




RESOLUTION 03-01-2019
A RESOLUTION APPROVING A WATER AGREEMENT WITH
DR. FRED HC OPENSHAW


BE IT HEREBY RESOLVED:

SECTION 1: The attached document represents the Water Agreement with Dr. Fred HC. Openshaw.

SECTION 2: This Resolution shall become effective upon passage.

Approved on this the 5th day of March, 2019.


Kirk F. Hunsaker, Mayor


Susan B. Farnsworth, City Recorder

AGREEMENT

THIS AGREEMENT is made and entered into on this 3 day of April, 2019, by and between the City of Santaquin, Utah, a municipality and political subdivision of the State of Utah, hereinafter ("City") and Dr. Fred HC Openshaw, hereinafter referred to as ("Customer").

RECITALS:

WHEREAS, the City owns and operates a water system, including water sources, and infrastructure for the delivery of culinary and irrigation/secondary, water to residents, businesses and other entities in and near Santaquin City; and

WHEREAS, most of the irrigation/secondary water delivered by the City is delivered through its secondary water system (hereinafter the "Secondary System"), which is separate and distinct from the City's culinary water system although culinary water sources are used for portions of the Secondary System supply; and

WHEREAS, the Summit Creek Irrigation and Canal Company (hereinafter the "SCICC") operates its own irrigation system in and near Santaquin City on behalf of, and to service the needs of, its shareholders; and

WHEREAS, Customer shall allocate twenty-five (25) water shares of the total number of shares he owns, which are represented by the numbered share certificates in SCICC identified in Exhibit A (hereinafter "Customer's Shares"), and desires to exchange water attributable to Customer's Shares for water drawn from the Secondary System through a two-inch irrigation water meter to irrigate certain real property, which is owned by Customer and is more particularly described in Exhibit B attached hereto (hereinafter "the Property"); and

WHEREAS, the City, at the request of several SCICC shareholders, has been evaluating the feasibility of delivering SCICC shareholder water through its Secondary System; and

WHEREAS, the City might be willing to enter into water wielding agreements in future years, but has determined that certain SCICC system improvements, including the metering of all of its water sources, are needed in order to calculate the actual allotment of water per SCICC share, before water wielding agreements based on specific amounts of water might be considered; and

WHEREAS, the City and SCICC are working in partnership on those SCICC system improvements at the present time, but anticipate that those improvements may take as much as a year to complete in order to collect data for the 2019 irrigation season; and

WHEREAS, Customer desires to utilize the water allocated to his SCICC shares by wielding that water through the Secondary System for the 2019 irrigation season, while recognizing that the formulation of such an agreement, for the Customer or other SCICC shareholders with similar requests, is premature until all SCICC system improvements have been completed and put into full operation; and

WHEREAS, as an alternative, the Customer desires the ability to enter into a temporary water sales/exchange agreement with the City for the 2019 irrigation season; and

WHEREAS, the Parties understand and agree that the water attributed to Customer's twenty-five (25) shares, even though it cannot be accurately measured at the present time, exceeds the amount of water that could be drawn through a two-inch irrigation meter and thus will provide added value to the City; and

WHEREAS, the Parties desire to enter into a temporary water sales/exchange agreement for the 2019 irrigation season, which shall provide water through the Secondary System for the irrigation of the Property in exchange for the use of the Customer's Shares pursuant to the terms of this agreement;

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which is herein acknowledged, the parties agree as follows:

1. Delivery of Customer's Water to Secondary System. Customer shall cause the delivery of all irrigation water attributable to Customer's twenty-five (25) shares to the Secondary System at the City's irrigation pond located along Pole Canyon Road and shall be responsible to negotiate with SCICC for said delivery.

2. Delivery of Water to Customer. During the term of this Agreement, the City shall deliver irrigation water to Customer, at the Property, through the Secondary System for irrigation of the Property in accordance with the terms of this agreement.

3. Water Meters. The parties shall measure the amount of water that City delivers to the Customer through the installation of a two-inch meter.. All costs associated with the Customer's physical connection to the Secondary System (*e.g. excavation permit, trenching, piping, meter box, restoration, etc.*) shall be borne by the Customer. The City will waive cost of the irrigation connection, two-hundred-fifty dollars (\$250), and the cost of the two-inch meter seven-hundred-fifty dollars (\$750), which will be installed by the City, for the term of this agreement. Upon the conclusion of this agreement, the City shall remove said meter. However, should the Customer and the City enter into a water agreement prior to, or within one year of the termination or expiration of this Agreement, the Customer agrees to pay the aforementioned irrigation connection fee and two-inch meter fee and the City may either continue the two-inch connection without removing the meter, or remove and reinstall a similar connection and meter.

4. Ownership of Water Shares. Customer shall retain title and ownership of all Customer's Shares. Customer shall indemnify, hold harmless and reimburse the City for any costs, fees or expenses incurred by the City to assure the continued delivery of Customer's water into the Secondary System as contemplated by this Agreement.

5. Payment of Water Assessments. Customer shall timely pay all regular annual assessments of the SCICC on Customer's Shares that are incurred during the term of this Agreement. Any and all special assessments, other assessments and fees attributable to Customer's Shares shall be the sole responsibility of Customer.

- 6. Restrictions on Water Use.** The City shall provide irrigation water from the Secondary System to the Property for irrigation of the Property, with the following restrictions:
- a. Irrigation of the Property shall be only by means of sprinklers, or a sprinkler system. All construction, operation and maintenance of the facilities necessary for the Customer's acceptance of water from the meter installed by City for irrigation of the Property shall be the sole responsibility of Customer.
 - b. No water delivered by or through the Secondary System may be used on the Property or elsewhere to flood irrigate.
 - c. The maximum meter size for all water delivered to the Property pursuant to this Agreement shall be two inch.
 - d. Emergency watering restrictions may be imposed and if imposed will apply to all Secondary System users with no differentiation resulting from this contract. The City assumes no liability for any damages resulting from emergency water restriction, should they be imposed.
 - e. The maximum amount of water that may be delivered to the Property during the irrigation season shall be three acre feet per acre.

7. Secondary System Base Rate and Water Usage Fees. The City shall waive all Santaquin City Secondary System Base Rates and Irrigation Usage Fees attributed to water delivered through the two-inch meter in exchange for the water delivered to the City's Secondary System as described in paragraph 1. Customer hereby waives its rights to any compensation, future credit, or any other consideration whatsoever in the event that the amount of water delivered to the Property through the Secondary System is less than the amount of water that Customer delivers to the City pursuant to paragraph 1. Should the total volume of water used by the Customer, as measured by the Customer's two-inch meter, exceed seventy-five (75%) of the total volume of water caused to be delivered to the City's Irrigation Pond by the Customer, pursuant to paragraph 1, Customer agrees to pay City irrigation usage fees on excess volumes pursuant to the fees outlined in the City's consolidated fee schedule. Overall usage will be calculated and billed at the end of the irrigation season after final meter readings have been captured. Overage Fees for the 2019 irrigation system shall be capped at a maximum of five-hundred dollars (\$500.00).

8. Impact Fees. The City shall waive the cost of pressurized irrigation impact fees for the term of this agreement. The Customer accepts the responsibilities for payment of future pressurized impact fees should the parties enter into a water agreement or should the use of the property change from its existing use.

9. Term. This Agreement shall run for a term commencing on the effective date and continue through December 31, 2019.

10. Default and Remedies. Except as otherwise provided in this Agreement, if either Party fails to perform any of its obligations under this Agreement or if either Party's representations or warranties contained in this Agreement shall be materially untrue, inaccurate or incomplete at any time, and that failure continues for ten (10) days after receipt by such Party (the "defaulting Party") of written notice from the other Party, such defaulting Party shall be in default and the other Party may: (i) terminate this Agreement upon thirty days written notice; (ii)

bring an appropriate action for specific performance of this Agreement; and/or (iii) pursue any other remedy available under this Agreement, at law or in equity.

11. Entire Agreement; Amendments. This Agreement sets forth the entire understanding of the Parties with respect to the subject matter hereof, and all prior negotiations, understandings, representations, inducements and agreements, whether oral or written and whether made by a Party hereto or by any one acting on behalf of a Party, shall be deemed to be merged in this Agreement and shall be of no further force or effect. No amendment, modification, or change in this Agreement shall be valid or binding unless reduced to writing and signed by all of the Parties hereto.

12. Expenses of Enforcement. In any proceeding to enforce, interpret, rescind or terminate this Agreement or in pursuing any remedy provided hereunder or by applicable law, the prevailing Party shall be entitled to recover from the other Party all costs and expenses, including a reasonable attorney's fee, whether such proceeding or remedy is pursued by filing suit or otherwise, and regardless of whether such costs, fees and/or expenses are incurred in connection with any bankruptcy proceeding.

13. Notices. Except as otherwise required by law, any notice given in connection with this Agreement must be in writing and must be given by personal delivery, overnight courier service, confirmed facsimile, or United States certified or registered mail, return receipt requested, postage prepaid, addressed to Customer or City as follows (or at another physical or electronic address as Customer or City may designate in writing):

Customer: Dr. Fred HC Openshaw
85 North Center Street
Santaquin, Utah 84655
Email: mark@littleopees.com

City: Santaquin City
Attention: Benjamin Reeves, City Manager
275 West Main Street
Santaquin, Utah 84655
Email: breeves@santaquin.org

With a copy to: Nielsen & Senior
Attention: Brett B. Rich
P.O. Box 970663
Orem, Utah 84097
Email: bbr@ns-law.com

Notice is deemed to have been given on the date on which notice is delivered, if notice is given by personal delivery or confirmed electronic transmission, on the date of delivery to the overnight courier service, if that service is used, and on the date of deposit in the mail, if mailed. Notice is deemed to have been received on the date on which the notice is actually received or delivery is refused.

14. Survival. Except as otherwise provided herein, all of the covenants, agreements, representations and warranties set forth in this Agreement survive the Closing, and do not merge into any deed, assignment or other instrument executed or delivered under this Agreement.

15. Waiver. The failure to enforce at any time any provision of this Agreement or to require the performance of any provision hereof shall not constitute a waiver of any such provision or affect either the validity of this Agreement or any part hereof or the right of either Party hereto to thereafter enforce each and every provision of this Agreement in accordance with the terms of this Agreement.

16. Time of Essence; Dates of Performance. Time is expressly declared to be of the essence of this Agreement. In the event that any date for performance by either Party of any obligation hereunder required to be performed by such Party falls on a Saturday, Sunday or nationally established holiday, the time for performance of such obligation shall be deemed extended until the next business day following such date.

17. Counterparts. This Agreement may be executed in any number of counterparts, each of which when so executed and delivered shall be deemed to be an original and all such counterparts, when taken together, shall be deemed to constitute one and the same instrument.

18. Electronic Transmission. Electronic transmission of this Agreement, signed by a Party, and retransmission of any signed electronic transmission, shall be the same as delivery of an original hereof.

19. Succession and Assignment. This Agreement shall be binding upon and inure to the benefit of the Parties named herein and their respective successors and permitted assigns. Any third party acquiring an interest in the Property after the execution of the Agreement shall be a permitted assignee of Customer. Neither Party may assign either this Agreement or any of its rights, interests, or obligations hereunder without the prior written approval of the other Party.

20. Further Acts. The Parties hereby agree for themselves, and for their successors and assigns, to execute any instruments and to perform any acts which may be necessary or proper to carry out the purposes of this Agreement.

21. Governing Law. This Agreement shall be governed by and construed in accordance with the laws of the State of Utah without giving effect to any choice or conflict of law provision or rule (whether of the State of Utah or any other jurisdiction) that would cause the application of the laws of any jurisdiction other than the State of Utah.

22. Submission to Jurisdiction. Each of the Parties submits to the jurisdiction of the Fourth Judicial District Court of the State of Utah in any action or proceeding arising out of or relating to this Agreement and agrees that all claims in respect of the action or proceeding may be heard and determined in such court. Each of the Parties waives any defense of inconvenient forum to the maintenance of any action or proceeding so brought and waives any bond, surety, or other security that might be required of any other Party with respect thereto. Each Party agrees that a final judgment in any action or proceeding so brought shall be conclusive and may be enforced by suit on the judgment or in any other manner provided by law or at equity.


23. **Interpretation.** In the event an ambiguity or question of intent or interpretation arises, no presumption or burden of proof shall arise favoring or disfavoring either Party by virtue of the authorship of any of the provisions of this Agreement. This Agreement has been divided into paragraphs and subparagraphs for convenience only and the paragraph headings contained herein are for purposes of reference only, which shall not limit, expand, or otherwise affect the interpretation of any provision hereof. Whenever the context requires, the singular shall include the plural, the plural shall include the singular, the whole shall include any part thereof, any gender shall include the masculine, feminine and neuter gender, and the term "person" shall include any individual, firm, partnership (general or limited), joint venture, corporation, limited liability company, trust, association, or other entity or association or any combination thereof.

24. **Authority of Signers.** Each person executing this Agreement hereby warrants his or her authority to do so, on behalf of the entity for which he or she signs, and to bind such entity.

25. The recitals are hereby incorporated into this agreement.

IN WITNESS WHEREOF, the Parties have executed this Agreement on the dates set forth below.

CUSTOMER




Dr. Fred HC Openshaw

Date: 4/3/19

STATE OF UTAH)
 ss:
COUNTY OF UTAH)


On this 3 day of April, 2019, personally appeared before me, Dr. Fred HC Openshaw, who after being duly sworn, stated that he executed the foregoing document.





Notary Public

CITY OF SANTAQUIN



KIRK F. HUNSAKER, Mayor

Date: 3/4/19

ATTEST:


SUSAN B. FARNSWORTH, Recorder