

POSSIBLE MOTION

I move to approve a Water Purchase Agreement for Raw Water between I Water LLC and City and Borough of Sitka attached.

Thursday, May 01, 2014

MEMORANDUM

To: Mark Gorman – CBS Administrator
From: Garry White, SCIP Director
Subject: I Water LLC Lease and Water Purchase Agreement

Introduction

I Water, LLC (I Water), a California based limited liability company is requesting to lease property at the SCIP with an option to purchase. I Water plans to construct a water bottling plant on the property. I Water is additionally requesting to acquire a guaranteed water allocation for bottling and export purposes.

The SCIP Board met with an I Water LLC representative at its March 19th meeting to discuss I Water's proposals. The SCIP Board met again on April 10th to discuss the proposals and finalize terms. The SCIP Board recommends the Assembly approve a land lease with option to purchase and water purchase agreement based on the terms detailed below.

Property

I Water LLC requests to purchase lots 3, 6, & 7 at the SCIP. Total property is estimated to be 107,810 SF with an estimated assessed value of \$431,240.*

**Lots 3 & 6 are currently leased to S&S General Contractors at a rate of \$.36/SF/YR until March 1, 2015.*

Proposed lease terms

- Lease term of 2 years with an option to purchase property once both the following benchmarks are met:
 - A building is constructed with certified construction costs of at least \$3 million dollars.
 - 500,000 gallons of water in an annual cycle are purchased from the CBS for bottling operations.
- Annual lease rate of \$0.36/SF/YR.
- An appraisal is performed on the property upon execution of the lease. Sales price for purchase option would be set by the appraisal. CBS will select appraiser. I Water will be responsible for cost of appraisal.

- I Water LLC has an option to renew lease for 4 – 5 year lease renewals with concurrence of both parties if they chose not to purchase property.
- If I Water LLC chooses not to renew lease or purchase property, all buildings on the property at the end of lease term become property of the CBS or must be removed from the property.
- I Water LLC will be responsible for all utility connections to buildings, including raw water line and meters.
- All other standard lease terms

Water Allocation

I Water LLC request to acquire a guaranteed water allocation agreement for a 10 year period. They propose to purchase the water for \$0.01/gallon with \$15,000 paid up front to be used as water credits.

CBS Water Allocation Background

The CBS has a total of 29,235 Acre-feet of water annually available for export. The CBS currently has a water purchase agreement with Alaska Bulk Water Inc. (formerly True Alaska Bottling Company) for 27,773 Acre-feet annually.

The CBS currently has 1,462 Acre-feet or 476,394,162 US gallons of water available for export annually. The sale of this water allocation is limited to export in containers of a 20' container van or smaller per current water purchase agreement with Alaska Bulk Water Inc.

Proposed water purchase agreement

- I Water LLC is allocated 200 million gallons of water annually for export in containers less than a 20' container van for a 10 year term at a price of \$0.01/gallon.
 - When 150 million gallons is exported annually, I Water LLC's allocation is increased by an additional 50 million gallons of water annually depending on CBS availability.
 - When 200 million gallons is exported annually, I Water LLC's allocation can increase again, depending on CBS availability.
- I Water LLC must export 500,000 gallons of water within 30 months of lease execution. If I Water LLC fails to export 500,000 gallons by the set benchmark date, the CBS can terminate the water purchase agreement.
- I Water LLC must export at least 500,000 gallons of water between 30 months and 60 months of lease execution. If I Water LLC fails to export 500,000 gallons by the set benchmark date, the CBS can terminate the water purchase agreement.
- I Water LLC must export at least 500,000 gallons of water between 60 months and 84 months of lease execution. If I Water LLC fails to export 500,000 gallons

by the set benchmark date, the CBS can terminate the water purchase agreement.

- I Water LLC must export at least 500,000 gallons of water between 84 months and 108 months of lease execution. If I Water LLC fails to export 500,000 gallons by the set benchmark date, the CBS can terminate the water purchase agreement.
- I Water LLC will pay the CBS a \$15,000 non-refundable fee that can be used as water credits within the 30 months of lease execution.
- CBS's water delivery availability is limited by State of Alaska Regulations, Municipal needs, and Force Majeure.
- All other standard Water purchase agreement terms.

Action

- Assembly approval of land lease agreement with option to purchase and water purchase agreement.

**PURCHASE AGREEMENT
FOR RAW WATER**

BETWEEN: **CITY AND BOROUGH OF SITKA**
100 Lincoln Street
Sitka, Alaska 99835

AND **I WATER, LLC**
1125 W. Olive St. Suite A
Sand Diego, CA 92103

1. Term and Documents Comprising this Agreement.

1.1 The initial term of this Purchase Agreement for Raw Water (“Agreement”) shall begin on the effective date and shall end 120 months after effective date. The City and Borough of Sitka (“Sitka”) hereby grants to I Water, LLC (“I Water”), the right to purchase raw water for water bottling operations, on the terms and conditions set forth herein.

1.2 The Agreement shall consist of the 18 sections in this Agreement plus Appendix A (a map) and Appendix B (the “Prospective Purchaser Agreement Between the State of Alaska and the City and Borough of Sitka for the Former Alaska Pulp Corporation Pulp Mill Property” dated April 28, 1999, including all attachments, which specifically includes “Memorandum of Understanding between the State of Alaska and the City and Borough of Sitka [:] Management Plan for Sawmill Cove Property (Former APC Property).”)

2. Definitions.

In this Agreement, the following terms shall have the definitions stated:

- a) “annually” means 12 consecutive months.
- b) “beneficial use” means the application of water, purchased by I Water for export or for use at the point of delivery, to a useful purpose, including domestic, commercial, agricultural, wildlife, and recreational uses.
- c) "raw water" means untreated water delivered by Sitka from Blue Lake via the Blue Lake penstock, a conduit which transports water from Blue Lake to the Blue Lake Powerhouse as shown on Exhibit A.
- d) “deliver” or “ to deliver” or “delivered” means the act by Sitka of making a specific quantity of water available to I Water at the point of delivery to be defined by CBS Public Works.
- e) "gallon" means one US gallon or 3.785 liters.
- f) "per day" means calendar day starting at midnight.

g) “per week” means during a period of seven (7) consecutive days.

h) “per year” means during a period of 12 consecutive months.

i) “point of delivery” means that physical location where the legal possession, ownership, and risk associated with the raw water which is the subject of this Agreement transfers from Sitka to I Water, as specified in this Agreement.

j) “water rights” means those rights to the beneficial use of water which are held by Sitka under certificates of appropriation issued by the State of Alaska pursuant to Alaska law.

3. Water Volumes Contracted by I Water from Sitka.

3.1 Sitka will make available to I Water a total of 200 million gallons of raw water for water bottling operations for a period of 30 months after the effective date of this Agreement. At the point when I Water exports 150 million gallons of raw water in an annual cycle, Sitka will make available an additional 50 million gallons of water for export in containers less than 20'. At the conclusion of the 30-month period described in the previous sentence, I Water's access to water will revert to the benchmarks outlined in Subsection 3.2 of this agreement. During the 30-month period immediately after the effective date of this Agreement, I Water must take delivery of and export at least 500,000 gallons of water. If I Water does not take delivery of and export at least 500,000 gallons of water from Sitka, pursuant to this Agreement, in the first 30 months after the effective date of this Agreement, this Agreement shall, at Sitka's election, terminate and expire without further action by Sitka on the forty-fifth (45th) day after Sitka gives notice to I Water by certified mail that I Water has breached or failed to comply with one of more of the conditions or requirements of this Agreement, unless within said 45-day period, I Water cures the specified default or defaults to Sitka's satisfaction, as determined by Sitka in its sole discretion.

3.2 Thirty (30) months after the effective date of this Agreement, the Benchmarks described in this subsection start. The quantities of raw water which is available for export by I Water from Sitka under this Agreement are set forth below:

Benchmark 1: Benchmark 1 begins 30 months after the effective date of this Agreement. I Water must have taken delivery of and exported from Sitka a minimum of 500,000 gallons of water within the 30-month period immediately previous to the most recent Benchmark Anniversary Date of Benchmark 1. If I Water does not meet the requirement set out in the previous sentence of Benchmark 1, this Agreement shall, at Sitka's election, terminate and expire without further action by Sitka on the forty-fifth (45th) day after Sitka gives notice to I Water by certified mail that I Water has failed to meet such requirement, unless within the 45-day period, I Water cures such failure as determined by Sitka in its sole discretion.

Benchmark 2: Benchmark 2 begins 60 months after effective date of this Agreement. I Water must have taken delivery of and exported from Sitka a minimum of 500,000 gallons of water

within the 30-month period immediately previous to the most recent Benchmark Anniversary Date of Benchmark 2. If I Water does not meet the requirement set out in the previous sentence of Benchmark 2, this Agreement shall, at Sitka's election, terminate and expire without further action by Sitka on the forty-fifth (45th) day after Sitka gives notice to I Water by certified mail that I Water has failed to meet such requirement, unless within the 45-day period, I Water cures such failure as determined by Sitka in its sole discretion.

Benchmark 3: Benchmark 3 begins 84 months after effective date of this Agreement. I Water must have taken delivery of and exported from Sitka a minimum of 500,000 gallons of water within the 24-month period immediately previous to the most recent Benchmark Anniversary Date of Benchmark 3. If I Water does not meet the requirement set out in the previous sentence of Benchmark 3, this Agreement shall, at Sitka's election, terminate and expire without further action by Sitka on the forty-fifth (45th) day after Sitka gives notice to I Water by certified mail that I Water has failed to meet such requirement, unless within the 45-day period, I Water cures such failure as determined by Sitka in its sole discretion.

Benchmark 4: Benchmark 4 begins 106 months after effective date of this Agreement. I Water must have taken delivery of and exported from Sitka a minimum of 500,000 gallons of water within the 24-month period immediately previous to the most recent Benchmark Anniversary Date of Benchmark 4. If I Water does not meet the requirement set out in the previous sentence of Benchmark 4, this Agreement shall, at Sitka's election, terminate and expire without further action by Sitka on the forty-fifth (45th) day after Sitka gives notice to I Water by certified mail that I Water has failed to meet such requirement, unless within the 45-day period, I Water cures such failure as determined by Sitka in its sole discretion.

4. The Parties' Rights and Obligations Regarding Water Delivered for Export.

4.1 By this contract, Sitka is entering into an Agreement to sell raw water under water rights issued to Sitka by the State of Alaska under water export authority contained in Water Appropriation Certificates LAS 19669 and ADL 43826. Sitka's contractual obligation to deliver water to I Water in the quantities specified in this Agreement is subject to these limitations:

a) Sitka shall retain first right and priority to water required for its municipal drinking water supply system and its municipal hydroelectric system, and it may suspend or limit raw water deliveries to I Water to meet the requirements of its municipal drinking water and hydroelectric systems, including planned expansion of its hydroelectric system.

b) Sitka will abide by the 1992 Blue Lake Watershed Control Plan as approved by the U.S. Environmental Protection Agency and described in City and Borough of Sitka Ordinance No. 92-1091.

c) Sitka may temporarily suspend raw water deliveries in order to perform planned and routine maintenance on its municipal drinking water, hydroelectric and/or water delivery systems, provided that Sitka shall give not less than 60 days prior notice to I Water of any such planned suspensions.

d) Sitka shall be relieved of its obligation to deliver raw water to I Water in the event of an interruption in water supply due to Force Majeure, or due to unforeseen circumstances that require repairs to or reconstruction of the municipal drinking water, hydroelectric systems, water delivery system, or other of Sitka's facilities, to the extent that the availability of raw water for delivery to I Water under this Agreement is adversely affected, and for so long as is required to effect such repairs or reconstruction, for such time as is necessary to address such circumstances.

e) The volumes of Sitka's raw water deliveries to I Water for export are subject to Sitka's compliance with all conditions contained in Water Appropriation Certificates ADL 43826, LAS 19669, and LAS 20526, including compliance with the rule curve and the support of spawning, incubation, and rearing of certain species of fish in Sawmill Creek and Blue Lake. Interpretation of applicable requirements and the means used to achieve compliance with such requirements shall be in Sitka's sole discretion.

f) In the event Sitka is relieved of its obligation to make agreed quantities I Waters obligation to take delivery of and to export water shall be reduced to the volumes actually delivered by Sitka during that period of time and the time for I Water's performance shall be extended for the same period of time Sitka has been so relieved of its obligation.

g) Sitka's point of delivery will be the heated water valve building or closer location contingent upon Sitka approval.

4.2 I Water agrees and warrants that the raw water delivered by Sitka to it for export shall be put to one or more beneficial uses.

5. No Warranty by Sitka of Water Quality or Fitness for a Particular Purpose.

5.1 Sitka does not warrant the quality or fitness for a particular purpose of any water contracted by it for delivery, and/or actually delivered, to I Water under this Agreement. I Water acknowledges and agrees that before entering into this Agreement, it has examined Sitka's water source, Sitka's methods of diversion, and Sitka's means of delivery to I Water of the quantities of water which are contracted under this Agreement, and that it has found all such items adequate and satisfactory for I Water's purposes.

5.2 I Water acknowledges and agrees that Sitka's planned expansion and routine alterations in its hydroelectric operations may produce temporary changes in water quality due to turbidity, and that the occurrence of such events shall not alter or affect I Water's contractual obligations under this Agreement.

5.3 I Water acknowledges and agrees that the quality of water contracted by Sitka to be delivered to it for export may vary due to natural events over which Sitka has no control, which include, without limitation, rainfall, drought, snowfall, avalanches, earthquakes and landslides, and that the occurrence of such events shall not alter or affect's I Water contractual obligations under this Agreement, except

that the quantity of water I Water is obligated to take delivery of and to export shall be reduced to the quantity Sitka can and does make available for delivery to I Water, as a consequence of an occurrence of any of such natural events.

5.4 I Water shall be solely responsible and liable for the quality and usefulness for any particular purpose of all water exported by, transported by, used by, or sold by, or delivered by I Water.

6. Purchase Price For Raw Water.

6.1 I Water will purchase raw water for export from Sitka under this Agreement, based upon the following prices: Raw water for export shall be priced at U.S. \$0.01 (one cent) per gallon.

6.2 I Water shall pay Sitka for all volumes of water delivered to I Water as actually measured by flow meters owned, operated, and documented by I Water and approved and monitored by Sitka at or near the point of delivery. I Water shall pay for each quantity of water loaded no later than fifteen (15) days after the presentation of an invoice by Sitka to I Water for such water. Failure by I Water to make timely payment shall be cause for Sitka to suspend water delivery to I Water.

6.3 I Water agrees to pay Sitka a non-refundable payment of \$15,000 at time of execution of this agreement. The non-refundable payment can be applied towards export water payments owed during the duration of this agreement. If no export occurs, Sitka shall retain payment unencumbered.

7. Conditions for Maintaining I Water's Purchase Right and Obligation; Termination.

7.1 Notwithstanding any other provision of this Agreement, this Agreement shall, at Sitka's election, terminate and expire without further action by Sitka on the forty-fifth (45th) day after Sitka gives notice to I Water by certified mail that I Water has breached or failed to comply with one or more of the conditions or requirements of this Agreement, unless within said 45-day period, I Water cures the specified default or defaults to Sitka's satisfaction, as determined by Sitka in its sole discretion.

7.2 Upon termination, all legal rights and obligations as between Sitka and I Water under this Agreement shall cease, except that I Water's obligations to Sitka under Sections 10, 11, 12, 14, 15, 16, and 17 of this Agreement shall survive termination.

8. Sitka's Permitting Actions.

Sitka agrees to take any and all actions which it determines, in the exercise of its sole discretion, to be reasonable, necessary, and economically feasible to maintain in good standing any permit, license, certificate, allocation, appropriation or other authorization which may authorize Sitka to fulfill its obligations under this Agreement.

9. Delivery of Water.

The parties agree that I Water shall be solely responsible for the costs of acquisition, construction and installation of any structure or facility which it determines to be required or convenient for bottling and

transportation of water delivered to it by Sitka, and for initiating and completing such acquisition, construction and installation. All structures and facilities must comply with all Federal, State, and local law, including zoning requirements.

10. Indemnification of Sitka.

Notwithstanding anything to the contrary in this Agreement, I Water shall defend, indemnify, and hold Sitka harmless from any claim, demand, action, or proceeding of any kind or nature, based upon, arising out of, or related to:

- a. any defect or flaw in the quality of water supplied under this agreement;
- b. any delays on the part of Sitka in the delivery of water under this agreement as the result of the mechanical or physical breakdown of equipment or facilities owned or operated by the Sitka;
- c. claims arising from the transportation or shipment of water after such water has left Sitka's water delivery system and as such has passed the point of delivery;
- d. injuries to employees of I Water or any of its contractors;
- e. damages resulting from accidents involving cargo loading operations, including but not limited to claims for personal injury, property damage, and pollution.

11. Assignment.

This Agreement, which is in the nature of a personal services contract, may not be assigned by either party without the prior written consent of the other party, which shall have full discretion to grant or withhold such approval, in its sole and absolute discretion except as provided below.

12. Waiver and Integration.

This Agreement, in conjunction with all land lease agreements between Sitka and I Water, integrates the entire Agreement between the parties regarding the sale and purchase of water. This Agreement supersedes all previous agreements, discussions, and negotiations, whether written or oral. Each party specifically acknowledges and represents that it has had ample opportunity to consult with legal counsel regarding this Agreement, and that any rule that an agreement should be construed against its drafter shall not apply to this Agreement.

13. Force Majeure.

Neither party shall be in breach of this Agreement as the result of any failure or delay in performing any of the obligations in this Agreement if such failure to perform or delay in performing is directly and proximately caused by any Force Majeure. Sitka shall not be in breach of this Agreement as the result of any failure or delay in performing any of its obligations in this Agreement if such failure to

perform or delay in performing is directly and proximately caused by any order of any United States court of competent jurisdiction, or by any act, rule, regulation, order or directive of any superior governmental unit or any agency thereof, or by any termination, modification, suspension, or revocation of any permit, license, allocation, appropriation, or certificate held by Sitka. In the event Sitka or I Water is relieved of an obligation under this Agreement due to Force Majeure, time frames under this Agreement shall be adjusted accordingly. The party asserting a Force Majeure event must demonstrate direct and proximate cause by clear and convincing evidence.

14. Applicable Law.

Any action or lawsuit brought to construe, interpret, or enforce this Agreement shall be brought in the superior court of the State of Alaska in Sitka, Alaska. Venue for any such action or lawsuit shall lie exclusively in Sitka, Alaska. The parties specifically disavow any application under the removal jurisdiction of the federal courts on grounds of diversity of citizenship, in any litigation concerning this Agreement.

15. Effective Date.

This Agreement is effective as of the last date signed below, which shall be deemed the “effective date” for the purpose of any time period which incorporates that term in this Agreement.

16. Authority.

The parties represent and warrant to each other that they have the full, complete, and absolute authority to enter into this Agreement; that this Agreement has been duly authorized by the governing body of each party; that the person executing this Agreement on its behalf has the full power and authority to do so; and that this Agreement is binding and enforceable against it in accordance with its terms. I Water acknowledges that this Agreement is only effective as against Sitka if the City and Borough of Sitka Assembly votes to authorize the Municipal Administrator to execute this Agreement on behalf of Sitka, and the Municipal Administrator of Sitka represents and warrants by affixing his signature to this Agreement that the Assembly has so voted.

17. Amendment and Severability.

This Agreement may not be amended except by written agreement of both parties. If any provision of this Agreement or any application thereof to any person, entity, or circumstance is held invalid, the remainder of this Agreement and application thereof to any person, entity, or circumstances shall not be affected thereby.

18. Time of Essence.

Time is of the essence in this Agreement.

IN WITNESS THEREOF, the parties have executed this Agreement as of the dates shown below.

I WATER, LLC

CITY AND BOROUGH OF SITKA

Title: _____

Mark Gorman, Municipal Administrator

STATE OF CALIFORNIA)
) ss.
COUNTY OF _____)

On this ____ day of _____, 2014, _____, whose identity is personally known to me or proved to me on the basis of satisfactory evidence, signs this Lease Agreement on behalf of I Water, LLC and affirms by signing this document to be authorized to sign on behalf of the I Water, LLC and does so freely and voluntarily.

Notary Public for California
My Commission Expires: _____

STATE OF ALASKA)
) ss.
FIRST JUDICIAL DISTRICT)

On this ____ day of _____, 2014, Mark Gorman, Municipal Administrator of the City and Borough of Sitka, Alaska, a municipal corporation organized under the laws of the State of Alaska, signs this Lease Agreement on its behalf, and affirms by signing this document to be authorized to sign on its behalf, and does so freely and voluntarily.

Notary Public for Alaska
My Commission Expires: _____