the date of this Agreement, the District's sole source of revenues to discharge its obligations to the City and to any other person shall consist of amounts received from the City pursuant to this Agreement.

**12.4 Defeasance of District Debt; Excess Revenues.**

(a) District shall ensure that the District Debt is issued in a way that (i) permits City at its option the ability to either defease or assume such District Debt in conjunction with the exercise of its Purchase Option in Section 8.6 above; and (ii) permits the District to escalate repayment of the debt or issue an optional call for early paydown without penalties.

City shall be responsible for any costs associated with assuming such District Debt according to (i) above.

(b) All revenues received by the District from or on behalf of the City, including investment earnings, in excess of the amounts needed to fully pay the then-due Project Costs will be used for the City's benefit in accordance with direction provided by the City.

**12.5 Compliance with Laws.** All activities of the Parties under this Agreement shall be in compliance with all applicable Federal, State and Local rules, laws, and regulations. The Parties agree and acknowledge that time is of the essence in the completion of the obligations hereunder, and each Party shall pursue with best efforts any permits or authorizations required for performance hereunder. District shall secure all permits and authorizations necessary to construct, operate, and maintain the Infrastructure and to deliver Water to City as contemplated by this Agreement.

**12.6 Agreement Regarding Remedies.** The Parties agree that their respective obligations under this Agreement are unique and the failure by any Party to perform its obligations under this Agreement would not be capable of being appropriately remedied by award of damages to any other affected Party to this Agreement and in any event, such damages would be difficult, if not impossible, to determine because of the unique nature of the Parties' obligations to each other hereunder. Further, the Parties agree that the remedy of termination of this Agreement by any Party is inappropriate and not in the public interest. Therefore, the Parties agree that they shall be entitled to the remedies of specific performance, mandamus and injunction as well as any other remedy either Party may have in equity in the event of any breach of any obligation by any Party under this Agreement. The Parties hereby waive any requirement that they be required to provide any bond or other surety in order to obtain any of the agreed upon remedies. In such regard, prior to exercising any such legal remedy, if either Party believes there is a material breach of the terms or conditions of this Agreement, such Party shall give written notice to the other, at which time the receiving Party shall have fifteen (15) days in which to cure such default or provide documentation to the Party giving the notice that affirmative action has been taken to cure such breach and is being diligently pursued. In the event that during design, installation, acquisition or construction of the Infrastructure and Extended Infrastructure, such District has breached its duties under the Agreement, the notice period has expired, and District has not taken steps or diligently pursued a remedy of the breach, City shall have the full right and authority to thereafter automatically assume the contracts with the Project Contractor and otherwise pursue completion of the Infrastructure and Extended Infrastructure in whatever manner necessary. Notwithstanding the foregoing, even in the case of a breach by District, City shall comply with all applicable terms of the issuance of the District Debt and repayment of such District Debt.

**12.7 Goods and Services.** The Parties hereby acknowledge and agree that this Agreement is a contract for goods and services.

**12.8 Authority.** This Agreement is made in part under the authority conferred in Section 791.026 and Chapter 1502, Texas Government Code.

**12.9 Severability.** The provisions of this Agreement are severable and, if any provision of this Agreement is held to be invalid for any reason by a court or agency of competent jurisdiction, the remainder of this Agreement will not be affected and this Agreement will be construed as if the invalid portion had never been contained herein.

**12.10 Assignment.** The assignment of this Agreement by any Party is prohibited without the prior written consent of the other Parties. All of the respective covenants, undertakings, and obligations of each of the Parties will bind that Party and will apply to and bind any successors or assigns of that Party.

**12.11 Cooperation.** The Parties agree to cooperate at all times in good faith to effectuate the purposes and intent of this Agreement.

**12.12 Third Party Beneficiaries.** Except as expressly provided for herein, nothing in this Agreement, express or implied, is intended to confer upon any person or entity, other than the Parties, any rights, benefits, or remedies under or by reason of this Agreement.

**12.13 Entire Agreement.** This Agreement contains the entire agreement of the Parties regarding the subject matter hereof and supersedes all prior or contemporaneous understandings or representations, whether oral or written, regarding the subject matter.

**12.14 Interpretation and Reliance.** No presumption will apply in favor of either Party in the interpretation of this Agreement or in the resolution of any ambiguity of any provisions hereof.

**12.15 Relationship of Parties.** This Agreement is based upon the active participation of the Parties. Neither the execution nor the delivery of this Agreement shall create or constitute a partnership, joint venture, or any other form of business organization or arrangement between the Parties, except for the contractual arrangements specifically set forth in this Agreement. No Party shall have any power to assume or create any obligation on behalf of the other Party.

**12.16 Amendments.** Any amendment of this Agreement must be in writing and will be effective if it is signed by the authorized representatives of the Parties.

**12.17 Applicable Law; Venue.** This Agreement will be construed in accordance with Texas law. Venue for any action arising hereunder will be exclusively in Midland County, Texas, and the Parties hereby agree that Midland County is the proper venue for any such action since the place for performance of the obligations hereunder, including, but not limited to the delivery of Water and payment by City of obligations incurred is in Midland County.

**12.18 Notices.** Any notices given under this Agreement will be effective if (i) forwarded to a Party by hand-delivery; (ii) transmitted to a Party by confirmed telecopy; or (iii) deposited with the U.S. Postal Service, postage prepaid, certified, to the address of the Party indicated below:

**CITY**:

City of Midland
City Hall
300 N. Loraine
Midland, Texas 79701
Attn: Courtney Sharp
Telephone: (432) 685-7202
Facsimile: (432) 686-1600
Email: csharp@midlandtexas.gov

with copy to:

Lloyd Gosselink Rochelle & Townsend, PC
816 Congress Ave., Suite 1900
Austin, Texas 78701
Attn: Cathleen Slack
Telephone: (512) 322-5809
Facsimile: (512) 874-3909
Email: cslack@lglawfirm.com

Midland City Attorney
300 N. Loraine
Midland, Texas 79701
Attn: Keith Stretcher
Telephone: (432) 685-7254
Facsimile: (432) 686-1643
Email: kstretcher@midlandtexas.gov

**DISTRICT**:

Midland County Fresh Water Supply District No. 1
1700 West Wall Street, Suite 210
Midland, Texas 79701
Attn: Jose Cuevas, President
Telephone: (432) 697-1447
Facsimile: (432) 697-9758
Email: jcuevas@jumburrito.com

with copy to:

Stubbeman, McRae, Sealy, Laughlin & Browder, Inc.
550 West Texas Ave. Suite 800
Midland, Texas 79701
Attn: Robert Rendall
Telephone: (432) 688-0246
Facsimile: (432) 682-4884
Email: rrendall@stubbemanlawfirm.com

**TRUSTEE**:

_____
_____
_____

**12.19 Counterparts; Effect of Partial Execution.** This Agreement may be executed simultaneously in multiple counterparts, each of which will be deemed an original, but all of which will constitute the same instrument.

**12.20 Authority.** Each Party represents and warrants that it has the full right, power and authority to execute this Agreement.

*(Signature Pages Follow)*

**CITY:**

**ATTEST:**

**CITY OF MIDLAND, TEXAS:**

_____
Amy M. Turner, City Secretary

By:_____
Printed Name: W. Wesley Perry
Title: Mayor

Date: _____

STATE OF TEXAS §
§
COUNTY OF MIDLAND §

This instrument was acknowledged before me on this _____ day of_____, 2012, by W. Wesley Perry, Mayor of the City of Midland, Texas, on behalf of said City.

_____
Notary Public - State of Texas

**Approved as to Content:**

By:_____
Printed Name: Courtney B. Sharp
Title: City Manager
Date: _____

**Approved as to Form:**

By:_____
Printed Name: Keith Stretcher
Title: City Attorney
Date: _____

**ATTEST:**

_____

**DISTRICT:**

**MIDLAND COUNTY FRESH WATER SUPPLY DISTRICT NO. 1:**

By:_____
Printed Name: Jose Cuevas
Title: President

Date: _____

STATE OF TEXAS §
§
COUNTY OF _____ §

This instrument was acknowledged before me on this _____ day of_____, 2012, by Jose Cuevas, President of Midland County Fresh Water Supply District No. 1, on behalf of said District.

_____
Notary Public - State of Texas

# EXHIBIT A

## Legal Description of T-Bar Ranch

Those certain tracts of land in Winkler County and Loving County, Texas acquired by the City by Warranty Deed on August 25, 1965 and recorded in Volume 35, Page 472, Deed Records of Winkler County, Texas and those certain groundwater rights acquired by the City by Deed recorded on June 23, 1966 and January 16, 1967 and recorded in Volume 217, Page 515 and Volume 222, Page 638, respectively, Deed Records of Winkler County, Texas and as further described as follows:

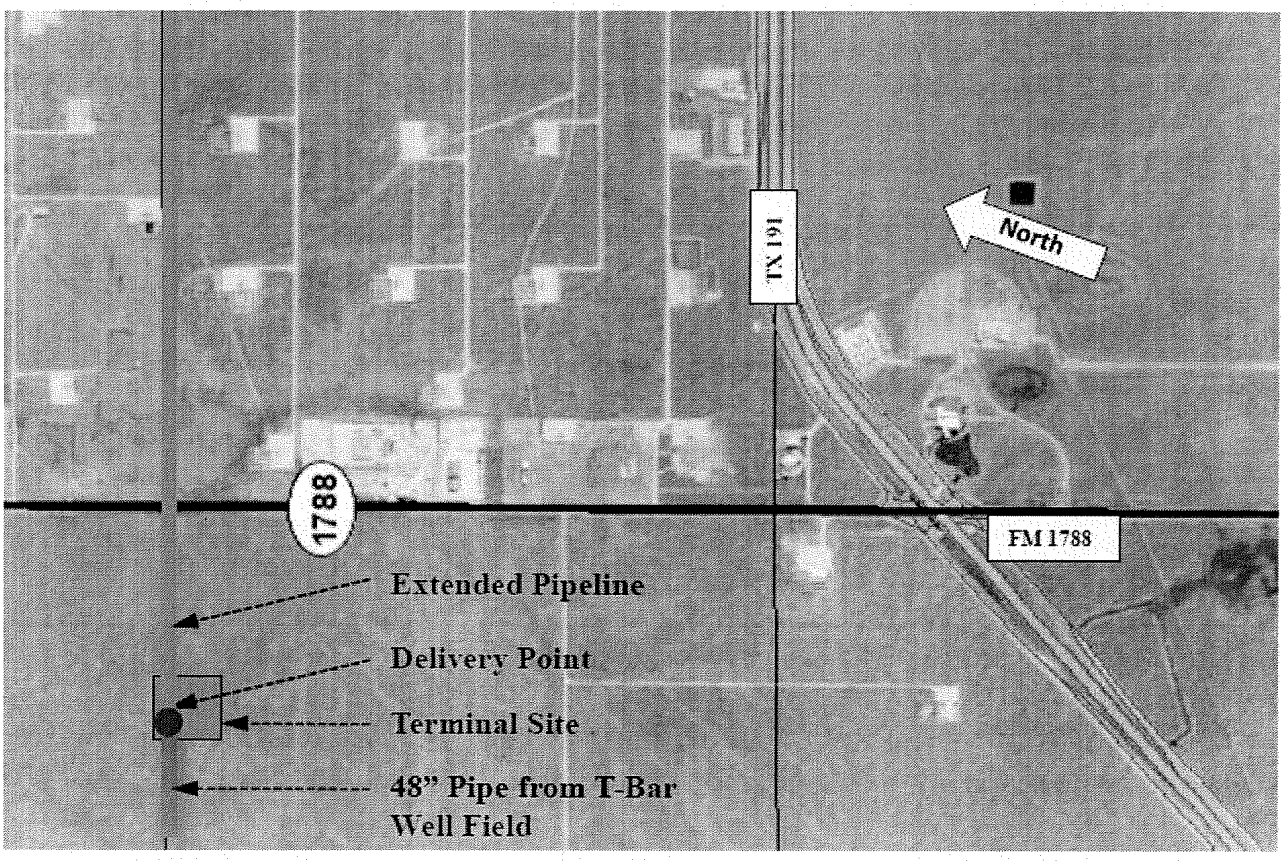
| Section | Block | Survey | Acreage |
|---|---|---|---|
| 7 | C-23 | PSL | 292 |
| 10 | C-23 | PSL | 640 |
| 11 | C-23 | PSL | 640 |
| 12 | C-23 | PSL | 496 |
| 13 | C-23 | PSL | 701 |
| 14 | C-23 | PSL | 640 |
| 17 | C-23 | PSL | 640 |
| 18 | C-23 | PSL | 640 |
| 19 | C-23 | PSL | 266 |
| 20 | C-23 | PSL | 471 |
| 21 | C-23 | PSL | 640 |
| 22 | C-23 | PSL | 640 |
| 23 | C-23 | PSL | 640 |
| 24 | C-23 | PSL | 640 |
| 25 | C-23 | PSL | 640 |
| 26 | C-23 | PSL | 640 |
| 27 | C-23 | PSL | 676 |
| 1 | C-24 | PSL | 640 |
| 2 | C-24 | PSL | 640 |
| 3 | C-24 | PSL | 640 |
| 4 | C-24 | PSL | 640 |
| 5 | C-24 | PSL | 687 |
| 6 | C-24 | PSL | 640 |
| 7 | C-24 | PSL | 640 |

| | | | |
|---|---|---|---|
| 12 | C-24 | PSL | 640 |
| 17 | C-24 | PSL | 640 |
| 18 | C-24 | PSL | 640 |
| 8 | 74 | PSL | 640 |
| 9 | 74 | PSL | 640 |
| 10 | 74 | PSL | 640 |
| 11 | 74 | PSL | 640 |
| 27 | 74 | PSL | 640 |
| 1 | 75 | PSL | 640 |
| | | Total Acreage | 20,229 |

| Section | Block | Survey | Acreage |
|---|---|---|---|
| 15 | C-23 | PSL | 640 |
| 16 | C-23 | PSL | 640 |
| 7 | 74 | PSL | 640 |
| | | Total Acreage | 1,920 |

# EXHIBIT B
## Description of Delivery Point

Water is delivered to the City of Midland at the Delivery Point within the Terminal Site as described in Exhibit C.1 and C.2 located approximately 1.2 miles North and .25 miles west of the intersection of TX 191 and FM 1788 as illustrated below. The Terminal Site infrastructure includes a Master Meter to measure the quantity of Water delivered to the City as well as all valves and other appurtenances necessary to delivery the Water according to the Wholesale Water Delivery Agreement. [See Exhibit C.2 for a schematic layout of the Terminal Site]



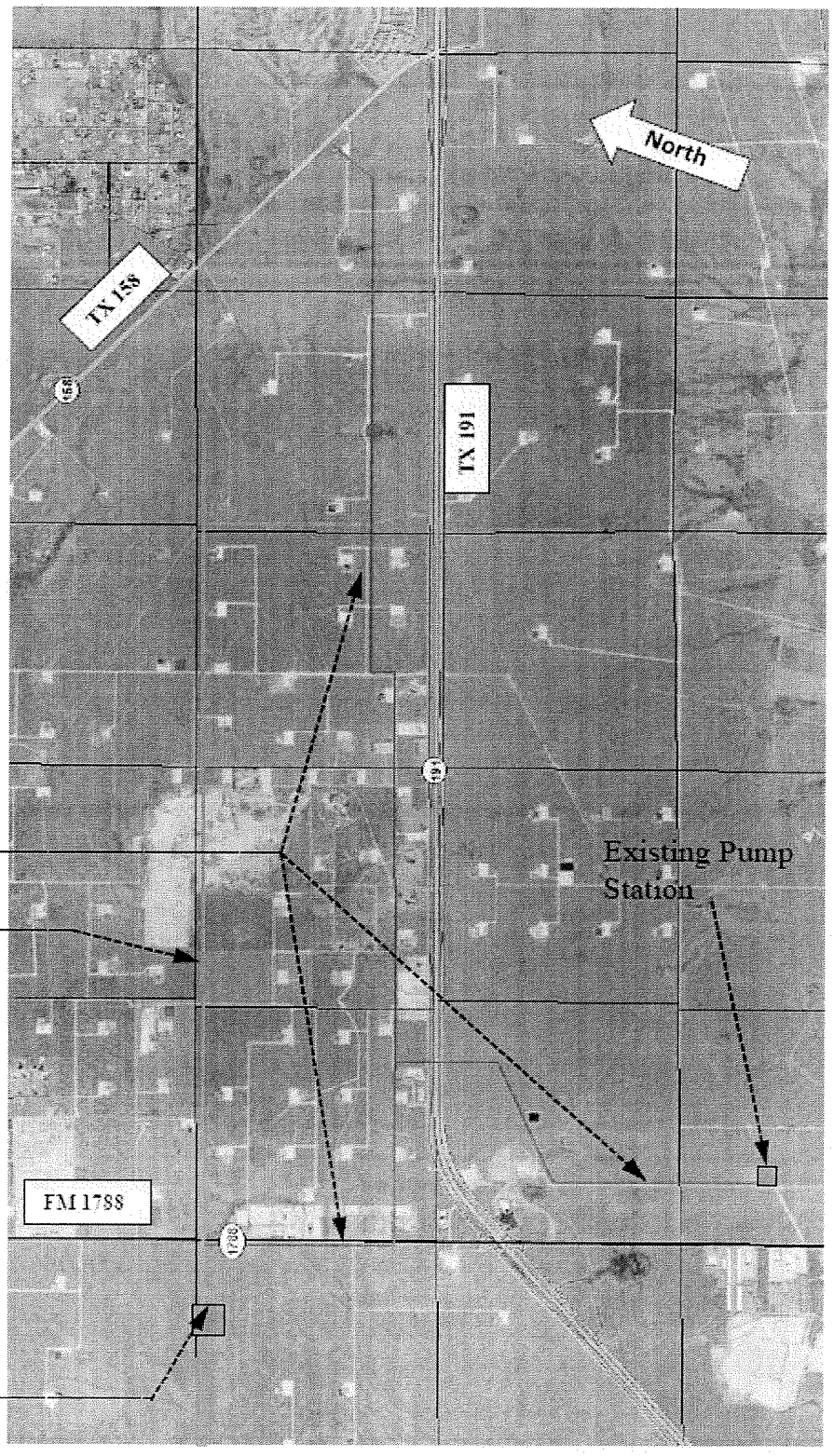
# EXHIBIT C.1
## Description of Extended Infrastructure

**Extended Infrastructure**
Infrastructure extending eastward from the T-Bar Well Field "Delivery Point" (as described in the Wholesale Water Delivery Agreement and illustrated in Exhibit B) including the Extended Pipeline, Chlorine Injection Station, Elevated Storage Tank and all associated Right-of-Way, valves and appurtenances necessary to deliver the Maximum Daily Amount of water to the City of Midland's Existing 36" Water Line at Hwy 158

16" PVC Pipe and all associated Right-of-Way, Valves and Appurtenances tying into the Extended Pipeline, the City of Midland's Existing 36" Water Line at Hwy 158 and the City of Midland's Existing Water Line at the Existing FM 1788 Pump Station near the Airport [Blue Line]

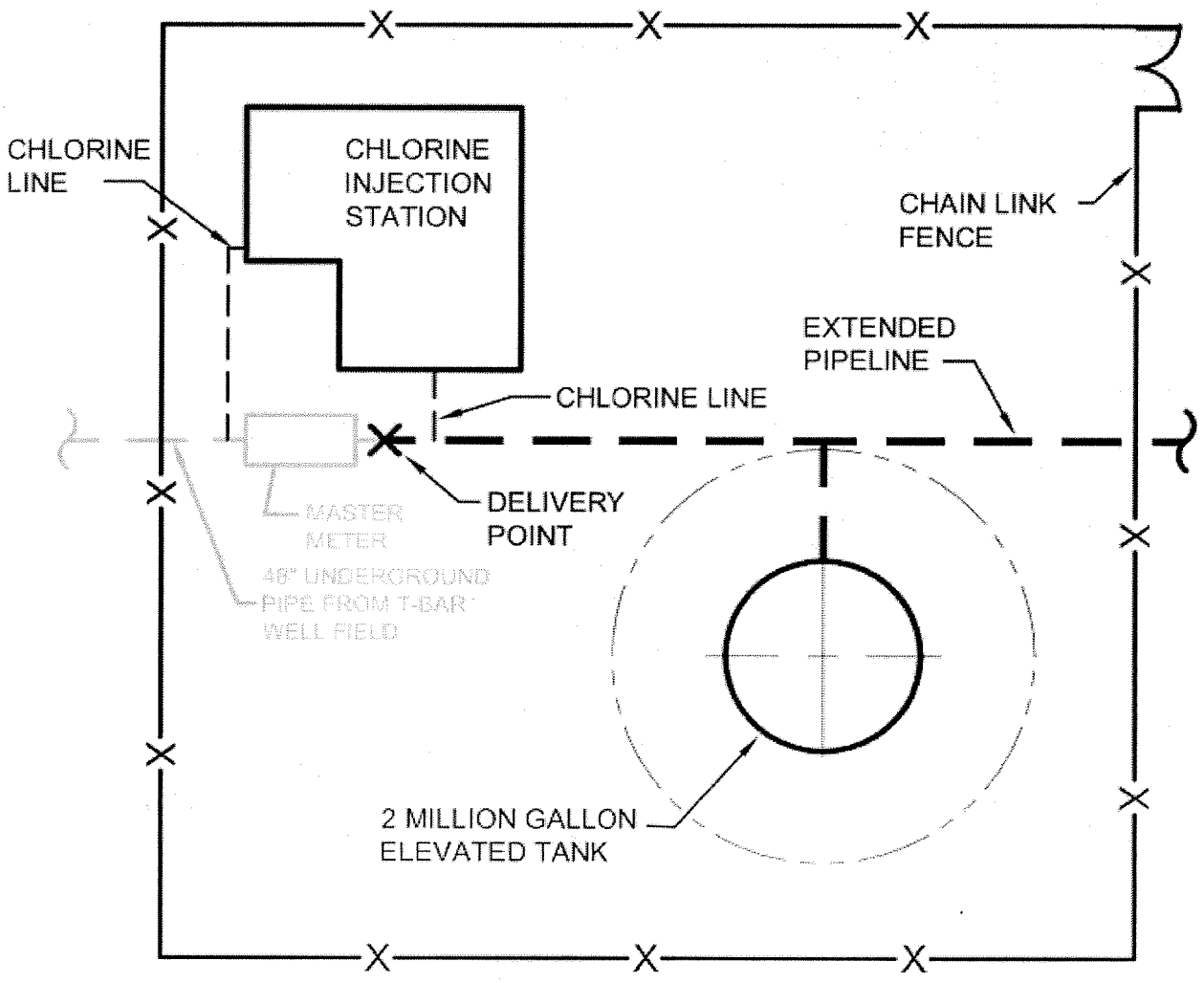
**Extended Pipeline**
48" Concrete Pressure Pipe and all associated Right-of-Way, Valves and Appurtenances extending eastward from the T-Bar Well Field "Delivery Point" (as described in the Wholesale Water Delivery Agreement and illustrated in Exhibit B) and tying into the City of Midland's Existing 36" Water Line at Hwy 158
[Orange Line]

**Terminal Site**
[Exhibit C.2]



# EXHIBIT C.2
## Description of Extended Infrastructure
## At the Terminal Site

Water is delivered to the City of Midland at the Delivery Point within the Terminal Site located near the intersection of TX 191 and FM 1788 [See Exhibit B]. The Extended Infrastructure at the Terminal Site includes a Chlorine Injection Station, a Two Million Gallon Elevated Storage Tank and all valves and other appurtenances necessary to delivery the Water according to the Wholesale Water Delivery Agreement.



## EXHIBIT D

**Form of T-Bar Easement**

**NOTICE OF CONFIDENTIALITY RIGHTS: IF YOU ARE A NATURAL PERSON, YOU MAY REMOVE OR STRIKE ANY OF THE FOLLOWING INFORMATION FROM THIS INSTRUMENT BEFORE IT IS FILED FOR RECORD IN THE PUBLIC RECORDS: YOUR SOCIAL SECURITY NUMBER OR YOUR DRIVER'S LICENSE NUMBER.**

## TEMPORARY ACCESS AND CONSTRUCTION EASEMENT AND TERM EASEMENT AGREEMENT

STATE OF TEXAS §
§
COUNTIES OF §
WINKLER AND LOVING

This **TEMPORARY ACCESS AND CONSTRUCTION EASEMENT AND TERM EASEMENT AGREEMENT** (the "***Agreement***") is entered into between the **CITY OF MIDLAND, TEXAS**, a Texas home-rule city (which together with its successors and assigns, and the trustees, directors, officers, and employees of the City are herein referred to as the "***City***") and the **MIDLAND COUNTY FRESH WATER SUPPLY DISTRICT NO. 1**, a freshwater supply district created pursuant to Chapter 53 of the Texas Water Code and the provisions of Article XVI, Section 59 of the Texas Constitution (together with its employees, invitees, contractors and assigns referred to herein as "***District***"). City and District may be referred to herein individually as "***Party***" or collectively as "***Parties***".

### RECITALS

WHEREAS, City owns approximately 22,149 acres of land in Winkler and Loving Counties, Texas, as more particularly described on **Exhibit A** attached hereto (the "***T-Bar Ranch***"), and the groundwater rights and groundwater associated therewith; and

WHEREAS, the Parties entered into that certain Wholesale Water Delivery Agreement (the "***Delivery Agreement***") whereby the District shall construct, install, own, operate, maintain and repair pipelines, wells, pumps and other equipment and personalty used in the production and transport of the groundwater (the "***Infrastructure***") from the T-Bar Ranch to the City; and

WHEREAS, subject to the terms and conditions set forth below, City desires to grant to District the temporary access and construction easement over and across the T-Bar Ranch for the purposes set forth herein; and

WHEREAS, subject to the terms and conditions set forth below, City desires to grant to District the term easement over and across the T-Bar Ranch for the purposes set forth herein.

## AGREEMENT

NOW, THEREFORE, for good and valuable consideration the receipt of which is hereby acknowledged, City and District agree as follows:

## ARTICLE I.
## GRANT OF EASEMENTS

1.1. Grant of Temporary Access and Construction Easement. City grants to District, its agents, employees, and contractors a non-exclusive temporary access and construction easement (the "***Temporary Easement***") over, across, and under the T-Bar Ranch described on **Exhibit A** attached hereto for the purpose of performing the work necessary to construct and install the Infrastructure. Such purposes are generally described below:

(a) To access the Infrastructure;

(b) To design, construct, and install, or cause to be designed, constructed, and installed, the Infrastructure pursuant to the Delivery Agreement; and

(c) To inspect or manage the inspection of construction of the Infrastructure pursuant to the Delivery Agreement.

1.2. Duration of Temporary Easement. The Temporary Access Easement hereby granted is effective commencing on the Effective Date hereof and continuing until the completion of construction and installation of the Infrastructure.

1.3. Restoration of Temporary Easement Property. Upon expiration of the Temporary Easement, District, its agents and contractors shall remove from the Temporary Easement Property all equipment, machineries, refuse, and other materials placed by District, its agents or contractors on the Temporary Easement Property and shall restore the Temporary Easement Property to its original condition, except as expressly contemplated by this Agreement.

1.4 Grant of Term Easement. City grants to District and its agents and employees a non-exclusive access and maintenance easement (the "***Term Easement***") for (a) vehicular and pedestrian ingress and egress to and from; and (b) for the ongoing maintenance, removal, operation, and repair of, the Infrastructure, over, across, and under the T-Bar Ranch as described on **Exhibit A** attached hereto.

1.5 Duration of Term Easement. The Term Easement hereby granted is effective commencing on the Effective Date and continuing until the earlier of (a) forty (40) years thereafter, or (b) the termination of the Delivery Agreement in accordance with the terms of the Delivery Agreement.

## ARTICLE II.
## GENERAL PROVISIONS

2.1. Maintenance of Easement Properties. District shall, at District's sole expense, at

all times maintain the T-Bar Ranch in a neat and clean condition, keeping the T-Bar Ranch free of trash and other refuse, and keeping the T-Bar Ranch free of artificial hazardous conditions.

3.2. Insurance. District and/or its successors and assigns shall require any and all contractors accessing the T-Bar Ranch to procure and maintain insurance policies and coverages in accordance with the terms of the Delivery Agreement. With respect to the policies and coverages referenced above, the District shall ensure (a) the City is named as an additional insured under such policies (except for Worker's Compensation); (b) a waiver of subrogation is included; and (c) copies thereof are provided to City prior to the commencement of construction and are maintained throughout construction and installation activities.

3.3. Attorneys' Fees and Expenses. Should either party be required to resort to legal action to enforce any of its rights under this Agreement, the prevailing party in any such dispute shall be entitled to reimbursement from the other party for reasonable attorneys' fees actually incurred in enforcing such rights.

3.4. Matters of Record. The Temporary Easement and Term Easement hereby granted are expressly made subject to any and all easements, covenants, rights-of-way, conditions and restrictions relating to the T-Bar Ranch to the extent and only to the extent, that the same may still be in force and effect, and either shown of record in the Offices of the County Clerk of Winkler and Loving Counties, Texas, or apparent on the ground.

(*Signature Pages Follow*)

(*Signature Page of City*)

The undersigned represents that such person is authorized to enter into this Agreement and to bind the party for which such person is signing to the provisions of this Agreement.

Dated the__day of _____, 20__ (the "***Effective Date***")

**CITY:**

**ATTEST:**

**CITY OF MIDLAND, TEXAS,**
a Texas home-rule city

_____
Amy M. Turner, City Secretary

By: _____
Name: W. Wesley Perry
Title: Mayor

STATE OF TEXAS §
§
COUNTY OF _____ §

This instrument was acknowledged before me on the _____ day of _____, 20___, by W. Wesley Perry, Mayor of the City of Midland, on behalf of such City.

_____
Notary Public, State of Texas
Printed Name: _____
My Commission expires:

**Approved as to Content:**

By: _____
Name: Courtney B. Sharp
Title: City Manager
Date: _____

**Approved as to Form:**

By: _____
Name: Keith Stretcher
Title: City Attorney
Date: _____

*(Signature Page of District)*

The undersigned represents that such person is authorized to enter into this Agreement and to bind the party for which such person is signing to the provisions of this Agreement.

**ATTEST:**

_____

**DISTRICT:**

**MIDLAND COUNTY FRESH WATER SUPPLY DISTRICT NO. 1,** a _____:

By: _____
Name: Jose Cuevas
Title: President

Date: _____

STATE OF TEXAS §
§
COUNTY OF _____ §

This instrument was acknowledged before me on the _____ day of _____, 20__ by Jose Cuevas, President of Midland County Fresh Water Supply District No. 1, on behalf of said District.

_____
Notary Public, State of Texas
Printed Name: _____
My Commission expires:

## EXHIBIT A

### Legal Description of T-Bar Ranch

Those certain tracts of land in Winkler County and Loving County, Texas acquired by the City by Warranty Deed on August 25, 1965 and recorded in Volume 35, Page 472, Deed Records of Winkler County, Texas and those certain groundwater rights acquired by the City by Deed recorded on June 23, 1966 and January 16, 1967 and recorded in Volume 217, Page 515 and Volume 222, Page 638, respectively, Deed Records of Winkler County, Texas and as further described as follows:

| Section | Block | Survey | Acreage |
|---|---|---|---|
| 7 | C-23 | PSL | 292 |
| 10 | C-23 | PSL | 640 |
| 11 | C-23 | PSL | 640 |
| 12 | C-23 | PSL | 496 |
| 13 | C-23 | PSL | 701 |
| 14 | C-23 | PSL | 640 |
| 17 | C-23 | PSL | 640 |
| 18 | C-23 | PSL | 640 |
| 19 | C-23 | PSL | 266 |
| 20 | C-23 | PSL | 471 |
| 21 | C-23 | PSL | 640 |
| 22 | C-23 | PSL | 640 |
| 23 | C-23 | PSL | 640 |
| 24 | C-23 | PSL | 640 |
| 25 | C-23 | PSL | 640 |
| 26 | C-23 | PSL | 640 |
| 27 | C-23 | PSL | 676 |
| 1 | C-24 | PSL | 640 |
| 2 | C-24 | PSL | 640 |
| 3 | C-24 | PSL | 640 |
| 4 | C-24 | PSL | 640 |
| 5 | C-24 | PSL | 687 |
| 6 | C-24 | PSL | 640 |
| 7 | C-24 | PSL | 640 |

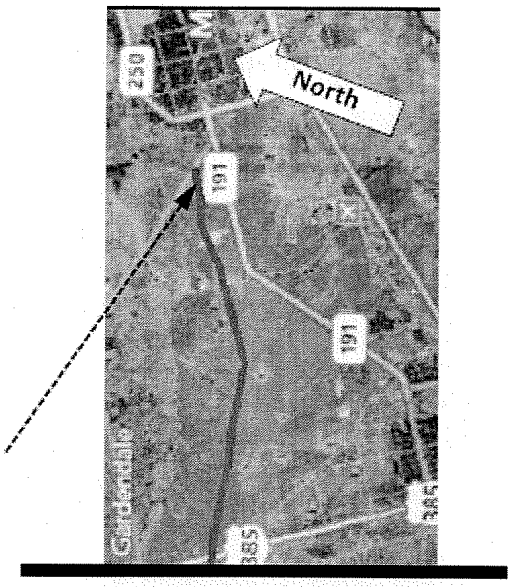
| | | | |
|---|---|---|---|
| 12 | C-24 | PSL | 640 |
| 17 | C-24 | PSL | 640 |
| 18 | C-24 | PSL | 640 |
| 8 | 74 | PSL | 640 |
| 9 | 74 | PSL | 640 |
| 10 | 74 | PSL | 640 |
| 11 | 74 | PSL | 640 |
| 27 | 74 | PSL | 640 |
| 1 | 75 | PSL | 640 |
| | | Total Acreage | 20,229 |

| Section | Block | Survey | Acreage |
|---|---|---|---|
| 15 | C-23 | PSL | 640 |
| 16 | C-23 | PSL | 640 |
| 7 | 74 | PSL | 640 |
| | Total Acreage | | 1,920 |

# EXHIBIT E
## Description of Expanded Infrastructure

**Expanded Infrastructure**

The Infrastructure is designed initially to deliver a Maximum Daily Amount of 20 Million Gallons per Day (MGD) of Water to the City. The initial Pipeline Design Capacity is 38 MGD. The Infrastructure must be expanded in order for the whole system to deliver 38 MGD. Below is a summary of the components within the system to be expanded to meet the Pipeline Design Capacity.

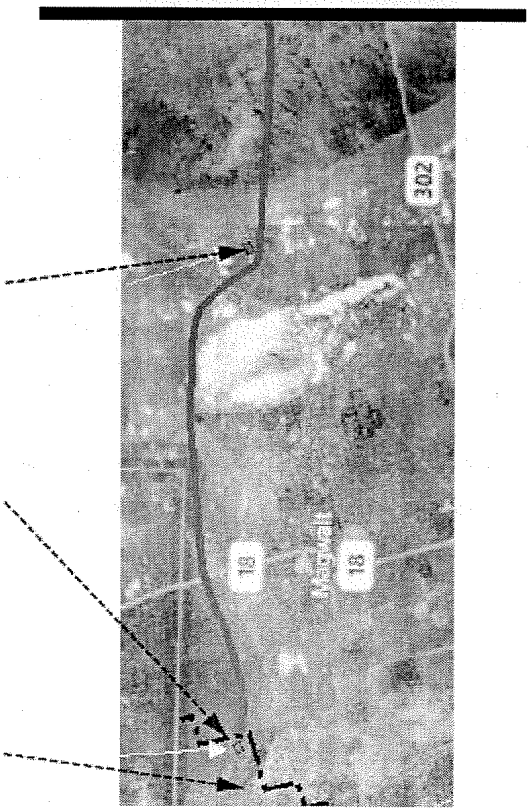



**Terminal Site**

Expansion of the Master Meter, Chlorination Station and associated valves and appurtenances required at the Terminal Site to provide Pipeline Design Capacity

**Intermediate Tank Site**

Expansion of the Chlorination Station and associated valves and appurtenances required at the Intermediate Tank Site to provide Pipeline Design Capacity




**Intermediate Pump Station**

A new pump station required along the pipeline at a location approximately 19 miles east of the HSPS at T-Bar Ranch to provide Pipeline Design Capacity

**High Service Pump Station (HSPS)**

Additional pumping capacity required at the HSPS at T-Bar Ranch to provide Pipeline Design Capacity

**Well Field**

Approximately 40 additional production wells required at T-Bar Well Field to provide Pipeline Design Capacity

# EXHIBIT F

## LEASE AND OPERATING AGREEMENT

THE STATE OF TEXAS §
§ KNOW ALL BY THESE PRESENTS:
COUNTY OF MIDLAND §

**THIS LEASE AND OPERATING AGREEMENT** (the "***Agreement***") is entered into this _____ day of _____, 20___ (the "***Effective Date***") between the CITY OF MIDLAND, TEXAS, a Texas home-rule city (the "***City***"), and the MIDLAND COUNTY FRESH WATER SUPPLY DISTRICT NO. 1, a freshwater supply district created pursuant to Chapter 53 of the Texas Water Code and the provisions of Article XVI, Section 59 of the Texas Constitution (the "***District***"). In this Agreement, the City and District are sometimes individually referred to as a "***Party***" and collectively referred to as the "***Parties***".

**WHEREAS**, the City and the District entered into that certain Wholesale Water Delivery Contract (the "***Contract***") whereby the District agreed to acquire right-of-way for, design, construct, install, and finance certain infrastructure (the "***Infrastructure***") including wells and pipelines to deliver groundwater owned by the City from beneath those certain tracts of land located in Winkler and Loving Counties (the "***T-Bar Ranch***") to a delivery point located approximately at the intersection of Hwy 191 and FM 1788 (the "***Delivery Point***"); and

**WHEREAS**, further at the request of the City, the District is acquiring right-of-way, designing, constructing, installing and financing certain improvements including a pipeline, an elevated storage tank, and an injection station beyond the Delivery Point as more particularly described in **Exhibit A** attached hereto (the "***Extended Infrastructure***"); and

**WHEREAS**, upon completion of the Extended Infrastructure, the District desires to lease to City the real and personal property associated with the Extended Infrastructure, and to grant to City the rights and obligations to operate and maintain the Extended Infrastructure, and the City desires to lease from the District the real and personal property associated with the Extended Infrastructure, and to undertake the operations and maintenance of the Extended Infrastructure.

**NOW, THEREFORE**, for good and valuable consideration and the mutual covenants provided for herein and those covenants contained in the Contract, the Parties agree as follows:

### ARTICLE I.
### LEASE

**1.1 Grant of Lease.** District hereby leases to City all that certain real property and improvements located thereon in Midland County, Texas as more particularly described on **Exhibit A** attached hereto, together with all rights and easements necessary for the operation and maintenance of the Extended Infrastructure, including rights of ingress to and egress from the

Extended Infrastructure. District shall at no time during the Term (as defined below) restrict or prohibit City from accessing the Extended Infrastructure and performing its obligations under Article II below.

**1.2 Term of Lease.** This Agreement shall commence on the Effective Date and shall terminate the earlier of (i) fifty (50) years thereafter; or (ii) the date upon which the City takes ownership of the Extended Infrastructure under the terms of the Contract (the "***Term***").

## ARTICLE II.
## OPERATIONS AND MAINTENANCE

**2.1 Operations and Maintenance of the Extended Infrastructure**. Throughout the Term of this Agreement, City shall, at its own expense, be solely responsible for the maintenance, operation, repair, replacement, and inspection of the Extended Infrastructure. City shall not be obligated to upgrade the Extended Infrastructure at its expense, but only to maintain the Extended Infrastructure in the same condition as of the Effective Date. City may, at its own expense and sole discretion, install or place in or on, or attach or affix to, the Extended Infrastructure such additional equipment or accessories as may be necessary or convenient to use the Extended Infrastructure for its intended purpose, provided that such equipment or accessories do not impair the value or utility of the Extended Infrastructure.

## ARTICLE III.
## MISCELLANEOUS

**3.1 Notices.** Any notices given under this Agreement will be effective if (i) forwarded to a Party by hand-delivery; (ii) transmitted to a Party by confirmed telecopy; or (iii) deposited with the U.S. Postal Service, postage prepaid, certified, to the address of the Party indicated below:

**CITY**:

City of Midland
City Hall
300 N. Loraine
Midland, Texas 79701
Attn: Courtney Sharp
Telephone: (432) 685-7202
Facsimile: (432) 686-1600
Email: csharp@midlandtexas.gov

with copy to:

Lloyd Gosselink Rochelle & Townsend, PC
816 Congress Ave., Suite 1900
Austin, Texas 78701
Attn: Cathleen Slack
Telephone: (512) 322-5809
Facsimile: (512) 874-3909
Email: cslack@lglawfirm.com

**DISTRICT**:

Midland County Fresh Water Supply District No. 1
1700 West Wall Street
Midland, Texas 79701
Attn: Jose Cuevas, President
Telephone: (432) 697-1447
Facsimile: (432) 697-9758
Email: jcuevas@jumburrito.com

with copy to:

Stubbeman, McRae, Sealy, Laughlin & Browder, Inc.
Attn: Robert Rendall
550 West Texas Ave. Suite 800
Midland, Texas 79701
Telephone: (432) 682-1616
Facsimile: (432) 682-4884
Email: rrendall@stubbemanlawfirm.com

**3.2 Counterparts; Effect of Partial Execution.** This Agreement may be executed simultaneously in multiple counterparts, each of which will be deemed an original, but all of which will constitute the same instrument.

**3.3 Severability, Waiver.** Any provision of this Agreement found to be prohibited by law shall be ineffective to the extent of such prohibition without invalidating the remainder of this Agreement. The waiver by any party of any breach of any term, covenant or condition hereof shall not operate as a waiver of any subsequent breach thereof.

**3.4 Applicable Law; Venue**. This Agreement will be construed in accordance with Texas law. Venue for any action arising hereunder will be exclusively in Midland County, Texas, and the Parties hereby agree that Midland County is the proper venue for any such action since the leased premises and place for performance of the obligations hereunder, including, but not limited to the operations and maintenance of the Extended Infrastructure is in Midland County.

**3.5 Authority.** Each Party represents and warrants that it has the full right, power and authority to execute this Agreement.

*(Signature Pages Follow)*

**CITY:**

**ATTEST:**

**CITY OF MIDLAND, TEXAS:**

_____
Amy M. Turner, City Secretary

By:_____
Printed Name: W. Wesley Perry
Title: Mayor

Date: _____

STATE OF TEXAS §
§
COUNTY OF MIDLAND §

This instrument was acknowledged before me on this _____ day of_____, 2012, by W. Wesley Perry, Mayor of the City of Midland, Texas, on behalf of said City.

_____
Notary Public - State of Texas

**Approved as to Content:**

By:_____
Printed Name: Courtney B. Sharp
Title: City Manager
Date: _____

**Approved as to Form:**

By:_____
Printed Name: Keith Stretcher
Title: City Attorney
Date: _____

**ATTEST:**

_____

**DISTRICT:**

**MIDLAND COUNTY FRESH WATER SUPPLY DISTRICT NO. 1:**

By:_____
Printed Name: Jose Cuevas
Title: President

Date: _____

STATE OF TEXAS §
§
COUNTY OF _____ §

This instrument was acknowledged before me on this _____ day of_____, 2012, by Jose Cuevas, President of Midland County Fresh Water Supply District No. 1, on behalf of said District.

_____
Notary Public - State of Texas

# EXHIBIT A

## Description of Extended Infrastructure

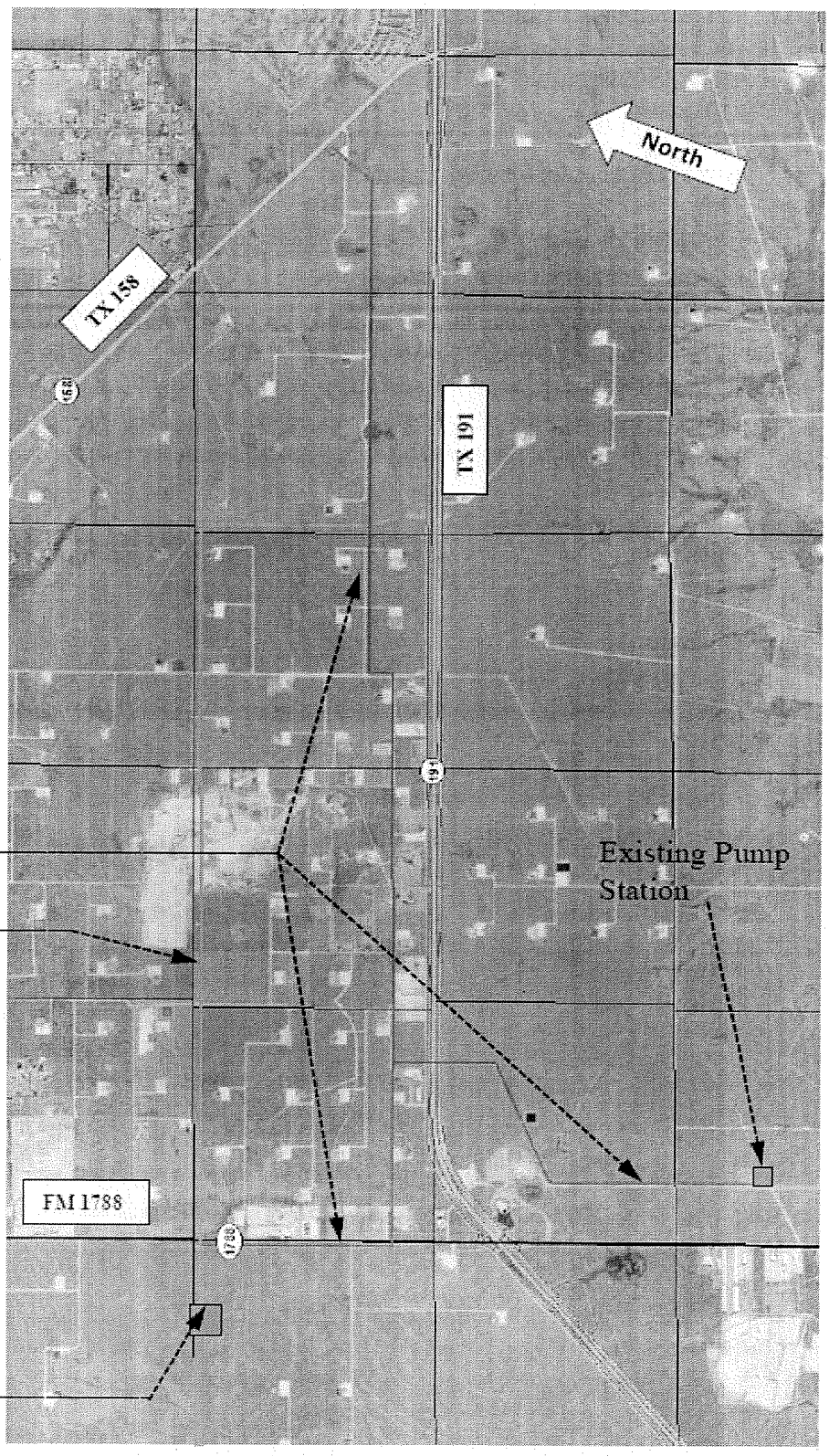
Extended Infrastructure
Infrastructure extending eastward from the T-Bar Well Field "Delivery Point" including the Extended Pipeline, Chlorine Injection Station, Elevated Storage Tank and all associated Right-of-Way, valves and appurtenances necessary to deliver the Maximum Daily Amount of water to the City of Midland's Existing 36" Water Line at Hwy 158

16" PVC Pipe and all associated Right-of-Way, Valves and Appurtenances tying into the Extended Pipeline, the City of Midland's Existing 36" Water Line at Hwy 158 and the City of Midland's Existing Water Line at the Existing FM 1788 Pump Station near the Airport [Blue Line]

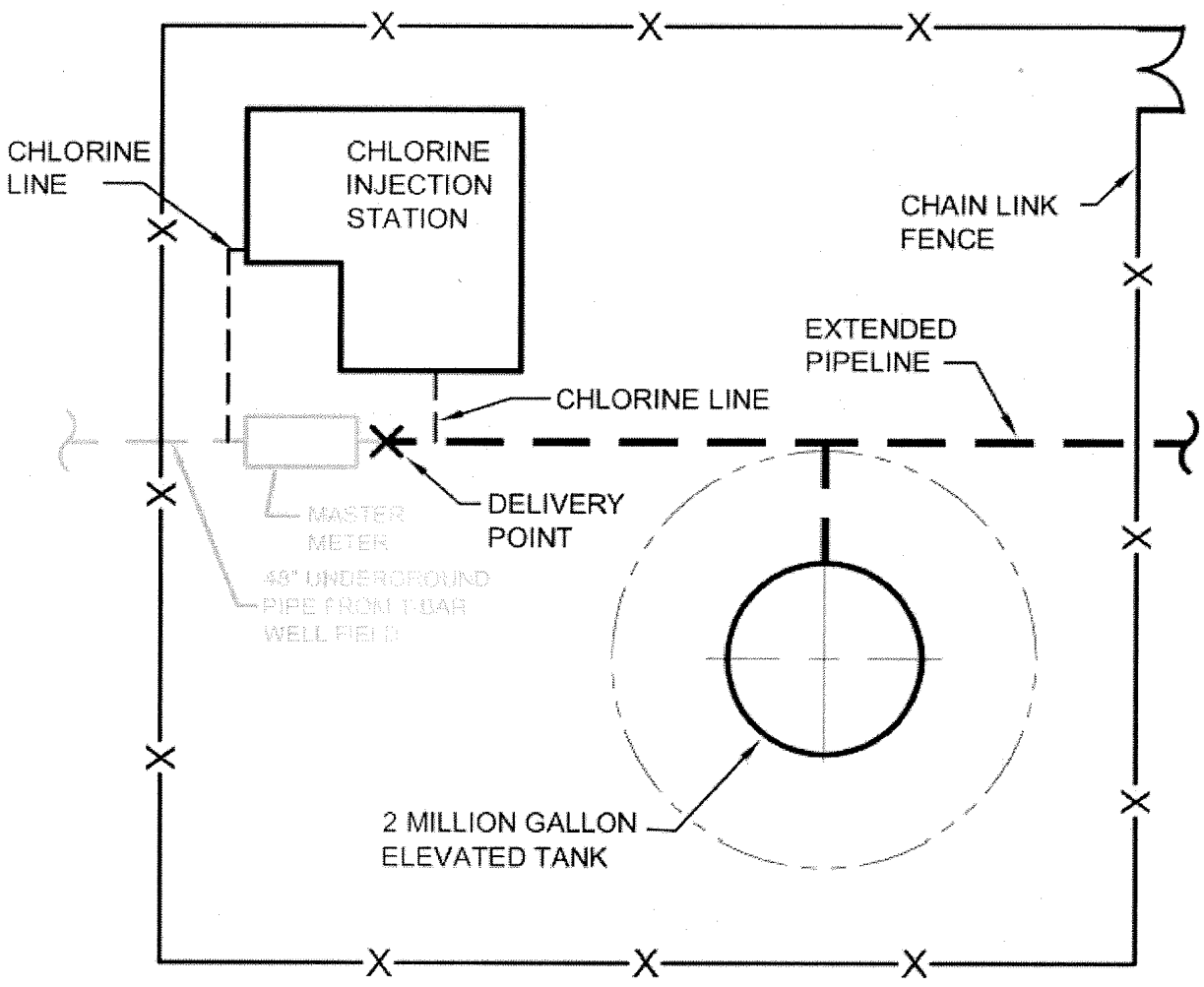
Extended Pipeline
48" Concrete Pressure Pipe and all associated Right-of-Way, Valves and Appurtenances extending eastward from the T-Bar Well Field "Delivery Point" and tying into the City of Midland's Existing 36" Water Line at Hwy 158

[Orange Line]

Terminal Site



Water is delivered to the City of Midland at the Delivery Point within the Terminal Site located near the intersection of TX 191 and FM 1788. The Extended Infrastructure at the Terminal Site includes a Chlorine Injection Station, a Two Million Gallon Elevated Storage Tank and all valves and other appurtenances necessary to delivery the Water according to the Wholesale Water Delivery Agreement.



# City Council Agenda

Approved for Agenda:

City Manager's Office

**MEETING DATE:** **Tuesday, May 30, 2012**

**TO:** **CITY COUNCIL**

**FROM:** **COURTNEY SHARP**

**SUBJECT:** **RESOLUTION(S) – Ratifying and Approving Three (3) Resolutions Regarding the T-Bar Project**

---

**Purpose:**

(1) Ratifying and approving revisions to the Amended and Restated Interlocal Agreement between the City of Midland and the Midland County Fresh Water Supply District No. 1 regarding the delivery of water from the T-Bar Ranch.
(2) Ratifying and approving revisions to the Wholesale Water Delivery Agreement between the City of Midland and the Midland County Fresh Water Supply District No. 1 regarding the delivery of water from the T-Bar Ranch.
(3) Approving a Remittance Agreement between the City of Midland and the Midland Development Corporation regarding the delivery of water from the T-Bar Ranch.

**Recommended City Council Action**

☒ Approve ☐ Deny ☐ Direction/Informational

**Discussion:**

The Midland County Fresh Water Supply District No. 1 (District) and City Staff have been working with our legal and financial advisors to obtain approval from the Attorney General's Office on the Amended and Restated Interlocal Agreement and the Wholesale Water Delivery Agreement. Both agreements must be approved by the AG in order for the District to issue the bonds for the T-Bar project.

The first two resolutions you will be considering for ratification is to the existing agreements. Revisions have been made to both agreements at the request of the AG's office.

The third resolution is a Remittance Agreement between the City and MDC. The AG's Office is requiring the City to show proof that funds will be available to cover (backstop) the $70 million loan the District will receive from the local banks (interim financing).

**RESOLUTION NO.**

**RESOLUTION APPROVING A REMITTANCE AGREEMENT BETWEEN THE MIDLAND DEVELOPMENT CORPORATION AND THE CITY OF MIDLAND REGARDING THE DELIVERY OF WATER FROM THE T-BAR RANCH; THE T-BAR RANCH IS LOCATED IN WINKLER COUNTY AND LOVING COUNTY, TEXAS**

**WHEREAS**, the Midland Development Corporation authorized the execution of a Remittance Agreement with the City of Midland regarding the delivery of water from the T-Bar Ranch; and

**WHEREAS**, the City Council finds it to be in the public interest to approve said agreement between the Midland Development Corporation and the City of Midland;

**NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF MIDLAND, TEXAS:**

**SECTION ONE.** That the Remittance Agreement between the City of Midland and the Midland Development Corporation regarding the delivery of water from the T-Bar Ranch is hereby approved.

**SECTION TWO.** That the Mayor and the City Secretary are hereby authorized and directed to execute and attest, respectively, on behalf of the City of Midland, said agreement in substantially the form as shown on Exhibit "A", which is attached hereto and incorporated herein for all purposes.

On motion of Council member _____, seconded by Council member _____, the above and foregoing resolution was adopted by the City Council of the City of Midland at a regular meeting on the _____ day of _____, A.D., 2012, by the following vote:

Council members voting "AYE":

Council members voting "NAY":

_____
W. Wesley Perry, Mayor

ATTEST:

_____
Amy M. Turner, City Secretary

RECOMMENDED AND APPROVED:

_____
Courtney Sharp, City Manager

APPROVED AS TO FORM:

_____
Keith Stretcher, City Attorney

## REMITTANCE AGREEMENT

This **REMITTANCE AGREEMENT** (this "*Agreement*") is made to be effective as of May __, 2012, by and between the **CITY OF MIDLAND, TEXAS**, a duly incorporated and existing home rule municipality operating and existing under the laws of the State of Texas (the "*City*"), and the **MIDLAND DEVELOPMENT CORPORATION**, a nonprofit development corporation organized and existing under the laws of the State of Texas, including Chapter 504, Texas Local Government Code, as amended (formerly Section 4A of the Development Corporation Act of 1979, Article 5190.6, Texas Revised Civil Statutes Annotated, as amended) (the "*Corporation*").

## RECITALS

**WHEREAS**, the City intends to obtain wholesale water delivery service from the Midland County Fresh Water Supply District No. 1. (the "*District*") and the District intends to provide such services through the development of wells and related infrastructure at the City's T-Bar Ranch and through the construction of a pipeline to transport water from the City's T-Bar Ranch to the City (collectively, the "*Project*"); and

**WHEREAS**, the City has agreed to pay certain costs associated with the District's acquisition and development of the Project in the event the District is unable to secure permanent financing for the Project; and

**WHEREAS**, the Corporation has determined that the production and transportation of water to the City through the Project will facilitate and support anticipated and emerging industrial development of substantial areas within the City and its extraterritorial jurisdiction, which are currently undeveloped or underdeveloped, and therefore the Project will promote the development of new and expanded business enterprises in the City.

## AGREEMENT

For and in consideration of the respective promises and mutual covenants and benefits hereinafter set forth, the City and the Corporation agree as follows:

1. **Capitalized Terms**. All capitalized terms not otherwise defined herein shall have the meaning ascribed to such terms in the Amended and Restated Interlocal Agreement Regarding T-Bar Ranch Groundwater Delivery between the City and the District (the "*Interim Financing Agreement*").

2. **Financing of Project**. To provide interim financing for the Project, the City has entered into the Interim Financing Agreement with the District. To support the City's ability to pay City Payments pursuant to the Interim Financing Agreement, the Corporation hereby agrees to enter into this Agreement, and the City hereby agrees that all City Payments shall be used solely to pay costs of the Project and the financing thereof, as provided by the Interim Financing Agreement.

3. **Use of Sales Tax Revenues**. In the event the City is required to provide funds to pay any City obligations incurred pursuant to the Interim Financing Agreement, and the City is

unable to secure alternative financing for such obligations, the Corporation agrees to remit its sales tax revenues received from the City and currently held in the Corporation's general fund, together with any interest earnings thereon, to or at the direction of the City to pay costs of the Project, and the Corporation shall remit its sales tax revenues in such amounts and at such times as the City shall direct for the purpose of paying all or any portion of the City Payments. During the term of this Agreement, the Corporation agrees to maintain a balance in its general fund of not less than $22,715,520 to satisfy the Corporation's obligations to pay costs of the Project.

4. **Levy, Collection and Payment of Sales Tax by the City**. In consideration of the Corporation's agreement to pay costs of the Project, the City covenants and agrees that it will take all steps necessary and authorized under applicable law to continuously levy and collect the Corporation's sales tax during the term of this Agreement in the manner and to the maximum extent permitted by applicable law.

5. **Obligation to be Absolute**. The obligation of the Corporation to make the payments set forth in this Agreement shall be absolute and unconditional. Until such time as the Interim Loan has been fully paid (or provision for payment thereof shall have been made) in accordance with the Interim Financing Agreement, the Corporation will not suspend or discontinue any payments provided for in this Agreement and will not terminate this Agreement for any cause, including, without limiting the generality of the foregoing, destruction of or damage to the Project; commercial frustration of purpose; or any failure of the City to perform and observe any agreement, whether express or implied, or any duty, liability, or obligation arising out of or connected with this Agreement. Nothing contained in this Section shall be construed to release the Corporation from performance of any of the agreements on its part contained in this Agreement, and in the event the Corporation shall fail to perform on its part, the City may institute such action against the Corporation as the City may deem necessary to compel performance so long as such action does not abrogate the Corporation's obligations to make the payments set forth in this Agreement.

6. **Term**. This Agreement shall be in force and effect from the date of execution hereof until the earlier of (i) the final payment (or provision for such payment) of the Interim Loan and (ii) January 31, 2013.

7. **Amendments and Supplements**. This Agreement may be amended, supplemented or extended by mutual agreement of the parties hereto, but not in such manner as to impair the rights of the Interim Lenders.

8. **Entire Agreement**. This Agreement contains the entire agreement between the parties pertaining to the subject matter hereof and fully supersedes all prior agreements and understandings between the parties pertaining to such subject matter.

9. **Counterparts**. This Agreement may be executed in several counterparts, and all such executed counterparts shall constitute the same agreement. It shall be necessary to account for only one such counterpart in proving this Agreement.

10. **Severability**. If any provision of this Agreement is determined by a court of competent jurisdiction to be invalid or unenforceable, the remainder of this Agreement shall nonetheless remain in full force and effect.

11. **Applicable Law**. This Agreement shall in all respects be governed by, and construed in accordance with, the substantive federal laws of the United States and the laws of the State of Texas.

12. **Captions**. The section headings appearing in this Agreement are for convenience of reference only and are not intended, to any extent and for any purpose, to limit or define the text of any section or any subsection hereof.

[*THE REMAINDER OF THIS PAGE INTENTIONALLY LEFT BLANK*]

IN WITNESS WHEREOF, the parties hereto have executed this Agreement to be effective as of the date and year first above written.

**MIDLAND DEVELOPMENT CORPORATION**

_____
President

ATTEST:

_____
Secretary

**CITY OF MIDLAND, TEXAS**

_____
Mayor

ATTEST:

_____
City Secretary