

COMMERCIAL WATER USE AGREEMENT

THIS COMMERCIAL WATER USE AGREEMENT ("this Agreement"), dated as of _____, 200__, is entered into by and between THE BUCKEYE WATER CONSERVATION AND DRAINAGE DISTRICT, an irrigation district organized and existing as a municipal corporation under the laws of the State of Arizona ("District"), and _____, a(n) _____ ("User"). District and User are referred to herein, individually and collectively, as "Party" or "Parties."

WHEREAS, the Parties desire to enter into a contract for the use of non-potable water by User on the terms and conditions set forth herein.

NOW, THEREFORE, THE PARTIES AGREE AS FOLLOWS:

1. Agreement. Subject to and in accordance with the provisions of this Agreement, District agrees to provide non-potable water to User, and User agrees to receive and pay for, in the following amounts and at the following described Delivery Price, non-potable water from District for use in User's construction operations.

A. Quantity:

B. Method of Delivery:

C. Delivery Site:

D. Delivery Price:

E. Hours of Operations: Daylight Hours Only

2. Term. The term of this Agreement is for a period of ____ days beginning on _____ and terminating on _____.

3. Purpose of Use. User agrees that the water delivered to and used by User pursuant to this Agreement shall be used for construction purposes only, and shall in all events be applied and used for lawful purposes consistent with the terms of this Agreement and with all applicable laws, rules, and regulations, including those of District, and of all federal, state, and municipal governmental authorities having jurisdiction.

4. Disclaimer of Warranties. DISTRICT DOES NOT WARRANT THE QUALITY OF THE WATER DELIVERED TO OR USED BY USER PURSUANT TO THIS AGREEMENT, AND USER EXPRESSLY ASSUMES THE RESPONSIBILITY TO TEST, MONITOR, AND INVESTIGATE THE SUITABILITY OF SUCH WATER FOR USER'S USES. DISTRICT DISCLAIMS ANY WARRANTIES OF FITNESS FOR A PARTICULAR PURPOSE AND WARRANTIES OF MERCHANTABILITY, AND DISCLAIMS ANY IMPLIED WARRANTIES, STATUTORY OR OTHERWISE, CONCERNING ANY WATER DELIVERED OR USED PURSUANT TO THIS AGREEMENT. DISTRICT PROVIDES AND USER RECEIVES AND USES ALL WATER PURSUANT TO THIS AGREEMENT IN ITS "AS-IS" CONDITION, AND USER COVENANTS WITH DISTRICT THAT USER SHALL TREAT OR OTHERWISE MANAGE SUCH WATER IN A MANNER CONSISTENT WITH APPLICABLE GOVERNMENTAL LAWS, RULES, AND REGULATIONS.

5. Payment/Breach.

5.1 Payment. Payment for all water delivered or used pursuant to this Agreement shall be made in advance and shall be in the form of cash, cashier's check, certified funds, or wire transfer. Upon receipt of payment as provided hereunder, District shall provide "seals" to User indicating the number of water deliveries that User is entitled to receive; such seals are to be surrendered to District's agent as water is received. From time to time during the Term, the Parties may agree on additional quantities of water to be delivered to or used by User, with User pre-paying therefor and receiving seals that shall be surrendered to District's agent upon each delivery of water made pursuant to this Agreement.

5.1.1 Failure to Report and Open Accounts. User hereby expressly agrees that District may impose a fee, not to exceed \$100 per occurrence, at any time User fails to report its water use or accurately report its water use pursuant to this Agreement. Reporting is required weekly and reports shall be considered delinquent and subject to penalty if not reported within 10 business days following the week in question. User further hereby expressly agrees that District may impose an Account Maintenance Fee of not to exceed \$50 per month on any accounts left open after the termination or expiration of this Agreement.

5.1.2 Sales Taxes. Any taxes imposed on deliveries of water to User pursuant to this Agreement, which District is required to pay or collect ("Sales Taxes"), shall be paid or reimbursed by User to District in addition to the Delivery Price. If User furnishes District with a timely and valid resale or other exemption certificate or proof of export acceptable to the relevant taxing authority, Sales Taxes will not be added to the Delivery Price; provided, however, if District is ever required to pay such Sales Taxes, User will promptly reimburse District for such Sales Taxes, together with any interest and penalties related thereto.

5.2 Breach. In the event a Party to this Agreement fails to do an act promised or refrain from doing an act prohibited, a default shall have occurred and the non-defaulting Party may declare a breach. If a breach is declared by District, in addition to all other remedies available to District, District may immediately cease delivery of water and pursue any and all other remedies available to District.

5.2.1 Remedies. IN NO EVENT WILL USER SEEK OR RECOVER DAMAGES OR OTHERWISE FROM DISTRICT IN ANY CLAIM OR CAUSE OF ACTION, WHETHER BASED ON CONTRACT, BREACH OF WARRANTY OR TORT (INCLUDING, BUT NOT LIMITED TO, NEGLIGENCE AND STRICT LIABILITY) IN EXCESS OF THE DELIVERY PRICE PAID FOR THE SPECIFIC DELIVERY OF WATER AS TO WHICH THE CLAIM IS MADE. DISTRICT SHALL NOT BE LIABLE TO USER FOR LOSS OF PROFITS OR SPECIAL, INDIRECT, INCIDENTAL, PUNITIVE, OR CONSEQUENTIAL DAMAGES, WHETHER SUCH CLAIMS ARE BASED ON NEGLIGENCE, BREACH OF WARRANTY, STRICT LIABILITY IN TORT, OR ANY OTHER CAUSE OF ACTION.

6. Availability of Water. This Agreement shall at all times be subject to prior rights of landowners in the Buckeye Water Conservation & Drainage District to receive water, and User hereby expressly waives, on behalf of User, and any of User's affiliates, agents, officers, directors, employees, representatives, and insurers any claim for loss as a result of the inability of District to deliver water as provided hereunder. User knows, understands, and agrees the nature of the District's business is such that it cannot be the guarantor of water availability, and User expressly assumes the risk of unavailability of water. District assumes no responsibility whatsoever for loss or damages that may be suffered by User occasioned by any water shortage, or for any other cause whatsoever; including water shortages caused by drought or because of demands on District for service beyond its available supply. In the event of any unavailability of water for delivery to User

pursuant to this Agreement, User, as its only available remedy, may recover the Delivery Price relating to any such quantities of water that were unavailable.

7. Measurement of Water.

7.1 Installation of Measuring System. User hereby agrees that all use of water pursuant to this Agreement shall be measured by a system acceptable to District. The measuring system shall meet manufacturer-suggested installation, operation, pipe configuration, and accuracy standards. User shall maintain the accuracy of such devices as close to zero as possible, but in no event shall error exceed plus or minus two percent (2%). If the measuring system required under this Section malfunctions or exceeds the error rate provided for herein, User shall repair or replace the measuring system and bring the error rate back to within the acceptable range within five (5) days after learning of such malfunction or exceedance. All responsibility and cost for the installation, maintenance, repair, and replacement of the measuring system required under this Section shall be borne by User at all times.

7.2 Characteristics of Measuring System. User shall design, construct, install, maintain, and repair the measuring system required under this Section in accordance with the manufacturer's suggestions for the specific application, at the point of receipt. Meters for any surface diversions shall be of a type specified by the manufacturer for use with water that is commonly debris laden, and all meters shall be of a type specified by the manufacturer for accuracy and low-maintenance operation. User shall provide the manufacturer's accuracy statements on the meters to District, upon its request.

7.3 District's Inspection of Measuring System. District may at reasonable times, at its sole expense and after reasonable notice to User, test and inspect the measuring system required under this Section to determine its accuracy.

7.4 Right of Access. User hereby grants District the right of access to any property owned or controlled by User for purposes of inspecting, repairing, or replacing the measuring system required under this Section, subject to reasonable advance notice by District.

7.5 Repair or Replacement of Measuring System by District. User further grants District the right to, after reasonable advance notice to User, take affirmative and unilateral action to repair or replace the measuring system required under this Section, as necessary, and User agrees to pay any and all costs associated with such repair or replacement deemed necessary by District. User agrees to pay such costs within fifteen (15) days after receiving notice thereof from District.

7.6 Estimated Billings. User agrees that District may, if it determines that the measuring system has been inoperable or inaccurate for a period of time, estimate the actual amount of water user by User during that period and adjust the payments and outstanding amounts due from User based upon those estimates. District shall make such estimates in a commercially reasonable manner.

8. Indemnification and Insurance.

8.1 Indemnification. To the fullest extent allowable under law, User, on behalf of User and its insurers, waives, releases, and discharges District and/or any of District's affiliates, agents, officers, directors, employees, representatives, and insurers from and against any and all suits, actions, legal and administrative proceedings, claims, demands, penalties, costs, and expenses and any resulting loss of use or business interruption in connection therewith (the "Claims"), regardless of the cause (even if such Claim is caused by the negligent or intentional acts, omissions, or misconduct of District or any of District's affiliates, agents, officers, directors,

employees, representatives, or insurers). User will look only to any insurance coverage User may elect to maintain (regardless whether User actually obtains any such coverage or whether such coverage is sufficient) with respect to the Claims User is hereby waiving, releasing, and discharging under this Section. Any insurance User maintains must permit or include a waiver of subrogation in favor of District consistent with the provisions of this Section. User further agrees to indemnify and hold harmless District and its affiliates, agents, officers, directors, employees, representatives, and insurers from any and all claims by third parties resulting from District's delivery and User's receipt and use of water pursuant to this Agreement, including all damages of any kind and all costs of defense, including attorneys' fees, court costs, and expert witness fees.

8.2 Insurance. User shall at all times during the Term, at User's sole cost and expense, maintain the insurance this Section requires.

8.2.1 Liability Insurance. User will maintain commercial general liability insurance providing coverage at least as broad as a current ISO form on an "occurrence" basis, with minimum limits of \$1,000,000 each occurrence and \$5,000,000 general aggregate (which may include umbrella coverages). User's liability insurance will (i) name District and District's affiliates, agents, officers, directors, employees, and representatives as additional insureds with respect to all matters arising out of the delivery or use of water pursuant to this Agreement; (ii) be primary to any other insurance maintained by District; and (iii) be placed and maintained with companies rated at least "A/VII" by A.M. Best Insurance Service and otherwise reasonably satisfactory to District. Such insurance may have a reasonable deductible but may not include self-insured retention in excess of \$25,000. If User's liability insurance is provided under a blanket policy, the above coverage limits must be made specifically applicable to the delivery and use of water pursuant to this Agreement. User shall deliver an ACORD Form 27 (or equivalent) certificate or other evidence of insurance satisfactory to District (i) prior to any use of water by User pursuant to this Agreement, (ii) not later than 30 days prior to the expiration of any current policy or certificate, and (iii) at such other times as District may reasonably request.

9. Successors and Assigns. This Agreement shall be binding upon the Parties' successors and assigns. Notwithstanding the foregoing, User shall have no right to assign its rights or duties under this Agreement without first obtaining the prior written consent of District, which consent may be withheld by District in District's sole and absolute discretion.

10. Non-Waiver. The failure of District to insist in any one or more instances upon the full and complete performance of any of the terms and conditions of this Agreement to be performed on the part of User, or to take any action permitted as a result thereof, shall not be construed as a waiver or relinquishment of the right to insist upon full and complete performance of the same, or any other covenant or condition, either in the past or in the future. The acceptance by District of sums less than may be due and owing it at any time shall not be construed as an accord and satisfaction.

11. Enforcement. The provisions of this Agreement may be enforced by either Party, and any violation or obligation in connection with this Agreement may be restrained or enforced, as applicable, by any court of competent jurisdiction. If any Party employs an attorney to enforce the provisions contained herein and prevails in such action, the prevailing Party shall be entitled to recover from the other Party its costs and reasonable attorneys' fees (including any expert witness fees) incurred in connection with the action.

12. Integration; Modification. This Agreement constitutes the entire agreement between the Parties pertaining to the subject matter hereof, and all prior or contemporaneous agreements and understandings, oral or written, are hereby superseded and merged herein. The provisions

hereof may be abrogated, modified, rescinded, or amended in whole or in part only by written instrument executed by both Parties.

13. Governing Law; Jurisdiction; and Venue. This Agreement is entered into in the State of Arizona and shall be governed by and construed under the laws thereof, without giving any effect to the principles of the conflicts of law. Venue for any action arising from this Agreement shall be proper in the Superior Court in and for Maricopa County, Arizona, and the Parties hereby consent to the jurisdiction of such court for purposes of interpreting and enforcing this Agreement.

14. Headings. The headings used in this Agreement are for convenience only and are not intended to affect the meaning of any provision of this Agreement.

15. Severability. In the event any portion of this Agreement shall be determined to be invalid, such invalidity shall not render the remaining portions of this Agreement void, unless the deletion of the invalid portion shall materially and substantially alter the rights of the parties under the remaining portions of this Agreement.

16. Notice. In order to be effective, all notices, demands, instructions, approvals, or other communications required or permitted to be given hereunder must be in writing and must be sent by personal delivery, by United States registered or certified mail (postage prepaid), or by an independent overnight courier service, addressed to the addresses as specified below, or at such other place as either Party may designate to the other Party by written notice given in accordance with this Section. Notices given by mail are deemed delivered within four business days after the Party sending the notice deposits the notice with the United States Post Office. Notices delivered by courier are deemed delivered on the next business day after the day the Party delivering the notice timely deposits the notice with the courier for overnight (next day).

If to District:

Ed Gerak
General Manager
Buckeye Water Conservation & Drainage District
Post Office Box 1726
Buckeye, Arizona 85326-00127
Facsimile: (623) 386-7789

If to User:

17. Cancellation. The Parties expressly agree that District, consistent with Arizona Revised Statutes Section 38-511, as amended, may cancel this Agreement within three (3) years after its execution and without penalty or further obligation, if any person significantly involved in initiating, negotiating, securing, drafting, or creating this Agreement on behalf of District is, at any time while this Agreement or any extension thereof is in effect, an employee or agent of any other Party to this Agreement in any capacity or a consultant to any other Party to this Agreement with respect to the subject matter hereof. In the event District elects to exercise its rights under this Section, it agrees to properly give notice to User of such election.

18. Confidentiality. The Parties hereby agree that each of them will hold in confidence the terms of this Agreement and all technical and business information either Party discloses to the other, except for such information which (i) is in the public domain at the time it is disclosed by one Party to the other, (ii) becomes part of the public domain by publication or otherwise through no fault of either Party, or (iii) is required to be disclosed by law or a court order. The Parties further agree that neither of them will use any technical or business information disclosed to them hereunder for any purpose other than the performance of this Agreement.

19. Time of the Essence. Time is of the essence under this Agreement. Any extension of time for performance under this Agreement by any Party must be in writing.

20. Transactions Costs. Each Party agrees to bear its own attorneys' fees, consultants' fees, and other costs associated with negotiating, drafting, and executing this Agreement.

21. Counterparts. This Agreement may be executed in any number of counterparts, each of which shall be deemed an original, with the same force and effect as if all signatures were appended to one instrument.

22. Effectiveness and Authority. This Agreement shall become effective when fully executed; the persons executing this Agreement represent and warrant they are so authorized to execute this Agreement on behalf of their respective Parties.

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

DISTRICT:

The Buckeye Water Conservation and Drainage District, an irrigation district organized and existing as a municipal corporation under the laws of the State of Arizona

By: _____
Its: General Manager

USER:

By: _____
Its: _____