



## Council Agenda Report

**From:** Dick McKinley, Public Works Director  
**Subject:** Water Supply Agreement with Firestone Walker Brewing Company  
**Date:** October 3, 2017

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### Facts

1. The City provides retail water service to residential and commercial customers within its service area in the City of Paso Robles. The City is a participant in the Nacimiento Water Project (“Project”). The City holds rights to 6,488 acre-feet per year of water from the Project. The City currently does not use the full amount of the Entitlement and has Project water available.
2. Firestone Walker, Inc. (“Company”) operates a commercial brewery and desires a source of non-potable water for use in the Company’s evaporative cooling plant. The Company is located adjacent to the pipeline that delivers Project water and wishes to build an interconnection with the Pipeline to take delivery of non-potable water from the City’s allocation of water from the Project.
3. The City is willing to sell and deliver a portion of its Project Water to Company on a non-exclusive as-available basis.
4. Utilizing untreated project water frees up treatment plant capacity for potable uses, reduces energy and chemical demands, and allows for increased direct use of imported surface water.
5. The company is currently projecting a demand of 67 units per day (33 acre-feet per year) increasing to 200 units per day (168 acre-feet per year). The maximum future delivery rate shall remain below 200 gallons per minute.

### Options

1. Take no action;
2. Authorize the City Manager to execute a Water Supply Agreement with Firestone Walker Inc. (see Attachment 1 for the Agreement);
3. Amend or modify the above options.

### Analysis and Conclusions

The City’s Project water that is not utilized in a given year does not carry over to the following year. The City is projecting to have an adequate supply of Project water available for the term of this agreement to satisfy the Company’s request. It is in the City’s best interest to put as much Project water to beneficial use as possible. Utilizing Project water has a direct benefit on the basin by offsetting local groundwater pumping and/or freeing up capacity in the City’s potable water treatment plant.

### Fiscal Impact

The Company will cover all costs associated with delivering Project water (including the cost of installing the interconnection and piping to their facilities). The Company will be charged for Project water on a per-unit basis at a rate of 85% the cost of treated potable water. Therefore, the cost for untreated Project

water will proportionally adjust alongside potable water rates. This rate for untreated Project water will fully cover all expenses associated with delivering untreated Project water.

**Recommendation**

1. Authorize the City Manager to enter into a Water Supply Agreement with Firestone Walker Inc.
2. Authorize the City Attorney and City Manager to make minor changes to the agreement, if necessary, remaining consistent with overall Council direction.

**Attachment**

1. Draft Water Supply Agreement – Firestone Walker Brewing Co.

## WATER SUPPLY AGREEMENT

This Water Supply Agreement ("Agreement") is made and entered into as of \_\_\_\_\_, 2017, by and between the CITY OF EL PASO DE ROBLES ("City"), a California municipal corporation, and FIRESTONE WALKER, INC. ("Company"), a California corporation, which is commonly referred to as the Firestone Walker Brewing Co. City and Company are sometimes individually referred to herein as a "Party" and collectively as the "Parties".

### RECITALS

A. The City provides retail water service to residential and commercial customers within its service area in the City of Paso Robles, in northern San Luis Obispo County. The City is a participant in the Nacimiento Water Project ("Project"), which is controlled by the San Luis Obispo County Flood Control and Water Conservation District ("District") and provides 17,500 acre-feet of water per year from Lake Nacimiento to project participants. The City holds rights to a maximum allocation of 6,488 acre feet of water from the Project, although the actual allocation in any given water year is subject to adjustment in connection with the amount of water actually available for delivery from the Project (the "Entitlement"). The City currently does not use the full amount of the Entitlement and has surplus Project water available.

B. Company operates a commercial brewery in the City ("Business") and desires a source of non-potable water for use in the Company's evaporative cooling plant ("Industrial Use"). The Business is located adjacent to the City's pipeline that delivers water from the Project ("Pipeline") and Company desires to build an interconnection with the Pipeline ("Interconnection Point") to take delivery of non-potable water from the City's allocation of water from the Project ("City Project Water").

C. City is willing to sell and deliver City Project Water to Company on a non-exclusive as-available basis on the terms and conditions set forth herein.

NOW THEREFORE, in consideration of the foregoing recitals and the promises and covenants contained herein, the Parties agree as follows:

1. **Purpose.** The Purpose of this Agreement is to formalize the terms and conditions by which City will provide non-potable water for Industrial Use to Company, beginning on the Effective Date and continuing each year thereafter for as long as this Agreement remains in effect.

2. **Term of Agreement.**

(a) **Contract Term.** The term of the Agreement shall commence on the Effective Date and continue for a term of five (5) years ("Term"). Following the Term, this Agreement will automatically renew for additional one (1) year periods unless written notice of termination is given by either Party no less than ninety (90) days prior to the expiration of the then-current Term. Notwithstanding the Term, the delivery of City Project Water pursuant to this Agreement shall be subject at all times to the availability of City Project Water which is surplus to the water requirements of the City, in its sole discretion.

(b) **Effective Date.** The "Effective Date" shall mean the date that the Interconnection Point described in Section 8 has been completed and approved by City's technical staff as operationally ready for commencement of delivery of City Project Water.

(c) **Delivery Year.** Each "Delivery Year" shall run concurrent with the delivery year for the Project. The delivery year for the Project currently commences on October 1.

4. **Quantity of City Project Water.**

(a) **Minimum Delivery.** In each Delivery Year during the Term of this Agreement, City shall deliver and Company shall purchase a minimum quantity of City Project

Water ("Minimum Quantity"). The Minimum Quantity for each Delivery Year will be determined as follows:

(i) Within thirty (30) days of the City receiving written notice from the District of the amount of City Project Water available in connection with the Entitlement, City will provide written notice to Company of the City's estimate of the amount of surplus City Project Water which is available for delivery to the Company in the upcoming Delivery Year. Within ten (10) business days of receipt of such written estimate, Company will provide written notice to City of the amount of available City Project Water that Company desires to take in the upcoming Delivery Year and the proposed schedule for the delivery of such water. With ten (10) business days of receipt of Company's written notice, City will confirm with Company the amount and delivery schedule of City Project Water for the next Delivery Year. City does not guarantee that surplus City Project Water will be available in any given Delivery Year.

(ii) Any portion of the Minimum Quantity of City Project Water that is not taken by Company during a given Delivery Year shall be forfeited and shall not roll over to the next year.

(iii) City will use reasonable efforts to deliver the Minimum Quantity to Company, subject to actual receipt by City of the estimated Entitlement of City Project Water from the District and the continued availability of such City Project Water as surplus to City requirements for normal operations. City shall not be responsible for any cost or damage to Company as a result of City Project Water not being available in the estimated Minimum Quantity.

**(b) Additional Delivery.** If available, Company may request delivery of surplus City Project Water in excess of the Minimum Quantity as available during the Delivery Year. Company shall give City no less than thirty (30) days written notice of its desire to purchase additional City Project Water and the proposed schedule for such delivery. City shall make a good faith effort to comply with such request subject to (i) the availability of surplus City Project Water; and (ii) sufficient delivery capacity to fulfill such request at the Interconnection

Point using the City's existing water distribution system. Any such additional City Project Water shall be purchased and delivered on the same terms as the Minimum Quantity, provided, however, that if the cost of procuring and delivering additional City Project Water exceeds the cost of delivering the Minimum Quantity, City shall have the right to impose a surcharge to compensate City for such additional cost as a condition to delivery. City shall notify Company of the amount of any such surcharge prior to delivery of any additional City Project Water and Company shall have the right to withdraw its request. In no event shall City be required to undertake any capital cost or expansion of its existing infrastructure to provide additional City Project Water.

5. **Reservation of Minimum Quantity.** Subject to the terms and conditions of this Agreement, City shall request sufficient City Project Water each year to fulfill its obligation to deliver the Minimum Quantity to Company under this Agreement.

6. **Purchase Price for City Project Water.** The purchase price for City Project Water delivered by City to Company shall be Eighty-Five Percent (85%) of the potable water rate charged by the City to water customers. The per unit<sup>1</sup> costs for the term of this Agreement shall be as set forth on Exhibit "A" attached hereto and incorporated herein by reference. In the event that City raises the rates charged to its potable water customers during the term of this Agreement, the purchase price for City Project Water delivered to Company under this Agreement shall be adjusted accordingly.

7. **Costs of Delivery.** All costs of delivery of the City Project Water will be included in the Base Cost up to the Interconnection Point. All costs of taking delivery at the Interconnection Point and delivery water to the facilities used in the Business will be the sole responsibility of Company.

8. **Payments for City Project Water.** City shall bill Company on a quarterly basis in arrears for City Project Water delivered to the Interconnection Point during the previous three

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<sup>1</sup> A "unit" is defined as one hundred (100) cubic feet.

(3) months. The amount payable by Company to City shall be based on the total quantity, measured in units of 100 cubic feet (“Units”), of City Project Water delivered during the quarter just ended multiplied by the then-current Purchase Price (as determined in Section 6), plus any costs payable by Company pursuant to this Agreement. All invoices billed to Company shall be payable within thirty (30) days of the invoice date. City shall have the right to charge late fees of up to five percent (5%) of the overdue amount for any invoice that is not paid within such period.

**9. Delivery of Water.**

**(a) Point of Delivery.** The physical point of delivery of City Project Water pursuant to this Agreement shall be the proposed Interconnection Point between the Pipeline and the Company water distribution system which is described on Exhibit "B" attached hereto and incorporated herein by this reference, or such other alternative location as may be approved by City. City shall be responsible for operating and maintaining the Interconnection Point and Company shall cooperate with the reasonable requests of City with respect to taking any action necessary to preserve the integrity of the Pipeline and the City’s water distribution system.

**(b) Facilities.** The City shall be responsible for designing, constructing and operating the Interconnection Point, which shall be located on City property. The estimated cost of the improvements related to the Interconnection Point, including a meter, SCADA software and hardware devices, controls and appurtenances, is THIRTY SIX THOUSAND DOLLARS (\$36,000) Prior to the City’s initiation of construction, Company shall pay to City THIRTY THOUSAND DOLLARS (\$60,000) as a deposit towards the costs of such construction. Upon completion of the improvements, Company shall pay City any remaining amount for such costs within thirty (30) days of receipt from the City of an invoice for such amount. If the City’s costs are less than THIRTY-SIX THOUSAND DOLLARS (\$36,000), City shall apply such remainder as a credit towards Company’s next payment for City Project Water. Company shall also be responsible for obtaining any and all regulatory and environmental permits, licenses or other approvals necessary to construct and operate the Interconnection Point.

(c) **Construction, Regulatory/ Permit and Other Costs.** Company shall be solely responsible for all costs related to the construction and operation of the Interconnection Point with City's water distribution system. Company shall also be solely responsible for all regulatory and/or permit compliance and costs with respect to the Interconnection Point.

(d) **Delivery Schedule.** City will deliver the City Project Water to Company at the Interconnection Point upon the mutually agreed delivery schedule. The volume of delivery to the Interconnection Point shall not exceed a maximum of Two Hundred (200) gallons per minute. The Company shall make all reasonable efforts to take water at a constant flow rate, as excessive or sudden changes in flow rate may have detrimental impacts upstream.

(e) **Force Majeure.** If by reason of acts of God, earthquakes, droughts, floods, storms, explosion, fires, labor troubles, strikes, insurrection, riots, acts of the public enemy, or federal, state, or local law, order, rule, or regulation, the City is prevented, in whole or in part, from the delivery of the City Project Water to Company, as provided herein, then City may reduce delivery of City Project Water to the Company.

(f) **Suspension.** The delivery of City Project Water may be suspended or curtailed during any period of water shortage, public emergency or disaster that is declared by City or if the City Project Water is needed to meet the requirements of City's residential and commercial customers.

(g) **Obligations of City.** For the purposes of this Agreement and subject the limitations contained in this Section 9, City shall have fulfilled its obligation to make City Project Water available for delivery so long as the amount of City Project Water purchased by Company is available at the Interconnection Point for Company to take delivery of pursuant to a predetermined and mutually agreed upon delivery schedule.



**10. Water Quality; Discharge.**

(a) **City Project Water.** The City Project Water is untreated and will be delivered to Company at the Interconnection Point in its actual condition as-is. City makes no representation or warranty as to the suitability of the City Project Water for the Industrial Use. Company, in its sole discretion and expense, shall be responsible for monitoring the quality of City Project Water for use by the Company.

(b) **Discharge Requirements.** Company will be solely responsible for the discharge of City Project Water following use of such water for the Industrial Use and shall comply with all applicable laws and permits with respect to such discharge.

**11. Use of City Project Water.** The City Project Water will be used by Company solely for the Industrial Use unless another use is approved by the City in writing. In no event will Company allow the City Project Water to be comingled with potable water or used for any domestic or potable purpose. All City Project Water provided under this Agreement is required to be used within City limits.

**12. Regulatory Requirements.**

(a) **Obligations of the City.** The implementation of this Agreement shall be subject to satisfaction by City of the regulatory requirements set forth herein. City shall, if necessary, undertake the following: (i) Obtain all permits, consents, entitlements and approvals necessary to enable the City to reserve and sell, and Company to purchase, the City Project Water that is the subject of this Agreement; and (ii) fully and completely comply with the requirements of the California Environmental Quality Act ("CEQA"), including, if it is determined that this transaction is subject to CEQA and not exempt from CEQA, the completion of an initial study, and (1) either (a) there shall have been adopted a negative declaration or a mitigated negative declaration, or (b) a final environmental impact report shall have been completed and approved, and (2) the time shall have expired within which a judicial proceeding may be instituted challenging the validity or completeness of any such determination of exemption, or adoption of a negative declaration or of a mitigated negative declaration, or approval of a final environmental

impact report. Company shall be responsible for reimbursing City for all reasonable costs and expenses incurred by City in connection with the foregoing, including all professional fees and costs. City may require Company to maintain an amount not to exceed FIFTY THOUSAND DOLLARS (\$50,000.00) on deposit at all times to cover such costs.

**(b) Obligations of Company.** Company shall be solely responsible for obtaining all regulatory approvals necessary in connection with permitting and constructing all facilities necessary for taking delivery of the City Project Water and using such City Project Water for the Industrial Use.

**13. Water Service.** Nothing in this Agreement is intended nor shall it be interpreted to impose upon the City an obligation to provide non-potable water for industrial use.

**14. Representations or Warranties of City.** City makes the following representations, warranties and covenants to Company:

**(a) Power and Authority to Execute and Perform this Agreement.** The City has the power and authority to enter into this Agreement and to perform its obligations and all necessary approvals and authorizations have been obtained.

**(b) Enforceability.** This Agreement constitutes a legal, valid and binding obligation of the City, and is enforceable against the City in accordance with its terms.

**15. Representations or Warranties of Company.** Company makes the following representations, warranties and covenants to City:

**(a) Power and Authority to Execute and Perform this Agreement.** Company has the power and authority to enter into this Agreement and to perform its obligations and all necessary approvals and authorizations have been obtained.

(b) **Enforceability.** This Agreement constitutes a legal, valid and binding obligation of Company, enforceable against Company in accordance with its terms.

**16. Default and Termination.** In the event Company fails to make any payment to City under this Agreement when due, or fails to perform any obligation otherwise required by this Agreement, City shall demand in writing that Company cure such non-performance. Company shall have thirty (30) days after receipt of such demand to cure. In the event Company fails to cure a default within the thirty (30) day period, City may suspend delivery of City Project Water and redirect such water to other uses for the duration of the suspension. City shall restore water delivery when Company has cured all outstanding defaults and paid all amounts due to the City in full. In the event that Company does not cure a default within ninety (90) days of suspension, then City may terminate this Agreement at any time thereafter.

**17. Expiration of Term.** This Agreement shall terminate and be of no further force and effect as of the expiration of the Term.

**18. Indemnity.** Company, its successors and assigns, shall hold harmless, defend and indemnify City, its officials, employees, agents, successors and assigns (all of which are herein referred to as the “City Indemnified Parties”) from and against all liabilities, obligations, claims, damages, losses, actions, judgments, suits, costs and expenses, including but not limited to reasonable attorneys’ fees (collectively, “Damages”), which may be imposed on, incurred by, or asserted against City Indemnified Parties as a result of (i) a breach of Company’s obligations; or (ii) the conduct of Company’s operations, including the operation of the Interconnection Point. Notwithstanding the foregoing, in no event shall Company be liable to indemnify a City Indemnified Party for any Damages resulting from the gross negligence or willful misconduct of City. This indemnification shall survive termination of the Agreement.

**19. Third Party Claims.** Promptly following notice of any “Third Party Claim” for which City is indemnified hereunder, City shall notify Company of such claim in writing. Company shall have a period of thirty (30) days following the receipt of such notice to notify City of whether Company elects to assume the defense thereof. If Company so notifies City that

it elects to assume the defense, Company thereafter shall undertake and diligently pursue the defense of the Third Party Claim. Company shall not consent to entry of judgment or enter into any settlement agreement, without the consent of City, which does not include a complete and unconditional release of City or which imposes injunctive or other equitable relief against City. City shall be entitled to participate in, but not control, the defense thereof, with counsel of its choice and at its own expense. If Company does not give the requisite notice, or fails to assume and diligently pursue the defense of such Third Party Claim, City may defend against such Third Party Claim in such manner as it may deem appropriate, at Company's expense, including without limitation settlement thereof on such terms as City may deem appropriate, and to pursue such remedies as may be available to City against Company. Notwithstanding the foregoing, City shall not consent to entry of a judgment or enter into any settlement agreement, without the consent of Company, which does not include a complete and unconditional release of Company.

**20. Notice of Claims.** The Parties shall promptly notify each other within ten (10) days of City or Company becoming aware of: (1) any claims or suits brought against City or Company which involve this Agreement or water supplied to Company pursuant to this Agreement, (2) any Third Party Claims, and (3) any force majeure event. Any such notice shall conform to the requirements specified in Section 26 of this Agreement.

**21. Remedies Not Exclusive.** Remedies provided in this Agreement for enforcement of its terms are intended and shall be construed as cumulative rather than exclusive and shall not be deemed to deprive either Party from also using any other remedies provided by this Agreement or by law.

**22. No Transfer of Rights.** The rights granted to Company hereunder constitute the right to take delivery of City Project Water only and shall not be interpreted as a sale, transfer, or assignment of any of City's water rights.

**23. Subject to Applicable Law.** The Parties acknowledge and agree that this Agreement and the rights and obligations of the Parties shall be subject to the laws governing

municipal corporations as they now exist and as they may be amended or codified by the Legislature of the State of California.

**24. Entire Agreement.** This Agreement contains the entire understanding between Company and City with respect to its subject matter, and supersedes all prior agreements, oral or written, and all prior or contemporaneous discussions or negotiations between Company and City. This Agreement cannot be amended except in writing signed by both Parties.

**25. No Waiver.** Any failure or delay on the part of either Party to exercise any right under this Agreement shall not constitute a waiver of the right, and shall not preclude such Party from exercising or enforcing the right, or any other provision of this Agreement, on any subsequent occasion.

**26. Notices.** All notices or other communications required or desired to be given pursuant to this Agreement shall be in writing and shall be hand-delivered or sent by a reputable overnight courier service providing delivery confirmation. Each such notice or communication shall be deemed to be duly given when hand-delivered or one (1) day after being deposited for next day delivery with an overnight courier. Each such notice or communication shall be addressed to the Parties at their respective addresses set forth below, or such other address as a Party notifies the other in writing.

If to City:	City of El Paso de Robles 1000 Spring Street Paso Robles, CA 93446 Attn: Public Works Director Tel: 805-237-3861 Email: dmckinley@prcity.com
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If to Company: Firestone Walker, Inc.  
1400 Ramada Drive  
Paso Robles, CA 93446  
Attn: Mark Fischer, Engineering Manager  
Tel: (805) 225-5911, ext. 623  
Email: MarkF@firestonebeer.com

**27. Headings; Section References.** Captions and headings appearing in this Agreement are inserted solely as reference aids for the ease and convenience; they shall not be deemed to define or limit the scope or substance of the provisions they introduce, nor shall they be used in construing the intent or effect of such provisions.

**28. Severability.** If any provision of this Agreement is finally determined by a court to be invalid or unenforceable as written, the provision shall, if possible, be enforced to the extent reasonable under the circumstances and otherwise shall be deemed deleted from this Agreement. The other provisions of this Agreement shall remain in full force and effect so long as the material purposes of the Agreement and understandings of the Parties are not impaired.

**29. Binding Effect Assignment.** This Agreement shall be binding on and inure to the benefit of the Parties, and their respective successors and permitted assigns. Company shall have the right to assign its rights under this Agreement only with the prior written consent of City, provided, however, that the City shall not unreasonably withhold such consent and further provided that the assignee agrees to be bound by all of the obligations of Company set forth herein. Notwithstanding the foregoing, no assignment permitted hereunder shall permit the delivery of City Project Water to any property or development other than the Property without the written consent of the City, in its sole and absolute discretion.

**30. Attorneys Fees.** In the event that any action or proceeding is brought to enforce one or more of the terms of this Agreement, to restrain an alleged violation of this Agreement, or to determine the validity of this Agreement or any part, the prevailing Party in any such action or proceeding shall be entitled to recover from the other its reasonable costs and attorneys' fees, in

addition to any other remedies available to it in law or equity. If both Parties are successful in one or more causes of action during any such proceeding, the costs and fees shall be apportioned as determined by the court.

**31. Governing Law and Venue.** This Agreement is a contract governed in accordance with the laws of the State of California. THE PARTIES HEREBY AGREE THAT VENUE FOR ANY ACTION BROUGHT TO ENFORCE THE TERMS OF THIS AGREEMENT SHALL BE IN A COURT OF COMPETENT JURISDICTION IN THE COUNTY OF SAN LUIS OBISPO, CALIFORNIA, AND CONSENT TO THE JURISDICTION THEREOF.

[Signatures follow on the next page]

IN WITNESS WHEREOF, the Parties have executed this agreement as of the date first written above.

**CITY:**

**COMPANY:**

City of El Paso de Robles  
a California municipal corporation

Firestone Walker, Inc.  
a California corporation

By: \_\_\_\_\_

By: \_\_\_\_\_

Name: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

Title: \_\_\_\_\_

**APPROVED AS TO FORM:**

By: \_\_\_\_\_  
Iris P. Yang, City Attorney



# EXHIBIT A

<b>Purchase Price for City Project Water</b>						
<b>Year</b>	2017	2018	2019	2020	2021	
<b>Purchase Price for Potable City Water</b>						
Fixed Fee	\$ 5.00	\$ 6.25	\$ 7.50	\$ 8.75	\$ 10.00	
Unit Cost	\$ 4.83	\$ 5.26	\$ 5.73	\$ 6.14	\$ 6.56	
<b>Purchase Price for Project Water</b>						
Fixed Fee	\$ 4.25	\$ 5.31	\$ 6.38	\$ 7.44	\$ 8.50	
Unit Cost	\$ 4.11	\$ 4.47	\$ 4.87	\$ 5.22	\$ 5.58	

**Notes:**

1. Project water pricing shall be 85% of the potable water rate
2. One Unit = 100 cubic feet = 748 gallons

EXHIBIT B  
Point of Connection

