



CITY OF
GEARHART

Staff Report

For City Council Meeting - 11/1/2023

Subject - New Business - Seaside Water Mutual Organization Understanding (MOU)

Synopsis: The City of Gearhart has water purchase agreements with both the City's of Warrenton and Seaside. They both expired in 2022, and a new agreement with Warrenton was just approved and signed on August 2nd. Seaside has provided us with the attached Mutual Organization Understanding (MOU) that they will be presenting to their Council at this month's meeting. A notable change from the previous version is reciprocation in the event of a water emergency. Seaside's Public Works Director, Mike Dimmick, met with Mark McFadden to ensure proper operation of the valve and connection history. In order for the City of Gearhart to proceed with the agreement, Council must make a motion.

Recommendation: City staff recommends Council motion to approve entering into the attached water MOU with the City of Seaside.

Legal Analysis: The City has 10 water accounts that receive water from Gearhart and Seaside reimburses us for. However, this MOU specifically relates to the inter-tie with Seaside along Highway 101 where the valve is usually closed. In an emergency situation where Gearhart's supply could not meet demand, the valve would be opened. And likewise, Gearhart would supply Seaside during an emergency.

Financial Analysis: The City budget was approved based on terms proposed in the agreement and will need approval yearly.

Respectfully Submitted,

A handwritten signature in black ink, appearing to be the name 'Chad', written in a cursive style.

Chad

**WATER MUTUAL ORGANIZATION UNDERSTANDING
AGREEMENT FOR EMERGENCY WATER SUPPLY**

THIS AGREEMENT ("Agreement") for Emergency Water Supply is dated effective this 1st day of November, 2023, between the CITY OF GEARHART ("Gearhart") and the CITY OF SEASIDE ("Seaside"), sometimes collectively referred to as the "parties" or to any one singly as a "party."

RECITALS

- A. Seaside is a municipality adjacent to Gearhart and operates its own, independent water system (the "Seaside System").
- B. Gearhart is a municipality adjacent to Seaside and operates its own, independent water system (the "Gearhart System").
- C. There is the possibility that Seaside and Gearhart may need access to additional sources of water during emergency periods.
- D. Seaside has agreed to provide emergency water supply to Gearhart, and Gearhart has agreed to provide emergency water supply to Seaside subject to the terms and conditions of this Agreement.
- E. This Agreement is intended to provide the framework for long-term water supply for Seaside and Gearhart for their respective emergency needs, subject to the availability of water from the systems.

AGREEMENT

In consideration of their mutual covenants, the payment for the water provided for herein, and other good and valuable consideration, the receipt of which is hereby acknowledged, Seaside and Gearhart agree to the following:

- 1. **Definitions.** The following definitions will apply to this Agreement:
 - 1.1 Available Water. The quantity of water from the Seaside System and Gearhart System (the "Systems"), determined by Seaside and Gearhart respectively, which at any given time is in excess of the amount of water then needed by the residents of Seaside or Gearhart.
 - 1.2 Connection. The point, located at the intersection of 2914 Hwy 101 and Park Ave, where Gearhart's pipe connects with the Seaside System.
 - 1.3 Effective Date. The date on which the last signatory of this Agreement has executed and delivered this Agreement.

- 1.4 **Emergency Need.** A condition determined by Seaside or Gearhart when the public welfare of the parties' respective residents requires access to Supplemental Source due to a System Limitation.
- 1.5 **Force Majeure.** Any cause beyond a party's control and without its fault or negligence. Such causes may include, but are not necessarily limited to, acts of God or the public enemy; acts of the federal, state, or local governments (other than the party in question); fires; floods; epidemics; volcanic eruptions; quarantine restriction; strikes; freight embargoes; and unusually severe weather or emergency that causes interruption of supply. An event of Force Majeure shall be limited to the time during which such event occurs.
- 1.6 **Master Meter.** A water meter at or near the connection installed by Gearhart.
- 1.7 **Request for Service.** A written notice from either Gearhart or Seaside to the other city, pursuant to a reasonable protocol to be established between them, that states a need for Available Water during a time of Emergency Need and estimating the approximate quantity and duration of need for Available Water.
- 1.8 **Supplemental Source.** Water from the other parties' System.
- 1.9 **System.** Either city's existing water supply system and related infrastructure.
- 1.10 **System Limitation.** A limitation due to any cause on the ability of the Systems to supply all water required at any given time.
2. **Obligation to Supply Water.** Pursuant to a Request for Services, and except during a System Limitation, Seaside or Gearhart shall furnish an uninterrupted supply of Available Water to the other city at the rate provided below during an Emergency Need.
3. **Rates.** Available Water supplied under this Agreement shall be sold at the in-City rates.
4. **Measurement of Water Use.** The Connection will be equipped with a Master Meter installed by Gearhart. The Master Meter will be used by Seaside to measure the volume of Available Water moved into either System. Representatives of both Systems may be present at meter readings. The Master Meter shall be read monthly during times when the Connection is open.
 - 4.1 **Failure of the Master Meter.** If the Master Meter at any time fails to accurately measure the water passage through though it, the charge for water used during the time the Master Meter is out of

order shall be based upon the average consumption as shown by the Master Meter when in proper operating condition during a comparable period of service.

- 4.2 **Meter Records.** Seaside shall freely share all of Seaside's Master Meter measurement records with Gearhart upon Gearhart's request for same.
5. **Billing for Water.** The System receiving water shall bill the other System on a monthly basis based exclusively on the meter readings of the quantity of water used by the other System during the previous month times the applicable rate per unit quantity for such water set forth in this Agreement, except as described in Section 4.1.
6. **Payment for Water.** The System receiving water shall pay the other System for all water passing through the Master Meter within thirty (30) days of receiving a bill.
7. **Maintenance of Master Meters.** Gearhart shall keep the Master Meter in continued good repair and shall test and calibrate the Master Meter annually. The cost of maintaining, testing, and calibrating the Master Meter is the responsibility of Gearhart.
8. **Other Maintenance.** The parties shall be responsible for maintaining and repairing their own respective water supply and distribution systems and shall not have any responsibility or liability to the other for same.
9. **Other Costs.** All costs incurred with respect to performance under this Agreement shall be paid by the party that incurred the cost, unless defined in this Agreement or otherwise agreed by both parties in writing.
10. **Limitation of Liability.** Neither party shall be deemed responsible or liable to the other on account of either a Gearhart System Limitation or a Seaside System Limitation.
11. **Laws.** Both parties shall comply with all ordinances, rules, and regulations of the other governing use of water.
12. **Assignment.** Neither party shall assign this Agreement, in whole or in part, or any other right or obligation under this Agreement, without the prior written approval of the other.
13. **Breach of Agreement.**
 - 13.1 **Definition of Breach:** A party shall breach this Agreement if it fails to perform any substantial obligation under this Agreement. A party shall not

breach this Agreement, however, if its failure to perform a substantial obligation under the Agreement is caused by an event of Force Majeure.

13.2 Remedies for Breach.

13.2.1 In the event of a breach of this Agreement by one party, the other party shall be entitled to any remedies that are available to it at law or in equity, provided it first gives notice and opportunity to cure to the other party as specified below.

13.2.2 Without limitation to the foregoing, the non-breaching party shall be entitled to termination of this Agreement provided the procedures set forth in Section 14.2 are followed.

13.3 Notification. The party alleging a breach of this Agreement shall give the other party written notice of the breach, specifying the nature of the alleged breach.

13.4 Opportunity to Cure. The breach shall give rise to the remedies for breach in this Agreement unless the following occurs:

13.4.1 The party receiving the notice has entirely cured the breach within 10 days of receipt of the notice, and so notifies the other party in writing within the 10-day period; or,

13.4.2 If cure within the 10 day period is not reasonably possible, the party against whom the breach is alleged has taken the following actions within the 10 day period:

13.4.2.1 Initiated such cure;

13.4.2.2 Notified the other party in writing of its intent to pursue such cure in good faith and with due diligence until the breach is entirely cured;

13.4.2.3 Has in such notice specified a reasonable completion date for completion of such cure; and,

13.4.2.4 Has completed cure within the completion date specified in the above notice.

13.5 Non-Waiver: Neither party shall be deemed to have waived any breach of this Agreement by the other except by an express waiver in writing. Any express written waiver as to one breach shall not be deemed a waiver of any other breach not expressly identified, even though the other breach may be of the same nature that waived.

14. Early Termination.

- 14.1 For Convenience. Either party may terminate this Agreement at any time for its own convenience by 30 days' written notice to the other party. Upon termination under this paragraph, the parties shall be entitled to payment for all water received prior to receipt of notice of termination.
- 14.2 For Breach of Agreement. Either party may terminate this Agreement in the event of a breach of the Agreement by the other which remains uncured after following the procedures set forth in Section 13 of this Agreement.

15. Arbitration.

- 15.1 Arbitration of Disputes. Any dispute over an interpretation of this Agreement and which is not settled by mutual agreement of the parties within 60 days of notification in writing by either party shall be submitted to an arbitrator mutually agreed upon by the parties. If the parties cannot agree on an arbitrator within 10 days after the expiration of the 60-day period, then the arbitrator shall be appointed as soon as practicable by the presiding judge of the Clatsop County Circuit court. The arbitrator shall be selected within 30 days from the expiration of the 60-day period following notification of the dispute. The arbitration shall be as speedy as is reasonably possible. The arbitrator shall render a decision within 45 days of the arbitrator's first meeting with the parties. Insofar as they legally may be bound, the parties agree to be bound by the decision of the arbitrator. The parties shall each pay one half of the arbitrator's compensation and shall bear their own costs and attorney's fees.
- 15.2 Continued Performance Pending Dispute Resolution. Notwithstanding the existence of any dispute over the interpretation of this Agreement, whether or not the same is in arbitration, both parties shall continue to perform their obligations under this Agreement pending resolution of the dispute.
- 15.3 Exclusion for Arbitration. Notwithstanding the foregoing provisions of this Section 15, a breach of this Agreement under Section 13 shall not be deemed a "dispute", subject to arbitration. No party currently in breach of this Agreement may demand arbitration.

16. **Notices.** Any notice under this Agreement must be in writing, and shall be sufficient as notice if (a) delivered personally to the following addressee; or (b) if deposited in the United States Mail, postage prepaid certified mail, return receipt requested, addressed as provided below; or (c) sent via email to the email to the email address provided below; or in all such cases to such other address/number/email address as the receiving party hereafter shall specify by written notice. Notification is deemed effective upon date of delivery if by delivery, on the date of transmission if by email or fax, and upon receipt if by U.S. Mail. Addressees are stated below, and are valid unless changed by written notice to the other party.

If to Seaside:

Spencer Kyle
989 Broadway, Seaside, Oregon 97138
Phone - (503) 738-5511
skyle@cityofseaside.us

If to Gearhart:

Chad Sweet
698 Pacific Way (PO Box 2510) Gearhart, Oregon, 97138
Phone – (503) 738-5501
chadsweet@cityofgearhart.com

17. **Representations and Warranties.** Neither party makes any representations or warranties under or related to this Agreement.
18. **Indemnity.** The parties mutually acknowledge they are responsible for their own actions performed in connection with this Agreement. Each party agrees to indemnify the other party for any and all liability arising out of the indemnifying party's own performance under this Agreement and shall hold harmless, indemnify, and defend the other party and its agents, officers, elected officials, employees, contractors, and volunteers, from and against any and all liability, settlements, loss, costs, and expenses (including attorneys' fees) in connection with any action, suit, claim, or proceeding resulting or allegedly resulting from (1) the party's own employees, agents, officers, contractors, and subcontractors' (collectively, the "Indemnifying Party") acts, omissions, activities or services in the course of any Indemnifying Party's performance of the services; (2) any violation, or alleged violation of a local, state, or federal law by any Indemnifying Party; and/or (3) any claim regarding intellectual property infringement in connection with the services of this Agreement.
19. **Effective Date and Term.** The Effective Date of this Agreement shall be the date of execution and delivery of the Agreement by the last of the parties to sign this

Agreement, as indicated in the signature block at the end of the Agreement. The Effective Date shall be filled in on the first page of this Agreement.

- 20. **Term.** The term of this Agreement shall be ten (10) years from the Effective Date for Water Delivery unless terminated or amended in accordance with the provisions of this Agreement.
- 21. **Amendments.** The parties may amend or supplement this Agreement only by written agreement between them.
- 22. **Entire Agreement.** This Agreement is the entire agreement of the parties on the subject matter hereof.
- 23. **No Third-Party Beneficiaries.** No third-party beneficiaries are intended by this Agreement, No persons other than the parties hereto may enforce this Agreement.
- 24. **Governing Law.** This Agreement shall be governed and construed under the laws of the State of Oregon.

IN WITNESS WHEREOF, the parties have executed this Agreement on the respective dates provided below after signature.

CITY OF GEARHART

CITY OF SEASIDE

By: _____

By: _____

Print name: _____

Print name: _____

Date: _____

Date: _____