

March 17, 2009

**FROM:** RENE A. RAMIREZ, Director   
Department of Public Utilities

**BY:** LON M. MARTIN, Assistant Director   
Department of Public Utilities

**SUBJECT:** APPROVE THE MEMORANDUM OF UNDERSTANDING BETWEEN THE LONG-TERM WATER CONTRACTORS AND CROSS VALLEY CANAL CONTRACTORS REGARDING MEDIATION SERVICES TO DEVELOP WATER ALLOCATIONS FOR RESTORING A SELF-SUSTAINING SALMON FISHERY IN THE SAN JOAQUIN RIVER AND AUTHORIZE REIMBURSEMENT COSTS FOR MEDIATION SERVICES NOT TO EXCEED \$4,730

AGENDA ITEM NO.	1 I
<b>COUNCIL MEETING</b>	
APPROVED BY	
DEPARTMENT DIRECTOR	
CITY MANAGER	

**KEY RESULT AREA**

Resource Management

**RECOMMENDATION**

Staffs recommends approving the Memorandum of Understanding (MOU) and authorizing the Director of Public Utilities to sign on behalf of the City of Fresno and authorizing the reimbursement for mediation services not to exceed \$4,730.

**EXECUTIVE SUMMARY**

On April 6, 2007, the City of Fresno (City) approved an amendment to its Long Term Class I Water Contract that stipulated all contractors are to participate in the restoration of a self-sustaining salmon fishery in the San Joaquin River. Essentially the City's water delivery is subject to the Order Approving Stipulated Settlement, the Judgment and further orders issued by the Court pursuant to Settlement in *Natural Resources Defense Council, et al. v. Rodgers, et al.* The Settlement requires the U.S. Bureau of Reclamation (USBR) to restore a self-sustaining Chinook Salmon fishery (and other fish) downstream of the Friant Dam and all Friant and Cross Valley Contractors are to provide the water supply. In addition to hydraulic conditions, Fresno's water supply will be reduced annually, by as little as 2% or as much as 12% as a result of the San Joaquin River restoration settlement. Friant Water Users Authority (FWUA) is tasked with assembling all impacted contractors to develop a water reduction formula in order to provide water for the fishery. They have proposed, and the City is willing to participate in, a voluntary mediation effort to agree upon methods and procedures for equitably allocating water amongst all Friant and Cross Valley Contractors. Fresno will be one of 27 other Cities and Irrigation Districts (Mediating Parties) entering into the MOU. Fresno's prorated share of the costs for mediation services will be approximately \$4,300 and staff is requesting authorization for a 10% contingency, \$430. The total expenditure is not to exceed \$4,730.

**KEY OBJECTIVE BALANCE**

Participation in the formulation of the water allocations for the San Joaquin River (River) fishery is essential due to resulting impacts to the City's water supply and future development. Council action on this matter optimizes the three key objectives of customer satisfaction, employee satisfaction, and financial management

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by allowing the City to partner with 27 other agencies to best formulate water contribution expectations maximizing each other's infrastructure. Customer satisfaction is achieved by constructing a water supply contribution that minimizes the impact to customers and new development.

### **BACKGROUND**

In December 1988 the case known as *Natural Resources Defense Council v. Rodgers* was filed by a collection of 14 environmentalists and fishing organizations (Plaintiffs), claiming that the USBR violated the National Environmental Policy Act. In 1992 the Plaintiffs' amended their complaint to add a claim that the Bureau had violated the California Fish & Game code; plaintiffs assert Section 5937 requires the USBR to release "sufficient" water from Friant Dam to keep the fish below the dam in good condition. This claim became the focal point of the litigation.

In 2005 and 2006, Senator Feinstein and Representative Radonovich encouraged settlement negotiations and even participated at times. After a series of Settlement attempts and Congressional Budget Office hurttles the House Natural Resources Committee approved the proposed Settlement legislation. The legislation is making its way through Congress and seems to have the support necessary for approval.

The Settlement legislation only identifies the amount of water and delivery timing to sustain a fishery, not how the water will be made available. The FWUA is tasked with assembling all impacted contractors to develop a water reduction formula in order to provide water for the fishery. They have proposed, and the City is willing to participate in a voluntary mediation effort to agree upon methods and procedures for equitably allocating water amongst all Friant and Cross Valley Contractors. Fresno will be one of 27 other Cities and Irrigation Districts entering into the MOU. The first water releases for the fishery program will start in October 2009. Prior to October, an environmental analysis has to be completed and it is necessary to include the results from these mediation efforts which will identify the water supply methodology.

Although City Attorney's Office has reviewed the MOU and has approved it as to form, they have requested the Department of Public Utilities (DPU) to send separate correspondence clarifying the mediation effort is voluntary and not binding. When the approved MOU is returned to the FWUA, DPU will include separate correspondence with the MOU addressing this issue as requested by the City Attorney's Office.

### **FISCAL IMPACT**

As part of the FY 2009 Annual Budget, within the Water Enterprise Fund, Account 53306 – Outside Legal Services, are unallocated savings from other projects that can be encumbered for this MOU. Therefore, no additional funds or transfers will be required.

Attachment: Memorandum of Understanding

**Memorandum of Understanding  
between and among  
Participating Friant Division Long-Term Water Contractors and  
Cross Valley Canal Contractors Regarding Mediation of Certain  
Aspects of Implementation of the Settlement in  
Natural Resources Defense Council, et al. v. Kirk Rodgers, et al.**

**A. Preface**

This Memorandum of Understanding (the "MOU") is entered into between and among the undersigned each of which is a Central Valley Project Friant Division or Cross Valley Canal water service contractor ("Mediating Parties").

The Mediating Parties are parties affected by the Stipulation of Settlement dated September 13, 2006, in the matter of *Natural Resources Defense Council, et al., v. Kirk Rodgers, et al.*, United States District Court Case No. CIV-S-88-1658 LKK/GGH ("Settlement"). As a result of the Settlement the Mediating Parties expect to suffer actual or potential water supply losses. The Mediating Parties believe that it is in the best interests of each to engage in a voluntary, confidential, privileged, and non-coercive process in which each may work with the others to agree upon methods and procedures for equitably allocating such water supply impacts resulting from the Settlement and the Water Management Goal measures of the Settlement (including Title III of the implementing legislation) to avoid such water supply impacts between and among the Mediating Parties.

**B. Agreement to Mediate**

**1. Engagement of Mediator**

**For the convenience and benefit of the Mediating Parties**, FWUA shall forthwith retain James C. Waldo, of Gordon, Thomas, Honeywell, Malanca, Peterson & Daheim, LLP, Seattle, Washington ("Mediator"), to act as a Mediator between and among the Mediating Parties, and FWUA, in a mediation consulting capacity, shall assist the Mediator and may retain additional consultants necessary to facilitate communication between and among the Mediator and the Mediating Parties to assist them in reaching one or more mutually acceptable agreements. In connection with the same, the Mediator and additional consultants shall be retained by written agreement between the additional consultants and FWUA.

**2. Participation in Mediation**

Each of the Mediating Parties shall cooperate and fully participate in the Mediation in good faith, and shall extend its best efforts towards achieving mutually acceptable resolution of all disputed issues that may be subject to the Mediation.

**3. Confidentiality and Privilege**

Each of the Mediating Parties acknowledges that it understands that the Mediator, FWUA

and its staff and any additional mediation consultants retained hereunder may not use information that is acquired in confidence in the course of the Mediation outside of the Mediation; must maintain impartiality towards each of the Mediating Parties; must make reasonable efforts to keep informed about matters that could raise questions about the Mediator's ability to conduct the Mediation impartially and must then disclose such matters to the Mediating Parties; and must preserve the confidentiality of Mediation communications as required by California Evidence Code §§ 1115 through 1128, which provide, in part, that all communications, negotiations, or settlement discussions, by, between or among the Mediating Parties in the course of the Mediation shall remain confidential, and that no evidence of anything said or any admission made, or any writing prepared, disclosed, or used, for the purpose of, in the course of, or pursuant to the Mediation, shall be admissible or subject to discovery, and that, furthermore, none of the Mediating Parties nor the Mediator, FWUA and its staff or additional consultants may be compelled in any arbitration, administrative adjudication, civil action, or other non-criminal proceeding, to disclose the same.

#### **4. Compensation of Mediator**

In its engagement of the Mediator and consultants FWUA shall function as an administrator, advancing all fees and costs charged by the Mediator and consultants under the written engagement agreement between the Mediator/Consultants and FWUA. Upon written notice or invoice from FWUA, the Mediating Parties shall reimburse FWUA for all sums so paid to the Mediator in the proportions described in Exhibit A, attached hereto, and incorporated herein by this reference, in a combined aggregate amount not to exceed \$115,000 unless agreed otherwise by amendment of this MOU pursuant to Part C.2, below. It is acknowledged that the proportions described in Exhibit A may be adjusted to reflect the actual Mediating Parties signatory to this Mediation Agreement.

#### **C. General Provisions**

##### **1. Effective Date**

This MOU is effective December 1, 2008.

##### **2. Minimum Participation**

This MOU shall only be effective upon participation of entities listed in Exhibit A that results in a 75% or greater financial participation.

##### **2. Modification or Amendment**

Any provision of this MOU may be modified or amended, including modification to add parties, only by written agreement executed by all of the Mediating Parties.

##### **3. Withdrawal from MOU**

Any of the Mediating Parties may withdraw from this MOU upon written notice to each of the other Mediating Parties, provided, however, that the obligation of a withdrawing party to reimburse FWUA for its proportionate share of the charges of the Mediator shall continue with

respect to all services rendered, and costs incurred, by the Mediator through the last day of the calendar month in which such written notice of withdrawal is provided.

**4. Execution**

This MOU shall be subject to the California Uniform Electronic Transactions Act, and may be signed in one or more counterparts, each of which, when executed and delivered, shall be an original, and all of which together shall constitute one instrument, with the same force and effect as though all signatures appeared on a single document, and signatures transmitted electronically, whether by fax, e-mail, e-mail attachment, or digital or photographic image, shall have the same force and effect as an original signature.

**5. Authority**

Each person executing this MOU certifies that he or she is authorized to execute it on behalf of the Mediating Party he or she represents, and that such Mediating Party shall be fully bound by the terms of this MOU upon such signature without further act, approval, or authorization.

Executed on \_\_\_\_\_, 200\_

By:

\_\_\_\_\_  
Name

\_\_\_\_\_  
Title

\_\_\_\_\_  
Entity