ITEM NO. 16

STAFF REPORT

CITY OF OCEANSIDE

DATE: July 6, 2011

TO: Honorable Mayor and City Councilmembers

FROM: Water Utilities Department

SUBJECT: **AMENDMENT 2 TO THE WATER SUPPLY AGREEMENT BETWEEN THE CITY OF OCEANSIDE AND WHELAN LAKE BIRD SANCTUARY, INC. TO EXTEND THE AGREEMENT FOR AN ADDITIONAL ONE YEAR**

SYNOPSIS

Staff and the Utilities Commission recommend that the City Council approve Amendment 2 to the Water Supply Agreement (Exhibit A) between the City of Oceanside and the Whelan Lake Bird Sanctuary, Inc., (Sanctuary), for the provision of recycled water to Whelan Lake from the San Luis Rey Wastewater Treatment Plant at no charge to the Sanctuary, extending the term of the agreement from June 30, 2011 to June 30, 2012, for the term of the amended agreement; and for the remaining term of this water supply agreement, said water will be provided at (i) the City's cost to supply the water, or (ii) at the price which the City would otherwise sell the same water to another buyer, whichever is less, and authorize the City Manager to execute the amendment.

BACKGROUND

The Whelan Lake Bird Sanctuary, which is adjacent to and west of the San Luis Rey Wastewater Treatment Plant, is a 323-acre natural habitat for migratory and indigenous birds (Exhibit B). Since 1958, the City has provided Whelan Lake, which is on the Sanctuary property, with recycled water. Over the course of several agreements, recycled water was provided in-trade for use of storage onsite, for maintenance improvements onsite by the city and for rent payments to the Whelan sisters.

The existing Water Supply Agreement between the City and the Sanctuary expires on June 30, 2031; however, a provision in the agreement to supply recycled water without cost expires on June 30, 2011. For the remaining term of the water supply agreement, recycled water is supposed to be provided at (i) the City's cost to supply the water, or (ii) at the price which the City would otherwise sell the same water to another buyer, whichever is less.

In October of 2010, the City received a request from the Whelan Lake Sanctuary, Inc., to extend the existing water supply agreement for a ten-year period without cost to the Sanctuary (Exhibit C).

ANALYSIS

The original agreement, dated July 9, 1958 and expiring on July 9, 1988, was executed in order to establish storage for 200 acre-feet of reclaimed water produced at the San Luis Rey Wastewater Facility. The Whelan sisters, who were owners and operators of the Whelan Dairy, were allowed to withdraw 100 acre-feet for their dairy operations; i.e., growing pasture and forage for cattle. Payment by the City for use of the storage was the actual 200 Acre-Feet of reclaimed water.

The terms of the agreement were renegotiated, and prior to the expiration date of the original agreement, on January 1, 1973, a new agreement was executed with an expiration date of July 9, 1988. This new agreement contained similar provisions which allowed the city to lease Whelan Lake for the purpose of discharging 100 acre-feet of reclaimed water to the Lake for use in pasturing milk animals and for landscape irrigation. In exchange, the owner of the property, Ellen Douglas Whelan (Whelan), was provided with initial rent of $6,915/year. The agreement also stated that Whelan would have use and control of the lake surface area for development, maintenance and preservation of the same as a refuge for fish, water fowl and wildlife with the right to dedicate the lake as a refuge at a time as Ms. Whelan deemed appropriate.

In 1977, the agreement was amended and the use of the land changed to an agricultural preserve. Amendments included payment of $29,700 from the City for maintenance; repair and improvement work on the roadway providing access to the property and to extend the term of the lease to continue for a ten (10) year period with an automatic renewal of an additional ten (10) year period. Additionally, language changed to allow Whelan to discharge into the Lake and to use any or all other water processed through the reclamation plant that the City had determined it did not need or could not utilize.

In March of 1991, Council took action to terminate all previous agreements and execute a new Agreement with a term of thirty (30) years during which the first ten (10) years, recycled water would be supplied at no cost to the Sanctuary. For the following twenty (20) years, water would be provided at either the City's cost to supply the water, or at the price which the City would otherwise sell the same water to another buyer, whichever is less. In March of 1996, the Sanctuary requested that upon expiration of the ten-year term for free water (March 11, 2001), the City continue for an additional ten years, through 2011, and preferably for a longer period of time, to supply the Sanctuary with recycled water at no cost. In response, Council took action to rescind all previous agreements with Whelan Lake and to execute a new Water Supply Agreement. The new agreement, effective May 17, 2000, expires on May 17, 2030, and allowed for recycled water to be supplied to Whelan Lake at no cost until May of 2006. During the next twenty-five year period, the water would be provided at either the City's cost to supply the water, or at the price which the City would otherwise sell the same water to another buyer, whichever is less.

In 2006, the Sanctuary again requested that the contract be extended at no cost because the City received the following benefits:

- The Lake provides ongoing preservation of a natural habitat for indigenous birds and a nesting and breeding ground for protected birds, such as the least Bell's vireo, the Clapper rail and the least tern;
- The City has ongoing accessibility to a treated water storage basin in emergencies;
- The Sanctuary provides an open-space buffer for the San Luis Rey Wastewater Treatment Plant;
- The Sanctuary land could be used for mandatory environmental mitigation to compensate for construction impacts to wetlands in other areas. The California Department of Fish and Game and the Army Corps of Engineers requires replacement or re-creation of wetlands at a 3:1 ratio, or 3 acres created for every 1 acre impacted. The Sanctuary has areas where wetlands can be created at a minimum 3:1 ratio. The 2006 estimated value of open land in the Whelan Lake Sanctuary is approximately $50,000 per acre, based upon the value of 1 acre of mitigation credit at the nearby Whelan Ranch Mitigation Bank.

Council took action to approve the contract at no cost from June 30, 2006, to June 30, 2011.

In October of 2010, the City received a written request from the Sanctuary for a ten-year extension to the term of the agreement allowing for a free supply of recycled water. During staff's review of the request, it was discovered that in March of 2000, 2.41 acres of land adjacent to the lake were used as mitigation for repair of a sewer line off of Douglas Drive. The mitigation included creation of southern willow scrub and freshwater/alkali marsh habitat. Typically, a mitigation implementation schedule is followed with site preparation and plant installation occurring in the early parts of the project and maintenance, monitoring and technical assessments concluding in the latter parts of the project. In this case, the project should have concluded in 2006 and there should have been a final inspection, removal of non-native plant material that may have grown and then closing out of the project, however, this was not completed.

Staff is currently in the process of hiring a biologist to oversee the closing of the project and the final removal of the non-native plant material. Until such time, the city is obligated to maintain the habitat which, in staff's opinion, includes the supply of recycled water to the habitat.

With the importance of recycled water to the city for both its local water supply development as well as compliance with the Water Conservation Master Plan components, continuing to deliver recycled water to any customer on a long-term no-cost basis does not make good business sense for the utility. The recycled unit at the San Luis Rey Plant sent approximately half of its production to Whelan Lake during 2010; the other half was purchased by the Oceanside Municipal Golf Course.

Staff recommends that the City Council approve Amendment 2 extending the term of the agreement from June 30, 2011 to June 30, 2012, for the provision of recycled water to Whelan Lake from the San Luis Rey Wastewater Treatment Plant at no charge to the Sanctuary.

FISCAL IMPACT

During 2010, the City delivered 112.50 AF (36.65 Million Gallons or 49,008 units) of recycled water to Whelan Lake. The recycled water rate is $1.75/unit and 112.50 AF of water delivered to paying customers would generate $85,764 annually. In July of 2011, the recycled water rate will increase to $1.81/unit and annual revenue from paying customers would generate $88,704.

The increased cost for chemicals, electricity, labor and equipment to treat to tertiary (recycled water standards) and to pump to Whelan Lake is approximately $24,000. If the water were not treated to tertiary standards and was otherwise disposed of through the outfall, the city would incur a cost of approximately $10,000. The increased cost for the additional year to deliver water to Whelan Lake is approximately $14,000.

CITY ATTORNEY'S ANALYSIS

The referenced documents have been reviewed by the City Attorney and approved as to form.

INSURANCE REQUIREMENTS

The City's standard insurance requirements will be met.

COMMISSION OR COMMITTEE REPORT

The Utilities Commission approved staff's recommendation at its scheduled meeting on May 24, 2011.

RECOMMENDATIONS

Staff and the Utilities Commission recommend that the City Council approve Amendment 2 to the Water Supply Agreement (Exhibit A) between the City of Oceanside and the Whelan Lake Bird Sanctuary, Inc., (Sanctuary), for the provision of recycled water to Whelan Lake from the San Luis Rey Wastewater Treatment Plant at no charge to the Sanctuary, extending the term of the agreement from June 30, 2011 to June 30, 2012, for the term of the amended agreement; and for the remaining term of this water supply agreement, said water will be provided at (i) the City's cost to supply the water, or (ii) at the price which the City would otherwise sell the same water to another buyer, whichever is less, and authorize the City Manager to execute the amendment.

PREPARED BY:

Cari Dale
Water Utilities Director

SUBMITTED BY:

Peter A. Weiss
City Manager

REVIEWED BY:

Michelle Skaggs Lawrence, Deputy City Manager

Teri Ferro, Financial Services Director

Exhibit A: Amendment 2

SECOND AMENDMENT TO THE WATER SUPPLY AGREEMENT

BETWEEN THE CITY OF OCEANSIDE AND

THE WHELAN LAKE BIRD SANCTUARY, INC.

The Second Amendment to this AGREEMENT , entered into this _____ day of _____, 2011, by and between the WHELAN LAKE BIRD SANCTUARY, INC., a California Nonprofit Public Benefit Corporation, hereinafter referred to as "SANCTUARY" and the CITY OF OCEANSIDE, a municipal corporation, hereinafter referred to as "CITY".

W I T N E S S E T H:

WHEREAS, CITY and SANCTUARY are parties to that certain Water Supply Agreement dated May 17, 2000, and amended June 28, 2006, (the "Existing Agreement"), pursuant to which CITY furnishes to SANCTUARY reclaimed water from the CITY's San Luis Rey Wastewater Treatment Plant, which water is used to maintain an appropriate water level at the SANCTUARY's Whelan Lake, which Lake is adjacent to the City's San Luis Rey Wastewater Treatment Plant; and .

WHEREAS, the parties desire to amend the Existing Agreement as described below.

NOW, THEREFORE, the parties hereto agree as follows:

1. Section 2 of the Existing Agreement is hereby amended and shall read: "CITY agrees to provide SANCTUARY with effluent discharge as set forth in the CITY's current waste discharge requirements for the San Luis Rey Wastewater Treatment Plant issued by the California Regional Water Quality Control Board. Such water will be of a quantity sufficient to maintain Whelan Lake at an appropriate level. Said water will be provided without cost to SANCTUARY from June 30, 2011 until June 30, 2012. For the remaining term of this water supply agreement, said water will be provided at (i) the City's cost to supply the water, or (ii) at the price which the CITY would otherwise sell the same water to another buyer, whichever is less."

IN WITNESS WHEREOF the parties hereto for themselves, their heirs, executors, administrators, successors, and assigns do hereby agree to the full performance of the covenants herein contained and have caused this Second Amendment to the Agreement to be executed by setting hereunto their signatures this _____ day of _____, 2011.

WHELAN LAKE BIRD SANCTUARY, INC.
SANCTUARY

BY: John Oakley
SIGNATURE

JOHN OAKLEY - PRESIDENT
NAME/TITLE

BY: Knox Bell
SIGNATURE

KNOX Bell, Secretary
NAME/TITLE

CITY OF OCEANSIDE
CITY

BY:_____
CITY MANAGER

_____
ATTEST; CITY CLERK

Bartlett Hamilton, ASST.
APPROVED AS TO FORM:
CITY ATTORNEY

ACKNOWLEDGMENT

State of California
County of San Diego

On June 14, 2011, before me Lisa A Ortiz, Notary Public, personally appeared Knox Bell, who proved to me on the basis of satisfactory evidence to be the person whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his authorized capacity, and that by his signature on the instrument the person, or the entity upon behalf of which the person acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature _____

LISA A. ORTIZ
Commission # 1817711
Notary Public - California
Los Angeles County
My Comm. Expires May 7, 2012

(Seal)

ACKNOWLEDGMENT

State of California
County of SAN DIEGO

On JUNE 20, 2011, before me, PHILIP A. HELMUTH, NOTARY PUBLIC
(here insert name and title of the officer)

personally appeared JOHN OAKLEY, who proved to me on the basis of satisfactory evidence to be the person(~~s~~) whose name(~~s~~) is/~~are~~ subscribed to the within instrument and acknowledged to me that he/~~she/they~~ executed the same in his/~~her/their~~ authorized capacity(~~ies~~), and that by his/~~her/their~~ signature(~~s~~) on the instrument the person(~~s~~), or the entity upon behalf of which the person(~~s~~) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature Philip A. Helmuth

PHILIP A. HELMUTH
Commission # 1937642
Notary Public - California
San Diego County
My Comm. Expires Jun 18, 2015

(Seal)

Whelan Lake Bird Sanctuary

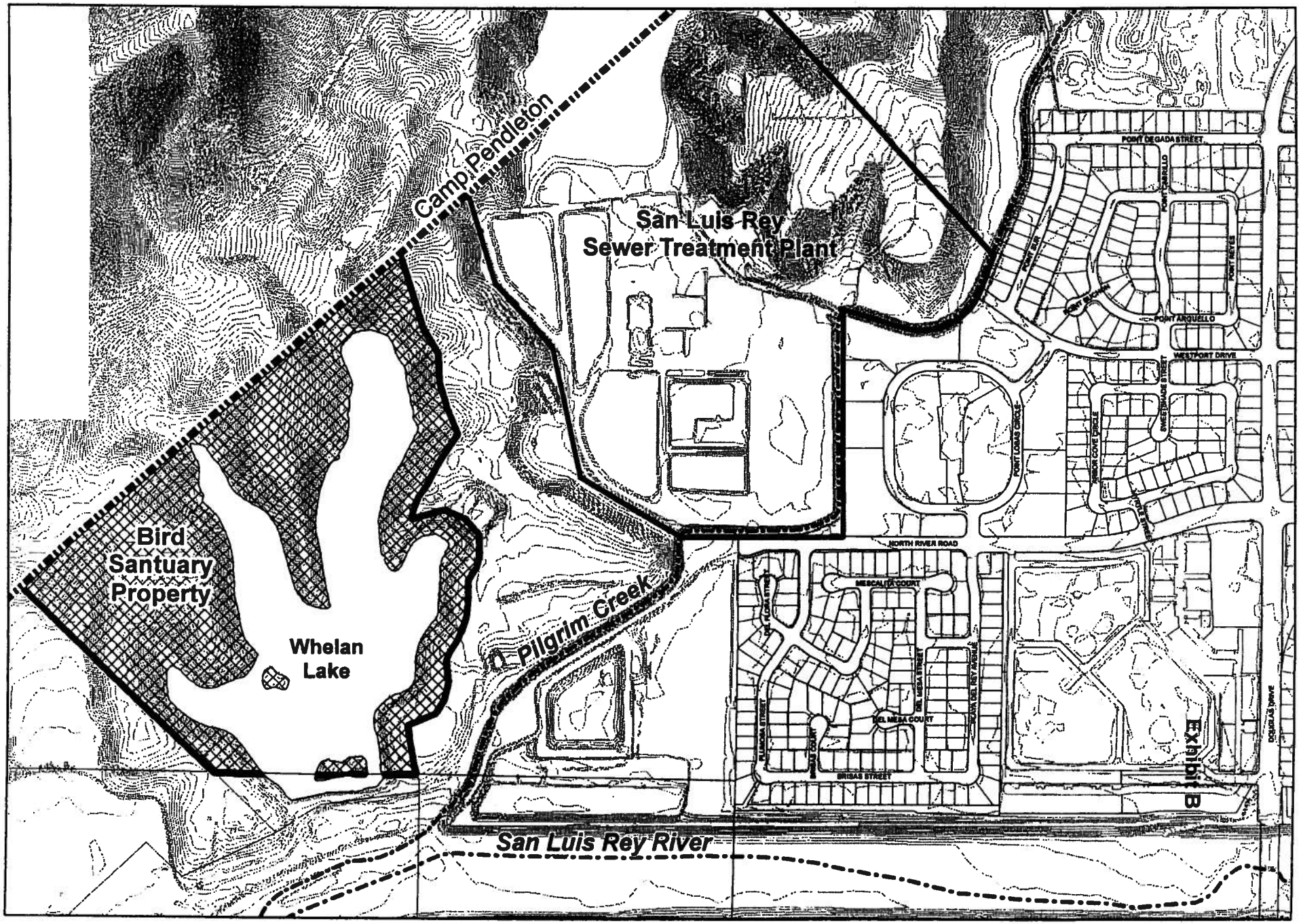

Exhibit B

WATER SUPPLY AGREEMENT BETWEEN THE CITY OF OCEANSIDE AND THE WHELAN LAKE BIRD SANCTUARY, INC.

THIS AGREEMENT, entered into this 17th day of May, 2000, by and between the WHELAN LAKE BIRD SANCTUARY, INC., a California Nonprofit Public Benefit Corporation, hereinafter referred to as "SANCTUARY" and 'the CITY OF OCEANSIDE, a municipal corporation, hereinafter referred to as "CITY".

W I T N E S S E T H:

WHEREAS, SANCTUARY is the owner of that certain real property and inland body of water situated in the City of Oceanside, County of San Diego, State of California, commonly known as Whelan Lake; and

WHEREAS, SANCTUARY desires to have a water supply for the purpose of maintaining the level of water in the Whelan Lake, and is willing to enter into an agreement with CITY to provide such water supply; and

WHEREAS, previous agreements were entered into and certain duties, rights and liabilities were established and promises were made between CITY and Ellen Douglas Whelan, previous owner of said Whelan Lake; and

WHEREAS, the parties hereto recognize the need to renegotiate said previous agreements and acknowledge that this Agreement will supersede and take precedence of all previous agreements in this regard.

NOW, THEREFORE, the parties hereto agree as follows:

1. All previous agreements, whether written or oral, regarding the supply of water to Whelan Lake are hereby rescinded, void and of no further effect. The existing water lease dated January 1, 1973 and amended on January 17, 1977 and March 11, 1991 will be terminated as of the date of this Water Supply Agreement, as to it respects to SANCTUARY's property.

2. CITY agrees to provide SANCTUARY with effluent discharge in conformance with Section 60319 of the State of California Department of Health Services, California Administrative Code, Title 22, Division 4 (Title 22). This is referred to in Section B, Discharge Specifications, Paragraph 7, of Order No. 93-07, "Waste Discharge Requirements for the City of Oceanside, San Luis Rey Wastewater Treatment Plant, San Diego County" issued by the California Regional Water Quality Control Board. Title 22, Section 60319, states, "Reclaimed water used as a source of supply in a landscape impoundment shall be at all times an adequately disinfected, oxidized wastewater." Such water will be of a quantity sufficient to maintain Whelan Lake at an appropriate level. Said water will be provided without cost to SANCTUARY from the date of this Water Supply Agreement until May 2006. During the next TWENTY-FIVE (25) years

said water will be provided at (i) the City's cost to supply the water, or (ii) at the price which the CITY would otherwise sell the same water to another buyer, whichever is less.

4. CITY hereby retains full responsibility for the construction, maintenance, testing and quality assurances required on the water supplied by CITY to said Whelan Lake. The water supplied pursuant to this Agreement will be of the quality heretofore accepted by the California Regional Water Quality Control Board.

5. If the SANCTUARY requests additional treatment of the water delivered to Whelan Lake from the San Luis Rey Wastewater Treatment Plant, or if any regulatory agency requires additional treatment of the delivered water, SANCTUARY will pay the City the difference between the City's cost to treat 1 million gallons of water to the secondary level and the City's cost to further treat one million gallons of water. The cost will be calculated in the current day's dollars.

6. Under no circumstances shall this Agreement, or any provision thereof be held, deemed or construed to grant, permit or allow CITY to create or maintain a public or private nuisance or to transport to or deliver or discharge upon any of SANCTUARY's property, including said Whelan Lake, any raw sewage ~~or untreated sewage effluent~~ which could create an odor or pollution of the air offensive to others in that area and CITY agrees and covenants not to do so.

7. In the event that drought or other circumstances beyond CITY's control should make the above referenced water supply unavailable, the CITY's obligation to provide said water shall be suspended for the duration of said drought or other circumstance.

8. The term of this agreement shall commence on the date first above written and terminate thirty (30) years thereafter.

9. Time is of the essence of all the terms, covenants, conditions and provisions of this Agreement.

10. The interpretation, validity and enforcement of this Agreement shall be governed by and construed under the laws of the State of California.

11. Should any provision herein be found or deemed to be invalid, the Agreement shall be construed as not containing such provision, and all other provisions which are otherwise lawful shall remain in full force and effect, and to this end the provisions of this Agreement are severable.

12. This Agreement comprises the entire integrated understanding between CITY and SANCTUARY concerning the supply of said water to the Whelan Lake.

13. The individuals executing this Agreement represent and warrant that they have the right, power, legal capacity and authority to enter into and to execute this Agreement on behalf of the respective legal entities of the SANCTUARY and the CITY.

IN WITNESS WHEREOF the parties hereto for themselves, their heirs, executors, administrators, successors, and assigns do hereby agree to the full performance of the covenants herein contained and have caused this Agreement to be executed by setting hereunto their signatures this 17th day of May, 2000.

WHELAN LAKE BIRD SANCTUARY, INC.
SANCTUARY

BY: _____
SIGNATURE

Knox Bell, SECRETARY
NAME/TITLE

BY: _____
SIGNATURE

_____
NAME/TITLE

CITY OF OCEANSIDE
CITY

BY: _____
CITY MANAGER

Charles W. Hughes ASSIST.
ATTEST: CITY CLERK

Assist
APPROVED AS TO FORM:
CITY ATTORNEY

STATE OF CALIFORNIA)
) ss.
COUNTY OF SAN DIEGO)

On 9th day of May, 2000 before me, Judi DiBenedetto, Notary Public, personally appeared Knox Bell,

X personally known to me

or

_____ proved to me on the basis of satisfactory evidence

to be the person whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his authorized capacity, and that by his signature on the instrument the person, or the entity upon behalf of which the person acted, executed the instrument.

WITNESS my hand and official seal

Judi DiBenedetto
SIGNATURE OF NOTARY PUBLIC

(S E A L)

JUDI DI BENEDETTO
COMM. #1182505
NOTARY PUBLIC-CALIFORNIA
SAN DIEGO COUNTY
My Commission Expires
MAY 8, 2002

FIRST AMENDMENT TO THE WATER SUPPLY AGREEMENT BETWEEN THE CITY OF OCEANSIDE AND THE WHELAN LAKE BIRD SANCTUARY, INC.

The First Amendment to this AGREEMENT, entered into this 28th day of June, 2006, by and between the WHELAN LAKE BIRD SANCTUARY, INC., a California Nonprofit Public Benefit Corporation, hereinafter referred to as "SANCTUARY" and the CITY OF OCEANSIDE, a municipal corporation, hereinafter referred to as "CITY".

W I T N E S S E T H:

WHEREAS, CITY and SANCTUARY are parties to that certain Water Supply Agreement dated May 17, 2000 (the "Existing Agreement"), pursuant to which CITY furnishes to SANCTUARY reclaimed water from the CITY's San Luis Rey Wastewater Treatment Plant, which water is used to maintain an appropriate water level at the SANCTUARY's Whelan Lake, which Lake is adjacent to the City's San Luis Rey Wastewater Treatment Plant.

WHEREAS, Sections 2 and 6 of the Existing Agreement shall be amended and shall read as described below. A new section 7 shall be added and shall read as described below.

WHEREAS, SANCTUARY has requested a five-year extension for the above stated provision.

WHEREAS, SANCTUARY maintains the Whelan Lake and the surrounding acreage as an open space, wild life sanctuary, all of which is environmentally beneficial to the neighboring areas in the City of Oceanside; so it is beneficial to the CITY for the SANCTUARY to have an adequate supply of reclaimed water to maintain the Whelan Lake in an environmentally sound manner.

NOW, THEREFORE, the parties hereto agree as follows:

1. Section 2 of the Existing Agreement is hereby amended and shall read: "CITY agrees to provide SANCTUARY with effluent discharge as set forth in the CITY's current waste discharge requirements for the San Luis Rey Wastewater Treatment Plant issued by the California Regional Water Quality Control Board. Such water will be of a quantity sufficient to maintain Whelan Lake at an appropriate level. Said water will be provided without cost to SANCTUARY from June 30, 2006 until June 30, 2011. For the remaining term of this water supply agreement, said water will be provided at (i) the City's cost to supply the water, or (ii) at the price which the CITY would otherwise sell the same water to another buyer, whichever is less."

2. Section 6 of the Existing Agreement is hereby amended by deleting the words "or untreated sewage effluent."

3. The Existing Agreement is hereby amended by adding a new section 7 that shall read: "Conditional on CITY delivering treated sewage effluent that meets the CITY's waste discharge requirements issued by the California Regional Water Quality Control Board, SANCTUARY agrees and covenants to maintain said Whelan Lake in a manner that will prevent the creation of a public or private nuisance caused by odor or pollution of the air offensive to others in that area."

4. No extension of term of Existing Agreement. The 25-year period specified at the end of Section 2 of the Existing Agreement, and the 30-year period specified in Section 8 of the Existing Agreement, shall continue to be based upon the original date of the Existing Agreement and shall therefore not be extended. The Existing Agreement, as amended, shall therefore expire on June 30, 2031.

5. Except as otherwise expressly set forth herein, all other terms and provisions of the Existing Agreement shall remain in full force and effect.

IN WITNESS WHEREOF the parties hereto for themselves, their heirs, executors, administrators, successors, and assigns do hereby agree to the full performance of the covenants herein contained and have caused this First Amendment to the Agreement to be executed by setting hereunto their signatures this 28th day of June, 2006.

WHELAN LAKE BIRD SANCTUARY, INC.
SANCTUARY

BY: _____
SIGNATURE

Knox Bell, Director, V.P., Secretary
NAME/TITLE

BY: _____
SIGNATURE

_____
NAME/TITLE

CITY OF OCEANSIDE
CITY

BY: _____
CITY MANAGER

_____
ATTEST: CITY CLERK

_____, ASST.
APPROVED AS TO FORM:
CITY ATTORNEY

STATE OF CALIFORNIA)
) ss.
COUNTY OF SAN DIEGO)

On May 16, 2006 before me, Kay J. Thornburg, a Notary Public, personally appeared KNOX BELL personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS my hand and official seal.

Signature Kay J. Thornburg (Seal)

KAY J. THORNBURG
COMM. #1560270
NOTARY PUBLIC-CALIFORNIA
SAN DIEGO COUNTY
My Commission Expires
MARCH 15, 2009