



STAFF REPORT

DATE: OCTOBER 2, 2012
TO: HONORABLE MAYOR AND CITY COUNCIL
FROM: ROD FOSTER, CITY MANAGER *[Signature]*
PREPARED BY: DEAN DERLETH, CITY ATTORNEY
SUBJECT: APPROVE SURPLUS WATER PURCHASE AGREEMENT WITH SAN BERNARDINO COUNTY FOR CLEANUP OF PERCHLORATE CONTAMINATION IN RIALTO-COLTON BASIN.

RECOMMENDED ACTION

It is recommended that the City Council approve the attached “Surplus Water Purchase Agreement By and Between the City of Colton and the County of San Bernardino” for a one-time purchase of 500 acre feet of surplus water by the County for \$68,000 to assist in its perchlorate cleanup efforts in the Rialto-Colton Basin.

GOAL STATEMENT

The proposed action will support the City’s goal to improve water quality for the City of Colton.

BACKGROUND

The County of San Bernardino asked the City to sell it 500 acre feet of surplus water on a one-time basis. The possible sale of surplus water was discussed by the Council in closed session on September 18, 2012, as part of its global settlement efforts of the on-going litigation, and Council directed staff to come back to open session with an agreement for consideration. Staff and the City Attorney prepared the proposed agreement, and it has been approved and executed by the County.

ISSUES/ANALYSIS

The County needs the surplus water to help perform its cleanup of the perchlorate contamination in the Rialto-Colton Basin. City staff members have confirmed that the 500 acre feet of water to be purchased under this agreement would be surplus to the City’s existing needs during the 2011-12 water year. This agreement does not obligate the City to sell more water than would be surplus. This agreement is also retroactive to September 30, 2012, as the 2011-12 water year ends as of this date.

The price of the surplus water under the proposed agreement will be \$136 per acre foot, for a total payment of \$68,000. City staff members have calculated the cost of \$136 per acre foot so that the City will not lose any money through the sale of the surplus water, while at the same time keeping the cost reasonable for the cleanup efforts. Of course, the County's use of the surplus water for cleanup of the perchlorate contamination will also benefit the City.

FISCAL IMPACTS

Under the agreement, the City will receive a one-time payment of \$68,000 for the 500 acre feet of surplus water.

ALTERNATIVES

1. Provide alternative direction to staff.

ATTACHMENTS

Surplus Water Purchase Agreement By and Between the City of Colton and the County of San Bernardino (Executed by County)

**SURPLUS WATER PURCHASE AGREEMENT
BY AND BETWEEN THE CITY OF COLTON
AND THE COUNTY OF SAN BERNARDINO**

This Surplus Water Purchase Agreement ("Agreement") is made and entered into as of September 30, 2012 (the "Effective Date") by and between the City of Colton, a municipal corporation organized under the laws of the State of California ("City"), and the County of San Bernardino ("County"). County and City are sometimes individually referred to as a "Party" and collectively as the "Parties." The Rialto Utility Authority ("Rialto") is not a party to this Agreement but is an intended third party beneficiary.

RECITALS

A. The City currently holds the right to take water from that portion of the County of San Bernardino that is referred to as the "Rialto-Colton Basin", as defined in paragraph B below.

B. The amount of water which the City is allowed to take from the Rialto-Colton Basin is set by formula on an annual basis in accordance with the terms of that certain Decree and Stipulated Judgment dated December 22, 1961 in the case of The Lytle Creek Water and Improvement Company, a corporation vs. Fontana Ranchos Water Company, a corporation, et. al., San Bernardino Superior Court Case Number 81264 ("Decree"). The City will not use its full allocation of water pursuant to the Decree during the production year beginning in October 2011 and ending in September 2012 ("2011/2012 Production Year") and will have surplus water available. As used in this Agreement, the term Rialto-Colton Basin shall mean the "Rialto Basin" as defined in paragraph 3(a) and Exhibit I of the Decree.

C. County desires to acquire five hundred (500) acre feet of water in the Rialto-Colton Basin in 2011/2012 Production Year for Rialto and City is willing to sell a portion of its surplus water allocation to meet that need in accordance with the terms and conditions set forth herein.

NOW, THEREFORE, the City and County agree as follows:

1. Sale of Water. City shall sell, transfer and assign to Rialto on a one-time basis five hundred (500) acre feet of water from the Rialto-Colton Basin (referred to herein as the "Water") during 2011/2012 Production Year. The foregoing transfer shall be a transfer of Water from the Rialto-Colton Basin and shall not constitute any transfer or assignment of the City's water rights under the Decree. The City shall have the right to file in its name any groundwater extraction notices in connection with the extraction of the Water by Rialto.

2. Purchase Price. County shall pay City the sum of One Hundred Thirty-Six Dollars (\$136.00) per acre foot for the Water. The payment of Sixty-Eight Thousand Dollars (\$68,000.00) shall be paid within ten (10) days of the approval of this Agreement by the City Council as set forth in Section 5.

3. Delivery of Water. Rialto shall be solely responsible for pumping the Water from the Rialto-Colton Basin and City shall have no obligation to pump or deliver such water for the County's use. The purchase price set forth in Section 2 shall be fully earned upon the execution and approval of this Agreement, and shall not be contingent on whether the Rialto actually pumps the Water, nor shall any portion of the purchased Water roll over or be applicable to the City's right to take water under the Decree in the ensuing 2012/2013 Production Year.

4. Reporting. Rialto shall use a meter to record all Water extracted from the Rialto-Colton Basin which is subject to this Agreement and shall provide City with information on such extraction so that it can comply with its reporting requirements to San Bernardino Valley Municipal Water District, which monitors compliance with the Decree.

5. City Council Approval. The transactions contemplated in this Agreement shall be subject to final approval by the City Council of City. Upon such approval, this Agreement shall become effective.

6. Representations and Warranties of City. City hereby represents and warrants to County: (i) that the City has the right to transfer and assign the Water; (ii) that the City has not entered into any other contract, agreement or option for the transfer or use, whether actual or beneficial, of the Water for the 2011/2012 Production Year; and (iii) that this Agreement constitutes a legal, valid and binding obligation of City, enforceable against City in accordance with its terms.

7. Representations and Warranties of County. County hereby represents and warrants to City: (i) that County has the power and authority to execute and deliver this Agreement and to perform its obligations hereunder; and (ii) that this Agreement constitutes a legal, valid and binding obligation of County, enforceable against County in accordance with its terms and (iii) that it is the County's understanding that Rialto intends to make use of the Water pumped pursuant to this Agreement within the upper Santa Ana River watershed.

8. Termination. This Agreement may be terminated as follows: (i) upon the mutual written agreement signed by the County and City; (ii) upon a material breach of this Agreement by one of the Parties, which breach is not cured within thirty (30) business days of written notice thereof; or (iii) in the event that the Agreement is not timely approved by the City Council as set forth in Section 5 (iv) in the event the Agreement is not executed in a timely manner by the County.

9. Entire Agreement. This Agreement contains the entire understanding between County and City with respect to its subject matter, and supersedes all prior agreements, oral or written, and all prior or contemporaneous discussions or negotiations between County and City. This Agreement cannot be amended except in writing signed by both Parties.

10. Notices. All notices or other communications required or desired to be given pursuant to this Agreement shall be in writing and shall be hand-delivered, or sent by a reputable overnight courier service providing delivery confirmation. Each such notice or communication shall be deemed to be duly given when hand-delivered, or one (1) day after being deposited for next day delivery with Federal Express or other reputable overnight courier. Each such notice or communication shall be addressed to the Parties at their respective addresses set forth below, or such other address as a Party notifies the other in writing.

CITY: 650 N. La Cadena Drive
Colton CA 92324
Attn: Amer Jakher, Public Works Director

COUNTY: Solid Waste Management Division
222 W. Hospitality Lane, 2nd Floor
San Bernardino CA 9
Attn: Arthur L. Rivera, Division Manager

11. Binding Effect and Assignment. This Agreement shall be binding on and inure to the benefit of the Parties, and their respective successors and permitted assigns. Neither County nor City nor Rialto shall have the right to assign its rights under this Agreement without the written consent of the other Parties. Rialto is an intended third-party beneficiary of this Agreement.

12. Attorneys Fees. In the event a dispute arises concerning the performance, meaning or interpretation of any provision of this Agreement, each Party shall bear its own costs and expenses incurred in enforcing or establishing its rights hereunder, including, without limitation, court costs, attorneys' fees and other related expenses. This provision is separate and several and shall survive the merger of this Agreement into any decision or judgment.

13. Governing Law and Venue. This Agreement has been prepared, negotiated and executed in, and shall be construed in accordance with the laws of the State of California without regard to the choice of law principles. Venue for any action to enforce the terms of this Agreement shall be in the Superior Court for the County of San Bernardino.

IN WITNESS WHEREOF, the Parties have executed this Agreement as of the date first written above.

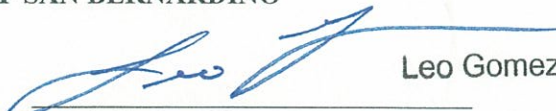
**SIGNATURE PAGE FOR THE
SURPLUS WATER PURCHASE AGREEMENT
BY AND BETWEEN THE CITY OF COLTON
AND THE COUNTY OF SAN BERNARDINO DATED SEPTEMBER 30, 2012**

CITY OF COLTON


By: _____
Sarah S. Zamora
Mayor

Attest: _____
Eileen C. Gomez
City Clerk

COUNTY OF SAN BERNARDINO

By:  _____
Laurie Rozko, Director
Purchasing Department
Leo Gomez, Supervising Buyer

Approved as to form:
JEAN-RENE BASLE
County Counsel


BY: Penny Alexander-Kelley
Principal Assistant County Counsel