



Item: Consulting Agreement with Water Right Solutions and First Amendment to the Agreement

From: Water Right Solutions, Inc.

Initiated By: City Interest in Utilizing, Protecting & Defending Its Various Water Rights and Reservations

Presented By: Coleen Balzarini, Fiscal Services Director

Action Requested: Authorize the City Manager to Execute a Consulting Agreement and First Amendment to the Agreement with Water Right Solutions, Inc.

Suggested Motion:

1. Commissioner moves:

“I move that the City Commission authorize the City Manager to execute a Consulting Agreement and First Amendment to the Agreement with Water Right Solutions, Inc.”

2. Mayor calls for a second, discussion, inquiries from the public, and calls the vote.

Staff Recommendation: It is recommended that the City Commission authorize the City Manager to execute a consulting agreement and first amendment to the agreement with Water Right Solutions, Inc.

Background:

Significant Impacts: Services performed by WRSI since 2002 have included filings with the Department of Natural Resources and Conservation (DNRC) to correct and amend the City’s existing water rights and reservations. WRSI has also submitted applications and support of requests to add new points of diversion and places of use to the City’s water reservation to accommodate industrial companies operating or intending to locate operations in Great Falls.

Purpose: On June 18, 2002, the City Commission authorized the City Manager to enter into an Agreement with Water Right Solutions, Inc (WRSI). A new agreement has been prepared that updates the scope of work that might be performed by WRSI and the fees related to the work. The fee schedule has been the same since 2002. Fee increases are necessary due to inflationary cost increases as well as increasing demands on WRSI staff, which are occurring as a direct result of the acceleration of the adjudication of Montana water rights.

Project Work Scope: First Amendment to Agreement: On February 6, 2008, the MT Department of Natural Resources and Conservation (DNRC) Montana Water Court issued a Notice of Entry of Temporary Preliminary Decree for the Missouri River, From Holter Dam to Sun River (Basin 41QJ). This basin has 2,584 water right claims on file with DNRC. The City has three water right claims in this basin as well as additional water rights in the downstream 41Q Basin. Staff recommends that the City engage WRSI to review, evaluate, and if necessary make recommendation to the City to exercise its right to object to information contained in the Temporary Preliminary Decree that may have an adverse impact on the City's water rights.

All interested parties, including the City, have an opportunity to review their own water rights, as well as the water rights of other parties, during the Temporary Preliminary Decree time period. Such a review would evaluate potential impacts to City water rights in relation to others and in relation to conflicting information related to City water rights, in Basin 41QJ. The review would also evaluate Basin 41QJ claims and potential impacts on the City's downstream water rights in Basin 41Q. There are no known existing issues, and it is possible that no issues related to City water rights will be identified that would require further action. In order to make that determination, it is necessary to review the 2,584 water right claims and their potential impact to the City's rights. There are a number of different scenarios that might have an adverse impact on the City's rights.

Example 1: A water right holder in 41QJ is claiming or using water rights which are in excess of its historical use or existing claimed rights. This excess claim poses a potential negative impact to the City rights and therefore the City should object during the preliminary decree period.

Example 2: A City water right contains incorrect information such as a 'place of use' description that requires correction by the City.

The 180 day comment period is the primary opportunity for the City to participate in the Water Court proceedings related to Basin 41QJ. The City's right to appeal any adverse decision is limited once the Final Decree is issued. Therefore, Staff believes it is advisable to engage Water Right Solutions to review the preliminary decree and related 2,584 water right claims on behalf of the City. It is anticipated this may take up to 32 hours of consulting time to review and provide recommendations on what actions, if any, the City should make in regards to Basin 41QJ water rights.

Evaluation and Selection Process: WRSI has served as the City's water right consultant since 2002 when the malting plant requested to purchase raw water from the City. The City's previously unused water reservation was identified as the source of water to be used for this request. In order to use the proposed water reservation it was necessary to identify the existing places of use and diversion points and then make a change application to the DNRC. During the course of that specific task it became apparent that the City's other water rights and reservations were in need of review. In conjunction with the malting plant water use application, WRSI was also engaged to perform an overall review and provide the City with a recommended course of future actions to protect its water rights. At this time WRSI is very familiar with the City's water rights and provides necessary expertise to the City in the protection of those rights.

Conclusion:

It is recommended that WRSI continue to act as the City's water rights consultant. This is a professional services contract where the consultant performs specific tasks at the request of the City. Each of those tasks has an associated cost of significantly less than the \$50,000 benchmark that would require a formal Bid or RFP process.

The First Amendment to the Agreement authorizes Water Right Solutions to review the preliminary decree and related 2,584 water right claims on behalf of the City. It is anticipated this may take up to 32 hours of consulting time to review and provide recommendations on what actions, if any, the City should make in regards to Basin 41QJ water rights. Based on the consultant's reported findings and recommendations it is possible that additional expenses may be necessary to protect the City's water rights.

Concurrences: The City Attorney has reviewed the contract. The indemnification clause within the contract has been revised per the City Attorney's recommendation.

Fiscal Impact: Consultant Agreement combined fees paid to date are \$105,500, or an average fee of less than \$21,000 per year. The rate will increase from \$75 per hour to \$85 per hour for staff time and \$100 per hour for principal consultant time. If the consultant appears as an expert witness on behalf of the City the fee will be \$150 per hour. Based on the consultant's reported findings and recommendations it is possible that additional work and related expenses may be necessary to protect the City's water rights.

Alternatives:

The City has two other alternatives. It can do nothing in regards to reviewing and defending its water rights in relation to other water rights. The risk is that there may be issue remarks by the Water Court that are detrimental to the City's rights and the window of opportunity to participate in that process will be missed.

City Staff can bring the water rights review process in house and avoid consulting fees. This is not a recommended alternative as this is a specialized area in which City staff is not proficient.

Attachments/Exhibits:

1. "A Cautionary Tale" by Stan Bradshaw, legal counsel to Trout Unlimited Montana Water Project. (Attachment not available online; on file in City Clerk's Office.)
2. Proposed agreement and first amendment to the agreement.

CONSULTING AGREEMENT

THIS AGREEMENT is entered into between WATER RIGHT SOLUTIONS, INC.,(WRSI) 303 Clarke Street, Helena, Montana 59601 ("Consultant") and City of Great Falls (City), P.O. Box 5021, Great Falls, MT 59403 ("Owner") on the following terms and conditions.

W I T N E S S E T H

1. Scope of Work. The Owner seeks to obtain the services of the Consultant and the Consultant agrees to provide to the Owner the following described services and scope of work:

WRSI will provide the following services: 1) Preparation of water rights documents associated with Applications for Permit Changes on City economic development projects or other municipal purposes; 2) Prepare documents necessary for the adjudication and defense of existing water rights, including the review of Water Court decrees, analysis of competing water rights for the purpose of objections; 3) Prepare analysis and research for the acquisition of additional water rights; 4) Attend, meetings and prepare presentations to the City Commission and other entities as requested; 5) Consultant will provide expert testimony at hearings before the DNRC, Water Court and District Court as needed.

Work will be coordinated as mutually agreed between the parties as various ongoing and new projects that involve water rights issues proceed through various legal/administrative processes.

2. Personnel. The Consultant may employ such employees as it deems necessary to operate its business affairs and to complete the Scope of Work set forth above. If the Consultant enters into any subcontract with an outside firm or person for particular tasks or particular expertise needed to complete the Scope of Work, such subcontracts (other than routine water sampling tests) shall be subject to the written approval of the Owner; provided, however, that any subcontracts identified in the Scope of Work (with subcontract fees set forth therein) shall be deemed to be approved by the Owner. The Consultant shall have the right to supervise and direct all work performed by any such subcontractors and the costs and fees of the subcontractors shall be paid by the Owner so long as subcontracts are approved in writing by the Owner or were included in the original Scope of Work.

3. Compensation. In consideration of the services rendered to the Owner as set forth in the Scope of Work, the Owner agrees to compensate the Consultant as follows:

a. Fees. All staff consulting fees, including travel, shall be billed at the rate of \$85.00 per hour. Consulting fees for the Principals of WRSI shall be billed at the rate of \$100.00 per hour. Expert testimony billed at \$150.00 per hour.

b. Expenses. Owner agrees to compensate the Consultant for reasonable expenses incurred in performing the Scope of Work including, but not by way of limitation: copies, postage, federal express, telephone charges, fax charges, use of automobile (at 0.65/mile) meals, filing fees, and water sample costs. In lieu of actual costs for meals, the Consultant may charge a reasonable per diem rate that shall be similar to the federal per diem rate. The general overhead costs of operating

Consultant's business (e.g., office space, utilities, equipment, secretarial support) are included in the hourly fees and shall not be billed to the Owner as expenses.

4. Invoices. The Consultant shall submit to the Owner monthly invoices providing a detailed accounting of all hourly services rendered and all expenses incurred. All itemized expenses submitted shall be supported by copies of receipts (except for reasonable per diem and mileage reimbursement).

5. Payment. The Owner agrees to pay the Consultant for all fees and expenses contained in the invoice within thirty (30) days of receipt of the invoice. Any invoices not paid within said 30 day period shall bear interest at the rate of 10% per annum.

6. Term. This Agreement shall be in force and effect until the Scope of Work is completed and the Consultant has been paid in full or until otherwise terminated as set forth in Paragraph 7.

7. Termination. Either party may terminate this Agreement upon providing the other party thirty (30) days prior written notice of the intent to terminate the Agreement. All notices shall be given as provided in Paragraph 8. In the event of termination of the Agreement by the Owner, the Owner shall still be liable to the Consultant for Consultant's fees and expenses incurred prior to the date of receipt of the Notice of Termination.

8. Notices. Any notice required by or issued in relation to this Agreement shall be made by first class mail to the following addresses of the parties:

Water Right Solutions, Inc.
303 Clarke Street
Helena, Montana 59601

City of Great Falls
Fiscal Services, P.O. Box 5021
Great Falls, MT 59403

All notices sent by mail shall be deemed to have been received three days after having been deposited in any United States Post Office properly addressed to the above address.

9. Independent Contractor. In performing the Scope of Work services under this Agreement, the Consultant and any person acting on behalf of the Consultant are independent contractors and are not and shall not be deemed employees or agents of the Owner.

10. Governing Law. The parties consent and agree that this Agreement is entered into in Helena, Montana, and that this contract shall be construed and enforced in accordance with the laws of the State of Montana. The parties further consent to and agree that the justice court and/or state district court for Lewis and Clark County, Montana, shall have jurisdiction over any disputes that may arise under this Agreement and that the prevailing party shall be entitled to costs and reasonable attorney fees. As an alternative to litigation, the parties may agree to submit the matter to binding arbitration and agree on a third party to resolve the dispute.

11. Amendments. This is the complete agreement of the parties and it supersedes any agreement or understanding that has been made prior to this Agreement. Any changes or alterations to this Agreement shall be in writing, duly signed by both parties, and affixed to the contract as an Amendment. This Agreement may not be assigned without the written consent of both parties, except as provided in Paragraph 13.

12. Waiver. The failure of a party to object to, or to take affirmative action with respect to, any conduct by the other party which is in violation of this Agreement shall not be construed as a waiver of the violation or breach or a waiver of any future violation, breach or wrongful conduct.

13. Survival of Agreement. This agreement shall not be terminated by a restructuring or incorporation of either party. This agreement shall be binding upon and inure to the benefit of the successors and assigns of the parties hereto. If either of the parties restructures but remains within the general scope of their business, this Agreement shall remain in effect and can be assigned.

14 Insurance: Consultant hereby agrees to obtain at its own expense and to keep in full force and effect during the contract term the following insurance coverages. All policies shall be issued by companies licensed to do business in the State of Montana and having at least an "A" rating in the current Best's Manual. All such policies of insurance shall be endorsed to be primary of all other valid and collectible coverages maintained by the Consultant and the City of Great Falls, with respect to their activities in relation to the services provided. All applicable policies will be written on an occurrence basis. Claims made policies are not acceptable and do not constitute compliance with the Permit Holder's obligation under this paragraph.

Comprehensive General Liability – Said coverage shall have limits of not less than \$750,000 per claim \$1,500,000 per occurrence combined single limit for bodily injury and property damage. Coverage shall name, as additional insured, the City of Great Falls.

Professional Liability Insurance - Consultant will maintain at its expense: Professional Liability Insurance in the amount of \$1,000,000 including coverage for errors and omissions caused by Consultant's negligence in the performance of its duties under this agreement."

Consultant shall furnish to the City of Great Falls certificates of insurance including a copy of the Additional Insured Endorsement as evidence that the required coverage is in effect.

15. Indemnification Consultant shall indemnify, defend and hold harmless the City, its officers, agents and employees from any and all claims, demands or liability arising out of any intentional or negligent act or omission by the Consultant, its agents or employees in the performance of this contract; and, City shall indemnify, defend and hold harmless the Consultant, its agents and employees from any and all claims, demands or liability arising out of any intentional or

negligent act or omission by the City, its officers, agents or employees in the performance of this contract.

16. Effective Date The effective date of this Agreement shall be the date of the last party to sign the Agreement. This Agreement governs and controls all work performed by the Consultant for the Owner from the effective date of the Agreement.

OWNER: City of Great Falls

By _____

Date: _____

CONSULTANT: Water Right Solutions, Inc.

By _____

Date: _____

David M. Schmidt
Principal, Senior Water Rights Specialist

APPROVED AS TO FORM:

By _____

David Gliko, City Attorney

AMENDED CONSULTING AGREEMENT

THIS FIRST AMENDMENT entered into between WATER RIGHT SOLUTIONS, INC. (WRSI) and The City of Great Falls (City) is an attachment to the scope of work as follows:

Conduct decree examination work in basins 41QJ and 41Q to identify water rights claims that could, if decreed potentially adversely impact water rights currently held by the City of Great Falls. WRSI will examine Montana Water Court Decrees to identify claims that would warrant objection. After consultation with the City WRSI would prepare draft objections (if any) for the City Attorneys, review.

It is anticipated this may take up to 32 hours of consulting time to review and provide recommendations on what actions, if any, the City should make in regards to Basin 41QJ water rights. Based on the consultant's reported findings and recommendations it is possible that additional work by WRSI may be necessary to protect the City's water rights. Any such additional work will be discussed and approved in advance by WRSI and City.

City of Great Falls

By _____ Date: _____
Greg Doyon, City Manager

Water Right Solutions, Inc.

By _____ Date: _____
David M. Schmidt, Principal Senior Water Rights Specialist

APPROVED AS TO FORM:

By _____
David Gliko, City Attorney

