

**Meeting Date: 6/4/2013**

**Report Type:** Consent

**Report ID:** 2013-00442

**Title: Agreement: Consent to Groundwater Substitution Transfer with Sacramento Suburban Water District**

**Location:** Citywide

**Issue:** City staff has negotiated an agreement to allow Sacramento Suburban Water District (SSWD) to sell water that SSWD is authorized to purchase under a wholesale water supply agreement with the City, as part of the 2013 Water Transfer program.

**Recommendation:** Pass: 1) a Motion authorizing the City Manager or the City Manager's designee to execute an Agreement between the City of Sacramento and Sacramento Suburban Water District for Consent to Groundwater Substitution Transfer; 2) a Motion ratifying the petition previously filed with the State Water Resources Control Board for the temporary transfer of surface water as described in the Agreement, and authorizing the City Manager and the City Manager's designees to take such other administrative actions as may be necessary to effectuate the transfer and sale of this water; and 3) a Resolution authorizing the City Manager or the City Manager's designee to accept the revenue from the sale of the water into the water fund (6005) and to amend the revenue and expenditure budgets for the water fund (6005).

**Contact:** Bill Busath, Engineering Services Manager, (916) 808-1434; Dan Sherry, Supervising Engineer, (916) 808-1419, Department of Utilities

**Presenter:** None

**Department:** Department Of Utilities

**Division:** CIP Engineering

**Dept ID:** 14001321

**Attachments:**

- 1-Description/Analysis
  - 2-Background
  - 3-Resolution
  - 4-Agreement
-

**City Attorney Review**

Approved as to Form  
Joe Robinson  
5/29/2013 5:33:34 PM

**City Treasurer Review**

Reviewed for Impact on Cash and Debt  
Russell Fehr  
5/28/2013 3:27:33 PM

**Approvals/Acknowledgements**

Department Director or Designee: Dave Brent - 5/29/2013 1:13:55 PM

## Description/Analysis

**Issue Detail:** City staff has negotiated an agreement to allow Sacramento Suburban Water District (SSWD) to sell water that SSWD is authorized to receive, under a wholesale water supply agreement with the City, to members of the State Water Contractors Association, as part of the 2013 Water Transfer Program. The Agreement with SSWD provides the City's consent and cooperation in seeking the necessary State Water Resources Control Board (State Board) State Board approval of the transfer, and provides for payments to City based on the amount of water that is transferred and sold by SSWD.

**Policy Considerations:** The requested action supports the City's water supply objective to implement a regional surface water/groundwater conjunctive use program, which utilizes more surface water when it is available and more groundwater when surface water is scarcer.

**Economic Impacts:** None

**Environmental Considerations:** Approval of the Agreement for Consent to Groundwater Substitution Transfer would allow SSWD to sell water to members of the State Water Contractors Association in 2013, provided that this temporary transfer is approved by the State Board. The approval of temporary water transfers is exempt from the California Environmental Quality Act (CEQA) under Water Code Section 1729 (see CEQA Guidelines Section 15282(u)).

The agreement provides that SSWD is the lead agency for the proposed sale of SSWD's wholesale water. SSWD filed a Notice of Exemption on May 3, 2013, and the SSWD Board of Directors authorized execution of SSWD's water purchase agreements with various State Water Contractors on May 20, 2013. In addition, the Bureau of Reclamation signed a Finding of No Significant Impact (FONSI number MP-13-078) in May 2013 on behalf of all participants in the 2013 temporary water transfer program.

**Sustainability:** The water transfer program supports the regional conjunctive use program that utilizes available groundwater in lieu of surface water during dry hydrologic years. SSWD must pump groundwater in lieu of receiving surface water from the City, in order to transfer the surface water not utilized by SSWD.

**Commission/Committee Action:** Not applicable

**Rationale for Recommendation:** The City's partnership with SSWD in the 2013 Water Transfer program offers additional revenue to the Department of Utilities Water fund and provides water to other agencies that are in short supply of water. In order to meet the necessary timelines for approval of the water transfer and sale by SSWD, the petition necessary to obtain approval of the temporary water transfer was filed with the State Board on behalf of the City and SSWD, as co-petitioners, in May 2013. This report recommends that the City Council ratify the petition previously filed with the State Board

and authorize City staff to take such other administrative actions as may be necessary to effectuate the transfer and sale of this water by SSWD.

**Financial Considerations:** The Agreement for Consent to Groundwater Substitution Transfer provides for compensation to the City of 20% of the buyers fee for each acre foot of water sold by SSWD, with a minimum payment of \$7,000 required to cover the City's administrative costs associated with the agreement and transfer approval process. The actual quantity of water that SSWD can transfer is not guaranteed and therefore the actual revenue to the City is unknown. The maximum revenue to the City for participating based on the maximum amount of water that SSWD can transfer is \$150,000. The revenue and expenditure budgets for the Water fund (6005) will be adjusted upon receipt of the proceeds. The proposed water transfer does not involve actual water treatment or conveyance at City facilities and therefore is not related to the Water Revenue Bonds Series 2013 funding.

**Emerging Small Business Development (ESBD):** ESBD requirements are not applicable to the Water Transfer program.

## **Background Information:**

The proposed City-SSWD Agreement is similar to the City-SSWD Agreement the City Council approved in 2010 for the transfer and sale of SSWD's wholesale water to State Water Project (SWP) willing buyers. The possibility of a dry year and low reservoir storage levels are likely to require some areas in California to supplement their water supplies with transfers from willing sellers. The purpose of the Water Transfer Program is to facilitate the transfer of water throughout the State between willing sellers and buyers that are at risk of experiencing water shortages in 2013.

Under the 2013 Water Transfer Program, the Department of Water Resources (DWR) is working cooperatively with the U.S. Bureau of Reclamation and the State Water Resources Control Board to expedite water transfers. Most transfers are expected to occur between willing sellers upstream from the Sacramento-San Joaquin Delta to buyers that export water from the Delta. DWR and Reclamation are also providing assistance with environmental compliance and endangered species coverage.

SSWD is participating in the 2013 Water Transfer Program and has negotiated an agreement with members of the State Water Contractors to sell up to 3,658 acre feet of surface water by pumping additional groundwater. SSWD is proposing to sell surface water that SSWD otherwise is entitled to receive from the City on a wholesale basis under a 2004 Wholesale Water Supply Agreement with the City. SSWD would be forgoing the receipt of this water (which is only available to SSWD during periods when lower American River flows exceed the Hodge flow criteria), by pumping additional groundwater.

Since the City's surface water supply is subject, among other things, to the terms of a 1957 water rights settlement contract between the City and Reclamation, the City has obtained consent to the proposed transfer and sale from Reclamation staff.

The proposed City-SSWD Agreement provides the City's consent for SSWD's sale of this water. The Agreement provides that SSWD will pay the City 20% of the buyer's fee per acre-foot of forgone surface water to offset lost wholesale revenue, with a minimum payment of \$7,000 required to cover the City's administrative costs associated with the agreement and transfer approval process, for maximum revenue to the City of \$150,000.

## **RESOLUTION NO. 2013-**

Adopted by the Sacramento City Council

**JUNE 4, 2013**

### **AMEND REVENUE AND EXPENDITURE BUDGET FOR THE GROUNDWATER SUBSTITUTION TRANSFER BY SACRAMENTO SUBURBAN WATER DISTRICT**

#### **BACKGROUND**

- A. In 2013, the Department of Water Resources and the U.S. Bureau of Reclamation are supporting water transfers between willing sellers and buyers, as was the case in 2010. The possibility of continuing dry weather and low reservoir storage levels are likely to require some areas in California to supplement their water supplies with transfers from willing sellers. The purpose of the 2013 Water Transfer Program is to facilitate the transfer of water throughout the State between willing sellers and buyers that are at risk of experiencing water shortages in 2013.
- B. Sacramento Suburban Water District (SSWD) is participating in the 2013 Water Transfer program and has negotiated an agreement with members of the State Water Contractors to sell up to 3,658 acre feet of surface water by pumping additional groundwater. SSWD is proposing to sell surface water that SSWD otherwise is entitled to receive from the City on a wholesale basis under a 2004 Wholesale Water Supply Agreement with the City. SSWD would be forgoing the receipt of this water (which is only available to SSWD during periods when lower American River flows exceed the Hodge flow criteria), by pumping additional groundwater.
- C. City and SSWD staff have negotiated an Agreement that provides the City's consent and cooperation in seeking necessary approvals for SSWD's transfer and sale of this water. The Agreement also provides that SSWD will pay the City 20% of the buyer's fee per acre-foot of forgone surface water to offset lost wholesale revenue, with a minimum payment of \$7,000 required to cover the City's administrative costs associated with the agreement and transfer approval process. The maximum revenue to the City for participating is \$150,000.

#### **BASED ON THE FACTS SET FORTH IN THE BACKGROUND, THE CITY COUNCIL RESOLVES AS FOLLOWS:**

- Section 1. The City Manager or the City Manager's designee is authorized to accept the revenue from the sale of the water into the water fund (6005) and to amend the revenue and expenditure budgets for the Water fund (6005) for these payments.

**AGREEMENT BETWEEN  
THE CITY OF SACRAMENTO  
AND  
SACRAMENTO SUBURBAN WATER DISTRICT  
FOR CONSENT TO GROUNDWATER SUBSTITUTION TRANSFER**

This Agreement for Consent to Groundwater Substitution Transfer (“Agreement”) is made effective this May \_\_\_, 2013 between the City of Sacramento, a charter city (“City”), and Sacramento Suburban Water District, a public agency formed under the County Water District Law, Government Code sections 30000 *et seq.* (“SSWD”). For purposes of this Agreement the City and SSWD also will each be called a “Party” and collectively the “Parties.”

**Recitals**

A. The City owns and operates public utility water systems for the provision of retail treated water service to its residents, including facilities on the lower American River for diverting and treating water known as the E.A. Fairbairn Water Treatment Plant (“Fairbairn WTP”). The City diverts untreated water from the Lower American River to the Fairbairn WTP pursuant to water rights permits nos. 11358 through 11361 issued by the State of California. The City’s permitted appropriative water rights are supplemented by a water rights settlement contract (the “City Settlement Contract”) between the City and the United States Bureau of Reclamation (“Reclamation”) dated June 28, 1957.

B. On January 20, 2004, the City and SSWD entered into a Wholesale Water Supply Agreement (“2004 Wholesale Agreement”), which provides SSWD with a firm treated water supply of up to 20 million gallons per day subject to restrictions based on certain hydrologic conditions set forth in the Water Forum Agreement to which the City and SSWD are signatories and in the City’s above-referenced water right permits.

C. SSWD has informed the City that it is operating a conjunctive use program, which has permitted SSWD to bank amounts of groundwater sufficient to induce stable-to-increasing groundwater levels in the aquifer it utilizes as a source of supply for its customers. Since 2007,

SSWD has taken treated surface water from the City under the 2004 Wholesale Agreement to increase its existing conjunctive use groundwater banking efforts.

D. The State Water Contractors is a non-profit association of 27 public agencies from Northern, Central and Southern California that purchase water under contract from the California State Water Project (“SWP”) and deliver that water to more than 25 million residents throughout the state and more than 750,000 acres of agricultural lands. Three members of the State Water Contractors, Dudley Ridge Water District, Empire-West Side Irrigation District, and Kern County Water Agency (the “Buyers”), have offered to purchase water from willing sellers upstream of the Sacramento-San Joaquin Delta, including SSWD, in order to supplement the Buyers’ contractual entitlements from the SWP due to the lack of precipitation during the 2012-2013 water year that has resulted in cutbacks to SWP water supplies and the constraints on pumping water from the Delta imposed by federal regulatory mandates and court decisions.

E. In order to provide water supplies for the above purpose, SSWD desires to forego the use of a portion of surface water supplies that SSWD has determined would otherwise be diverted, treated and provided to SSWD by the City pursuant to the 2004 Wholesale Agreement for the 2013 calendar year, by substituting the use of groundwater for such foregone supplies, and to sell those foregone supplies to the Buyers for use in their respective service areas to mitigate for the impacts of significant cutbacks in their water supplies resulting from regulatory constraints and SWP supply cutbacks.

F. Based on estimated runoff data for the American River, SSWD has informed the City that it estimates that it will be able to forego up to 3,658 acre-feet of surface water supplies that SSWD would otherwise obtain from the City pursuant to, and in accordance with the hydrologic restrictions set forth in, the 2004 Wholesale Agreement, during July, August and September 2013.



## Agreement

Based on the foregoing Recitals, the Parties agree as follows:

**1. SSWD Intent to Forego Surface Water Deliveries and Transfer Foregone Surface Water.** SSWD has indicated its intention to reduce its purchase and use of treated surface water otherwise available for delivery from the City to SSWD during the 2013 calendar year in accordance with the terms of the 2004 Wholesale Agreement, and to make up for this reduction with a corresponding increase in the amount of groundwater used by SSWD during the 2013 calendar year. SSWD has further indicated its intention to sell to the Buyers such increment of surface water (hereafter referred to as the “Transfer Water”) that is not diverted from the American River by the City for treatment and delivery to SSWD during the 2013 calendar year as a result of such reduced purchase and use of treated surface water, and corresponding increased use of groundwater, by SSWD. SSWD understands and acknowledges that the City is relying on these representations by SSWD in entering into this Agreement.

**2. City’s Consent to Transfer.** Based on the above, the City consents to SSWD’s sale of the Transfer Water to the Buyers in accordance with the provisions of this Agreement; provided that the foregoing consent (a) shall only apply to the actual amount of undiverted surface water made available for sale by SSWD during the 2013 calendar year, as verified by the California Department of Water Resources (“DWR”), as a result of SSWD’s reduced purchase and use of treated surface water and corresponding increased use of groundwater as described in Section 1 above, and (b) shall not be effective for any purpose unless and until the City receives written confirmation from Reclamation that transfer and sale of the Transfer Water as provided herein is not in conflict with the City Settlement Contract, in such form as may be acceptable to City in its sole discretion, which shall be an express condition precedent to the transfer and sale of any Transfer Water by SSWD. The maximum amount of Transfer Water shall be 3,658 acre-feet for the 2013 calendar year.

### **3. Payment to City.**

A. In consideration of the City's staff time, engineering and technical expenses, attorneys' fees, and other expenses incurred by City in the performance of this Agreement, SSWD shall pay City the amount of \$7,000.00 not later than 30 days after this Agreement is executed by both parties. This payment shall be due and payable: (1) whether or not the approvals necessary for transfer and sale of the Transfer Water are obtained; and (2) even if the City provides SSWD a notice of withdrawal from pursuing State Board or Reclamation approval pursuant to Section 6(D) below.

B. SSWD will pay the City a total of 20% of the Buyers' acre-foot fee for each acre-foot of Transfer Water that is sold by SSWD to the Buyers, not counting the first \$7,000.00 received by SSWD. SSWD's payment to the City will be based on the number of acre-feet of Transfer Water for which SSWD is paid in excess of the first \$7,000.00 received by SSWD due to the sale of Transfer Water to the Buyers.

C. SSWD will not be obligated to pay the compensation to the City provided in Section 3(B) unless the Buyers accept the Transfer Water and pays SSWD therefore. If SSWD receives payment from the Buyers, SSWD will pay the City the compensation provided in Section 3(B).

D. SSWD will pay the City the total sum owing for the amount of Transfer Water invoiced to Buyers within 30 days of receipt by SSWD of each payment from the Buyers for the invoiced amount of Transfer Water. SSWD will provide the City a copy of the Buyers' payment accounting for the Transfer Water at the time it makes payment to the City.

E. The City acknowledges and agrees that no additional compensation will be due under the 2004 Wholesale Agreement for the gross amount of the Transfer Water, provided that compensation for any and all treated water that SSWD purchases and uses shall continue to be governed by the 2004 Wholesale Agreement.

**4. Sale in SSWD's Sole Discretion.** SSWD will have the sole discretion to determine whether to sell any quantity of Transfer Water to the Buyers. Nothing in this Agreement will be construed to require SSWD to sell any water to the Buyers or to pay the City any money under this Agreement unless SSWD sells some quantity of Transfer Water to the Buyers, except as provided in Section 3(A). Nothing in this Agreement excuses SSWD's obligation to the City to pay for any treated surface water that the City delivers to SSWD for consumptive use under the 2004 Wholesale Agreement.

**5. Term of Agreement.** This Agreement is intended to apply only to SSWD's transfer of water to the Buyers during the 2013 calendar year and will automatically terminate upon the earlier of: (a) completion of SSWD's sale of the Transfer Water to the Buyers and satisfaction of all of its other obligations under this Agreement; or (b) SSWD's receipt of the City's notice of withdrawal from pursuing State Water Resources Control Board ("State Water Board"), Reclamation or any other governmental approval pursuant to Section 6(D) below and City's receipt of the payment required by section 3(A).

**6. Cooperation; Approvals.** The City will cooperate with SSWD as needed for SSWD to secure the approvals necessary to implement SSWD's sale of Transfer Water to the Buyers for the 2013 calendar year, subject to the following conditions:

A. SSWD will be responsible for and pay all costs of obtaining any governmental approval(s) and compliance with applicable laws, including but not limited to obtaining the State Water Board approval required for the temporary transfer of the Transfer Water pursuant to Water Code sections 1725 through 1732 and the Reclamation approval described in Section 2, above. If necessary, the City will file a temporary change petition in its name, with SSWD as co-petitioner as appropriate, to obtain the above-referenced State Water Board approval required for SSWD's transfer of the Transfer Water.

B. SSWD will be the lead agency and will pay all costs required for the purpose of compliance with CEQA for this Agreement, the proposed transfer and SSWD's sale of the Transfer Water to the Buyers for the 2013 calendar year. SSWD represents that the transfer

which is the subject of this Agreement, is a proposed temporary change under Article 1 of Chapter 10.5 of the Water Code, and therefore the transfer and SSWD's sale of Transfer Water to the Buyers are exempt from CEQA under the provisions of Water Code section 1729.

C. Except as otherwise provided in Section 3(A), each Party will bear its own costs for staff time, engineering and technical expenses, attorneys' fees, and other expenses related to performing their respective duties under this Agreement.

D. Notwithstanding any other provision of this Agreement, the City may opt to withdraw from pursuing any governmental approval, including the Reclamation and/or State Water Board approvals specified above, or from compliance with any law applicable to the proposed sale and transfer, if the City determines in its sole discretion that the compliance or approval process, or the conditions of compliance or approval, are not acceptable. If the City opts to withdraw, the City shall promptly notify SSWD in writing of the withdrawal and this Agreement shall terminate as provided in Section 5 above. The City shall be relieved of any obligations to SSWD under this Agreement or on any other basis, if, for this or any other reason, SSWD fails to receive all approvals and compliance necessary to implement SSWD's sale of Transfer Water to the Buyers for the 2013 calendar year.

## **7. Water Rights.**

A. The only rights granted to the Parties as a result of this Agreement are those expressly set forth in this Agreement. The City's reduced diversions of surface water pursuant to this Agreement will not confer any appropriative, public trust or other right to water on any person or entity.

B. Nothing in this Agreement will be construed to act as a forfeiture, diminution or impairment of any water right or contractual entitlement of the City or SSWD. Consistent with the provisions of California Water Code sections 109, 475, 1011, 1014 through 1017, 1244 and 11961, SSWD's pumping of groundwater in lieu of taking delivery of treated surface water from the City under the 2004 Wholesale Agreement and its sale of Transfer Water to the Buyers pursuant to this Agreement, or this Agreement itself, will not be evidence of either the existence

of surplus water after this Agreement expires, or of the lack of beneficial use of the water involved, and the Parties will not contend otherwise.

C. SSWD agrees to comply with Water Code Section 1732. In accordance with the provisions of Water Code section 1745.10, SSWD and the City have each determined that the pumping of groundwater under this Agreement would not create nor contribute to conditions of long-term overdraft in the affected groundwater basin.

**8. Indemnification.** To the extent permitted by State law, SSWD will indemnify, defend and hold harmless the City and its officers, agents, and employees from any and all claims, lawsuits (including but not limited to CEQA lawsuits), judgments, damages, penalties, costs, liabilities and losses (including without limitation, sums paid in settlement of claims, actual attorneys' fees, paralegal fees, consultant fees, engineering fees, expert fees and any other professional fees) that arise from or are related in any way to the SSWD's sale of the Transfer Water to the Buyers or any other activities under this Agreement, including but not limited to obtaining all approvals necessary to sell the Transfer Water, determining and accounting for the amount of Transfer Water made available for sale, and the collection and proper payment of funds due to the City for Transfer Water actually sold. The provisions of this section shall survive any termination of this Agreement.

**9. Agreement Not a Precedent.** The Parties intend that the provisions of this Agreement will not bind the Parties as to the provisions of any future agreement between them. This Agreement was developed specifically to facilitate SSWD's sale of Transfer Water to the Buyers during the 2013 calendar year.

**10. Entire Agreement.** This Agreement represents the sole, final, complete, exclusive, and integrated expression and statement of the terms of agreement between the Parties concerning the subject matter of this Agreement. No modification of this Agreement shall be effective unless and until such modification is evidenced by a writing signed by both Parties. There are no written or oral agreements, conditions, representations, warranties, or promises with respect to the subject matter of this Agreement except those contained in or referred to in this document.

**11. Severability.** If any term or provision of this Agreement is deemed invalid or unenforceable by any court of final jurisdiction, it is intended by the Parties that all other provisions of this Agreement be construed to remain fully valid, enforceable and binding on the Parties.

**12. Interpretation.** SSWD and the City each had a full and fair opportunity to consult independent counsel in the negotiation and execution of this Agreement. For the purposes of interpretation of this Agreement, neither Party will be deemed to have been its drafter.

**13. Notices.** Any notice, demand, or request made in connection with this Agreement will be in writing and will be deemed to have been duly given on the date of service, if (a) served personally on the person to whom notice is to be given, or (b) sent by electronic mail, and the recipient acknowledges receipt, or (c) on the third day after mailing, if mailed to the person to whom notice is to be given by first-class United States mail, postage-prepaid, and properly addressed to the following designated representatives of SSWD and the City:

To City:                      City of Sacramento  
                                    Department of Utilities  
                                    Attn: Dave Brent, Director  
                                    1395 35<sup>th</sup> Avenue  
                                    Sacramento, CA 95822  
                                    E-mail: [dbrent@cityofsacramento.org](mailto:dbrent@cityofsacramento.org)

To SSWD:                     Sacramento Suburban Water District  
                                    Attn: Robert S. Roscoe, General Manager  
                                    3701 Marconi Avenue, Suite 100  
                                    Sacramento, CA 95821  
                                    E-mail: [rroscoe@sswd.org](mailto:rroscoe@sswd.org)

**14. Governing Law.** This Agreement is governed by and will be interpreted in accordance with the laws of the State of California. This Agreement is deemed to have been executed in Sacramento County and therefore, the state or federal court where the Parties' offices are located shall be venue for any litigation concerning the enforcement or construction of this Agreement.

**15. Counterparts.** This Agreement may be executed in counterparts, each of which shall be deemed an original, and all of which taken together shall constitute one and the same Agreement.

The foregoing is hereby agreed to by the Parties on the date first written above.

CITY OF SACRAMENTO:

SACRAMENTO SUBURBAN WATER DISTRICT:

By: \_\_\_\_\_  
John F. Shirey  
City Manager

By: \_\_\_\_\_  
Robert S. Roscoe  
General Manager

Attest:

\_\_\_\_\_  
City Clerk

Approved as to form:

\_\_\_\_\_  
City Attorney