

SECOND AMENDMENT
TO
AGREEMENT BY CITY OF WILLITS
FOR DISPOSAL OF SEWAGE FROM
BROOKTRAILS RESORT IMPROVEMENT DISTRICT

THIS AMENDMENT TO AGREEMENT made this 11 day of Sept., 1975, between the CITY OF WILLITS, a municipal corporation, herein called "City" and BROOKTRAILS RESORT IMPROVEMENT DISTRICT, a public corporation, herein called "District", both in Mendocino County, California,

W I T N E S S E T H:

That this agreement is predicated on the following facts:

a. On September 11, 1967, the parties hereto entered into a written agreement entitled Agreement by City of Willits for Disposal of Sewage From Brooktrails Resort Improvement District, herein called Agreement;

b. On April 17, 1970, the parties hereto entered into a further written agreement entitled First Amendment to Agreement by City of Willits for Disposal of Sewage From Brooktrails Resort Improvement District, herein called Amendment;

c. The Division of Water Quality of the State Water Resources Control Board has ordered the City to undertake the construction of improvements to its sewage treatment plant which will improve the quality of the effluent emanating therefrom;

d. The total estimated cost of said improvements to provide 840,000 gallons per day dry weather flow capacity, as determined by Brown & Caldwell, engineers for the City, is \$2,487,656, of which \$2,165,815 will be provided by the Environmental Protection Agency and the State of California, and the balance of \$321,840 is for improvements to the City sewage treatment plant and land disposal facilities;

e. The District wishes to purchase capacity in said sewage treatment plant, of 160,000 gallons per day average daily dry weather flow which is one quarter of the dry weather flow capacity;

f. Average daily dry weather flow shall be the average daily dry weather flow for the period commencing May 1 and ending September 30 of each year;

g. The public interest and general welfare will be served by clarifying the manner of apportioning and payment of costs between the City and the District.

NOW, THEREFORE, IT IS DETERMINED and AGREED, as follows:

1. The Agreement be, and is hereby, amended by deleting sections 5, 7, 8, 10, 11 and 12 therefrom.

2. The Amendment be, and is hereby, repealed as of the effective date of this second amendment.

3. City Ownership. The present sanitary sewage treatment and disposal facilities, and all future improvements thereto, shall be, become and remain the exclusive property of the City, and the City shall have sole jurisdiction over its operation and possession. Any liability for malpractice in the treatment and disposal of wastewater shall not pass to District in the event that the quality and quantity of wastewater received from District is within the specifications as hereinbefore stated or hereafter agreed to.

4. District Capacity. The District shall have the exclusive right to dispose of sanitary sewage in said plant up to 160,000 gallons per day, dry weather average daily flow, which is estimated to constitute 25% of the capacity therein.

5. Additional District Capacity. The District may purchase additional capacity in said plant at a replacement cost which shall be the portion of \$2,814,876 times an inflation factor that the amount of dry weather average daily flow so acquired bears to 750,000 gallons average daily dry weather flow, provided that the City, by resolution adopted by its City Council prior thereto, shall have

determined there is reason to believe that the capacity to be sold is surplus City capacity. The inflation factor shall be the ratio of the 1913 ENR Construction Cost Index for San Francisco prevailing at the time of purchase of additional capacity to 2800.

6. Capacity Improvements. The cost of improvements to the City sewage treatment plant which will result in increasing its capacity beyond 750,000 gallons per day average dry weather flow shall be charged to and paid for by the party who will become entitled thereto. Costs of increase in capacity for both parties shall be prorated according to capacity needed and assigned to each. Capacity assigned shall be in gallons average daily dry weather flow, as peak and winter conditions will be anticipated in design. No additional capacity shall be assigned by the City to the District without the approval of the District, expressed by supplement or amendment to this agreement.

7. Overuse by District. In the event that sewage flow from District shall so increase as to exceed its capacity allotment, the City Council may elect to require that it either purchase additional capacity in the existing plant, or the City may undertake to construct additional improvements which will provide such capacity. During the interim, the City shall have the right to collect an additional capacity charge per year from the District which shall be determined by multiplying that part of the then cost of the treatment plant that the average capacity used bears to its then total capacity (multiplicand) by .07264891 (being the annual factor for 10 years amortized at 6% per annum) (multiplier). The then value of the treatment plant shall be \$2,814,876 times an inflation factor as defined in Section 5 plus costs of any improvements thereto hereafter made, whether to capacity over 750,000 gallons per day average dry weather flow or to quality of treatment.

8. Quality Improvements. The parties acknowledge that the City is currently obligated to make improvements to the City sewage treatment plant which will result in improving the quality of its

efficient or meet other requirements of State and Federal agencies, commissions and departments having jurisdiction thereover. The local share costs of such improvements to the District for 100,000 gallons per day average dry weather flow capacity is \$111,333.00.

The District agrees to pay \$100,000 within 90 days of acceptance by both City and District of this second amendment to the agreement and the remaining \$11,333 within 60 days of the time the City accepts a construction bid to increase average dry weather flow capacity beyond 640,000 gallons per day to replace all or a portion of the 110,000 gallons per day of the City's future capacity assigned to the District.

8A. Future Quality Improvements. The parties acknowledge that the City may be required to make improvements to the City sewage treatment plant in the future to meet more stringent effluent quality requirements by State and/or Federal agencies than are currently in effect. The costs of such improvements shall be apportioned between the parties in the ratio of their then respective dry weather flow treatment capacities in the plant.

9. City Control as to Improvements. The City shall have the right to employ engineers of their selection to design and provide improvements to the City sewage treatment plant, both as to capacity and quality, provided, however, that such engineers shall be experienced and recognized engineers as to such work. All such work shall be designed as to produce an efficient and economical cost, both as to construction and as to maintenance and operation, and not constitute overdesign.

10. Plan Review by District. The Board of Directors of District, with the advice of its engineers, shall have the right to review, make suggestions and approve for their adequacy, plans, specifications and cost estimates prior to their approval by the City Council of the City, provided, however, that its approval shall not be unreasonably withheld.

11. District Inspection. The Board of Directors of the District, through its engineering representatives, shall have the right at all reasonable business hours, to inspect the City sewage treatment plant, and also any improvements during their construction.

12. Capital Costs. The City shall establish and maintain accurate accounts of all capital costs as to its sewage treatment plant, separate and distinct from all other accounts of the City, in conformance with good municipal accounting practices. The Board of Directors of the District, through its representatives, shall have the right to examine and make copies of said accounts at all reasonable business hours.

13. Operation Costs. The City shall establish and maintain books of account of all costs of administration, maintenance, operation and repair of the City sewage treatment plant, separate and distinct from all other accounts of the City, and distinct from capital improvements thereto, in conformity with good municipal accounting practices. The Board of Directors of the District, through its representatives, shall have the right to examine and make copies of said accounts at all reasonable business hours.

14. Annual Report. The City shall annually cause to be made an audit of its accounts for the previous fiscal year which shall separately treat therein the accounts relating to the City sewage treatment plant. On or before October 1 of each year, the City shall deliver to the District's Manager a copy of the parts thereof relating to its sewage treatment plant.

15. Measuring Facilities. The City shall provide a measuring weir and metering recording facilities, on the District outfall line at the City boundary, from which the District flow may be ascertained and recorded. The City shall be responsible for maintaining the records. The City shall also provide similar facilities to keep records as to its gross flow. The District may inspect flow records at all reasonable business hours. Title to sewer facilities from the

the collecting station to discharge on East Commercial Street, consisting of 14" sewer trunk lines and manholes and running from station approximately 1+00 to 20+50 as shown on Water and Sewer Construction map dated August 1, 1986 and approved by the County Engineer. Said lines are hereby dedicated by the District to the City of Millis and the City of Millis hereby accepts said facilities as part of the City's sewerage system.

16. Proportioning Operating Costs. All costs of administration, maintenance, operation and repair of the City sewage treatment plant shall be apportioned annually by the City according to the ratio of flow of the plant to the local flow entering the treatment plant. Annually the City shall file with the District's Manager a copy of the City's budget which concerns the plant, and a statement of the amount of the District's share of the estimated costs of administration, maintenance, operation and repair for the forthcoming fiscal year. An sufficient time for District to budget and provide for payment of same. For the purpose of estimating such costs the flow ratio established for the preceding fiscal year shall be used. In each subsequent fiscal year, the City shall recompute the appropriate annual flow ratio as established by the flow records for said year and provide credit the District with any underage or overage of the estimate costs.

17. Replacement Costs. All costs of replacing plant equipment, machinery or facilities resulting from breakage or obsolescence shall be distributed in the ratio of average dry weather flow capacity as between the City and District. All replacement costs thereof for pollution abatement shall also be apportioned in the ratio of average dry weather flow capacity. Replacement costs may be paid from the District's Capital Recovery Fund. Said apportionment of costs between City and District shall be District's proportionate share of average dry weather flow capacity, less any governmental subventions.

18. Auxiliary Revenues. All revenues derived by the City from the sale of water or other by-products of the City sewage treatment plant shall be credited to costs of maintenance before proration thereof between the parties hereto.

19. Method of Raising Funds. Each party shall have reserved to it the right to determine and utilize the method by which it raises its share of any funds under this second amendment to the agreement. Funds raised from taxes shall be paid by the District to the City semiannually on or before January 2 and on or before July 2 of each year. District's proportionate share of charges for operation and maintenance shall be paid by District to the City monthly.

20. Wastewater Capital Recovery Fund. The District agrees to establish and maintain a Wastewater Capital Recovery Fund (WCRF) for its proportionate share of plant capacity in accordance with regulations and guidelines of the California State Water Resources Control Board and the Environmental Protection Agency. For purposes of computing WCRF requirements, the District's WCRF requirement is one quarter of 25% sum of construction cost of the treatment plant improvements plus the value of the currently existing plant incorporated in the improved plant. The total cost is \$2,071,156 plus \$280,000 which is \$2,351,156. One quarter of this sum is \$587,783. Subject to approval of the California State Water Resources Control Board, the District agrees to deposit each year one sixteenth (1/16) of \$58,773, which is 10% percent of the District allocated cost. The District is entitled to make bond principal payments for treatment plant construction from the WCRF and also to disburse amounts from the WCRF for replacement or preservation of treatment plant facilities or for expansion and improvement of treatment works except pipelines smaller than 12 inches in diameter and appurtenances thereof. After the minimum balance is reached, the District agrees to maintain its WCRF balance at no greater than the ten percent minimum requirement of \$58,773 over the 12 year life of the treatment plant, or after disbursements for treatment plant facilities replacement or expansion, the District

agrees to restore the minimum NCRF balance to \$55,778 at the rate of, at least one sixteenth (1/16) of \$58,775 per year less disallowances allowed by regulations of the State Water Resources Control Board and the Environmental Protection Agency. The District NCRF shall not apply to any additional which the City of Millite may have to raise in order to insure 100,000 gallons per day average dry weather flow to the District.

19. Industrial Cost Recovery. Under EPA regulations, a wastewater user recover from industrial users an amount equal to the portion of the Federal grant allocations to industrial users. The District agrees to make payments to Millite to meet these requirements in the event that any industrial user connects to the District sewer system. The minimum Federal grant cost allocated to an industrial user connected to the District system shall be 75 percent of the District's proportionate share of \$1,487,656 times the ratio which dry weather flow capacity allocated to the industrial plant bears to the District's proportionate share of 100,000 gallons per day total capacity. Engineers of the City of Millite may also compute and include in the allocated industrial plant cost additional industrial storage treatment size of 0.2 megawatt solids or other waste characteristics as the District with regulations and guidelines of the State Water Resources Control Board and the Environmental Protection Agency. One thirtieth (1/30) of the allocated Federal grant cost for each industry connected to the District sewer system shall be paid by the District to the City beginning with the year of their industrial connection and extending to the 10 year period at which the City's responsibility for industrial cost recovery expires to the Federal government ends, whichever period is less.

20. Responsibility for Plant In the event that the District shall have abandoned its use of the City sewage treatment plant it shall forfeit its interest therein and the plant shall remain available for use by the City.

21. Replacement by City. The City may relocate its sewage treatment plant and abandon the use of its present plant by reason of orders of State or Federal agencies, commissions and departments having jurisdiction thereover, or by reason of predominating reasons of economy or ecology. In such event the former plant and property shall be sold for its highest and best use and price and the moneys realized shall be apportioned between the parties and applied on account of the costs of the new plant according to their capacity interests. The District may elect to have a capacity in the new plant determined by it. In such event the moneys so realized shall be prorated as a credit per its former proportion of capacity, and the balance of costs shall be prorated in proportion to the ratio of capacity in the new plant.

22. City Regulations. The District shall abide by all rules and regulations of the City concerning the type and condition of the sewage permitted to be discharged to the sewers of the City and the District shall regulate and prohibit the residents of the District from depositing in said sewerage system any sewage or matter which, by the rules and regulations of the City, the people of said City are denied the right to deposit in its sewerage system.

23. Breach of Covenants. In case of a breach or alleged breach on the part of either party in the performance of any of its obligations hereunder, not less than thirty (30) days notice of said breach shall be given to it in writing by the other party, delivered to the office of Manager thereof, or mailed to said office registered mail, postage prepaid, and said party shall have thirty (30) days from the date of said delivery or registration of said mail to cure said breach. However, none of the rights or privileges granted to either party shall, in any event, be forfeited unless it shall be so ordered by a court of competent jurisdiction.

24. Delinquent Payments. In the event that the District shall fail to make any payments herein provided within thirty (30) days

from the due date thereof, interest at the rate of six percent (6%) per annum shall accrue thereon from the due date thereof until paid. In the event the District shall fail to conform its operation within said thirty (30) days or to pay the City any amount provided herein within six (6) months from the due date thereof, the City, at its election, may file and prosecute to judgment a suit to recover, or in mandate, or in mandatory or prohibitory injunction, or other legal or equitable remedy. Recoverable costs shall include court costs and a reasonable attorney's fee to be fixed by the court in the event of suit.

19. Sanitary Obligation. Each party shall maintain and operate its sanitary sewerage facilities in full conformity with all State and local sanitary laws, rules and regulations, and in an efficient and economical manner. In the event of breach by either party, following notice by the other to it in the manner provided in Section 23, such injured party may enforce conformance by court action.

20. Remedies. For the breach of any duty hereunder by either party, the other or its successor, or any taxpayer thereon for himself or in a representative capacity on behalf of all other taxpayers of either party, or any bondholder of any of the sewer bonds of either party for himself or in a representative capacity on behalf of all such bondholders, shall have the following remedies against the other:

(i) Accounting. By action in law or suit in equity, to require such party to account as a trustee of an express trust;

(ii) Injunction. By such action or suit, to obtain any writ or things which may be unlawful or in violation of any provision hereof; and

(iii) Mandamus. By such action, suit or proceeding, to enforce the rights of such party hereunder, and to require and compel such party to perform and carry out its duties and obligations under the law and its covenants agreements herein.

21. Nature of Remedies. As to the remedies of either party aggrieved hereunder:

(i) Cumulative. No remedy conferred hereby or by the law is intended to be exclusive of any other remedy, and each such remedy is cumulative and in addition to every other remedy and may be exercised without exhausting and without regard to any other remedy conferred hereby or by the law.

(ii) Waiver. No waiver of any default or breach of duty or contract shall extend to or shall affect any subsequent default or breach of duty or contract or shall impair any rights or remedies herein.

(iii) Delays. No delay or omission to exercise any right or power accruing upon any default shall impair any such right or power or shall be construed to be a waiver of any such default or acquiescence thereof.

(iv) Enforcement. Every substantive right and every remedy conferred may be enforced and exercised from time to time and as often as may be deemed expedient.

(v) Status Quo. In case any suit, action or proceeding to enforce any right or exercise any remedy shall be brought or taken and then discontinued or abandoned, or shall be determined adversely, then, and in every such case, said Entity shall be restored to its former position and rights and remedies as if no such suit, action or proceedings had been brought or taken.

28. Arbitration. In case any dispute, difference or controversy should arise between the parties hereto regarding the construction, meaning or effect of this agreement or any of its provisions, or the rights, privileges, duties or obligations of the parties hereto or either of them, the parties hereto may agree that such dispute, difference or controversy shall be arbitrated and decided by two arbitrators, one of whom shall be selected by the Council of the City, and the other by the Board of the District; provided, however, that if the two arbitrators are not able to agree, they shall appoint a third arbitrator.

(i) Arbitrators - Qualifications. The persons appointed shall be trained and qualified in the matter to be passed upon by them. If the matters principally involve engineering, the arbitrators shall be Registered Civil Engineers. If they involve accounting, the persons appointed shall be Certified Public Accountants. If the matters involve law they shall be passed upon by duly Licensed Attorneys. Where problems in controversy are complex in nature, to the extent practicable they shall be divided and the separate matters assigned to persons qualified.

(ii) Id. - Appointment, Vacancies. The arbitrators appointed shall be notified in writing as well as the parties hereto, by the appointing party. If an arbitrator shall refuse to act or shall resign, another shall be appointed in his place by the party making the original appointment. If there is a failure or refusal to appoint an arbitrator for thirty (30) days after written demand, a party or arbitrator may apply to the Superior Court for Mendocino County and said Court shall designate and appoint such arbitrator or arbitrators.

(iii) Hearings. All arbitrators appointed shall sit at any hearing. The arbitrators may require any person to attend before them as a witness and in a proper case to bring with him any book or written instrument. The fees for such attendance shall be the same as the fees for witnesses in civil actions at law. The arbitrators shall have power to regulate the taking of depositions, to appoint a time and place for hearing, to adjourn from time to time, to administer oaths to witnesses, to hear the allegations and evidence of the parties and to make an award thereon.

(iv) Subpoenas. Subpoenas shall issue in the name of the arbitrators or a majority of them, and shall be signed by the arbitrators or a majority thereof and shall be directed to said person and shall be served in the same manner as subpoenas to testify before a court of record in this State. If any person or persons so summoned to testify shall refuse or neglect to obey said subpoenas, upon petition, said Superior Court may compel the attendance of such person or persons before said arbitrators, or punish said person or persons for contempt in the same manner now provided for the attendance of witnesses or the punishment of them in the courts of this State.

(v) Depositions. Upon petition approved by the arbitrators or a majority of them, said Superior Court may direct the taking of depositions to be used as evidence before the arbitrators, in the same manner and for the same reasons as provided by law for the taking of depositions in suits or proceedings pending in said Superior Court.

(vi) Award. The award shall be in writing, signed by at least two arbitrators, and acknowledged or approved in like manner as a deed for the conveyance of real property, and delivered to the Manager of each of the parties.

(vii) Id. - Vacation. On application by either party, said Superior Court may make an order vacating the award for fraud, misconduct, acts in excess of power, or other grounds provided by law. A rehearing may be directed.

(viii) Modification. On application of either party, said Superior Court may make an order modifying or correcting an award, because there was an evident mistake, the award was for a material matter not submitted, is in imperfect form, or other grounds provided by law.

(ix) Order Confirming Award. At any time within three months after the award is made, unless the parties shall consent that time in writing, and if said award shall not be accepted in writing by the other party, the other party may apply to the Superior Court for an order confirming the award. Said Court shall grant said order unless the award is vacated, modified or corrected as herein provided by law.

(x) Id. - Form. Upon the granting of an order confirming, modifying or correcting an award, judgment may be entered in conformity therewith in said Court. The party applying for the order shall attach to such application copies of this agreement, the selection or appointment of the arbitrators and the award, if any, each written extension of time, if any, within which to make the award, and the award. The judgment when rendered by the Court shall be docketed as if it were rendered in an action.

(iii) id. - Effect. The judgment so entered shall have the same force and effect, in all respects, as, and be subject to all of the provisions of law relating to, a judgment in an action, and it may be enforced, as if it had been rendered in an action in the Court in which it is entered.

(iv) Appeal. An appeal may be taken from an order confirming, modifying, correcting, or vacating an award or from a judgment entered upon an award, as from an order or judgment in an action.

(v) Law Applicable. Title IX (commencing with Sec. 1240) of Part III of the Code of Civil Procedure, as now or hereafter provided, shall apply.

29. Incorporation. In case the District should become incorporated, or shall merge or consolidate or reorganize or annex into any other public or municipal corporation, then such corporation shall succeed to all the rights, privileges, duties and obligations devolving upon the District under the terms of this agreement, so far as the same may be done under law; provided, nothing herein contained shall be deemed to absolve the District from continuing payment of its share of the cost of maintaining and operating and other costs of the City hereunder, so long as the City sewer facilities shall be used by the District; provided, further, that in the event of such change in character, as aforesaid, nothing herein will be deemed to prevent the parties hereto from entering into a supplementary agreement.

30. Duplicate Agreement. This agreement shall be executed in duplicate.

31. Effective Date. The provisions of this agreement relating to the costs of administration, maintenance, operation, repair and replacements shall become effective upon recordation or notice of completion of such improvements by City and the installation of the measuring devices by City, and shall become effective in all other regards except as otherwise herein provided, as of its date.

32. Agreement Indefeasible. The term of this agreement shall be indefinite. In the event the parties shall mutually agree to a termination of this agreement, their interests shall be preserved from liquidation of all of the plant and property on the account of

funds realized.

IN WITNESS WHEREOF the parties hereto have caused these presents to be executed by their respective officers, by resolution of the City Council of the City and the Board of Directors of the District, the day and year above written.

CITY OF MILLIKEN

BROOKHAVEN RESORT IMPROVEMENT DISTRICT

By: *Walter J. Miller*
Mayor

By: *Walter E. Miller*
President

ATTESTED:

ATTESTED:

Walter E. Miller
City Clerk

Walter E. Miller
Secretary

APPROVED AS TO FORM:

APPROVED AS TO FORM:

MERLE P. ORCHARD
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