

## **WATER SUPPLY AGREEMENT**

This Water Supply Agreement (the “Agreement”) is entered into as of the Effective Date defined below between the City of Kyle, Texas, a municipal corporation (“Kyle”) and the City of San Marcos, Texas, a municipal corporation (the “San Marcos”).

### **Recitals**

WHEREAS, San Marcos maintains a reserved raw water capacity that currently exceeds its current and near future water needs; and

WHEREAS, in order to preserve such reserved capacity to meet future long term water demands, San Marcos pays for such excess and unused capacity; and

WHEREAS, Kyle is in need of additional water supplies to meet its current and near term demands and seeks to purchase from San Marcos water from San Marcos’ excess and unused water capacity; and

WHEREAS, without impairing its ability to meet current and near term needs, San Marcos has sufficient raw water capacity to supply the amount of water requested by Kyle; and

WHEREAS, San Marcos’ groundwater production facilities and the San Marcos Surface Water Treatment Plant (the “San Marcos Treatment Plant”) are capable of producing and treating such water; and

WHEREAS, it is understood that San Marcos does not intend and by this Agreement will not be obligated to sell to Kyle any amount of water other than is available from San Marcos’ capacity in excess of what is necessary and available to meet the needs of San Marcos and

WHEREAS, San Marcos and Kyle desire to enter into this Agreement for San Marcos to assist Kyle to meet its water supply needs.

NOW, THEREFORE, in consideration of the foregoing and the following mutual promises, covenants, benefits and agreements contained herein, San Marcos and Kyle agree as follows:

### **Article 1. Supply of Treated Water by San Marcos**

**Section 1.01. Quantity of Water to be Supplied.** San Marcos agrees to provide to Kyle, and Kyle agrees to purchase from the San Marcos, water treated at the San Marcos Treatment Plant (the “Treated Water”) in such varying amounts as needed by Kyle, but not to exceed 560 Acre Feet per year (the “Annual Limit”). San Marcos will make available to Kyle up to 500,000 gallons of Treated Water each day (the “Maximum Daily Quantity”), which may be taken in smaller quantities at Kyle’s sole discretion without reducing the Maximum Daily Quantity available for any subsequent day. The Treated Water shall be delivered in a consistent delivery pressure range, at a flow rate of up to 347 gallons per minute. Higher flow rates may be

allowed by San Marcos, in its sole and absolute discretion, if not detrimental to operations, service pressures or flows in the San Marcos water distribution system. The unit of measurement for all Treated Water delivered hereunder shall be 1,000 gallons of water, U.S. Standard Liquid Measure. San Marcos does not guarantee the delivery of the quantities of water under this paragraph and its obligation to supply water hereunder is subject to Section 4.02 or any other limitations on San Marcos' ability or obligation to supply water as may be provided in this Agreement.

**Section 1.02. Additional Quantities of Water.** Kyle may request to purchase, and San Marcos may supply additional quantities of Treated Water in excess of the Annual Limit and Maximum Quantity at the applicable rate established under this Agreement and, subject to availability and capacity of San Marcos' water distribution facilities as determined by San Marcos, in its sole and absolute discretion. San Marcos, may, but is in no manner obligated to, supply all or any portion of such additional amounts of Treated Water requested.

**Section 1.03. Other Users of San Marcos Water Distribution and Treatment Facilities.** San Marcos will endeavor to ensure that any connections made to the San Marcos Treatment Plant and/or its water distribution facilities to serve other users are equipped and operated in such a way that San Marcos is able to comply with its supply obligations to Kyle under this Agreement. In the event of a circumstance set forth in Section 4.02 which reduces available Treated Water below the Annual Limit or Maximum Daily Quantity, San Marcos shall not reduce Kyle's supply under this Agreement by a percentage greater than reduced for any other wholesale purchaser of water from San Marcos.

**Section 1.04. Point of Delivery.** The Treated Water will be delivered at such point of delivery (the "Point of Delivery") designated in that certain Amended and Restated Water Transportation Agreement entered into between Kyle and San Marcos in 2002 (the "Amended and Restated Water Transportation Agreement"), which, as of the date of this Agreement is designated as a Ground Storage Tank constructed by Kyle at a point approximately 1,000 feet east of the intersection of Interstate Highway 35 and an eight-inch tap into the San Marcos water main at the northwestern perimeter of the Champions Business Park Subdivision along Yarrington Road, Hays County, Texas. The parties may mutually agree in writing to designate a new Point of Delivery or other future points of delivery.

**Section 1.05. Quality of Water to be Supplied.** San Marcos agrees that the Treated Water supplied under this Agreement will be of the same quality as potable water made available by San Marcos within all areas covered by its Certificate of Convenience and Necessity (the "Delivered Water Quality"). Kyle shall be solely responsible for improving or otherwise altering the Delivered Water Quality to meet any inconsistent standards it deems suitable for its needs.

**Section 1.06. Operation and Maintenance of Facilities.** This Agreement is subject to the requirements for the operation and maintenance of all existing facilities, equipment, meters, pipelines and connections necessary for the delivery of water to Kyle under the Amended and Restated Water Transportation Agreement. No new construction or installation of additional facilities, equipment, meters, pipelines or connections by either party shall be mandated by this Agreement, it being the understanding of the parties that such facilities, equipment, pipelines,

meters and connections as provided in the Amended and Restated Water Transportation Agreement are capable of serving the requirements of this Agreement.

## **Article 2. Payments for Treated Water and Other Terms of Supply**

**Section 2.01. Billing Rate.** The initial rate to be paid by Kyle for Treated Water under this Agreement shall be \$4.56 per 1,000 gallons of Treated Water furnished after the Effective Date. Thereafter, the rate for Wholesale Treated Water shall be as set periodically by resolution of the San Marcos City Council.

**Section 2.02. Billing and Payment.** At the end of each calendar month, San Marcos shall determine the quantity of water consumed by Kyle and furnish Kyle with an itemized monthly billing statement showing the quantity of Treated Water supplied in 1,000 gallon increments and the amounts due based upon the applicable billing rate. On or before the 15<sup>th</sup> day following the date of the billing statement, Kyle shall pay to San Marcos the amount due for such previous month as stated therein. After that due date, interest shall accrue on all bills at the maximum rate allowed by law. In the event Kyle fails to pay any charges when due and payable, San Marcos may give written notice of such delinquency to Kyle. If all bills due and unpaid, including interest thereon, are not paid within 45 days after delivery of such notice, then Kyle agrees that San Marcos shall be authorized, at its option, to institute suit to collect any amounts due and unpaid, together with interest thereon and reasonable attorneys' fees and further agrees that San Marcos may, at its option, discontinue delivering water covered by this Agreement to Kyle until all amounts due and unpaid are paid in full with interest thereon as herein specified.

**Section 2.03. Minimum Monthly Payment Amount.** By entering into this Agreement, San Marcos will incur maintenance, administrative and operational expenses necessary to comply with and manage its obligations under this Agreement. In order to offset such expense, Kyle will pay to San Marcos a minimum monthly amount of \$150.00, regardless of the actual amount of Treated Water delivered to Kyle each month.

**Section 2.04. Kyle's Collection of Fees.** Kyle agrees to establish, charge and collect from its water customer's rates, fees and charges sufficient to pay all payments under this Agreement.

**Section 2.05. Reduction or Cessation of Supply of Treated Water.** Except in cases of emergency, when notice will be given as soon as practicable, San Marcos will notify Kyle 30 days prior to undertaking scheduled maintenance of the San Marcos Treatment Plant or other water treatment and water distribution facilities that will require a reduction or cessation of supply of Treated Water to Kyle. San Marcos will notify Kyle as soon as possible of any unscheduled maintenance or failure of the San Marcos Treatment Plant or other water treatment or water distribution facilities that has caused or will cause a reduction or cessation of supply of Treated Water to Kyle. San Marcos will notify Kyle at least 90 days prior to any other reduction or cessation by San Marcos of supply of Treated Water to Kyle that is authorized by this Agreement, unless the reduction or cessation is the result of a circumstance under Section 4.02 below, or is based upon a default by Kyle.

### **Article 3. Term, Default and Termination**

**Section 3.01. Term.** The initial term of this Agreement is five years (the “Initial Term”) commencing on the Effective Date. This Agreement may be renewed or extended for additional renewal terms with the mutual consent of the parties. If neither party sends written notice to the other of its intent to renew the Agreement at least 90 days before the expiration of the Initial Term, then this Agreement shall terminate automatically on the last day of the Initial Term.

**Section 3.02. Default; Termination.** The failure or refusal of a party to comply with any term, provision, or covenant of this Agreement will constitute a default by that party. This Agreement may be terminated by either party upon a default by the other party. In the event of a default by a party, the other party will give the defaulting party written notice of default, and, if the defaulting party fails to cure or remedy the default within 30 days following receipt of notice, this Agreement will terminate immediately without further notice to the defaulting party. San Marcos may suspend the supply of Treated Water under this Agreement without terminating this Agreement if Kyle fails to pay any amount billed by San Marcos under Section 2.02 of this Agreement, unless Kyle has notified San Marcos in writing of a bona fide dispute concerning the bill prior to the deadline in San Marcos’ billing notice.

### **Article 4. Miscellaneous Provisions**

**Section 4.01. Regulatory Compliance.** The obligations of Kyle and the San Marcos under this Agreement are subject to all applicable federal, state and local laws and regulations currently in effect and as amended or modified from time to time (the “Laws and Regulations”). San Marcos is responsible for compliance with the Laws and Regulations that apply to the San Marcos Treatment Plant and its facilities and portion of the Water Transmission Line on its property, in its easements or within its territorial limits. Kyle is responsible for compliance with the Laws and Regulations that apply to its facilities and portion of the Water Transmission Line on its property, in its easements or within its territorial limits.

**Section 4.02. Force Majeure.** If San Marcos should be prevented, wholly or in part, from transporting and delivering water to Kyle under this Agreement by reason of an act of God, unavoidable accident, acts of the public enemy, strikes, floods, fires, governmental restraint, breaks in San Marcos’ pipelines or storage facilities, damage to the San Marcos Treatment Plant or other treatment facilities or water distribution facilities, shortages in water supply to San Marcos, or reduction, interruption or loss of sources of water available to San Marcos relied upon to supply water under this Agreement, or for any other cause beyond San Marcos’ reasonable control, then the obligation of San Marcos to deliver water to Kyle shall be discontinued during the continuance of such force majeure. Force Majeure does not include any act which is the fault or caused by the negligence of San Marcos and in the exercise of reasonable caution, could have been avoided or mitigated. No damages shall be recoverable from San Marcos by reason of the suspension of the transportation and delivery of Treated Water due to any of the causes above mentioned. San Marcos shall notify Kyle promptly if such delivery of water is suspended and shall use due diligence to restore service at the earliest practicable date. Under no circumstances shall San Marcos be required, for the purpose of meeting the supply obligations under this Agreement, to secure water from sources other than currently available

and contracted for by San Marcos.

**Section 4.03. Independent Contractors.** Nothing in this Agreement will be construed as creating any form of partnership or joint venture relationship between the parties. The parties are independent contractors with respect to each other.

**Section 4.04. Assignment.** This Agreement will inure to the benefit of, and be binding upon, the successors and permitted assigns of the parties. Except as provided elsewhere herein, neither party may assign any of its rights or duties under this Agreement without the written consent of the other party.

**Section 4.05. No Transfer of Rights and Third Parties.** In entering into this Agreement, it is understood and agreed by Kyle that San Marcos does not grant to Kyle and Kyle does not claim any right, title or interest in any contracts, water rights or reservations, or government approvals or certificates relating to water, water rights, water reservations or other water interests procured or owned by San Marcos. This Agreement shall be for the sole and exclusive benefit of San Marcos and Kyle and shall not be construed to confer any benefit or right upon any third party.

**Section 4.06. Amendments.** This Agreement may be amended only through a written amendment executed by the parties.

**Section 4.07. Governing Law and Venue.** This Agreement is governed by the laws of the State of Texas. Venue for any dispute shall be in the appropriate state courts of Hays County, Texas.

**Section 4.08. Severability.** If any material portion of this Agreement is found by a court to be invalid or unenforceable for any reason, either Party shall have the option of terminating this Agreement on a going forward basis.

**Section 4.09. Remedies; No Waivers.** It is not intended hereby to specify, and this Agreement shall not be considered as specifying, an exclusive remedy for any default, but all such other remedies existing at law or in equity may be availed of by either party and shall be cumulative. No waiver or waivers of any breach or default, or any breaches or defaults, made by a party hereto of any term, covenant, condition or liability hereunder or the performance by the other party of any duty or obligation hereunder shall be deemed or construed to be a waiver of subsequent breaches or defaults of any kind.

**Section 4.10. Notices.** All notices given under this Agreement will be delivered personally, by certified mail, return receipt requested, or by confirmed fax transmission, by overnight mail or by courier, to the following address for the respective party:

To San Marcos:      San Marcos City Manager  
City of San Marcos  
630 East Hopkins Street  
San Marcos, TX 78666  
Fax No. (512) 396-4656

To Kyle:              Kyle City Manager  
City of Kyle  
100 West Center Street  
Kyle, Texas 78640  
Fax: (512) 262-3800

Executed to be effective the date of the last signature below (the “Effective Date”).

City of San Marcos:

City of Kyle:

By: \_\_\_\_\_  
Jared Miller, City Manager

By: \_\_\_\_\_  
Scott Sellers, City Manager

Date: \_\_\_\_\_

Date: \_\_\_\_\_

Attest:

Attest:

\_\_\_\_\_  
Jamie Lee Case, City Clerk

\_\_\_\_\_  
Jennifer A. Vetrano, City Secretary