

IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ARKANSAS
CIVIL DIVISION

Norman, an Incorporated City, Plaintiff

v.

49-CR-2016-34

The City of Glenwood, Defendant

BREACH OF CONTRACT COMPLAINT

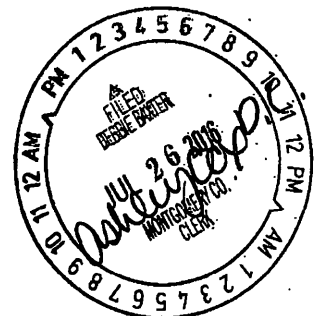
COMES NOW the town of Norman, Arkansas, by and through its attorney, Robin C. Smith and for its breach of contract complaint states as follows:

- 1) The parties to this action are municipalities located in the state of Arkansas.
- 2) Norman, Arkansas is an incorporated city located in Montgomery County, Arkansas.
- 3) Glenwood is a city of the second class located in Pike and Montgomery Counties.
- 4) On July 18, 2006 the parties entered into a contract for the sale / purchase of water. A copy of the original contract is attached hereto as Exhibit One.
- 5) Upon information and belief, sometime in 2008, Glenwood enacted ordinance number 08-05 to amend their water rates to include a three percent cost of living increase.

Thereafter the Glenwood mayor and the Norman mayor executed an undated

“Amendment.”

- 6) No consideration was given by Glenwood for the amendment to the contract and the City of Norman did not enact an ordinance authorizing the then Norman mayor, Ginger Klein bind the city to the new terms.
- 7) The amendment contained the following provisions for increased fees for water:



A.
\$9,534.75 / 1,800 = \$5.29/th
Water production = \$.70/th
Water cost for first 1800 units = \$5.99/th

B.
Water Costs for each additional unit = \$1.80/th

C.
Per the City of Glenwood ordinance #08-05 there will be A 3% COST OF LIVING increase that will be added to the water production rate in Section A and to the water cost rate for additional units in Section B of this contract. This rate will be added in January of each year successive thereafter 2009.

- 8) In the "Section A" of the Amendment, the first line represents the monthly minimum water charge for the first 1.8 million gallons used. The second line, "Water production" represents a new rate for production estimated cost which is subject to the "Section C" 3% cost of living adjustment for the first 1.8 million gallons. The resulting two numbers from "Section A" combine for the result in the per unit charge for first 1,800 units.
- 9) Thereafter, Glenwood billed Norman at the new rates, however after the 2009, Glenwood increased both multiples contained under section A by 3% instead of just the "water production rate" as set out in section C of the amendment which only called for a 3% cost of living increase to be added to the "water production rate in Section A and to the water cost rate for additional units in Section B."
- 10) Had the parties intended to increase both rates contained in section A, the amendment would have call for an increase "to the water costs for the first 1,800 units and the water production rate" or to "all costs in sections A and B," or to the total "Water cost for first 1800 units" instead of "the water production rate", which is only a portion of section and

which only refers to the second line on section A.

- 11) Beginning in 2010, Glenwood increased both section A rates and the Section B rate contained in paragraph B, not just "the water production rate" as called for in the amendment.
- 12) Mayor Markham has brought this calculation error to the attention of the City of Glenwood that it first occurred in 2010 and again in January of 2015. In 2015, the error for 2010 was corrected and a credit was issued.
- 13) In 2015, Mayor Markham noticed that the water costs were out of sync and again found that the City of Glenwood was over billing by adding the cost of living increase to all values and was then increasing the overbilling cumulatively by 3%. Mayor Markham pointed this out and again a credit was issued.
- 14) At some point after the 2015 credit, the City of Glenwood again began over charging for water and have refused to adjust the rates to comport to the amendment.
- 15) Beginning with the January 2016 bill, Glenwood also began adding a late fee and interest charges to the monthly billing submitted to Norman, which the city of Norman does not owe, as they have at all times paid more than the correct amount under the original contract and the city of Norman had until January 2016 paid the proper charge under the "Amendment."
- 16) When the billing issue was again brought to the attention of the City of Glenwood, they started trying to charge the City of Norman for various "start-up costs," they incurred prior to the startup and thereafter, but well after the applicable statute of limitations

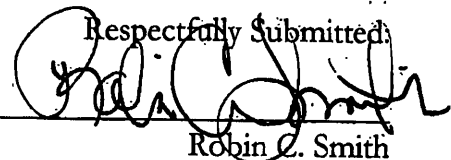
barred recovery for those items.

17) Due to Glenwood's improper billing, the City of Norman paid considerably more money per month for its water purchases than agreed to by the parties in the original contract.

WHEREFORE the plaintiff prays this court:

- a. Find the City of Glenwood to be in breach of the parties' original contract.
- b. Find that the 2009 amendment was approved by the then mayor of Norman without either actual or apparent authority due to lack of an Ordinance on the issue and is therefore void.
- c. If the court finds the amendment is valid, or that a cost increase was somehow justified under the original contract, that the court determine Glenwood breached the contract when it began increasing both section (A) calculations contrary to the agreement and that the City of Norman is entitled to a judgment against the City of Glenwood equal to the overbilling.
- d. Award the city of Norman their attorney's fees incurred in prosecuting this matter.

Respectfully Submitted:



Robin C. Smith

Robin Smith Law Firm, PA

Ark. Bar No. 2005-193

P.O. Box 1580

Mount Ida, AR 71957

870-867-5297

WATER PURCHASE CONTRACT

THIS contract for the sale and purchase of water is entered into as of the 18 day of July, 2006, between the City of Glenwood, Arkansas, 210 North Second Street, Pike County, Glenwood, Arkansas 71943, hereinafter referred to as "Seller" and the City of Norman, Arkansas, P. O. Box 427, Montgomery County, Norman, Arkansas 71960, hereinafter referred to as the "Purchaser"

WITNESSED:

WHEREAS, the Seller is fully empowered to enter into contracts with other cities for the purpose of selling water for municipal, domestic, industrial and other useful purposes permitted by law and upon such terms and for such time as the parties may agree; and

WHEREAS, the Seller owns and operates a water treatment and supply system (hereinafter referred to as the "System") capable of providing an adequate water supply for the foreseeable future to the Purchaser; and

WHEREAS, the Purchaser has a need for such water supply and desires to enter into a contractual arrangement with the Seller for water from said System; and

WHEREAS, by Ordinance No. 0605 enacted on the 18 day of July, 2006, by the Seller, the sale of water to the Purchaser in accordance with the provisions of the said Ordinance was approved, and the execution of this contract carrying out the said Ordinance by the Mayor, and attested by the Recorder/Treasurer, was duly authorized; and

WHEREAS, by Ordinance no. 7-2-06 of the City Council of Purchaser, enacted on the 18 day of July, 2006, the purchase of water from the Seller in accordance with terms set forth was approved, and the execution of this contract by the Mayor and attested by the Recorder/Treasurer was duly authorized;

NOW, THEREFORE, in consideration of the foregoing and the mutual agreements hereinafter set forth,

A. The Seller agrees:

1. To furnish the purchaser at the point of delivery hereinafter specified during the term of this contract or any renewal or extensions thereof, potable treated water as may be required by the Purchaser not to exceed 200,000 gallons per day. Water shall be taken at a rate not to exceed 175 gallons per minute (gpm). Seller shall retain the right to control water supplied to Purchaser within the previously stated "not to exceed" quantities. Water delivered under this contract shall be of the same quality as that distributed by Seller to its other customers on this system. Furthermore, Seller agrees to have the treatment facility operated and operate the transmission facilities in such manner as will assure the approval of the Arkansas Department of Health and Human Services (ADHH). If, in the future, it is agreed by both parties that if a larger quantity of water is desired by the Purchaser, any improvements required shall be at the expense of the Purchaser.
2. That water will be furnished at a sufficient pressure for the complete filling of the Seller's storage facility.
3. To allow the Purchaser to connect to the Seller's system in such a manner and with such materials as are required by the State and by the Seller. Purchaser shall construct a meter facility that includes, at a minimum, an appropriately sized water meter, telemetry, control facilities, transmission facilities and backflow prevention device, all acceptable to the City of Glenwood, Arkansas and meeting all state and local rules, codes and specifications. The materials up to the exact point of delivery to become the property of the Seller as a part of the System. This includes all monitoring, control, transmission, metering and attendant facilities and devices to provide water into the Purchaser's system, being done with the Seller's supervision and approval and at the Purchaser's expense.

except all backflow prevention facilities shall remain the property and responsibility of the purchaser. Any future connections must be done by mutual agreement of the Purchaser and Seller by contract amendment.

4. Purchaser agrees that backflow devices necessary to protect the Seller's system are a necessary part of the connection facilities and agrees to test and maintain such facilities as necessary and required by state or local codes or statutes, but in no case shall maintenance and inspections be performed less than annually. Purchaser shall supply all records of such maintenance and inspections on an annual basis to Seller. Purchaser is hereby authorized to enter onto any of Seller's properties, whether held in fee simple or by easement, necessary to verify maintenance and inspection of backflow prevention device or any other portion of the metering facilities. Purchaser agrees that during the term of the contract, should the existing backflow measures be inadequate to meet the State's Standards, to bring the backflow measures up to State's Standards at Purchaser's sole expense.
5. Purchaser agrees that control and monitoring facilities by telemetry are a necessary part of the connection facilities in the form of Supervisor Control and Data Acquisition (SCADA) equipment. The Purchaser agrees to install at his sole expense SCADA equipment approved by the Seller. Such equipment to be compatible with Seller's current SCADA system.
6. To furnish the Purchaser at the above address not later than the 15th day of the month following water usage, with an itemized statement of the amount of water furnished the Purchaser and the charges for such during the preceding month. The quantity of water for which Purchaser shall be billed shall be based upon the reading of the master meter of the Seller except under conditions set out in Section A-6. The unit of measure for water delivered hereunder shall be 1,000 gallons of water, U.S. Standard Liquid Measure, rounded to the nearest 1,000 gallons.

7. Seller shall maintain and calibrate (or arrange for calibration of) its metering equipment as often as it considers necessary or such time as Purchaser may show reasonable evidence of error. If, upon any test, the percentage of any inaccuracy thereof is found to be in excess of two percent (2%), registration thereof shall be corrected for a period extending back to the time such inaccuracy began, if such time is ascertainable, and if not, then for a period extending back one-half of the time elapsed since the last date of calibration, but in no event further back than a period of six (6) months. In the event Purchaser has provided no check meter with reference thereto and if for any reason any master meter is out of service or out of repair so that the amount of water delivered cannot be ascertained or computed from the reading thereof, the water delivered during the period such meter is out of service or out of repair shall be determined by the Seller from the best available information, by correcting the error if the percentage of error is ascertainable by calibration tests or mathematical calculations, or by estimating the quantity of water by the deliveries made during preceding periods under similar conditions when the meter was registering accurately, or from the pumpage records of the Seller and other customers on the same supply line.

8. Purchaser represents and covenants that all payments to be made hereunder shall constitute "operating expenses" of its Waterworks System with the effect that the obligation to make such payments from its Waterworks revenues under this contract shall be an operating expense as defined by the Statutes of Arkansas, as amended.

B. The Purchaser Agrees:

1. To pay the Seller, not later than the thirty (30) days from the date of invoice/billing, for water delivered into accordance with the following schedule of rates:

- a. \$6,030.00 for the first 1.8 million gallons, which amount shall also be the minimum rate per month.
 - b. \$1.69 per 1,000 gallons for water in excess of 1.8 million gallons per month.
2. Should Purchaser fail to make any payments at the times herein specified, interest on such amounts shall accrue at the rate of ten percent (10%) per annum from the date such payment becomes due until paid in full with interest as herein specified. In the event such payment is not made within sixty (60) days from the date such payment becomes due, Seller may, at its option, discontinue delivery of water to Purchaser until the amount due Seller is paid in full including collection fees.
 3. Title to all water supplied under this agreement shall remain with Seller to the point of delivery, which shall be the meter, and upon passing through the meter installed at that point, title to the water shall pass to Purchaser. Each party hereto agrees to save and hold the other harmless from all claims, demands, and causes of action which may be asserted by anyone on account of transportation, delivery and disposal of said water while title remains in such party.
 4. That Seller is hereby authorized to enter onto any Purchaser's properties, whether held in fee simple or by easement, wherein there is reasonable need to operate and/or maintain Seller's facilities located on Purchaser's properties, whether for the present system or for any mutually agreed upon future facilities. Operation and maintenance shall be provided by the Seller up to and including the meter located at this point of delivery, except as otherwise stated.
 5. Seller's meter shall be of the type required by the City of Glenwood, Arkansas. Purchaser shall pay all costs of meter replacement at a

frequency not greater than that of once every ten (10) years. Said costs shall be in addition to the wholesale costs of water set forth in B-1.

6. Purchaser further agrees to fix and collect such rates and charges for water services to its customers as will, in combination with any other funds legally available and reasonably assured for the purpose, make possible the prompt payment of all expenses of operating and maintaining its Water System and all payments contracted hereunder.

C. It is further mutually agreed between the Seller and the Purchaser:

1. That this contract shall extend for a term of thirty (30) years from the date of renewal as evidenced by the date of passage and approval by the Glenwood City Council and thereafter may be renewed or extended for such term, or terms, as may be agreed upon by Seller and Purchaser.
2. That the Point of Delivery for the Norman Water System shall be a master meter located on the eight inch (8") water distribution line along Highway 8 at Caddo Gap.
3. Force Majeure
 - a. If, for any reason of "force majeure", either of the parties hereto shall be rendered unable wholly or in part to carry out its obligation under this agreement, other than the obligation of Purchaser to make the payments required under the terms of Section B-1 and B-2 hereof, then if such party shall give notice and full particulars of such reasons in writing to the other party within a reasonable time after the occurrence of the event, or cause relied on, the obligation of the party giving such notice, so far as it is affected by such "force majeure", shall be suspended during the continuance of the inability then claimed, but for no longer period, and any such

parties shall endeavor to remove or overcome such inability with all reasonable dispatch. The term "force majeure" as employed herein shall mean acts of God, strikes, lock-outs, or other industrial disturbances, acts of public enemy, orders or actions of any kind of the Government of the United States or the State of Arkansas; or any civil or military authority, insurrections, riots, epidemics, landslides, lightning, earthquakes, fires, hurricanes, storms, floods, wash-outs, breakage or accident to dams, machinery, pipelines, or canals or other structures of machinery, partial or entire failure of water supply and inability on the part of Seller to deliver water hereunder, or of Purchaser to receive water, on account of any other cause not reasonable within the control of the party claiming such inability. It is understood and agreed that the settlement of strikes and lock-outs shall be entirely within the discretion of the party having the difficulty, and that the above requirement that any "force majeure" shall be remedied with all reasonable dispatch shall not require the settlement of strikes and lock-outs by acceding to the demands of the opposing parties when such settlement is unfavorable to it in the judgment of the party having the difficulty. No failure of Seller to meet any obligation by reason of force majeure shall relieve Purchaser from its obligations to make the payments required under the terms of Section B-1 and B-2.

- b. No damages shall be recoverable from Seller by reason of the suspension of delivery of water due to any of the causes above-mentioned. If Seller's ability to deliver water to Purchaser is affected by any of such causes, Seller shall promptly notify Purchaser, in writing, giving the particulars as soon as practicable after the occurrence of the cause or causes for such interruption. If the supply of water does not meet the requirements of all of its customers, then the available amount of water will be allocated by Seller so as to meet the requirements of its various customers in

accordance with their respective needs.

- c. It is expressly recognized by Purchaser that Seller may be compelled to make necessary alterations, perform maintenance, make repairs or construct extensions of new or additional water transporting facilities from time to time during the life of this contract and any suspension of delivery to Purchaser due to such operation shall not be cause for claim of damage on part of Seller provided all reasonable effort is used by Seller to provide Purchaser with water in accordance with this contract. In such case Seller shall give Purchaser as much advance notice as may be practicable of the suspension of delivery and of the estimated duration thereof.
4. That the provisions of this contract pertaining to the schedule of rates to be paid by the Purchaser for water delivered are subject to modification at the end of every one (1) year period, except from the date of initiation of service rates shall not be raised for a period of two (2) years.
5. That this contract is subject to such rules, regulations, or laws as may be applicable to similar agreements in this State and the Seller and Purchaser will collaborate in obtaining such permits, certificates, or the like, as may be required to comply herewith.
6. That the Purchaser shall not enter into any contracts for the wholesale supply, or resale, of water supplied by the Seller to any other entity or agency or provide service outside its corporate limits, jurisdiction, or current service area without first having received approval, in writing, from the Seller.
7. That in the event of any occurrence rendering the Purchaser incapable of performing under this contract, any successor of the Purchaser, whether the result of legal process, assignment or otherwise, shall succeed to the rights of the Purchaser hereunder.

8. In the event any sales or use taxes, or taxes of any similar nature are hereafter imposed upon the gathering, taking, sale, use or consumption of the water received by Purchaser under this contract, the amount of such taxes shall be borne by Purchaser, in addition to all other charges, and whenever Seller shall be required to pay, collect, or remit any such taxes on water received by Purchaser, then Purchaser shall promptly reimburse Seller therefor.

9. In the event of an extended shortage of water or the supply of water available to the Seller is otherwise diminished over any extended period of time, the supply of water to Purchaser's consumers shall be reduced or diminished in the same ratio or proportion as the supply to other customers on the system is reduced or diminished.

IN WITNESS WHEREOF, the parties hereto, acting under authority of their respective governing bodies, have caused this contract to be duly executed in several counterparts, each of which shall constitute an original, all as of the day and year first above written.

CITY OF GLENWOOD, ARKANSAS



Ronald Martin, Mayor


ATTEST:



Jane Ketchum, Recorder/Treasurer

(seal)

APPROVED AS TO LEGALITY AND FORM:



Jana Bradford, City Attorney

CITY OF NORMAN, ARKANSAS



Al Davis, Mayor

ATTEST:



Carolyn James, Recorder/Treasurer

(seal)

AMENDED
WATER PURCHASE CONTRACT
CITY OF NORMAN
2009

Blumberg No. 5208
EXHIBIT
2

The City of Glenwood has found it necessary, because of the increasing costs in the construction of the water line to supply water to the City of Norman from the Glenwood Water & Sewer Water Plant, to increase the schedule of rates for billing;

The Glenwood Water & Sewer Dept. is now amending Section B. 1. a. & b. on page 4 and 5 of the original Water Purchase Contract dated July 18, 2006.

NOW THEREFORE, in consideration of the foregoing and the mutual agreements hereafter set forth,

NORMAN'S AMENDED RE-PAYMENT

20 YEARS = 1,746,846.30 @ 2.75%
YEARLY - 1,746,846.30 x .0655 = \$114,418.43
MONTHLY - 114,418.43 / 12 = \$ 9,534.75

NOTE: Minimum monthly charge based on 1,800 units of water.
A unit equals 1,000 gallons.

A.
\$9,534.75 / 1,800 = \$5.29/th
Water production = \$.70/th
Water cost for first 1800 units = \$5.99/th

B.
Water costs for each additional unit = \$1.80/th

C.
Per the City of Glenwood Ordinance #08-05 there will be A 3% COST OF LIVING increase that will be added to the water production rate in Section A and to the water cost rate for additional units in Section B of this contract. This rate will be added in January of each year successive thereafter 2009.

All other articles in the original Water Purchase Contract dated July 18, 2006 shall remain in full force and effect.

IN WITNESS WHEREOF, the parties hereto, acting under authority of their respective governing bodies, have caused this contract to be duly executed in several counterparts, each of which shall constitute an original, all as of the day and year first above written.

CITY OF GLENWOOD, ARKANSAS


Ronald Martin, Mayor

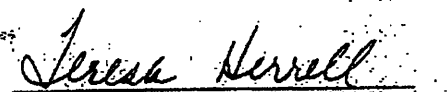
ATTEST:


Jane Ketchum, Recorder/Treasurer

CITY OF NORMAN, ARKANSAS


Ginger Klein, Mayor

ATTEST:


Teresa Herrell, Recorder/Treasurer