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PLANNING AND BUILDING
DEPARTMENT

CITY OF SACRAMENTO
CALIFORNIA

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City Council
Sacramento, California

AG 2001-049

APPROVED

APR 24 2001

OFFICE OF THE
CITY CLERK

Honorable Members in Session:

SUBJECT: INDEMNIFICATION AGREEMENT BETWEEN THE CITY OF SACRAMENTO AND RECLAMATION DISTRICT 1000 AND NATOMAS CENTRAL MUTUAL WATER COMPANY

LOCATION/ COUNCIL DISTRICT: North and South Natomas
District 1

RECOMMENDATION: City staff recommends the Council adopt the attached resolution authorizing execution of an Indemnification Agreement between the City and Reclamation District 1000 (RD1000) and Natomas Central Mutual Water Company (Natomas Mutual) related to participation in the Revised Natomas Basin Habitat Conservation Plan (NBHCP).

CONTACT PERSON: Carol Shearly, North Natomas Manager, 264-5893

FOR COUNCIL MEETING OF: April 24, 2000 (afternoon)

SUMMARY: City staff recommends the Council approve an Indemnification Agreement between the City of Sacramento and RD1000 and Natomas Mutual. In order for both water entity Boards to agree to join with the City and Sutter County in the Revised NBHCP process, the City must agree to indemnify RD1000 and Natomas Mutual for costs incurred in the event of a future lawsuit brought against them as part of the NBHCP, in specific circumstances. The reasons for approving such an agreement are: i) the regional nature of the NBHCP is strengthened by involving as many of the entities in the Natomas Basin as possible, and 2) the concerns raised by Judge Levi in his August 15, 2000, ruling related to how the NBHCP succeeds if the City is sole permittee is addressed by participation of as many parties as possible in the Revised NBHCP process.

COMMISSION ACTION: No action has been taken by the Planning Commission on this item.

BACKGROUND INFORMATION:

Natomas Basin Habitat Conservation Plan and Incidental Take Permit: The Natomas Basin HCP was approved by the City Council on August 7, 1997 (Ord. No. 97-046 and Reso. No. 97-459) and the

Implementation Agreement (IA) was executed on December 31, 1997. The HCP is the conservation plan supporting a federal incidental take permit (ITP) under Section 10(a)(1)(B) of the Endangered Species Act (ESA) and a state permit under Section 2081 of the California Fish and Game Code. The federal and state permits were also issued on December 31, 1997. The HCP applies to the 53,341 acre interior of the Natomas Basin. The Basin contains incorporated and unincorporated areas within the jurisdictions of the City of Sacramento, Sacramento County, and Sutter County. The goal of the HCP is to preserve, restore, and enhance habitat values found in the Natomas Basin while allowing urban development to proceed according to the local land use plans. The HCP establishes a **multi-species conservation program** to mitigate the expected loss of habitat values and incidental take of protected species that would result from urban development, operation of irrigation and drainage systems, and rice farming.

Federal Lawsuit: On August 15, 2000, and January 26, 2001, Judge Levi issued Orders invalidating the City's ITP in the case of *National Wildlife Federation et. al vs. Secretary of Interior Bruce Babbitt*. During the drafting of the NBHCP, it was assumed that all five entities would ultimately participate in the NBHCP and get ITP's - the City, Sutter County, Sacramento County, RD1000, and Natomas Mutual. The City was the first and, to date, only permittee for the NBHCP. One of the concerns raised by the Judge in the Order was the US Fish and Wildlife Service (USFWS) did not show evidence of how the NBHCP would succeed if the City is the only permittee in what is supposed to be a regional plan. In response to the Judge's concern, the City is now seeking the participation of the other entities in the Revised NBHCP. Sutter County is working with the City to revise the NBHCP and obtain an ITP. Sutter is sharing the cost of the EIR/ EIS consultant.

RD1000 and Natomas Mutual Board Meetings: The City and Sutter County approached RD1000 and Natomas Mutual to participate in the NBHCP process. RD1000 and Natomas Mutual have agreed to participate in the Revised HCP and seek ITPs subject to an Indemnification Agreement with the City. On February 27, 2001, the Natomas Mutual Board stated, "... the Board has approved the request to join with the City (HCP), with the indemnification and attorney's costs provisions in place." The minutes of the RD1000 Board meeting of March 9, 2001, state "After discussion, it was moved by Trustee Dean to join the City/ Sutter County HCP/ EIR under the conditions outlined by staff and to authorize the District Engineer to sign such agreements when all conditions have been met. Seconded by Trustee Gilbert, duly put and carried."

Indemnification Agreement: The proposed Indemnification Agreement is attached as Exhibit A. The basic premises of the agreement are:

1. RD1000 and Natomas Mutual agree to participate in the NBHCP and its review under CEQA and NEPA, and
2. The City shall defend, indemnify, and hold harmless RD1000 and Natomas Mutual against any and all liability ("Claims") incurred by RD1000 and Natomas Mutual which arise from or are related to RD1000's and Natomas Mutual's performance of the terms of the IA, with the exception of Claims brought solely against RD1000 and Natomas Mutual challenging the adequacy of RD1000's and Natomas Mutual's Best Management Practices (BMPs) and/or implementation of those BMPs as those BMPs are to be set forth in the Revised NBHCP.

Also attached to the Indemnification Agreement as Exhibit 1 is a scope of work that states that the parties agree to cooperate in good faith to develop an NBHCP designed to provide the basis for an incidental take permit for, at a minimum, RD1000's and Natomas Mutual's operations and maintenance activities. A definition of

good faith cooperation follows in the exhibit.

In order to strengthen the regional nature of the NBHCP and to address the Judge's concern about the City as sole permittee, City staff recommend the Council approve the Indemnification Agreement.

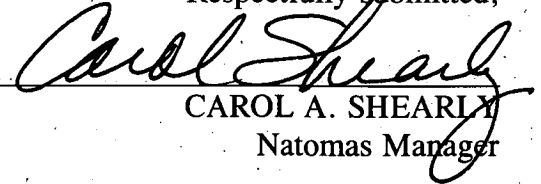
FINANCIAL CONSIDERATIONS: This Indemnification Agreement may result in costs to the City related to defense of RD1000 and Natomas Mutual in the event of litigation against the parties on the NBHCP, the EIR/ EIS, or incidental take permit(s). However, those costs would be funded by the North Natomas Public Facilities Fee, and would not be a general fund liability.

ENVIRONMENTAL CONSIDERATIONS: No environmental review has been done for this agenda item. Previous environmental review has been conducted related to the Natomas Basin HCP, including but not limited to, the 1986 North Natomas Community Plan Environmental Impact Report (EIR), the Supplement to the 1986 NNCP EIR prepared for the 1994 North Natomas Community Plan, and the North Natomas Comprehensive Drainage Plan EIR. The City is currently conducting an EIR/ EIS for the Revised NBHCP.

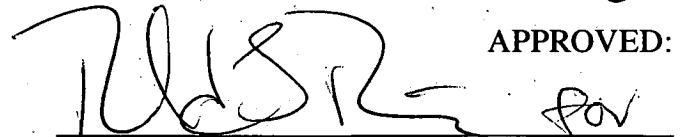
POLICY CONSIDERATIONS: The 1994 North Natomas Community Plan requires approval of a Habitat Conservation Plan and the Corps 404 permit for the Sacramento Local Area Project has a condition that required the establishment of a Habitat Conservation Plan prior to completion of the flood protection improvements. The Natomas Basin Habitat Conservation Plan was developed to comply with these two requirements. The incidental take permit issued by US Fish and Wildlife Service was deemed invalid by Judge Levi in the *National Wildlife Federation et. al. v. Secretary of the Interior Bruce Babbitt* case. The City is now revising the NBHCP and conducting an EIR/ EIS in order to obtain a new incidental take permit. One of the issues raised by the Judge in his August 15, 2000, ruling was "How does the Plan work if the City is the sole permittee?" Sutter County is participating with the City in seeking an incidental take permit. Adding other permittees to the NBHCP, namely through this Indemnification Agreement, RD1000 and Natomas Mutual, strengthens the regional nature of the NBHCP, helps address the Judge's concern, and reduces the likely legal challenge of the Revised HCP, EIR/ EIS and incidental take permit.

ESBD: None at this time.

Respectfully submitted,


CAROL A. SHEARY
Natomas Manager

APPROVED:


ROBERT P. THOMAS
City Manager

Attachments:

Resolution approving Indemnification Agreement
Exhibit A - Indemnification Agreement



RESOLUTION NO. 2001-239

ADOPTED BY THE SACRAMENTO CITY COUNCIL

ON DATE OF _____

APPROVED
APR 24 2001
OFFICE OF THE
CITY CLERK

A RESOLUTION AUTHORIZING THE CITY MANAGER OR HIS
DESIGNEE TO EXECUTE AN INDEMNIFICATION AGREEMENT
BETWEEN THE CITY OF SACRAMENTO, RECLAMATION
DISTRICT 1000, AND NATOMAS CENTRAL MUTUAL WATER
COMPANY RELATED TO PARTICIPATION IN THE NATOMAS
BASIN HABITAT CONSERVATION PLAN PROCESS

WHEREAS, on February 27, and March 9, 2001, respectively, the Boards of Directors of the Natomas Central Mutual Water Company (Natomas Mutual) and Reclamation District 1000 (RD1000) expressed their willingness to participate in the Revised Natomas Basin Habitat Conservation Plan (NBHCP) process subject to an Indemnification Agreement with the City of Sacramento.

WHEREAS, the City desires the participation of RD1000 and Natomas Mutual in the Revised NBHCP process in order to strengthen the regional nature of the plan.

WHEREAS, the City is willing to indemnify RD1000 and Natomas Mutual in specific circumstances related to the Revised NBHCP.

NOW, THEREFORE BE IT RESOLVED by the Council of the City of Sacramento that the City Manager or his designee is authorized to execute the Indemnification Agreement, attached as Exhibit A.

MAYOR

ATTEST:

CITY CLERK

FOR CITY CLERK USE ONLY

RESOLUTION NO.: _____

DATE ADOPTED: _____

INDEMNIFICATION AGREEMENT

This Indemnification Agreement ("IA") is made and entered into on April __, 2001, between Reclamation District No. 1000 ("RD 1000"), Natomas Central Mutual Water Company ("Natomas Mutual"), and the City of Sacramento (the "City") (collectively, the "Parties").

1. *Participation of RD 1000 and Natomas Mutual in the City's Habitat Conservation Plan for the Natomas Basin ("NBHCP") and in the California Environmental Quality Act ("CEQA") and the National Environmental Policy Act ("NEPA") review of the NBHCP.*

RD 1000 and Natomas Mutual agree to participate in the NBHCP and its review under CEQA and NEPA pursuant to the scope of participation set forth in Exhibit 1, which is incorporated herein by reference.

2. *Term*

The term of this IA shall commence as of the date first written above and shall continue until the earliest of the following to occur:

- a. completion of work identified in Exhibit 1, including finalization of any litigation related to that work; or
- b. 10 working days after written notice by any of the Parties of substantial failure by any of the other Parties to fulfill its obligations under this IA in a timely manner through no fault of the terminating party.

3. *Performance of the Services*

The Parties acknowledge that the work performed within the scope of Exhibit 1 will be closely reviewed by third parties, and if perceived by such third parties not to comply with applicable laws, may be legally challenged. Accordingly, the Parties shall use their best efforts in the performance of the services under the terms of this IA to ensure that all work product complies with applicable local, state and federal laws.

4. *Indemnification*

- a. The City shall defend, indemnify, and hold harmless RD 1000, Natomas Mutual, and their successors and assigns, and their respective directors, officers, employees, agents, and representatives against any and all liability, demands, claims, costs, losses, damages, recoveries, settlements, and expenses (including interest, penalties, attorneys' fees, engineering fees, accounting fees, and expert witness fees) of any nature ("Claims") incurred by RD 1000 and Natomas Mutual, known or unknown, contingent or otherwise, which directly or indirectly arise from or are related to RD 1000's and Natomas Mutual's performance of the terms of this IA, with the exception of Claims brought solely against RD 1000 and Natomas Mutual challenging the adequacy of RD 1000's and Natomas Mutual's Best Management Practices ("BMPs"), and/or RD 1000's and Natomas Mutual's implementation of their BMPs as those BMPs are to be set forth in the revised NBHCP. This indemnification includes payment for counsel for RD 1000 and Natomas Mutual that is chosen by RD 1000 and Natomas Mutual, and that is separate from the counsel for the City. For example:

a) if litigation against the revised NBHCP and/or the CEQA or NEPA documents related thereto is commenced only against the overall NBHCP and/or against the CEQA or NEPA document, the City will indemnify RD 1000 and Natomas Mutual for 100% of their defense fees/costs;

b) if litigation is commenced and pursued against the revised NBHCP and/or the CEQA or NEPA documents, and also includes causes of action and/or simultaneous lawsuits against RD 1000 and Natomas Mutual's BMPs, then the City will indemnify RD 1000 and Natomas Mutual 100% of their defense fees/costs. However, after completion of that litigation, and depending upon the litigation's outcome (e.g., court ruling adversely on RD 1000's and Natomas Mutual's BMPs), RD 1000 and Natomas Mutual shall discuss, in good faith, with the City, and endeavour to reach agreement regarding, the possibility of reimbursing a portion of the City's costs incurred defending RD 1000 and Natomas Mutual for claims only related to RD 1000's and Natomas Mutual's BMPs. If the Parties are required to discuss this contribution given the result of the litigation, and the Parties are unable to reach a resolution of the contribution issue, the Parties will submit the matter to arbitration following mediation;

c) if litigation is commenced and pursued only and solely against RD 1000 and/or Natomas Mutual on their BMPs then no indemnification from the City is required.

- b. If any Claim is asserted against RD 1000 or Natomas Mutual by a third party, RD 1000 and Natomas Mutual shall promptly notify the City of the Claim in writing, in reasonable detail (the "Claim Notice"). Upon RD 1000's and Natomas Mutual's request in the Claim Notice, the City must satisfy its indemnification obligation under this IA by reimbursing RD 1000 and Natomas Mutual for counsel and experts of RD 1000's and Natomas Mutual's choice as necessary to defend RD 1000 and Natomas Mutual against the Claim. The City's obligation to indemnify RD 1000 and Natomas Mutual is not conditioned on RD 1000's and Natomas Mutual's giving the Claim Notice unless the failure by RD 1000 and Natomas Mutual to give the Claim Notice materially prejudices the defense of the Claim.
- c. The City shall have 10 days after RD 1000 and Natomas Mutual provide the Claim Notice to notify RD 1000 and Natomas Mutual whether: (i) the City disputes its liability to RD 1000 and Natomas Mutual with respect to the Claim; or (ii) the City will pay for independent counsel to defend RD 1000 and Natomas Mutual. During the 10 day period, RD 1000 and Natomas Mutual may file any motion, answer, demurrer, or other pleading that it deems necessary or appropriate to protect its interests and that does not materially prejudice the City.
- d. RD 1000, Natomas Mutual, and their counsel, shall cooperate in good faith in the defense of the Claim with the City and its counsel.
- e. If the City fails to reimburse RD 1000 and Natomas Mutual after RD 1000 and Natomas Mutual gives the Claim Notice, RD 1000 and Natomas Mutual shall have the right, but not the obligation, in addition to all other rights RD 1000 and

Natomas Mutual may have, to undertake the defense of the Claim; and later recover fees/costs from the City.

- f. The City shall reimburse RD 1000 and Natomas Mutual for RD 1000's and Natomas Mutual's reasonable attorneys' fees, engineering fees, accounting fees, expert witness fees, costs and expenses (including RD 1000's and Natomas Mutual's fees, costs, and expenses incurred by monitoring, participating in, or cooperating with any action, compromise, or settlement) within 30 days after the City's receipt of a statement of such fees, costs, and expenses from RD 1000 and/or Natomas Mutual.

5. *General Provisions*

a. *Authorization*

The signatories to this IA hereby represent that they are authorized to enter into this IA on behalf of the party for which they sign.

b. *Assignment*

This IA cannot be assigned by either party without the prior written consent of the other party. This IA shall be binding on, and inure to the benefit of, each party's successors in interest.

c. *Waivers*

Waiver of any breach or default hereunder shall not constitute a continuing waiver or a waiver of any subsequent breach either of the same or of another provision of this IA.

d. *Modification*

No waiver, alteration, modification, or termination of this IA shall be valid unless made in writing.

e. *Jurisdiction*

This IA shall be governed by and construed in accordance with the laws of the State of California. Any suit, action, or proceeding brought under the scope of this IA shall be brought and maintained to the extent allowed by law in Sacramento County, California.

f. *Counterparts*

This IA may be executed in one or more counterparts, each of which shall be deemed to be an original, but all of which together shall constitute but one and the same instrument.

g. *Captions*

The headings or captions to the sections of the IA are not a part of the IA and shall have no effect upon the construction or interpretation of any part thereof.

h. *Severability*

If, after the date of execution of this IA, any provision of this IA is held to be illegal, invalid, or unenforceable under present or future laws effective during the term of this IA, such provision shall be fully severable. However, in lieu thereof, there shall be added a provision as similar in terms to such illegal, invalid, or unenforceable provision as may be possible and be legal, valid, and enforceable.

i. *Entire IA*

This IA sets forth the entire understanding among the Parties as to the subject matter of the IA and supercedes all prior discussions, negotiations, letters of understanding, or other promises, whether oral or in writing.

j. *Attorney's Fees*

In the event that any party brings an action under this IA for the breach, enforcement, or interpretation thereof, the prevailing party in such action shall be entitled to its reasonable attorney's fees and costs, whether or not such action is prosecuted to judgment.

k. *Notices*

Any notice or demand desired or required to be given hereunder shall be in writing and deemed given when personally delivered, transmitted via facsimile transmission, or deposited in the mail, postage prepaid, sent certified or registered, and addressed to the Parties as set forth below or to such other address as any of the Parties shall have previously designated by such a notice.

If to RD 1000:

J.N. Clifton
District Engineer
Reclamation District No. 1000
1633 Garden Highway
Sacramento, California 95833
Telephone: (916) 922-9173
Facsimile: (916) 922-2129

If to Natomas Mutual:

Peter Hughes
General Manager
Natomas Central Mutual Water Company
2601 West Elkhorn Boulevard
Rio Linda, California 95673

If to either RD 1000 or to Natomas Mutual, then with a copy to:

Patrick Mitchell
Downey, Brand, Seymour & Rohwer, LLP
555 Capital Mall, 10th Floor
Sacramento, California 95814
Telephone: (916) 441-0131
Facsimile: (916) 441-4021

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If to the City:

Robert Thomas
City Manager
City of Sacramento
915 I Street, Room 101
Sacramento, CA 95814
Telephone: (916) 264-5704
Facsimile: (916) 264-7618

Any notice so delivered personally or transmitted via facsimile transmission shall be deemed to be received on the date of delivery and any notice so mailed shall be deemed to be received 5 days after the date on which it was mailed.

Reclamation District No. 1000

By: **DRAFT**
J.N. Clifton, District Engineer
Reclamation District No. 1000

Natomas Central Mutual Water Company

By: **DRAFT**
Peter Hughes, General Manager
Natomas Central Mutual Water Company

City of Sacramento

By: **DRAFT**
City of Sacramento

City of Sacramento, approval as to form:

By: **DRAFT**
William Carnazzo, Chief Assistant City Attorney
City of Sacramento

Exhibit 1

Reclamation District No. 1000 ("RD 1000"), Natomas Central Mutual Water Company ("Natomas Mutual"), and the City of Sacramento (the "City") agree to cooperate in good faith to develop a Natomas Basin Habitat Conservation Plan ("NBHCP") designed to provide the basis for an incidental take permit for, at a minimum, RD 1000's and Natomas Mutual's operations and maintenance activities, including historic and existing farming practices in the Natomas Basin. Good faith cooperation includes:

- (1) adequate opportunity for RD 1000 and Natomas Mutual to review any changes to the NBHCP and to participate in any decisions regarding aspects of the NBHCP that would affect RD 1000 and Natomas Mutual's operations and maintenance activities, including historic and existing farming practices in the Natomas Basin;
- (2) adequate opportunity for RD 1000 and Natomas Mutual to participate in any decisions and to revise any NBHCP language involving real property owned by RD 1000 or by Natomas Mutual;
- (3) opportunity for RD 1000 and Natomas Mutual to suspend or to terminate their participation in the NBHCP should RD 1000 and Natomas Mutual determine that the NBHCP would not adequately protect RD 1000's and Natomas Mutual's operating and maintenance activities, including historic and existing farming practices in the Natomas Basin; and
- (4) RD 1000 and Natomas Mutual will each contribute ten thousand dollars (\$10,000), for a total of twenty thousand dollars (\$20,000), which will constitute their contribution to the cost of preparing the NBHCP and the related Environmental Impact Report/Environmental Impact Statement.