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APR 26 2007

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MEMORANDUM **Law Department - Council Memo No. 28**

DATE: April 26, 2007

TO: MAYOR AND COUNCIL

THRU: MICHAEL D. HOUSE, CITY ATTORNEY MDH

FROM: CYNTHIA J. HAGLIN, ASSISTANT CITY ATTORNEY CJH

SUBJECT: Central Arizona Water Conservation District v. United States, et al.

RECOMMENDATION: The Law Department recommends approval of Resolution No. 4064 which authorizes the City Mayor on behalf of the City of Chandler to execute the Intergovernmental Agreement and the City Attorney to execute the Contract for Legal Services among the cities of Chandler, Glendale, Goodyear, Mesa and Scottsdale relating to their joint representation in Central Arizona Water Conservation District v. United States, et al. (No. CIV 95-625-TUC-WDB), by the law firm of Engelman Berger, P.C.

BACKGROUND: This lawsuit, *Central Arizona Water Conservation District v. United States*, arose from a dispute as to the amount of CAWCD's capital repayment obligation to the United States for the construction of the Central Arizona Project ("CAP"). The federal government's obligations to pay CAWCD for costs associated with delivery of CAP water for federal purposes also was at issue. The parties disagreed by hundreds of millions of dollars.

CAWCD's capital costs, and the operation, maintenance and replacement costs which it is required to pay, directly impact Chandler through the water rates and tax assessments which are used to pay for CAP water. If CAWCD had been unsuccessful in this action, Chandler's costs of its various sources of CAP water could have increased by hundreds of thousands of dollars annually.

In November, 1995, the City Council authorized a contract for joint representation of Chandler in this litigation with the cities of Glendale, Goodyear, Mesa, Scottsdale and Peoria by the law firm of Ulrich, Kessler & Anger, P.C., and subsequently, Engelman Berger, P.C. The contract has been extended several times, with the last extension occurring in December, 2005.

DISCUSSION: The cities of Chandler, Glendale, Goodyear, Mesa and Scottsdale want to continue to jointly retain the law firm of Engelman Berger, P.C. Mr. William Anger will continue to serve as primary counsel under this contract. The city of Peoria has determined that it will not participate in this contract but will instead be represented by the Peoria City Attorney in this matter.

Over the last several years, extensive settlement negotiations have been undertaken to resolve the CAP litigation. On May 3, 2000, CAWCD and the United States submitted a stipulation for a stay of litigation and for ultimate judgment upon the satisfaction of stipulated conditions to U.S. District Court. One of those stated conditions was resolution of the water rights claims of the Gila River Indian Community.

Under the terms of that stipulation (amended April 28, 2003), the United States and CAWCD agreed upon a reduced payment ceiling of $1.65 billion for the Central Arizona Project system and certain reallocations of CAP water. This amount was $700 million less than the United States had originally asserted. As a result of the stipulation, CAWCD lowered the capital charges for CAP M&I water. The City of Chandler pays roughly $73,000 less for these capital charges per year. We expect that even greater savings may be achieved in the capital repayment charges when all of the conditions required for final settlement are completed and final judgment in the CAP litigation is entered by the Court.

The Arizona Water Settlements Act, Public Law 108-451, authorizes the CAP water reallocations and certain financial obligations required under the stipulation. It also authorizes the Gila River Indian Community Water Rights Settlement Agreement (the "Settlement Agreement"). The Act, which became law on December 10, 2004, requires that numerous actions be completed before the Gila River Indian Community settlement becomes enforceable. The Arizona Water Settlements Act requires that all of these actions be completed so that the "Enforceability Date" for the Gila River Indian Community settlement occurs no later than December 31, 2007.

The parties to the Settlement Agreement have made significant progress in completing the actions required for that Enforceability Date, as follows:

1. The Settlement Agreement has been amended to eliminate any conflicts with the Act and the Secretary of Interior and Arizona's Governor have both signed that Agreement.

2. The Settlement Agreement has been submitted to both the Maricopa County Superior Court (the adjudication court) and the U. S. District Court for their approval and the settlement parties who are involved in those respective pleadings are defending the Settlement Agreement against objections filed by other entities.

3. Several of the required reallocations of agricultural and CAP Municipal and Industrial ("M&I") water have been completed by Federal Register Notice dated August 25, 2006.

4. Amended CAP M&I subcontracts have been offered addressing all required terms, including an initial delivery term of 100 years, new shortage sharing provisions and certain other terms.

5. The Gila River Indian Community's contract for CAP water has been amended as required by the Act.

6. State legislation required by the Settlement Agreement has been enacted.

7. Certain required funding and dismissal of lawsuits are pending and will take place either shortly before or concurrently with the Enforceability Date. Some other activities (requiring action by parties other than Chandler) are moving towards completion.

Please note that on March 17, 2007, the City of Chandler approved its amended CAP M&I Water Service Subcontract which contained the new terms and delivery of an additional 4,986 acre-feet of CAP M&I water, as required by the Act.

Staffs of the cities of Chandler, Glendale, Goodyear, Mesa and Scottsdale have recommended a contract for Mr. Anger to continue the settlement-related work be approved with a budget of $100,000. This contract will expire upon the completion of the CAP litigation or when there are no further activities that are a condition for the cities to receive water under the Settlement Agreement, whichever event occurs last. The contract may be terminated earlier or extended pursuant to the Cities' direction.

FINANCIAL IMPLICATIONS: The total cost of this contract is not more than $100,000 and to be divided equally among the five cities, with each city's percentage of cost at 20%. This will result in costs to Chandler of no more than $20,000.00 for the term of the contract.

Funds for this litigation are available in the 605.3840.0000.5215 account.

PROPOSED MOTION: Move to approve Resolution No. 4064 authorizing the City Mayor on behalf of the City of Chandler to execute the Intergovernmental Agreement and the City Attorney to execute the Contract for Legal Services among the cities of Chandler, Glendale, Goodyear, Mesa and Scottsdale relating to their joint representation in Central Arizona Conservation District v. United States, et al. (No. CIV 95-625-TUC-WDB) by Engelman Berger, P.C.

cc: W. Mark Pentz, City Manager

RESOLUTION NO. 4064

A RESOLUTION OF THE CITY OF CHANDLER, ARIZONA, AUTHORIZING THE CONTRACT FOR LEGAL SERVICES AND INTERGOVERNMENTAL AGREEMENT, AMONG THE CITIES OF CHANDLER, GLENDALE, GOODYEAR, MESA AND SCOTTSDALE, RELATING TO THEIR JOINT REPRESENTATION BY OUTSIDE COUNSEL IN CENTRAL ARIZONA WATER CONSERVATION DISTRICT V. UNITED STATES, ET AL. (NO. CIV 95-625-TUC-WDB)

WHEREAS, upon the Notice of Completion of the Central Arizona Project ("CAP") system, which was issued by the United States on September 30, 1993, the total capital repayment which Central Arizona Water Conservation District ("CAWCD") is required to pay back to the United States for the CAP system was to be determined; and

WHEREAS, the United States asserted that CAWCD was required to pay back $2 billion in these capital costs, while CAWCD asserted that its obligation did not exceed $1.8195 billion; and

WHEREAS, on July 10, 1995, CAWCD filed suit against the U.S. requesting that the U. S. District Court issue a judicial declaration that CAWCD's repayment obligation for the Central Arizona Project does not exceed $1.8195 billion; and

WHEREAS, CAWCD's complaint also requested that the Court issue a judicial declaration that the federal government was obligated to reimburse CAWCD for operation, maintenance and replacement costs associated with water delivered and reserved for federal purposes, which the U.S. has refused to pay; and

WHEREAS, the cities of Chandler, Glendale, Goodyear, Mesa and Scottsdale also will likewise be impacted, by the capital costs, and operation, maintenance and replacement costs which CAWCD will incur, through the Cities' water rates and tax assessments which are used to pay for CAP water; and

WHEREAS, these same cities and Peoria undertook joint representation by Ulrich, Kessler & Anger, P.C. (and subsequently Engelman Burger, P.C.) through an Intergovernmental Agreement on December 1, 1995 and continued that representation through several subsequent intergovernmental agreements, with the most recent agreement approved by the City of Chandler on December 15, 2005; and

WHEREAS, CAWCD and the United States have negotiated a Revised Stipulation Regarding A Stay of Litigation, Resolution of Issues During the Stay and For Ultimate Judgment Upon the Satisfaction of Conditions ("Revised Stipulation"), which was approved by order of Judge Carroll, U.S. District Court, on April 28, 2003, which

resolves this dispute and extends the completion date for all conditions of that Revised Stipulation until May 9, 2012; and

WHEREAS, the Gila River Indian Community Water Rights Settlement Agreement, which was executed by the Gila River Indian Community on February 5, 2003 and which was recently approved by the Council of the City of Chandler on May 22, 2003, must become legally enforceable as a condition precedent to entry of ultimate judgment in Central Arizona Water Conservation District v. United States, et al. pursuant to the Revised Stipulation; and

WHEREAS, the Arizona Water Settlements Act, which became law December 10, 2004, requires that a number of actions be completed prior to the Gila River Indian Community Water Rights Settlement Agreement becoming legally enforceable, including court approval of an amended settlement agreement that comports with the Act (the "Gila River Indian Amended and Restated Water Rights Settlement Agreement"); and

WHEREAS, it is prudent to enter this contract, which has a limit of $100,000.00, so that the City of Chandler, with the cities of Glendale, Goodyear, Mesa and Scottsdale, may continue to be represented by Engelman Berger, P.C. in this matter; and

WHEREAS, the $100,000.00 budget for this contract shall be apportioned among the cities of Chandler, Glendale, Goodyear, Mesa and Scottsdale (the "Cities") on an equal basis, each City's percentage of cost being 20% of that budget, for an amount not to exceed $20,000.00 during the contract term; and

WHEREAS, the Cities in order to amend the contract for joint representation, must enter a new Intergovernmental Agreement.

NOW, THEREFORE, BE IT RESOLVED by the City Council of the City of Chandler, as follows:

1. That the Mayor of the City of Chandler is hereby authorized on behalf of the City to execute the Intergovernmental Agreement and the City Attorney is hereby authorized to execute the Contract for Legal Services among the Cities of Chandler, Glendale, Goodyear, Mesa and Scottsdale relating to Joint Legal Representation in Central Arizona Water Conservation District v. United States, et al. (No. CIV 95-625-TUC-WDB).

2. That the various City officers and employees be and they hereby are authorized and directed to perform all acts necessary to give effect to this Resolution.

APPROVED, PASSED AND ADOPTED by the City Council of the City of Chandler, Arizona, this _____ day of _____, 2007.

ATTEST:

_____ _____
CITY CLERK MAYOR

APPROVED AS TO FORM:

_____
CITY ATTORNEY

CERTIFICATION

I HEREBY CERTIFY that the above and foregoing Resolution No. 4064 was duly passed and adopted by the City Council of the City of Chandler, Arizona, at a regular meeting held on the _____day of _____, 2007, and that a quorum was present thereat.

_____
CITY CLERK

APPROVED AS TO FORM:

_____
CITY ATTORNEY

City of Glendale No._____
City of Scottsdale No._____

INTERGOVERNMENTAL AGREEMENT

AMONG THE CITIES OF CHANDLER, GLENDALE, GOODYEAR, MESA, AND SCOTTSDALE RELATING TO JOINT REPRESENTATION IN SETTLEMENT EFFORTS RELATING TO *CENTRAL ARIZONA WATER CONSERVATION DISTRICT V. UNITED STATES OF AMERICA, ET AL.* (NO. CIV 95-625-TUC-WDB) ("CAP LITIGATION")

This Intergovernmental Agreement is made to be effective this ____ day of _____, 2007, among the Cities of Chandler, Glendale, Goodyear, Mesa, and Scottsdale, municipal corporations, hereafter collectively referred to as the "Cities."

Whereas, joint projects among the Cities allow the Cities to maximize their effectiveness and minimize their costs;

Whereas, the Cities and the City of Peoria entered into an Intergovernmental Agreement effective December 1, 1995 for joint legal representation in the CAP Litigation ("CAP Litigation IGA");

Whereas, due to developments in the CAP Litigation that were not foreseen when the CAP Litigation was adopted, the Cities and the City of Peoria entered into an amendment to the CAP Litigation IGA effective June 16, 1997 that raised the limit on litigation costs from $100,000 to $150,000 and established a separate fund of $50,000 to be used for settlement negotiations if they occurred;

Whereas, when intensive settlement activities did occur and necessitated increases in the settlement fund the Cities and the City of Peoria entered into amendments to the CAP Litigation IGA, including Third, Fourth, Fifth, Sixth, Seventh, Eighth and Ninth and Tenth Intergovernmental Agreements relating to the joint representation in settlement efforts relating to the CAP Litigation;

Whereas, settlement activities have continued and the Cities agree that they want continued joint legal representation to complete these settlement efforts, which will require an additional budget of $100,000 for this representation;

NOW, THEREFORE, for and in consideration of the terms and conditions of this Eleventh Intergovernmental Agreement, the Cities agree as follows:

1. The purpose of this Intergovernmental Agreement is to identify and define the responsibilities of the Cities relating to joint funding for outside legal counsel to represent the Cities in settlement activities relating to the CAP Litigation and the settlement of the Gila River Indian Community water rights claims which occur after the depletion of the monies in the settlement fund authorized in the Tenth IGA.

2. Subject to the terms of this Intergovernmental Agreement and the contract

negotiated with outside counsel, the Cities agree to share in the costs of joint legal representation by outside counsel in settlement activities relating to the CAP Litigation and the Gila River Indian Community's water rights claims which occur after the depletion of the settlement fund authorized in the Tenth IGA. Unless terminated or extended as provided within the contract negotiated with outside counsel, the term of the representation by outside counsel shall expire at the conclusion of the CAP litigation or when no other actions are necessary relating to the settlement of the Gila River Indian Community Claims whichever event occurs last. The total expense of joint representation shall not exceed $100,000, including all expenses of any description. The Cities agree to share the total cost of joint representation on a one-fifth basis. Costs shall be allocated as follows:

		%		$
Chandler	=	20%	=	$20,000
Glendale	=	20%	=	$20,000.00
Goodyear	=	20%	=	$20,000.00
Mesa	=	20%	=	$20,000.00
Scottsdale	=	20%	=	$20,000.00
	=	100%	=	$100,000.00

3. Pursuant to the Contract among the Cities and the law firm of Engelman Berger, P.C. ("Contract"), each of the Cities shall pay directly outside legal counsel its per capita share of the total costs of joint representation in response to monthly bills from outside counsel.

4. Subject to the Contract and the provisions of the Supreme Court's Rules of Professional Responsibility for Attorneys, each of the Cities agrees to cooperate in good faith with the other Cities in an effort to make the joint representation a success.

5. This Intergovernmental Agreement may be cancelled pursuant to A.R.S. § 38-511.

6. This Intergovernmental Agreement shall become effective upon approval and execution by the authorized representatives of all Cities and upon delivery of a fully executed original to each of the Cities.

7. This Intergovernmental Agreement shall be extended or terminated in accordance with the Contract.

IN WITNESS WHEREOF, the parties hereto have executed this Intergovernmental Agreement to be effective the date first written above.

ATTEST: CITY OF CHANDLER

_____ By:_____

Its:_____ Its:_____

ATTEST:

_____

Its:_____

CITY OF GLENDALE

By:_____

Its:_____

ATTEST:

_____

Its:_____

CITY OF GOODYEAR

By:_____

Its:_____

ATTEST:

_____

Its:_____

CITY OF MESA

By:_____

Its:_____

ATTEST:

_____

Its:_____

CITY OF SCOTTSDALE

By:_____

Its:_____

DETERMINATION OF LEGAL COUNSEL

The foregoing agreement has been reviewed by the undersigned attorneys who have determined that it is in proper form and within the power and authority granted under the laws of the State of Arizona to the respective public entities they represent.

MDH

Chandler City Attorney

Glendale City Attorney

Goodyear City Attorney

Mesa City Attorney

Scottsdale City Attorney