

City of Brisbane

Agenda Report

TO: Honorable Mayor and City Council

FROM: Director of Public Works/City Engineer via City Manager

SUBJECT: Term Sheet with Oakdale Irrigation District for Water Transfer

DATE: September 17, 2012

City Council Goals:

To provide for effective and efficient delivery of City services. (#1)

To provide public service that assures the safety of property and citizens residing, working, or visiting in Brisbane. (#9)

Purpose:

To obtain Council's approval of a Term Sheet with Oakdale Irrigation District outlining the general framework for a possible future agreement that would provide potable water to the Baylands development, and possibly also to undeveloped parcels in Sierra Point. This future agreement shall not be entered into unless and until the completion and certification of required CEQA analyses, and not until the conclusion of agreements with other entities not a party to the Term Sheet, but whose concurrence is required for an ultimate water transfer.

This action is consistent with the community's value of ensuring the highest level of water quality, in that it examines a means of providing future developments with potable water of the same quality provided to existing Brisbane citizens and businesses.

Recommendation:

Approve the draft Term Sheet and authorize the City Manager to sign the document on the city's behalf.

Background:

SB 610 (Costa), the Water Supply Planning Act, specifies certain projects subject to the California Environmental Quality Act that must complete a Water Supply Assessment (WSA). The proposed Baylands development is such a project. The WSA to be completed must demonstrate a readily available water supply to serve the project for at least a 20-year period, and must also consider reduction from single and multiple dry years. The WSA will be a supporting document for completion of the project's Program Environmental Impact Report.

The City of Brisbane operates two distinct water systems that are interconnected; the city system, and the Guadalupe Valley Municipal Improvement District's system. The combined "water supply assurance" for these systems is 0.98 million gallons per day (MGD), 100% of which is water supplied under contract with the San Francisco Public Utilities Commission (SFPUC).

The sum of our current water use trends, a development agreement commitment to the Health Care Partners project at Sierra Point, and projected central Brisbane residential growth projects our uncommitted supply of water in 2030 to range from 0.14 - 0.24 MGD. This "reserve" supply is appropriate to deal with unexpected supply reductions, but is inadequate to supply undeveloped parcels in the Baylands and at Sierra Point.

The Baylands project maximum expected need for water is 2 MGD. Based on current zoning, staff has estimated the future water needs of undeveloped parcels at Sierra Point as 0.4 MGD.

Oakdale Irrigation District's Board of Directors is scheduled to consider this Term Sheet at their regularly scheduled 9/18/12 meeting.

Discussion:

The Term Sheet is not a binding agreement between the agencies. The document simply lays out a preliminary framework negotiated between the parties, and informs the public of the goals and principles that will guide any ultimate transfer that might be approved. Additionally, the Term Sheet provides basic project definition so that CEQA review may be commenced now by the appropriate agencies for the future "project", that is, any "Water Exchange Agreement" that might ultimately be approved by the parties.

Project level environmental review for the future project will need to address impacts in at least three geographic areas:

1. Within the OID service area.
2. Along the transmission route of Modesto Irrigation District (MID) and SFPUC.
3. Within the City of Brisbane where the water will be used.

The identification of environmental review required within the MID and SFPUC systems leads us to a discussion of the other agreements specified in the Term Sheet, which will have to be completed, in addition to the CEQA review before the future Water Exchange Agreement could be finalized.

The Term Sheet discusses that OID water will be delivered from their system, directly to the MID system. MID will then utilize this delivered water in lieu of Tuolumne River water, thus creating an excess of water in New Don Pedro Reservoir. MID will then exchange this excess water to SFPUC, directly transferring it to them in the "water bank" that SFPUC owns in New Don Pedro. The Exchange Agreement in Paragraph 8 of the Term Sheet deals with this transfer of water.

The SFPUC (an agency of the City and County of San Francisco), will then be able to wheel banked water through its Regional Water System to Brisbane. The Wheeling Agreement in Paragraph 7 of the Term Sheet deals with this transfer.

The last agreement required for a future Water Exchange Agreement is the Developer Funding Agreement. This document will require UPC to fully fund the costs of delivering transferred water to Brisbane, and will also require UPC to demonstrate its commitment to sustainability by agreeing to build a recycled water system as part of its project. (Note that the 0.4 MGD requested for Sierra Point is not 100% the responsibility of UPC. Staff expects to offer this source of water to the other developers in this area, and if they choose to not participate, we have the option of reducing the ultimate volume of water.)

With regards to the future delivery of water, the Term Sheet envisions a future Water Exchange Agreement that could provide up to 2,400 acre-feet per year¹(AFY) for a term of 50 years, with permitted renewals in 25-year increments.

For the first 5 years of the Agreement, any water taken/delivered is paid for at \$500 per acre-foot. The amount not taken, (e.g., 2,400 – the quantity delivered) is paid for at \$100 per acre-foot.

At the beginning of the 6th year, Brisbane is required to notify OID how much water will be taken during the remainder of the Agreement. All of that water is paid for at \$500 per acre-foot, regardless of whether or not it is actually taken.

Fiscal Impact:


The costs that are the City of Brisbane’s responsibility to complete environmental review and other agreements will be borne by UPC. The costs for delivered water will be borne by UPC. The requirement for UPC to pay these costs will be memorialized in the “Developer Funding Agreement” discussed in paragraph 9 of the Term Sheet.

Measure of Success:

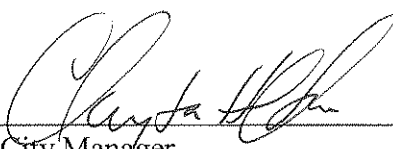
Completion of the required environmental review for the provision of any new potable water supply into Brisbane, and the development of any necessary agreements to provide such a new supply of water to meet the demands of any Baylands development that might ultimately be approved by the City Council and Brisbane voters.

Attachments:

Draft Term Sheet Oakdale Irrigation District – City of Brisbane



Director of Public Works/City Engineer



City Manager

¹ 1,000 AFY is approximately equal to 1 MGD. So, 2,400 AFY equals 2.4 MGD.

*DRAFT TERM SHEET
OAKDALE IRRIGATION DISTRICT – CITY OF BRISBANE*

**TERM SHEET FOR WATER TRANSFER AGREEMENT
BY AND BETWEEN THE OAKDALE IRRIGATION DISTRICT AND
THE CITY OF BRISBANE**

This Term Sheet is entered into this ___ day of _____, 2012, between and among the Oakdale Irrigation District (“OID”) and the City of Brisbane (“Brisbane”), both of which are collectively referred to hereafter as “Parties”.

RECITALS

WHEREAS, OID is operating under and by virtue of Division 11 of the California Water Code; and

WHEREAS, Brisbane is a general law city subject to the California Government Code; and

WHEREAS, Brisbane desires to acquire water from OID for municipal and industrial (M&I) purposes, including a water supply for the project referred to herein as the Baylands Project, a brownfield mixed-use development located adjacent to the west side of Highway 101; and

WHEREAS, OID is interested in transferring water to Brisbane; and

WHEREAS, if OID transfers water to Brisbane, the Parties expect that the water will be delivered utilizing, among other facilities, OID’s reservoirs, South Main Canal and laterals, certain designated facilities partially or fully owned and operated by the Modesto Irrigation District (“MID”), and the City and County of San Francisco’s (“CCSF”) Regional Water System; and

WHEREAS, this Term Sheet sets forth an understanding between the Parties to cooperate in the development, processing and completion of appropriate environmental review pursuant to the California Environmental Quality Act (“CEQA”) by the designated Lead Agency; and

WHEREAS, this Term Sheet sets forth some of the terms and conditions related to a sale of water from OID to Brisbane so that the appropriate Lead Agency can commence development, processing and completion of the appropriate CEQA documentation, and

WHEREAS, this Term Sheet is intended to provide a general framework for the subsequent negotiation of definitive agreements regarding the transfer and delivery of water from OID, and is not intended to create any binding contractual obligations on any party hereto or to commit any party to a particular course of action. A transaction of this type involves many essential terms and conditions that have not yet been agreed upon, and it is expressly contemplated by the Parties that, in order to effectuate the proposed transfer, binding agreements will have to be negotiated, agreed to by the Parties and submitted for approval to the OID Board of Directors and the Brisbane City Council; and

WHEREAS, this Term Sheet is intended to memorialize the preliminary terms that have been negotiated among the Parties, and to inform the public regarding the goals and principles identified by

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OID that will guide the proposal to transfer water to Brisbane throughout the public review process; and

WHEREAS, the terms set forth in this Term Sheet are the Parties' preliminary concepts that may be included in a final water transfer agreement. They are not intended, nor should they be considered as, binding on the Parties; and

WHEREAS, the Parties reserve their complete and sole discretion to evaluate and determine project impacts, alternatives and mitigation measures including, but not limited to, the ability to choose the "No Project" alternative, under CEQA; and

WHEREAS, by entering into this Term Sheet, the Parties do not intend to make an irretrievable commitment of resources or to commit to any course of action prior to completion of all appropriate environmental review.

NOW, THEREFORE, the Parties, on the terms and conditions herein set forth, agree as follows:

TERMS

1. DEFINITIONS:

The following definitions shall govern this Term Sheet:

(a) "Delivery" means that the water is to be made available to Brisbane on an annual basis pursuant to an agreed upon schedule at a designated point(s) of delivery. The points of delivery can be Goodwin Dam or any lateral or canal at OID's boundary. It is the sole responsibility of Brisbane to develop an exchange of water between OID, MID and CCSF, and to develop a wheeling agreement with the CCSF, so that OID's transfer water can be delivered to the CCSF water system intake. If no exchange and/or wheeling agreements are entered into between OID, MID, CCSF, and Brisbane, as necessary, at Brisbane's option, the Delivery may be made pursuant to an alternative arrangement between OID and Brisbane that utilizes the CCSF system, the State Water Project and/or Central Valley Project facilities, or through another means of transfer. This definition is intended to include the grammatical variations of the term "delivery" including "deliver" and "delivered," where such term references water.

(b) "Transfer Water" shall mean and refer to the water transferred by OID to Brisbane under the terms and conditions of the final Water Transfer Agreement.

(c) "Water Transfer Agreement" or "the Agreement" means the final water transfer agreement executed by OID and Brisbane for the transfer of water by OID to Brisbane.

2. TERM:

The Parties expect a term for the Water Transfer Agreement of fifty (50) years from the effective date of the Agreement. The Parties also expect to permit renewals of the Water Transfer Agreement of twenty-five (25) years. Brisbane may terminate the Agreement on two (2) years prior notice at any time after five (5) years from the effective date.

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3. THE WATER TRANSFER:

Brisbane will have an option under the Water Transfer Agreement to reserve or take/pay for Transfer Water and may exercise the option at its discretion. If Brisbane does exercise its option, OID will annually sell and deliver Transfer Water for reasonable and beneficial uses. The Parties intend that the Transfer Water will be used within the political boundaries of Brisbane, except that Brisbane may sell, lease, transfer, or assign the water for use outside its boundaries within the Hetch Hetchy water service area.

4. QUANTITY:

OID will make available for transfer up to a maximum of 2,400 acre-feet of water to Brisbane beginning on the effective date of the Water Transfer Agreement. For the first five (5) years following the execution of the Agreement, Brisbane shall provide OID with a delivery schedule that will identify the minimum quantity of water that OID shall deliver to Brisbane for the following year. During this five (5) year period, Brisbane can take delivery of as much or as little water as it determines necessary in the annual delivery schedule, subject to the 2,400 AF maximum.

On or before January 1 of the sixth year following the effective date of the Agreement, Brisbane must notify OID in writing how much water it will be acquiring by transfer during the remainder of the term of the Agreement. Brisbane does not need to take delivery of this quantity in each year of the term, but must pay for the identified quantity of water regardless of whether or not the full quantity is taken. The quantity identified by Brisbane shall not exceed 2,400 acre-feet.

5. RESERVATION AND PURCHASE PRICE:

Brisbane will pay the following amounts:

(a) Reservation Price. For the first five (5) years following the execution of the Water Transfer Agreement, Brisbane shall pay OID the sum of \$500 per acre foot for which delivery was taken and \$100 per acre foot derived by 2,400 minus the acre-feet taken.

(b) Purchase Price. Beginning in year six (6) following the execution of the Water Transfer Agreement, and for each year thereafter remaining in the term of the Agreement, Brisbane shall pay to OID \$500 per acre foot of water. Such price shall apply to the quantity identified by Brisbane in writing on or before January 1 of the sixth year, and will be paid to OID regardless of the quantity of water actually taken by Brisbane in any particular year.

6. ANNUAL CHANGES TO PURCHASE PRICE:

(a) The purchase price shall be adjusted based on changes to the Consumer Price Index as shown as the urban wage earners and clerical workers, U.S. City average (CPI-W)(“Index”) for the twelve-month period concluding with the August CPI index of each preceding year. Effective October 1 of each year, following the initial delivery of water, the base purchase price shall be modified based upon the same percentage that the Index as published in August of such year has changed, as compared to the Index published in August of the preceding year, provided, however, that the increase shall be no less than two percent (2%) and shall not exceed four percent (4%) in any year.

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(b) If the Index is discontinued or revised during the term, such other index or computation with which it is replaced shall be used in order to obtain substantially the same result as would be obtained if the Index had not been discontinued or revised, and in the absence of such a comparable replacement index, the Parties shall mutually determine a comparable replacement index.

(c) The provisions of this Section 6 shall apply only to water actually taken by Brisbane. The provisions of this Section 6 shall not apply to the \$100 reservation price as set forth in Section 5(a).

7. WHEELING AGREEMENT:

The Agreement is contingent upon an agreement with CCSF that provides for the wheeling of water on an annual basis pursuant to an agreed-upon schedule that permits Brisbane to acquire and use the water transferred by OID.

8. EXCHANGE AGREEMENT:

The Agreement is contingent upon an agreement between OID and Modesto ID, and between Modesto ID and CCSF for the exchange of water. Any costs, approvals or permits associated with the exchange agreement will be borne or obtained by OID. OID staff will cooperate with Brisbane in the development, negotiation and preparation of an exchange agreement to be presented to Modesto ID and to CCSF for consideration and possible approval. Notwithstanding such cooperation, OID retains the sole right to reject any such exchange agreement between OID and Modesto ID.

9. DEVELOPER FUNDING AGREEMENT:

The Agreement is contingent upon an agreement between Baylands Project developer and Brisbane for developer to fully fund the development of all agreements and associated costs for delivery of Transfer Water to the Baylands, and wherein the developer will demonstrate its commitment to sustainability by agreeing to build a recycled water system sized for irrigation and building plumbing demands for the final approved Baylands Project. Brisbane retains the sole right to negotiate and approve the developer funding agreement.

10. WATER QUALITY:

OID will not warranty the quality or fitness for use of Transfer Water.

11. WATER SUPPLY REDUCTIONS:

Water transferred to Brisbane will not be reduced on an annual basis by OID for any reason, unless by mutual agreement of the Parties.

12. WATER RIGHTS:

OID will transfer water that is not subject to the permitting jurisdiction of the State Water Resources Control Board (SWRCB).

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13. ENVIRONMENTAL REVIEW:

Brisbane will be the lead agency for purposes of the California Environmental Quality Act (CEQA) with respect to the transfer of water from OID. Brisbane is also undertaking CEQA review of its local development and water supply analysis, including growth inducing impacts and its receipt of water from OID. The expenses of environmental review and approval for both OID and Brisbane will be paid entirely by Brisbane.

14. NO IRRETRIEVABLE COMMITMENT OF RESOURCES:

By agreeing to this Term Sheet, neither Party is agreeing to commit any resources that could result in an environmental impact. It is a condition to the obligations of the Parties that environmental review be completed prior to entering into any binding agreement regarding the transfer of water from OID to Brisbane and the obligation of Brisbane to pay for Transfer Water.

Following completion of the above-referenced CEQA document and any supplements thereto, unless OID selects the “No Project” alternative (in which case no Water Transfer Agreement will be negotiated), OID will negotiate in good faith with Brisbane to develop a Water Transfer Agreement acceptable to both Parties, which Agreement will be consistent with the above-referenced CEQA documents. OID expressly retains its discretion with respect to whether it will enter into a Water Transfer Agreement, and on what terms, as well as its discretion to consider any and all alternatives, including the “No Project” alternative, and any and all mitigation measures indentified in the above-referenced CEQA process.

15. COOPERATION:

To the extent reasonably required, each Party shall, in good faith, assist the other in developing the information and agreements necessary to develop and enter into a Water Transfer Agreement, as well as obtaining all necessary approvals and preparation of required environmental documents.

16. RESALE, LEASE OR ASSIGN:

Brisbane will be entitled to resell, lease, transfer, or assign the Transfer Water. However, any such resale, lease, transfer or assignment shall only be to water entities within the Hetch Hetchy water service area.

17. ADDITIONAL ITEMS TO BE DISCUSSED, NEGOTIATED AND RESOLVED

The Parties anticipate that terms addressing several additional topics will be needed including, but not limited to:

- (a) Additional acts
- (b) Force Majeure
- (c) Assignment
- (d) Third Party Beneficiaries
- (e) Default, Cure and Remedies
- (f) Attorneys Fees
- (g) Notices

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- (h) Miscellaneous Provisions
- (i) Applicable Law and Forum

18. NOTICES:

All notices that are required, either expressly or by implication, to be given by any Party to the other will be signed for by OID and Brisbane by such officers as they may, from time to time, authorize in writing to so act.

Any notices to Parties required by this Agreement shall be emailed, delivered or mailed, United States first-class postage prepaid or by private mail courier, e.g. FedEx, addressed as follows:

OAKDALE IRRIGATION DISTRICT
Attn: Steve Knell
General Manager
Oakdale Irrigation District
1205 E F Street,
Oakdale, CA 95361-4198

CITY OF BRISBANE
Attn: Randy Breault
Director of Public Works / City Engineer
50 Park Place
Brisbane, CA 94005

Notice shall be deemed given (a) two business days following mailing via regular or certified mail, return receipt requested, (b) one business day after deposit with any one-day delivery service assuring “next day” delivery, or (c) upon actual receipt of notice, whichever is earlier. The Parties shall promptly give written notice to each other of any change of address, and mailing or shipment to the addresses stated herein shall be deemed sufficient unless written notification of a change of address has been received.

19. MEDIATION:

In the event of a dispute between the Parties as to any right, alleged right, obligation or alleged obligation under this Term Sheet, the Parties shall make a good faith effort to resolve the dispute by nonbinding mediation prior to the commencement of any lawsuit by one party against the other.

20. EFFECTIVE DATE:

The effective day and date of this Term Sheet shall be the day and date first above written.

The Parties hereby re-confirm that neither the Water Transfer Agreement, nor the proposed water transfer, can proceed unless and until the Parties have negotiated, executed and delivered mutually acceptable agreements based upon information produced from the CEQA environmental

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review process and on other public review and hearing processes, and subject to all applicable governmental approvals. The Parties intend by this Term Sheet to inform and focus the work necessary to develop and review a proposed water transfer, not to pre-determine whether or not that proposed water transfer shall be done or, if so, under what conditions.

By signing below, the Parties evidence their general agreement with the provisions of this Term Sheet and agree to use this Term Sheet as the framework for the good faith negotiations of binding definitive agreements. Any agreements resulting from negotiations will become effective only if and after such agreement has been considered and approved by the OID Board of Directors and the Brisbane City Council following conduct of all legally required procedures.

With the above understandings and agreements the Parties hereto do execute this Term Sheet.

OAKDALE IRRIGATION DISTRICT,
a political subdivision of the State of California

By: _____
Steve Knell, General Manager

CITY OF BRISBANE,
a California municipal corporation

By: _____
Clayton L. Holstine, City Manager

Approved as to form:

Harold S. Toppel, City Attorney