

May 31, 2012

**FROM:** PATRICK N. WIEMILLER, Director  
Department of Public Utilities

**BY:** MARTIN A. QUERIN, PE, Assistant Director  
Department of Public Utilities – Water Division

**SUBJECT:** 1. ADOPT FINDINGS THAT THE PROPOSED AGREEMENT IS NOT A "PROJECT" WITHIN THE PUBLIC RESOURCES CODE SECTION 21803 (CALIFORNIA ENVIRONMENTAL QUALITY ACT GUIDELINES SECTION 15378) AND THAT NATIONAL ENVIRONMENTAL QUALITY ACT COMPLIANCE IS COMPLETE BASED UPON THE UNITED STATES BUREAU OF RECLAMATION'S ADOPTED "FINDING OF NO SIGNIFICANT IMPACT" COVERING THE WATER RECAPTURE PROGRAM FOR WATER YEAR 2012

2. AUTHORIZE THE DIRECTOR OF PUBLIC UTILITIES OR HIS DESIGNEE TO ENTER INTO AN AGREEMENT BETWEEN THE CITY OF FRESNO AND WESTLANDS WATER DISTRICT (WWD) FOR SALE OF RECAPTURED SAN JOAQUIN RIVER RESTORATION WATER

**RECOMMENDATIONS**

Staff recommends that City Council:

1. Adopt findings (below) that the proposed agreement is: a) not a "project" and therefore exempt from further California Environmental Quality Act (CEQA) review, and b) National Environmental Policy Act ("NEPA") compliance is complete based on the Bureau's published "finding of no significant impact" ("FONSI") (below).
2. Authorize and direct the Director of Public Utilities to enter into the "Agreement for Sale of Recaptured San Joaquin River Restoration Water" ("Agreement"; attachment A) in substantially the same form as attached to this report and make appropriate application to the Bureau of Reclamation ("Bureau") to effectuate the Agreement.

Presented to City Council  
Date 5/31/12  
Disposition Approved

**EXECUTIVE SUMMARY**

The City has a right to a portion of the water sent downstream on the San Joaquin River as a result of the implementation of the San Joaquin River Restoration activities. This water, called "Recapture Water," is most directly available at the confluence of the San Joaquin and Merced Rivers, near San Luis Reservoir.

Westlands Water District proposes to buy the City's Recapture Water. The City will receive \$175 per acre-foot for this water, for a total of approximately \$1.55 million. Access to the funds is more beneficial to the City than

AGENDA ITEM NO. <u>8:45am #1A</u>
COUNCIL MEETING <u>05/31/12</u>
APPROVED BY

DEPARTMENT DIRECTOR
CITY MANAGER 

is this increment of water during this upcoming water year, particularly given the cost of obtaining direct access to the water itself.

## **BACKGROUND**

After many years of litigation, in 2006 the Bureau and many of the Central Valley Project ("CVP") Friant water users agreed upon a San Joaquin River Environmental Restoration Program. The San Joaquin River Restoration Settlement includes certain fisheries restoration goals ("Restoration Program") and water management goals ("Water Recapture Program").

A component of the Restoration Program involves increasing the flows along the San Joaquin River in an attempt to restore certain fisheries habitat. The result of the increased flows is a reduction in the water available to the Friant CVP contractors, including the City. In other words, implementing the Restoration Program results in the City receiving less CVP water than it has historically.

The Water Recapture Program is intended to mitigate the lost water supply resulting from implementation of the Restoration Program. Pursuant to Water Recapture Program, the Bureau makes available to the Friant contractors some portion of restoration flows. The contractors may transfer, trade, or arrange for recapture this water through various water conveyance systems.

The Bureau has notified the City that it has a right to approximately 8,896 acre-feet of recapture water. The City proposes to sell this water to Westlands Water District (WWD).

## **ENVIRONMENTAL FINDING**

1. National Environmental Policy Act ("NEPA"). The Bureau adopted a "finding of no significant impact" ("FONSI"), covering the Water Recapture Program for water year 2012. (See Attachment B.) The City relies on the FONSI for NEPA compliance for the Agreement.
2. California Environmental Quality Act (CEQA). The Agreement is not a "project" within the meaning of Public Resources Code section 21803 (CEQA Guidelines § 15378) because implementation of the Agreement has no reasonable potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment. This finding is supported based on the following:
  - a. WWD is an existing water service contractor with the Bureau and has the right to receive water from the San Luis Unit of the CVP under Water Service Contract No. 14-06-200-495A-IR3.
  - b. No new facilities will be used or required to deliver water pursuant to the Agreement;
  - c. The Agreement is undertaken in furtherance of the Restoration Program described above; and
  - d. The Agreement will:
    - i. provide a short-term, temporary supply of water to WWD;

- ii. provide WWD will a small incremental increase in its access to water from existing Bureau facilities in a year when WWD would otherwise receive less than its full contract entitlement from the Bureau; and
- iii. be used for existing (no new) uses within WWD, on lands already under irrigation or municipal and industrial uses.

### **FISCAL IMPACT**

The Water Division will receive approximately \$1.55 million from the sale of the Recapture Water to Westlands Water District. Under the the City's CVP contract, the Water Division is required to pay \$62.53 per acre foot for the Recapture Water. The estimated net revenue returned to the City will be approximately \$1 million. These funds will be deposited into the Water Enterprise Fund.

5/31/12  
845AM.

## AGREEMENT FOR PURCHASE OF RECAPTURED SAN JOAQUIN RIVER RESTORATION WATER

This Agreement for Purchase of Recaptured San Joaquin River Restoration Water ("Agreement") is made and effective as of May 31, 2012 by and between (i) the City of Fresno, a California municipal corporation ("City") and (ii) the Westlands Water District, a California water district ("WWD") with reference to the following facts:

A. City has the right to receive water from the Friant Division of the Central Valley Project ("CVP") under Contract No. 14-06-200-8901D ("City CVP Contract").

B. On or about September 13, 2006, a Stipulation of Settlement was entered in the litigation entitled *Natural Resources Defense Council, et al. v. Kirk Rodgers, et al.*, United States District Court, Eastern District of California, No. CIV. S-88-1658-LKK/GGH ("SJ River Settlement").

C. In March 2009, the San Joaquin River Restoration Settlement Act (Public Law 111-11 (H.R. 146); "SJ River Restoration Act") was enacted as required by and as a mechanism to implement certain portions of the SJ River Settlement.

D. Together, the SJ River Settlement and the SJ River Restoration Act provide for certain environmental restoration activities along the main stem of the San Joaquin River, referred to as the "San Joaquin River Restoration Program" or the "Restoration Program". Pursuant to the Restoration Program, the United States Bureau of Reclamation ("Reclamation") periodically releases a portion of the Friant Division CVP water supplies, including those associated with the City CVP Contract, to supplement San Joaquin River flow ("Restoration Flows").

E. Also pursuant to the SJ River Settlement and the SJ River Restoration Act, a portion of the Restoration Flows are recaptured by Reclamation and made available to the Friant Division contractors, including the City, in the San Luis Reservoir (the "Recaptured Water").

F. Reclamation has forecast that 8,896 acre-feet of Recaptured Water will be available to the City between March 1, 2012 and February 28, 2013 (the "2012 Water Year").

D. To fully promote the Restoration Program, the City wishes to sell its Recaptured Water to WWD.

E. WWD has the right to receive water from the San Luis Unit of the CVP under Water Service Contract No. 14-06-200-495A-IR3. Due to drought and regulatory constraints on the water supply available to it under its water service contract, WWD anticipates that it will be water short during the 2012 Water Year and in certain subsequent water years and wishes to acquire supplemental supplies.

THEREFORE, the parties agree as follows:

1. Purchase of Recaptured Water. City shall sell, and WWD shall purchase, the 2012 Water Year Recaptured Water for \$175 per acre foot (the "Purchase Price"). City shall be responsible for all rates and charges associated with delivery of the Recaptured Water to the San Luis Reservoir. WWD shall be responsible for all rates and charges to convey the Recaptured Water from San Luis Reservoir to WWD.

2. Recaptured Water Amounts. The actual amount of Recaptured Water made available by Reclamation may vary slightly from the current projection of 8,896 acre-feet. WWD shall purchase and City shall sell up to 10,000 acre-feet of Recaptured Water at the Purchase Price.

3. Payment of Purchase Price.

a. WWD shall make an initial payment to City of \$1,556,800 (one million, five hundred fifty six thousand, eight hundred dollars; 8,896 acre-feet times the Purchase Price) (the "Initial Payment") within 30 days of the date that Reclamation approves the transfer of the Recaptured Water as provided in this Agreement.

b. In addition, within 30 days after the end of the 2012 Water Year the City and WWD shall reconcile the amount of Recaptured Water actually delivered to WWD versus the assumed delivery amount of 8,896 acre feet. WWD shall either make a final payment to the City, or the City shall provide a refund to WWD, based upon this reconciliation. For example, if WWD received 8,996 acre-feet of Recaptured Water, WWD shall make a final payment to the City of \$17,500 (100 acre-feet times the Purchase Price). This final payment shall be made within 30 days of the reconciliation provided herein.

4. Transfer Agreement. In order to accomplish delivery of the Recaptured Water to WWD, the parties shall execute, and forward to the US Bureau of Reclamation, a transfer agreement in a form substantially similar to Attachment A, attached hereto.

5. Counterparts. This Agreement may be executed in counterparts by the parties. Facsimile signatures shall be binding.

6. Entire Agreement. This Agreement constitutes the entire agreement between the parties with respect to the subject matter hereof. All prior agreements with respect to that subject matter, whether verbal or written, are hereby superseded in their entirety by this Agreement and are of no further force or effect. Amendments to this Agreement shall be effective only in writing, and then only when signed by the authorized representatives of the respective parties.

7. Time of the Essence. Time is of the essence and the performance by the parties of this Agreement.

8. Specific Performance. The parties acknowledge that the water to be purchased by WWD under this Agreement is unique, and that the failure of the City to perform under this Agreement may not be readily compensable in monetary damages. Therefore, in addition to any other remedies available to WWD at law or in equity, in the event of a breach or threatened breach of this Agreement by the City, WWD shall be entitled to specific performance of this Agreement.

9. Severability. If any provision of this Agreement is determined by a court of competent jurisdiction to be void or unenforceable, that provision shall be deemed automatically reformed to be enforceable to the maximum extent legally permissible, and that balance of the Agreement shall be unaffected.

10. Ambiguities. This Agreement shall be interpreted as if it had been jointly drafted by both parties. Therefore, the normal rule of construction that ambiguities are construed against the drafter is hereby waived.

11. Notices. All notices under this Agreement shall be effective (i) when personally delivered to the City or WWD, as the case may be, (ii) when sent by facsimile on a business day between the hours of 8 a.m. and 5 p.m. (with written confirmation of transmission) to the City or WWD, as the case may be, at the numbers set forth below, provided that a copy is mailed as indicated below, or (iii) three business days after deposit in the United States mail, registered or certified, postage fully prepaid and addressed to the respective parties as follows:

To City: Martin A. Querin, PE, Assistant Director of Public Utilities  
City of Fresno, Department of Public Utilities  
2600 Fresno Street  
Fresno, CA 93721  
Facsimile No.: (559) 488-1024  
Telephone No.: (559) 621-8600

To WWD: Tom Glover, Deputy General Manager  
Westlands Water District  
P. O. Box 6056  
Fresno, CA 93703  
Facsimile No.: (559) 241-6277  
Telephone No.: (559) 241-6215

or such other address or facsimile number as the parties may from time to time designate in writing. As a matter of convenience, however, communications between the City and WWD shall, to the extent feasible, be conducted orally by telephone or in person, and/or through the parties' respective counsel, with such communications to be confirmed and made effective in writing as set forth above provided no such oral notice or communication shall be effective unless so confirmed in writing.

16. Further Action. The parties agree to perform all further acts, and to execute, acknowledge, and deliver any documents that may be reasonably necessary, appropriate or desirable to carry out the purposes of this Agreement.

17. No Third Party Beneficiaries. This Agreement does not create, and shall not be construed to create, any rights enforceable by any person, partnership, corporation, joint venture, limited liability company or other form of organization or association of any kind that is not a party to this Agreement.

18. Environmental Compliance. The obligations of the parties under this Agreement are expressly conditioned upon: (i) compliance with the California Environmental Quality Act ("CEQA") and all other applicable environmental laws with respect to the actions contemplated by this Agreement, and (ii) the receipt of all necessary governmental and third party consents and approvals for those actions. Each party shall promptly prepare all appropriate environmental documents, if any are required, for it to undertake the actions contemplated in this Agreement. The parties shall cooperate to diligently complete all environmental review required in order to implement this Agreement, and shall use reasonable efforts to reduce any overlap in analyzing, mitigating, or studying environmental impacts associated with the actions proposed in this Agreement. Notwithstanding any other provision of this Agreement, no action shall be taken to effect the actions contemplated by this Agreement, and no other action shall be taken that commits any material resources of any party, until all required environmental review is completed and all parties have independently made all findings required by CEQA and other applicable environmental laws. If, upon completion of such environmental review, a party finds one or more significant, unmitigated environmental impacts resulting from the actions contemplated by this Agreement and cannot make a finding that the benefits of the proposed project outweigh the impact or impacts, or that the impacts can be mitigated to a level below significance, then this Agreement shall terminate without further obligation or liability of any party, and any payments theretofore made by WWD shall be immediately returned to WWD. Neither the execution of this Agreement, nor any preliminary steps taken to implement this Agreement, shall be taken into account in determining whether mitigating or avoiding any significant impact is feasible.

19. Attorneys' Fees. In the event of any action between the parties seeking enforcement or interpretation of any of the terms and conditions of this Agreement, the prevailing party in such action shall be awarded its reasonable costs and expenses, including, but not limited to, taxable costs and reasonable attorneys' fees.

IN WITNESS WHEREOF, the parties have executed this Agreement as of the date first above written.

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The parties have executed this Agreement on the day and year first above written.

**CITY OF FRESNO,**  
a California municipal corporation

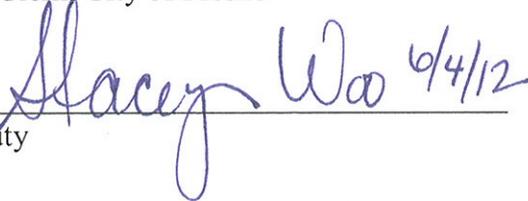
**WESTLANDS WATER DISTRICT**  
a California water district

By:   
Patrick N. Wiemiller  
Director of Public Utilities

By:   
Dave Ciapponi  
Assistant General Manager

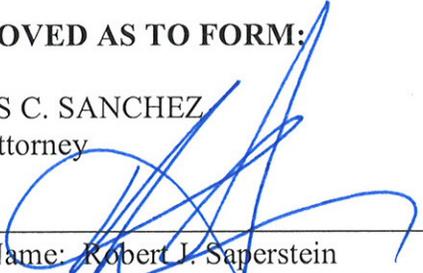
**ATTEST:**

YVONNE SPENCE, CMC  
City Clerk, City of Fresno

By:  6/4/12  
Deputy

**APPROVED AS TO FORM:**

JAMES C. SANCHEZ  
City Attorney

By:   
Print Name: Robert L. Saperstein  
Title: Special Counsel to the City Attorney  
Date: May 25, 2012

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5/25/12

# ATTACHMENT A

## WATER TRANSFER AGREEMENT 2012-2013 WATER YEAR

THIS AGREEMENT is made and entered into this 31<sup>st</sup> day of May 2012, by and between the CITY OF FRESNO, hereinafter referred to as "City", and WESTLANDS WATER DISTRICT, hereinafter referred to as "WWD" with reference to the following facts:

A. The United States Bureau of Reclamation ("Reclamation") has forecast that City will be allocated a portion of recaptured San Joaquin River Restoration flows in the 2012/13 water year currently estimated to be 8,896 acre-feet (the "Recaptured Water"). Reclamation has notified the parties that the amount of Recaptured Water made available to the City in the 2012/13 water year will likely increase.

B. WWD is a contractor with Reclamation and is entitled to receive CVP water under Water Service Contract No. 14-06-200-495A-IR3. Due to drought and regulatory constraints on the annual water supply available to it, WWD is and will experience water supply shortages. To help offset these shortages, WWD wishes to purchase, subject to all necessary approvals, up to 10,000 acre feet of Recaptured Water from the City, but no more than the total amount of the Recaptured Water made available to the City by Reclamation.

THEREFORE, subject to Reclamation's approval, the Parties agree as follows:

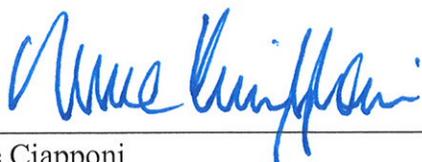
1. The City does hereby transfer to WWD up to 10,000 acre-feet of Recaptured Water, but not to exceed the total Recaptured Water allocated to City by Reclamation, for use by WWD in the 2012-2013 water year pursuant to the schedule attached hereto as Exhibit 1.
2. The City agrees to pay all Reclamation rates and charges associated with delivery of the Recaptured Water to San Luis Reservoir.
3. WWD agrees to pay all Reclamation and San Luis and Delta Mendota Water Authority rates and charges associated with delivery of the Recaptured Water from San Luis Reservoir to its normal turn-outs on the San Luis Canal or Delta Mendota Canal.
4. WWD shall ensure that the Transferred Water is put to reasonable and beneficial use in accordance with State and Federal law, including Reclamation law.

**IN WITNESS THEREOF**, the parties, through their duly authorized representatives, have executed this agreement as of the day and year first above written.

**CITY OF FRESNO,**  
a California municipal corporation

**WESTLANDS WATER DISTRICT**  
a California water district

By:   
Patrick N. Wiemiller  
Director of Public Utilities

By:   
Dave Ciapponi  
Assistant General Manager

## EXHIBIT 1

Delivery Schedule to WWD

June	
July	4,875
August	185
September	265
October	486
November	1015
December	655
January	745
February	670

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5/25/12