

**INTERGOVERNMENTAL AGREEMENT
BETWEEN THE CITIES OF DAYTON AND LAFAYETTE, OREGON
CONCERNING THE FINANCING, OWNERSHIP AND OPERATION
OF THE JOINT WATER PROJECT IMPROVEMENTS**

A. DESIGNATION OF JOINT, SEPARATE, AND JOINTLY UTILIZED ASSETS

B. FINANCING AGREEMENT (LOAN REPAYMENT)
(INCLUDING PLEDGE OF SECURITY OF INTEREST IN EASEMENT BY CITY OF
LAFAYETTE TO CITY OF DAYTON)

C. WATER PROJECT MAINTENANCE AND OPERATING AGREEMENT

RECITALS

1. In August 1995, the Cities of Dayton and Lafayette, Oregon (“Cities”), entered into an Intergovernmental Agreement (“Original IGA”) for the purpose of locating a site to jointly develop well fields and transmission mains to distribute water to each city, construct a water treatment plant and related improvements, and to conduct engineering, design and construction of the wells, plant, and related improvements (“the Project”).
2. In January 1997, the Cities modified the Original IGA with Addendum No. 1, intending to divide into equal parts the 40-acre easement on the Brill property, to be held in common by assigning the “front” 20-acre parcel to the City of Dayton and the “back” 20-acre parcel to the City of Lafayette (Exhibit B, Addendum No. 1), as originally anticipated by Section 7 of the Original IGA, as well as agreeing to share equally in the cost of:
 - a. Constructing a temporary or permanent road to the front parcel in order to construct a test well;
 - b. Constructing, maintaining, and operating a permanent roadway the length of the transmission main on both the front and back parcels;
 - c. All costs of constructing, operating and maintaining the first well that are directly related to its performance as a test well.
3. On August 27, 1998, a Settlement was reached between the Cities and the Brills which superseded the original 40-acre easement, referred to in section 2 above. The Settlement conveyed a perpetual easement, to the City of Dayton, for a one acre well site, a 20 foot wide Underground Utility Easement, and a 20 foot wide Roadway and Underground Utility Easement. The Cities shared the cost of this easement. The test well was constructed with the Cities agreeing to share the costs and subsequently became Well No. 1. Later, the city of Dayton shared the cost of Lafayette’s first well, Well No. 4, to offset Lafayette’s expenditures on Well No. 1.
4. In April 2004, the Cities modified the Original IGA with Addendum No. 2, which included a Designation of Joint, Separate, and Jointly Utilized Capital Assets (“Project Assets”), and a Joint Water Project Maintenance and Operating Agreement, as required by the original IGA. Addendum No. 2 also included a Financing Agreement, entered into by the Cities to address the following:

To fund the construction of the Project as agreed in the IGA, the City of Dayton secured a loan from the state of Oregon in the amount of \$3,983,000.00 and the City of Lafayette issued bonds in the amount of \$3,275,000. Because the City of Dayton has increased its loan obligation in an amount up to \$600,000.00 to cover an additional portion of the project costs, the City of Lafayette has agreed to repay such increased loan amount to the City of Dayton so that each city will ultimately contribute equally to the engineering, design and construction of the joint capital assets of the Project.

As security for the Financing Agreement, the City of Lafayette was required to pledge its interest in the easement for Well No. 2 to the City of Dayton. Due to an error in recording the easement for Well Site No. 2, which has now been remedied, this requirement was not timely fulfilled. The City of Lafayette remains current on all other aspects of the Financing Agreement, and now, having been properly recorded, the City of Lafayette wishes to pledge its interest in the easement for Well No. 2 to the City of Dayton as required by the Financing Agreement.

5. In order to more accurately document the development of the Project, designate the ownership of Project Assets, and to update the Cities' operation and maintenance obligations for the Project, the Cities now wish to supersede the Original IGA, as amended by Addendum No. 1 and Addendum No. 2, and enter into this Intergovernmental Agreement. Once this Agreement is fully executed, the Original IGA, as amended by Addendum No. 1 and Addendum No. 2, shall no longer be in effect.

TERMS

1. **Adoption of Agreement.** Based on the recitals above, the Cities of Dayton and Lafayette agree to supersede the Original IGA, as amended by Addendum No. 1 and Addendum No. 2, including all recitals and terms therein and exhibits thereto, and replace it with this Intergovernmental Agreement Between the Cities of Dayton and Lafayette, Oregon, Concerning the Financing, Ownership and Operation of the Joint Water Project Improvements, including Exhibits A, B, and C which are described and attached hereto, and incorporated herein as if fully set forth, as follows:

A. **Exhibit A: Designation of Joint, Separate, and Jointly Utilized Capital Assets.**

The Cities agree to share equally in the cost of the construction, maintenance, and operation of those assets designated in Exhibit A as "joint capital assets". The Cities also agree that unless otherwise designated as "jointly utilized assets," the cost of engineering and construction, as well as maintenance and operation of any assets owned solely by one city shall be paid by that city, either Dayton or Lafayette. Relevant separate assets of the City of Dayton and separate assets of the City of Lafayette are also listed in Exhibit A.

Exhibit A to this Agreement shall replace Exhibit A to the Original IGA, which shall no longer be in effect after this Agreement is executed.

B. Exhibit B: Financing Agreement (Loan Repayment)

In April 2004, the Cities entered into a Financing Agreement (Loan Repayment) for a portion of the cost of project engineering and construction. The Financing Agreement was attached as Exhibit B to the Original IGA.

The Financing Agreement as executed in April 2004 is also attached as Exhibit B to this Agreement and shall remain in full force and effect under this Agreement.

C. Exhibit C: Water Project Maintenance and Operating Agreement

The Cities agree to maintain and operate the Project as set forth in the Joint Water Project Maintenance and Operating Agreement attached as Exhibit C to this Agreement. The City of Dayton will maintain all jointly owned or utilized aspects of the Project, with the City of Dayton assessing the City of Lafayette a maintenance fee based on water usage as determined by the methodology defined in Exhibit C.

Exhibit C to this Agreement shall replace Exhibit C to the Original IGA, which shall no longer be in effect after this Agreement is executed.

2. Ownership of Project Assets. Both Cities agree that ownership of Project Assets shall be as designed in Exhibit A to this Agreement.

3. Maintenance. Both Cities agree that maintenance and operation of the Project shall be as provided in Exhibit C to this Agreement.

4. Liability. Each City agrees to contribute equally to any damages that may be assessed arising from the use or condition of any of those shared capital assets specified in Exhibit A to this Agreement. Each City shall be solely liable for any damages that may be assessed arising from the use or condition of those parts of the Project not jointly shared.

5. Termination of the Agreement. This Agreement shall continue in full force and effect in perpetuity unless terminated by one or both of the parties. Either city may terminate this Agreement by providing written notice to the other party a minimum of two years prior to the effective date of termination. If written notice of termination is given, representatives of the Cities shall meet to attempt to arrive at a division of assets and a mutually agreeable price therefore. The price of an asset shall be based upon the capital improvement's depreciated value. The depreciated value shall be based upon the useful life of the capital improvement under generally accepted accounting principles using a straight line method of depreciation. If the Cities are unable to agree to a division of assets within sixty (60) days, the dispute shall be submitted to an arbitrator mutually agreed upon by the parties. In the event that parties cannot agree on an arbitrator, then the arbitrator shall be appointed by the Presiding Judge of the Yamhill County Circuit Court.

6. **Assignment.** Neither city shall have the right to assign its interest in this Agreement (or any portion thereof) without prior written consent of the other city.
7. **Amendment.** Amendments or addendum to the Agreement shall be in writing and must be approved by the respective City Councils of Dayton and Lafayette.
8. **Severability.** If any provision of this Agreement is determined by a court of competent jurisdiction to be invalid or unlawful, such unlawful or invalid provision shall be severed from the Agreement and the remaining provisions shall continue in full force and effect.
9. **Approval by Lafayette.** In a public meeting held on February 12, 2009, the City Council of the City of Lafayette adopted Resolution No. 2009-01, approving this Intergovernmental Agreement in form and substance and agreeing to supersede the Original IGA under the terms set forth herein.
10. **Approval by Dayton.** In public meeting held on February 2, 2009, the City Council of the City of Dayton adopted Resolution No. 08/09-30, approving this Intergovernmental Agreement in form and substance and agreeing to supersede the Original IGA under the terms set forth herein.
12. **Effective Date.** This Agreement shall be effective upon the last date signed by the parties.

CITY OF DAYTON, OREGON

By: Christy M...

Title: City Manager

Date: 3/9/09

Approved as to form:

Paul Elsner

Paul Elsner
Beery & Elsner LLP
City Attorney
City of Dayton

CITY OF LAFAYETTE, OREGON

By: Deane Ribs

Title: CITY ADMINISTRATOR

Date: 2-23-09

Just D. Luke for

Andrew E. Jordan
Jordan Schrader Ramis PC
City Attorney
City of Lafayette

Exhibit A

DESIGNATION OF ASSETS OF JOINT WATER PROJECT CONSTRUCTED BY THE CITIES OF DAYTON AND LAFAYETTE

1. JOINT CAPITAL ASSETS

- Easements (2) for Well No. 2, Transmission Main and Electrical.
- Permanent Access Roadway between Wells #1 and #4.
- Easement for Well No. 3.
- Easement for Well No. 4.
- Easement for Well No. 5.
- Well No. 5 and appurtenant structures including lines from wellhead to transmission main.
- Transmission Main from Well #1 to Dayton reservoir/clear well.
- Treatment Plant Building and related accessory structures and equipment (including fire pump, filters and generator).

2. SEPARATE CAPITAL ASSETS

A. City of Lafayette:

- Well No. 4 and appurtenant structures including lines from wellhead to transmission main.
- Well No. 2 and appurtenant structures including lines from wellhead to transmission main.
- Transmission main from Dayton reservoir/clear well to Lafayette distribution system.

B. City of Dayton

- Well No. 1 and appurtenant structures including lines from wellhead to transmission main.
- Water Line, Access Road and Well Site Easement – Brill Property.
- Well No. 3 and appurtenant structures including lines from wellhead to transmission main.
- Reservoir/clear well.
- All transmission mains from reservoir/clear well to Dayton distribution system.
- Real property for site of Treatment Plant, Reservoir, and other accessory structures.

3. JOINTLY UTILIZED (CAPITAL) ASSETS

(Assets separately owned and jointly used)

- 1.5 million gallon reservoir*

* Per previous agreements, 25% of the costs associated with the engineering, construction, operation and maintenance of the reservoir was paid by the City of Lafayette, since the reservoir is intended to perform in lieu of a clear well constructed solely by the City of Lafayette for its use.

EXHIBIT B

FINANCING AGREEMENT (LOAN REPAYMENT)

between the

CITY OF LAFAYETTE, OREGON

(the “City of Lafayette”)

and the

CITY OF DAYTON, OREGON

(the “City of Dayton”)

Relating to

\$600,000

City of Lafayette, Oregon

Loan Repayments to the City of Dayton, Oregon

Dated as of June 1, 2003

FINANCING AGREEMENT (LOAN REPAYMENT)

This Financing Agreement (Loan Repayment) (the "Financing Agreement") is dated as of June 1, 2003, and is entered into by and between the cities of **LAFAYETTE, OREGON** (the "City of Lafayette") and **DAYTON, OREGON**, (the "City of Dayton"), both political subdivisions of the State of Oregon (collectively, the "Cities"). The Cities hereby agree as follows:

ARTICLE I. RECITALS, DEFINITIONS AND RULES OF CONSTRUCTION

Section 1.1 General Recitals.

- (a) In August 1995, the Cities entered into an Intergovernmental Agreement (the "IGA") for the purpose of locating a site to jointly develop well fields and a transmission main to distribute water to each of the Cities, including a water treatment plant and related improvements, and to conduct engineering, design and construction of the wells, plant, and related improvements;
- (b) In January 1997, the parties modified the IGA with Addendum No. 1 ("Addendum No. 1"), dividing into equal parts the easement held in common by assigning the front 20-acre parcel to the City of Dayton and the back 20-acre parcel to the City of Lafayette;
- (c) In the IGA, as modified by Addendum No. 1, the Cities agreed to share equally in the costs of (i) constructing a temporary or permanent road to the front parcel in order to construct a test well; (ii) constructing, maintaining and operating a permanent roadway the length of the transmission main on both the front and back parcels; and (3) all costs of constructing, operating and maintaining the first well that are directly related to its performance as a test well;
- (d) Section 8 of the IGA states that the Cities will designate joint capital assets and share equally in the cost of construction, operation and maintenance of such joint capital assets;
- (e) Section 9 of the IGA states that the transmission main from the wells to the point of bifurcation for distribution to each City shall be owned by the City of Dayton; however costs of engineering, construction and debt service of the transmission main shall be shared equally by the Cities;
- (f) Section 10 of the IGA states that the City of Dayton will maintain all parts of the Project that both Cities own and/or use, with the City of Dayton assessing the City of Lafayette a maintenance fee based on water usage;
- (g) To fund the construction of the Project as agreed in the IGA, as amended and supplemented, the City of Dayton secured a loan from the State of Oregon in the amount of \$3,983,000 and entered into a Loan Agreement dated November 7, 2002 between the City of Dayton and the State of Oregon, acting by and through its Economic and Community Development Department;
- (h) To fund its portion of the Project the City of Lafayette issued its Water Revenue Bonds, Series 2000 in the aggregate principal amount of \$3,275,000 (the "Series 2000 Bonds") pursuant to Resolution No. 2000-24 (Master Water Bond Resolution) adopted by the City on September 28, 2000 (the "Master Resolution");

- (i) Because the City of Dayton has increased its loan obligation to the State of Oregon in an amount up to \$600,000 to cover the additional portion of the Project costs, the City of Lafayette has agreed to repay that increased loan amount to the City of Dayton; and
- (j) As security for its loan repayment obligations to the City of Dayton, the City of Lafayette will pledge to the City of Dayton an Easement (as defined below) for a future well;
- (k) The City of Lafayette is authorized to finance real and personal property such as the Project pursuant to Oregon Revised Statutes Section 271.390 and execute and deliver this Financing Agreement to finance the additional costs of the Project.

Section 1.2 The Cities Recite:

- (a) The City of Dayton will borrow an amount up to an additional \$600,000 from the State of Oregon to cover 2003 Project Costs;
- (b) The City of Lafayette will repay the City of Dayton the additional amount up to \$600,000 for 2003 Project costs from Net Revenues of the City's Water Operating Account on a subordinate basis to the Series 2000 Bonds, subject to the terms and conditions set forth herein.

Section 1.3 Definitions.

All capitalized terms not defined in this Financing Agreement shall have the meanings defined for those terms in the Master Resolution or the IGA, as amended and supplemented. Unless the context clearly requires use of a different definition, the following capitalized terms shall have the meanings defined for those terms in this section:

“Addendum No. 2” means Addendum No. 2 to Intergovernmental Agreement and dated June 1, 2003.

“Easement” means that interest in real property known as Parcel B, *Well Site No. 2 and 20' Utility Easement*, Exhibit 2 pp.11-12 of Deed Record 2001108467, recorded May 30, 2001, Yamhill County, Oregon.

“Intergovernmental Agreement” means the Intergovernmental Agreement for the Siting, Engineering and Construction of Improvements to the Water Systems of the Cities of Dayton and Lafayette, Oregon, dated as of August 23, 1995, as amended and supplemented by Addendum No. 1, dated as of January 6, 1997.

“Financing Agreement” means this Financing Agreement (Loan Repayment), including the exhibits attached hereto and any amendments to this Financing Agreement and its exhibits.

“Financing Amount” means the amount up to \$600,000 to be paid by the City of Lafayette to the City of Dayton for additional costs of the Project, as shown in the attached Exhibit 1.”

“Financing Payments” means payments due in the amounts specified and on the dates specified in Exhibit 1.

“OECCDD” means the State of Oregon, acting by and through its Economic and Community Development Department.

“2000 Project” shall mean financing the costs of locating a site to jointly develop well fields and a transmission main to distribute water to each of the Cities, including a water treatment plant and related improvements, and to conduct engineering, design and construction of the wells, plant, and related improvements.

“2003 Project” shall mean the additional amount up to \$600,000 in project costs which represents the City of Lafayette’s portion necessary to complete the 2000 Project.

ARTICLE II. REPRESENTATIONS AND COVENANTS OF THE CITIES

Section 2.1 Representations and Covenants of the City of Lafayette. The City of Lafayette represents, covenants and warrants for the benefit of the City of Dayton as follows:

- (a) The City of Lafayette is authorized under ORS 271.390 and the City Charter to enter into this Financing Agreement and to perform all of its obligations under this Financing Agreement.
- (b) On June 12, 2003, the City of Lafayette adopted Resolution No. 03-10 approving the execution and delivery of Addendum No. 2 and the exhibits attached thereto, including as Exhibit B this Financing Agreement.
- (c) The City of Lafayette represents and covenants that all required action has been taken to ensure the enforceability of this Financing Agreement. All Financing Payments required by Section 3.2(b) below shall be paid to the City of Dayton.

Section 2.2 Representations and Covenants of the City of Dayton. The City of Dayton represents and covenants for the benefit of the City of Lafayette as follows:

- (a) The City of Dayton is authorized to enter into a [Supplemental] Loan Agreement with OECDD and to enter into this Financing Agreement and to perform all of its obligations under this Financing Agreement.
- (b) On July 7, 2003, the City of Dayton adopted Resolution No. 03/04-01 approving the execution and delivery of Addendum No. 2 and the exhibits attached thereto, including as Exhibit B this Financing Agreement.
- (c) The City of Dayton represents, covenants and warrants that all required action has been taken to ensure the enforceability of this Financing Agreement (except as such enforceability may be limited by bankruptcy, insolvency, reorganization, moratorium or similar laws or equitable principles relating to or limiting creditors’ rights generally).

ARTICLE III. THE FINANCING AND THE PAYMENTS

Section 3.1 The Financing.

The City of Dayton agrees to borrow an additional amount from OECDD and loan that amount to the City of Lafayette as provided in this Financing Agreement. The City of Lafayette agrees to make payments on the dates and in the amounts to the City of Dayton as shown in the attached Exhibit 1 to this Financing Agreement. The City of Dayton agrees to loan the City of Lafayette an amount up to \$600,000 upon the terms and conditions set forth in this Financing Agreement. The City of Dayton makes this loan to the City of Lafayette under the same terms set by OECDD to its loan to the City of Dayton: a repayment period

of thirty (30) years and rate of interest of one percent (1%). This Financing Agreement shall commence on the date provided above.

Section 3.2 The Payments and Additional Charges.

- (a) The City of Lafayette agrees to pay the City of Dayton, its successors or assigns, without deduction or offset of any kind, as payment for the Financing made under this Financing Agreement, the Financing Payments.
- (b) The City of Lafayette shall pay the City of Dayton the Financing Amount in installments, with interest, on the payment dates or next succeeding business day, as shown in Exhibit 1, as those amounts may be reduced by any prepayment of the Financing Payments.
- (c) In addition to the Financing Payments, the City of Lafayette covenants to pay, to the extent permitted by law, all costs and expenses which the City of Dayton may incur because of any default by the City of Lafayette under this Financing Agreement, including reasonable attorneys' fees and costs of suit or action at law to enforce the terms and conditions of this Financing Agreement.

Section 3.3 Prepayment.

- (a) The City of Lafayette may prepay the Financing Payments as described in Section 3.2(b) above at any time.
- (b) The City of Lafayette shall give notice of prepayment of Financing Payments to the City of Dayton not later than 15 days before the prepayment date. The notice shall state the date of the prepayment and the amount of the principal amount, plus accrued interest, if any, to be prepaid. Prepayment of principal shall not alter the obligation to make payments when due according to the schedule in Exhibit 1.

Section 3.4 Nature of City of Lafayette's Obligations.

- (a) Notwithstanding Oregon Revised Statutes Section 271.390(3), the parties hereto agree that the Financing Payments made by the City of Lafayette shall be payable from the Net Revenues of the City of Lafayette's Water Fund on a subordinate basis to payment of the City's Series 2000 Bonds, which shall have a superior and prior lien on the Net Revenues of the City's Water Fund. This Financing Agreement shall constitute a subordinate obligation under the City's Master Resolution.
- (b) The City of Lafayette covenants that it will charge rates and fees in connection with the operation of the Water System which, when combined with other Gross Revenues, are adequate to generate Net Revenues sufficient to pay principal and interest on the City of Lafayette's Water Revenue Bonds, Series 2000, on a first and prior lien, and covenants that it will charge rates and fees sufficient to pay principal and interest on the Financing Payments on a second and subordinate lien basis to the City of Lafayette's Water Revenue Bonds, Series 2000.
- (c) Subject to Section 3.4(a) hereof, the City of Lafayette hereby agrees that its obligation to pay all Financing Payments and Additional Charges is absolute and unconditional, and shall not be subject to any of the following:
 - (i) any setoff, counterclaim, recoupment, defense or other right which the City of Lafayette may have against the City of Dayton, any contractor or anyone else for any reason whatsoever;

- (ii) any insolvency, bankruptcy, reorganization or similar proceedings by the City of Lafayette;
 - (iii) abatement through damage, destruction or non-availability of the 2000 Project or the 2003 Project, whether or not caused by “force majeure” as described in Section 4.1(b); or
 - (iv) any other event or circumstance whatsoever, whether or not similar to any of the foregoing.
- (d) The City of Lafayette hereby agrees to pledge its interest in the Easement for Well No. 2 to the City of Dayton as security for this Financing Agreement.
- (i) Within thirty (30) days of the date of this Agreement, the City of Lafayette shall provide to the City of Dayton a deed of conveyance of the Easement signed by the City of Lafayette. Within sixty (60) days of the date of this Agreement, the Cities shall adopt a resolution that (a) attaches the deed of conveyance of the Easement as an exhibit, and (b) includes recitals recognizing the Easement as pledge of security for this Financing Agreement and providing that the deed shall not be formally accepted and recorded by the City of Dayton unless and until such time as a specific contingent event of default occurs under Article IV.
 - (ii) The Parties understand and agree that the undivided half-interest in the Easement conveyed by City of Lafayette to City of Dayton is in a subordinate position to City of Lafayette Bondholders.
 - (iii) If a bondholder asserts a default to this encumbrance on the Easement, or if an auditor for City of Lafayette asserts an audit exception for that reason, the City of Dayton will release the Easement from the Financing Agreement, including reconveying the Easement if necessary.

Section 3.5 Estoppel.

The Cities hereby certify, recite and declare that all things, conditions and acts required by the Constitution and Statutes of the State of Oregon and by this Financing Agreement to exist, to have happened and to have been performed precedent to and in the execution and the delivery of this Financing Agreement, do exist, have happened and have been performed in due time, form and manner, as required by law, and that this Financing Agreement is a valid and binding obligation of the Cities enforceable against the Cities in accordance with its terms.

ARTICLE IV. EVENTS OF DEFAULT AND REMEDIES

Section 4.1 Events of Default Defined.

- (a) The following shall be events of default under this Financing Agreement and the terms “events of default” and “default” shall mean, whenever they are used in this Financing Agreement, any one or more of the following events:
 - (i) Failure by the City of Lafayette to pay any Financing Payment required to be paid hereunder in the amount and at the time specified herein;
 - (ii) Except as provided in Section 4.1(b) below, failure by the City of Lafayette to observe and perform any covenant, condition or agreement on its part to be observed or performed for a period of sixty (60) days after written notice to the

City of Lafayette by the City of Dayton, or by any person or agent acting on its behalf, specifying such failure and requesting that it be remedied, unless the City of Dayton shall agree in writing to an extension of such time prior to its expiration; provided, however, that if the failure stated in the notice cannot be corrected within the applicable period, the City of Dayton will not unreasonably withhold its consent to an extension of such time if corrective action is instituted by the City of Lafayette within the applicable period and diligently pursued until the default is corrected; or

- (iii) The commencement by the City of Lafayette of a voluntary case under any applicable bankruptcy, insolvency or other similar law now or hereafter in effect or an assignment by the City of Lafayette for the benefit of its creditors, or the entry by the City of Lafayette into an agreement of composition with creditors, or the taking of any action by the City of Lafayette in furtherance of any of the foregoing.
- (b) If by reason of force majeure, the City of Lafayette is unable in whole or in part to carry out its agreement herein contained, the City shall not be deemed in default during the continuance of such inability. The term "force majeure" as used herein shall mean, without limitation, any of the following: acts of God; strikes, lockouts or other industrial disturbances; acts of the public enemy; orders or restraints of any kind of the government of the United States of America or of Yamhill County, Oregon wherein the City is located or any of their departments, agencies or officials, or any civil or military authority; insurrections; riots; landslides; earthquakes; fires; storms; droughts; floods; explosions; breakage or accident to machinery, transmission pipes or canals; or any similar or different cause or event not reasonably within the control of the City of Lafayette.

Section 4.2 Remedies on Default.

Whenever any event of default referred to in Section 4.1 above shall have happened and be continuing, the City of Dayton shall have the right, after demand or notice, to the extent permitted by law, to exercise any of the following remedies:

- (a) to require the City of Lafayette to make any payment(s) due and owing in order to bring Financing Payments current with the schedule in Exhibit A;
- (b) in the event payment under subsection (a) is not made within sixty (60) days, to declare the unpaid principal components of the Financing Payments immediately due and payable, with accrued interest to the date of payment; or
- (c) to take whatever action at law or in equity may appear necessary or desirable to enforce this Financing Agreement or to protect any of the rights vested in the City of Dayton by this Financing Agreement, either at law or in equity or in bankruptcy or otherwise, whether for the specific enforcement of any covenant or agreement contained in this Financing Agreement, including enforcement of any pledge of security, or in aid of the exercise of any power granted in this Financing Agreement or for the enforcement of any other legal or equitable right vested in the City of Dayton by this Financing Agreement or by law.

Section 4.3 No Remedy Exclusive.

No remedy herein conferred upon or reserved to the City of Dayton is intended to be exclusive and every such remedy shall be cumulative and shall be in addition to every other remedy given under this Financing Agreement to the City of Dayton or now or

hereafter existing at law or in equity. No delay or omission to exercise any right or power accruing upon any default shall be construed to be a waiver thereof, but any such right and power may be exercised from time to time and as often as may be deemed expedient. To entitle the City of Dayton to exercise any remedy reserved to it, it shall not be necessary to give any notice other than such notice as may be required herein or by law.

Section 4.4 Agreement to Pay Attorneys' Fees and Expenses.

If any party to this Financing Agreement should default under any of the provisions hereof and any non-defaulting party or parties should employ attorneys or incur other expenses for the collection of moneys on the enforcement or performance or observance of any obligation or agreement on the part of the defaulting party herein contained, the defaulting party agrees that it will on demand therefor pay, to the extent permitted by law, to such non-defaulting party or parties the reasonable fees of such attorneys and such other expenses incurred by such non-defaulting party or parties.

ARTICLE V. MISCELLANEOUS

Section 5.1 Notices.

All notices, obligations or other communications hereunder shall be sufficiently given and shall be deemed given when delivered or mailed by registered mail, postage prepaid, to:

City of Lafayette: City of Lafayette, Oregon
P.O. Box 55
Lafayette, Oregon 97127
Attention: City Administrator

With a copy to: E. Andrew Jordan, Esq.
City Attorney
Jordan Schrader, PC
2 Centerpointe Drive, Sixth Floor
Lake Oswego, Oregon 97035

City of Dayton: City of Dayton, Oregon
P.O. Box 339
Dayton, Oregon 97114
Attention: City Administrator

With a copy to: Paul Elsner, Esq.
Beery & Elsner LLP
1750 S.W. Harbor Way, Suite 380
Portland, Oregon 97201

Section 5.2 Binding Effect.

This Financing Agreement shall inure to the benefit of and shall be binding upon the Cities and their respective successors and assigns.

Section 5.3 Severability.

In the event any provisions of this Financing Agreement shall be held invalid or unenforceable by any court of competent jurisdiction, such holding shall not invalidate or render unenforceable any other provisions hereof.

Section 5.4 Amendments.

This Financing Agreement may be amended only as approved in writing by the Cities.

Section 5.5 Execution in Counterparts.

This Financing Agreement may be simultaneously executed in several counterparts, each of which shall be an original and all of which shall constitute but one and the same instrument.

Section 5.6 Applicable Law.

This Financing Agreement shall be governed by and construed in accordance with the laws of the State of Oregon. Any action regarding this Financing Agreement or the transactions contemplated hereby shall be brought in the circuit court of Yamhill County, Oregon.

Section 5.7 Headings.

The headings, titles and table of contents in this Financing Agreement are provided for convenience and shall not affect the meaning, construction or effect of this Financing Agreement. All references herein to Sections, and other subdivisions which do not specify the document in which the subdivision is located shall be construed as references to this Financing Agreement.

IN WITNESS WHEREOF, the Cities of Lafayette and Dayton have caused this Financing Agreement to be executed in their name by their duly authorized representatives, all as of the date first above written.

CITY OF LAFAYETTE, OREGON

CITY OF DAYTON, OREGON

By: *L. W. Nank*
Title: *Mayor*

By: *Georgia M. Winkler*
Title: *Mayor*

Date: *3-11-2004*

Date: *Apr 12, 2004*

Approved as to form:

Joan S. Kelsey
Joan S. Kelsey
Beery & Elsner LLP
For City of Dayton

E. Andrew Jordan
E. Andrew Jordan
Jordan Schrader P.C.
For City of Lafayette

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EXHIBIT 1 - Financing Payments

Exhibit C

Joint Water Project Maintenance and Operating Agreement

Section 1: Recitals and Definitions

1.1 Authority

The Cities of Dayton and Lafayette (collectively Cities) enter into this Agreement pursuant to ORS 190.010 *et seq.* and ORS 225.050 to provide for maintenance and operation of water system improvements constructed pursuant to the Intergovernmental Agreement¹ of which this Agreement is Addendum No. 2, Exhibit C.

1.2 Parties

The Parties to this Agreement are the Cities of Dayton and Lafayette both of which are duly constituted Oregon municipal corporations. Through their respective City Councils, each city has designated its respective City Administrator to act on its behalf.

City of Dayton P.O. Box 339 Dayton, Oregon 97114 Contact: City Manager	City of Lafayette P.O. Box 55 Lafayette, Oregon 97127 Contact: City Administrator
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1.3 Effective Date

This Operation and Maintenance Agreement is effective as of date of approval of the Superseding Intergovernmental Agreement by the City Councils of both the City of Dayton and the City of Lafayette.

1.4 Definitions

- (a) "Construction Contract" means the bidding requirements and all contract documents for the construction of Water System Improvements for the Facility by the Cities of Dayton and Lafayette
- (b) "EPA" means United States Environmental Protection Agency.
- (c) "Facility" means the water treatment plant and booster pump station, fire pump and associated system improvements including the reservoir, transmission lines from the Dayton Prairie Well Field to the point of bifurcation for distribution to Dayton or Lafayette, all of which are jointly constructed by the Cities of Dayton and Lafayette and are to be operated, maintained and repaired pursuant to this Agreement by Dayton.
- (d) "Fiscal Year" means the yearly period running from July 1 to June 30 of the next calendar year.
- (e) "Intergovernmental Agreement" or "IGA" means the "Intergovernmental Agreement for the Siting, Engineering, and Construction of Improvements to the Water Systems of the Cities of Dayton and Lafayette, Oregon (dated August 23, 1995), as amended by Addendum No. 1, Designation of Parcels and Cost of Roadway (January 6, 1997).

¹ As this term is defined at Section 1.4 below.

(f) "Governmental Requirements" means all applicable federal, state or local statutes, laws, ordinances, codes, rules, regulations, standards, guidance from regulatory agencies, permits, licenses or other regulatory requirements of any kind either now in effect or which come into effect during the term of this Agreement and which relate to this Agreement, the performance of services by City of Dayton, the Cities, the Facility, or any other matter relating to this Agreement.

(g) "Major Renewal and Replacement Costs" include any and all capital cost(s) greater than Twenty Thousand dollars (\$20,000) (as adjusted annually for inflation using the ENR Construction Cost Index).

(h) "Maintenance and Operating Costs" includes all costs associated with the Facility operations, maintenance, repair, and replacement as further defined in this Agreement.

(i) "Prudent Industry Practices" means:

- the service(s), practice(s), method(s) and act(s) which are commonly used in the potable water industry to perform services; or
- such practice(s), method(s) or act(s) which in the exercise of reasonable judgment (in light of facts known at the time) could be expected to accomplish a desired result at reasonable cost, consistent with good business practices, reliability, safety and expedition.

Provided however, the term is not intended to be limited to optimum practices, methods or acts to the exclusion of all others but rather as a range of reasonable practices, methods or acts taken or engaged in by municipal entities managing and operating similar facilities in the industry under similar circumstances.

(j) "Raw water" means water received at the Water Treatment Plant for treatment.

(k) "Site" is the real property owned by Dayton on which the water treatment plant and booster pump station will be located.

(l) "Finished Water" means Raw Water that has been treated at the Facility in accordance with the standards required by the State of Oregon, Department of Human Services, Oregon Health Department.

1.5 Authorized Representatives

(a) Dayton will designate an individual to serve as representative in all dealings with Lafayette concerning the subject matter of this Agreement.

(b) Lafayette will designate an individual to serve as representative in all dealings with Dayton concerning the subject matter of this Agreement.

(c) Change of Representatives. Representatives may be changed at any time with written notice to the other party.

1.6 Owner

The Cities shall jointly own the Facility as further specified in Exhibit A.

1.7 Operator

The City of Dayton shall be the Operator of the Facility, with the exception of setting flow and chlorination rates for the Lafayette transmission line and maintaining the pumps feeding the Lafayette transmission line.

Section 2: Maintenance and Operation

2.1 Services to be Performed by Operator.

In order to supply Finished Water, Operator shall manage the day-to-day operation of the Facility, operate and maintain the Facility, and undertake such tasks generally necessary for satisfactory performance of the Facility.

2.2 Scope of Maintenance and Operation.

Operator will maintain and operate the Facility according to Prudent Industry Practices. Operator shall treat Raw Water to the standards required by EPA and the State of Oregon, and shall produce Finished Water that meets those standards. Operator shall provide the appropriate level of certified operator at all times.

2.3 Approval of Maintenance and Operating Procedures.

The Cities shall jointly agree on the substance and protocol of procedures necessary for the maintenance and operation of the treatment plant and related improvements. Nothing in this agreement prevents or prohibits coordinated, cooperative efforts being agreed upon by the cities.

2.4 Standard Operating Procedures.

If requested by Lafayette, Dayton shall provide Lafayette a copy of its standard operating procedures, as such may be determined and revised by Dayton's Public Works Director. The standard operating procedures shall comply with the protocols agreed to pursuant to Section 2.3.

2.5 Inspection

At any time, Lafayette may enter the Property to inspect the Facility and Operator's performance of its obligations. Lafayette shall be responsible for its own acts in performing any inspection or observation.

Section 3: Renewal, Amendment

3.1 Term of Agreement.

This Agreement shall be perpetual unless terminated consistent with the provisions of Section 5.1 by either or both parties.

3.2 Amendment.

This Agreement may be amended as the Parties deem necessary. Any amendment(s) shall be in writing and approved by resolution of the City Councils of both Dayton and Lafayette.

Section 4: Default; Remedy

4.1 Breach; Notice.

(a) Events constituting a breach of this agreement may include, but are not limited to, the following:

(i.) Failure by Dayton to perform Operator's obligations, as specified in Subsections 2.1 and 2.2; or

- (ii.) Failure by Lafayette to meet payment obligations, as specified in Section 6.
- (b) Within 30 days of an event believed to constitute a breach, written notice of such failure may be delivered from one City Administrator to the other City Administrator, setting out with specificity the nature of the breach and the necessary cure.

4.2 Default; Resolution

- (a) Events of default shall include:
 - (i.) Failure by Dayton to cure or attempt to cure a deficiency in operations or maintenance as specified in Sections 2.1 and 2.2, within 30 days of receiving notice as provided in Section 4.1(b).
 - (ii.) Failure by Lafayette to cure or attempt to cure a deficiency in payment obligations as specified in Section 6, within 30 days of receiving notice as provided in Section 4.1(b).
- (b) Upon delivery of a notice of default, the Cities shall meet within 10 days of notice and attempt to reach a resolution of the matter to their mutual satisfaction. If the Cities cannot resolve the matter leading to default, the Cities shall submit the matter to the dispute resolution process as outlined in Section 7.10.

Section 5: Termination

5.1 Termination.

Either Dayton or Lafayette may terminate this Agreement for any reason by giving the other a minimum of two (2) years written notice. If written notice of termination is given, the city representatives shall divide and allocate the assets of the Facilities as provided in Section 12 of the Intergovernmental Agreement.

5.2 Effective Date.

Any such termination of this Joint Water Project Maintenance and Operating Agreement shall take effect on March 1 first reached following at least two years written notice. Regardless of whether notice of termination has been given, the Cities shall continue to perform their mutual obligations under this Agreement until termination is effective.

Section 6: Establishment and Allocation of Maintenance and Operating Costs

6.1 Establishment of Costs and Methodology of Sharing Costs

- (a) The Cities agree to determine in good faith all costs of operating and maintaining the Facility and to adjust the Maintenance and Operating costs annually.
- (b) Included in the Maintenance and Operating Costs are Category 1, operating and maintenance costs based on the volume of water usage, and Category 2, fixed operating and maintenance costs. The Cities agree to establish a methodology that would include a proportional share of Category 1 costs and an equal share of Category 2 costs; however, the Cities may establish any methodology necessary and appropriate to meet their purposes.

(c) If the Cities cannot agree on the Operating and Maintenance Costs and the methodology of sharing costs, they shall follow the resolution process provided in Section 6.4.

6.2 Allocation of Share of Costs

- (a) The Cities agree that Lafayette shall pay its share of the Maintenance and Operating Costs of the Facility as described in Section 6.1 to Dayton, including any Major Renewal and Replacement Costs as determined in Section 6.4.
- (b) Not later than March 1st of each year, Dayton shall provide Lafayette with an estimate of Lafayette's share of the Maintenance and Operating Costs for the current fiscal year and an estimate of Maintenance and Operating Costs for the next fiscal year. By June 15th of each fiscal year, Dayton shall ascertain actual water consumption by Lafayette and its residents for the previous twelve (12) months and bill the City of Lafayette for their share of the Maintenance and Operating Costs according to the established methodology and in relation to actual water consumption for that time period.
- (c) Not later than December 15th, Lafayette shall make a payment to Dayton of one half of the estimated cost for that fiscal year. By June 25th, Lafayette will make a payment to Dayton of the full amount ascertained according to the established methodology as noted in subsection (b) above.

6.3 Late Payment

Any portion of the share of Maintenance and Operating Costs owed by Lafayette but not received by Dayton within 30 days of the due date may be assessed interest as provided by ORS 82.010 until paid in full. The accrued interest plus the portion of the share owed shall constitute a debt that Dayton may submit to the dispute resolution process described in Section 7.10.

6.4 Expenditure of Funds for Major Renewal/Replacement.

Except in the event of an emergency, Dayton shall notify Lafayette in writing and consult with Lafayette prior to the expenditure of funds for Major Renewal and Replacement Costs. If the Cities do not agree on the need for or amount of such expenditure, the Cities shall share equally the cost of a professional evaluation of the proposed expenditure. The independent engineer or other appropriate professional shall have experience in the construction, operation, and maintenance of water treatment plants and systems and shall evaluate the renewal or replacement needs and associated costs. If the Cities do not accept the evaluation, they shall follow the dispute resolution process of Section 7.10.

6.5 Annual Budget Responsibility

Each City shall include in its annual budget sufficient funds to pay their respective shares of Maintenance and Operating Costs and Major Renewal and Replacement Costs of the Facility under the Intergovernmental Agreement as amended. Furthermore, both Dayton and Lafayette covenant and agree to maintain and if necessary to adjust their water rates so that there are sufficient funds available to pay their respective shares of Operating and Maintenance Costs including Major Renewal and Replacement Costs for the Facility.

6.6 Reserve Account

The Cities shall meet to determine the establishment of reserve fund(s) for anticipated Major Renewal and Replacement Costs and/or costs of expansion.

Section 7: Miscellaneous

7.1 Notice of Claims and Lawsuits

If either City becomes aware of any claim or lawsuit involving the Facility, it must promptly notify the other in writing, providing the information of which it is aware concerning the claim or lawsuit.

7.2 Liability; Indemnification; Insurance

- (a) The Cities each agree to contribute equally to any damage(s) that may be assessed arising from the use or condition of any of the jointly owned and/or jointly utilized improvements as specified in Exhibit A of Addendum No. 2 to the IGA. Each City shall be solely liable for any damage(s) that may be assessed arising from the use or condition of those part(s) of the Project not jointly shared or owned.
- (b) Each City shall indemnify the other against any claims, suits or actions for damages arising under or related to this Agreement, and the IGA as amended.
- (c) In addition, Dayton, to the extent permitted by law, agrees to indemnify, defend and hold harmless Lafayette, its Mayor, Councilors, employees and agents (hereinafter collectively referred to as Lafayette) from and against any and all losses, expenses, penalties, fines, costs, demands and claims sustained or alleged to have been sustained as a result of the actions of Dayton, its Mayor, Councilors, employees or agents acting pursuant to this Agreement or as Operator of the Facility.
- (d) Similarly, Lafayette, to the extent permitted by law, agrees to indemnify, defend, and hold harmless Dayton, its Mayor, Councilors, employees and agents (hereinafter collectively referred to as Dayton) from and against any and all losses, expenses, penalties, fines costs, demands and claims sustained or alleged to have been sustained as a result of the actions of Lafayette, its Mayor, Councilors, employees or agents acting pursuant to this Agreement.
- (e) The cost of property insurance related to operation and maintenance of the Facility shall be included in Maintenance and Operating Costs. Lafayette shall be named as an additional insured on Dayton's property insurance policy. Dayton shall be responsible for purchasing and maintaining such property insurance in an amount equal to replacement value of the Facility and shall provide a copy of the insurance certificate to Lafayette.
- (f) As of the date of this Agreement, Dayton and Lafayette participate in the same liability insurance pool; therefore, the Cities agree to name each other as additional insureds on their respective liability insurance policies. In the event either City changes its liability insurance carrier or policy in a manner that affects this Agreement, the Cities shall determine any steps necessary to provide for appropriate coverage.
- (g) Dayton and Lafayette agree that each waives any right of action that it may acquire against the other for loss or damage to that City's property or to

property in which that City may have an interest to the extent that such loss is covered by any insurance policy or policies and to the extent that proceeds (which proceeds are free and clear of any interest of third parties) are received by the City claiming the loss or damage.

7.3 Permits

- (a) Operational: Dayton shall be responsible for securing any local, state or federal permit(s) required to operate and maintain the Facility.
- (b) Land use: Dayton shall be responsible for securing any necessary land use permit(s) related to the siting of the Facility. The Cities' representatives shall approve all signs related to the Facility prior to sign installation. Any permit required for a sign shall be the responsibility of Dayton.

7.4 Labor & Personnel

Regardless of the type of services performed by Dayton employees at or concerning the Facility, all Dayton employees shall remain, for all compensation, workers compensation and benefit purposes, employees of Dayton and not employees of Lafayette or joint employees.

7.5 Safety & Health

Operator shall be responsible for the conduct of all operations under this Agreement consistent with all applicable laws and regulations (including occupational safety and health) as well as Prudent Industry Practices.

7.6 Security; Compliance

Through their representatives, the Cities shall agree on necessary security requirements for the Facility, costs of which shall be included in Maintenance and Operating Costs. As Operator, Dayton shall make any security arrangements required by the Cities.

7.7 Records & Audit

Dayton shall maintain records and accounts concerning the operation, maintenance, repair, and equipping of the Facility. Dayton shall provide to Lafayette access to and copies of all records pertaining to maintenance and operation of the Facility. Any request by members of the public to inspect public records shall be directed to the Dayton City Administrator for a response.

7.8 Dispute Resolution

- (a) Mediation. Should the Cities arrive at an impasse regarding any claims or disputed claims arising under the terms of or pursuant to this Agreement, the Cities agree that they shall submit their dispute to mediation prior to the commencement of any litigation or arbitration. The mediator shall be an individual mutually acceptable to both Cities, but in the absence of agreement, either City may apply to the Presiding Judge, Yamhill County Circuit Court for appointment of a mediator. Each City shall share equally in the fees and costs of the mediator. Each City shall be responsible for its own attorneys' fees and other expert fees. Mediation shall be at Portland, Oregon unless the Cities agree otherwise. Both Cities agree to exercise their best effort in good faith to resolve all disputes in mediation. Participation in mediation is a mandatory requirement and failure to comply with this requirement is a

material breach of this Agreement. The schedule and time allowed for mediation will be mutually acceptable.

- (b) Arbitration. If the dispute is not resolved by mediation, the Cities agree that they shall enter into binding arbitration to resolve the matter, under the same process and division of costs as set forth for resolving the dispute by mediation as set forth in Subsection (a) above.
- (c) Either Dayton or Lafayette may file a suit for injunctive relief to resolve a dispute in a court with proper jurisdiction located in Yamhill County, Oregon. The prevailing party shall be entitled to recover its costs, attorney and expert fees both at trial and on appeal.

7.9 No Third Party Beneficiaries.

Neither Dayton nor Lafayette intends to nor do they confer any benefit on any person, firm, or corporation other than the parties hereto.

City of Lafayette

Name Miane Runko
Title CITY ADMINISTRATOR
Date 2-23-09

Approved as to Form

John D. Wheeler
E. Andrew Jordan
Jordan Schrader
Lafayette City Attorney

City of Dayton

Christy Ellis
City Manager
3/9/09

Approved as to Form:

Paul Elsner
Paul Elsner
Beery & Elsner LLP
Dayton City Attorney