

## **SULTAN CITY COUNCIL AGENDA ITEM COVER SHEET**

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**ITEM NO:** A-12  
**DATE:** November 12, 2009  
**SUBJECT:** Contract for Services – Ed Moats  
**CONTACT PERSON:** Deborah Knight, City Administrator

**ISSUE:**

The issue before the city council is to authorize Mayor Eslick to sign a contract with Mr. Edwin Moats (Attachment A) not to exceed \$2,625 to:

1. Prepare a letter to Lands Commission Goldmark regarding the decision to temporarily close Reiter Foothills to off road vehicle use.
2. Represent the City of Sultan in an administrative appeal of the Department of Natural Resources decision to temporarily close the off road vehicle access to Reiter Foothills effective November 2, 2009.

**STAFF RECOMMENDATION:**

1. Discuss the issues surrounding the Department of Natural Resources decision to temporarily close off road vehicle (ORV) access to Reiter Foothills.
2. Discuss the role the City of Sultan should take in challenging the Department of Natural Resources (DNR) administrative decision.
3. Discuss contracting with Ed Moats to provide professional support in challenging DNR's administrative decision
4. Discuss the city's long-term strategy and interest in working through the appeal process to challenge future DNR decisions related to Reiter Foothills.

**SUMMARY:**

Reiter Foothills Temporary Closure

On November 2, 2009, the Department of Natural Resources made an administrative decision to close Reiter Foothills to off road vehicle use. The agency explained the reason for the closure was to protect environmental resources during the winter and to do restoration work to repair damage caused by off road vehicles.

The DNR decision has serious recreation and economic impacts to Sultan residents and business owners. The draft *Reiter Foothills Recreation Plan* proposed by DNR would close the current ORV site and permanently limit ORV use in the remainder of the area.

Many Sultan residents and families use the current ORV site. Sultan businesses benefit from the out-of-town visitors to the site who stop and spend money while enjoying time together in the Reiter Foothills area.

Mayor Carolyn Eslick and city staff have been meeting with state legislative representatives Pearson and Kristiansen, County Councilmember Dave Somers, Ed Husmann and other stakeholders to discuss the best way to ensure DNR understands the impacts of the temporary closure and proposed changes recommended in the *Reiter Foothills Recreation Plan*.

It is also important that DNR follow the proper decision making process. The administrative decision to temporarily close the site may be appealed to the State of Washington Administrative Office.

#### Appeal of Administrative Decision

The City has an opportunity to appeal the administrative decision to temporarily close Reiter Foothills to ORV use by filing a petition for declaratory order with the Department of Natural Resources and the State Office of Administrative Hearings which acts as the hearing examiner for the State of Washington.

The city does not need an attorney to submit the declaratory order or represent the city in front of the state's hearing examiner.

#### Reiter Foothills Recreation Plan SEPA

The Department of Natural Resources administrative decision was in advance of a SEPA determination of non-significance on the recently issued draft of the *Reiter Foothills Recreation Plan*.<sup>1</sup>

The City has an opportunity to comment on the SEPA determination of non-significance issued for the *Reiter Foothill Recreation Plan* by the DNR on November 10, 2009. The SEPA comment period closes on December 4, 2009. The city must submit comments during the SEPA period in order to have legal standing to appeal the final SEPA decision.

The city will need an attorney licensed to practice in Washington State to represent the city in Superior Court where a SEPA appeal would be heard.

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<sup>1</sup> The plan is available on the DNR website at [http://www.dnr.wa.gov/RecreationEducation/Topics/RecreationPlanning/Pages/amp\\_rec\\_reiter\\_foothills.aspx](http://www.dnr.wa.gov/RecreationEducation/Topics/RecreationPlanning/Pages/amp_rec_reiter_foothills.aspx)

## Recommended Contract for Services

Edwin (Ed) Moats has been working with Mr. Ed Husmann to review Department of Natural Resources actions and decisions related to temporarily close Reiter Foothills and the *Reiter Foothills Plan*. Mr. Moats is familiar with Washington State department decision making rules and regulations.

Mr. Moats is licensed to practice law in two states – but he is not a member of the bar in Washington State. Mr. Moats has previously served as a legislative analyst for the Snohomish County Council. He currently is a public affairs consultant.

Mr. Moats can represent the city at an administrative hearing. He can not represent the city at a SEPA appeal in Superior Court, since he is not licensed to practice law in Washington State.

Mr. Moats anticipates the appeal process will take approximately 21 hours. His hourly rate is \$125.

The city will need to use Kenyon Disend or hire another representative if the council decides to appeal DNR's SEPA decision.

Bob Sterbank with Kenyon Disend has done quite a bit of this work when he was in private practice. Margaret King will be available at the council meeting on November 12, 2009 to answer council questions about a proposed scope of work.

The council will need to discuss and provide direction to staff on the following questions:

1. Does the council want to file a petition for declaratory order with the Department of Natural Resources and Department of Administrative Hearings?
2. Does the council want to submit comments on the SEPA determination of non-significance issued by DNR on November 10, 2009 on the *Reiter Foothills Recreation Plan*?
3. Does the council want to contract for services with Mr. Edwin Moats to represent the city during an administrative appeal?
4. Does the council want to direct the city's attorney to submit an administrative appeal and SEPA comments?

## **BACKGROUND:**

In 2007 the State Legislature provided funding to the Department of Natural Resources to fund recreation planning in Reiter Foothills.<sup>2</sup> In April 2008, the Department of Natural Resources formed a planning committee made up of local stakeholders.

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<sup>2</sup> Chapter 46.09.170(4) RCW

Mayor Eslick appointed local property and business owner, Ed Husmann as the city's representative on the committee. The committee met 12 times in 2008 and early 2009 to develop alternatives for the *Reiter Foothills Forest Recreation Plan*.

In the spring of 2009, Ed Husmann notified the city of DNR's efforts to limit off-road vehicle use of the Reiter Foothills area. On May 14, 2009, the council approved sending a letter of support to DNR in part the letter states,

*"The options under consideration restrict motorized recreation to less than ten percent of the Reiter Foothills area. There appears to be no additional plan for access to the areas West and to the North of the Wallace Falls State Park. This will be a severe reduction to what is currently and historically, has been used as a motorized recreation area. We do not feel that it is the intent of this legislation to reduce recreational opportunities or access, on and to our Public lands.*

*The City of Sultan insists the Committee consider additional options that provide greater access for auto traffic and increased motorized recreational area for this project. We strongly feel that the Reiter should plan for increased use, not a curtailment or current activities."*

In October 2009, the Department of Natural Resources announced the decision to temporarily close Reiter Foothills to ORV use. On November 10, 2009, DNR issued a SEPA determination of non-significance on the *Draft Reiter Foothills Forest Recreation Plan*. The recommended alternative severely limits future ORV access to the area.

There is a 21 day comment period on the SEPA determination. The city has until 5:00 p.m. on December 4, 2009 to submit comments during the SEPA process and become a party of record. Only parties of record can appeal a SEPA determination.

The question for the city council is what level of administrative and legal effort should be taken to protect the city's economic and environmental interests in this issue.

#### **FISCAL IMPACT:**

Mr. Moate's hourly rate is \$125. He estimates it will take 21 hours to complete the scope of work for a total cost of \$2,625.

#### COMMENCEMENT OF ACTION

|                |         |
|----------------|---------|
| Petition       | 3 hours |
| Communications | 2 hours |

#### DISPOSITIVE MOTIONS

|                |         |
|----------------|---------|
| Reply          | 2 hours |
| Oral Argument  | 1 hour  |
| Communications | 2 hours |

#### BRIEFING

|                |          |
|----------------|----------|
| Opening Brief  | 2        |
| Reply Brief    | 4 hours  |
| Communications | 2        |
| <br>           |          |
| HEARING        |          |
| Oral Argument  | 2 hours  |
| Communications | 1 hour   |
| <br>           |          |
| SUBTOTAL       | 21 hours |

The city has sufficient revenues in the general fund to cover the cost of the proposed contract. The city's legal services fund has exceeded its line-item budget. However, a budget amendment is not necessary for audit purposes. If the council wants to amend the legal services budget, this could be included in the budget amendments proposed for the December 10, 2009 council meeting.

If the council wants to use Kenyon Disend to represent the city, city staff estimate the cost at approximately \$5,250.

Note, this work does not include a SEPA response or appeal in Superior Court.

**ALTERNATIVES:**

1. Authorize Mayor Eslick to sign a contract with Ed Moats (Attachment A) not to exceed \$2,625.

This alternative implies the city council is prepared to pursue an appeal of the DNR decision to temporarily close Reiter Foothills to ORV use.

The council must provide direction to staff on whether to proceed with submitting SEPA comments since SEPA comments on the *Reiter Foothills Recreation Plan* are due by December 4, 2009. The next council meeting is after the deadline on December 10, 2009.

2. Do not authorize Mayor Eslick to sign a contract with Ed Moats (Attachment A) not to exceed \$2,625. Discuss areas of concern and potential legal strategies and provide direction to staff.

This action implies either the city council wants to use in-house legal counsel to represent the city's interests or that the council is not interested in taking action at this time.

**RECOMMENDED ACTION:**

1. Discuss the issues surrounding the Department of Natural Resources decision to temporarily close off road vehicle (ORV) access to Reiter Foothills.
2. Discuss the role the City of Sultan should take in challenging the Department of Natural Resources (DNR) administrative decision.

3. Discuss contracting with Ed Moats to provide professional support in challenging DNR's administrative decision
4. Discuss the city's long-term strategy and interest in working through the appeal process to challenge future DNR decisions related to Reiter Foothills.

## **ATTACHMENTS**

A – Moats Contract for Services

## **AGREEMENT FOR SERVICES BETWEEN THE CITY OF SULTAN AND**

THIS AGREEMENT, is made this 13th day of November, 2009, by and between the City of Sultan (hereinafter referred to as "City"), a Washington Municipal Corporation, and Edward Moats (hereinafter referred to as "Service Provider"), doing business at 13906 228th St. NE Arlington, Wa 98223.

WHEREAS, Service Provider is in the business of providing certain services specified herein; and

WHEREAS, the City desires to contract with Service Provider for the provision of public affairs professional services, and Service Provider agrees to contract with the City for same;

NOW, THEREFORE, in consideration of the mutual promises set forth herein, it is agreed by and between the parties as follows:

### **TERMS**

- 1. Description of Work.** Service Provider shall perform work as described in Attachment A, Scope of Work, which is attached hereto and incorporated herein by this reference, according to the existing standard of care for such services. Service Provider shall not perform any additional services without the expressed permission of the City.
- 2. Payment.**
  - A. The City shall pay Service Provider at the hourly rate set forth in Attachment B but not more than a total of two thousand six hundred and twenty-five dollars (\$2,625) for the services described in this Agreement. This is the maximum amount to be paid under this Agreement.
  - B. Service Provider shall submit monthly payment invoices to the City after such services have been performed, and the City shall make payment within four (4) weeks after the submittal of each approved invoice. Such invoice shall detail the hours worked, a description of the tasks performed, and shall separate all charges for clerical work and reimbursable expenses.
  - C. If the City objects to all or any portion of any invoice, it shall so notify Service Provider of the same within five (5) days from the date of receipt and shall pay that portion of the invoice not in dispute. The parties shall immediately make every effort to settle the disputed portion.
- 3. Relationship of Parties.** The parties intend that an independent contractor - client relationship will be created by this Agreement. As Service Provider is customarily engaged in an independently established trade which encompasses the specific service provided to the City hereunder, no agent, employee, representative or subcontractor of Service Provider shall be or shall be deemed to be the employee, agent, representative or subcontractor of the City. None of the benefits provided by the City to its employees, including, but not limited to, compensation, insurance and unemployment insurance, are available from the City to the Service Provider or his employees, agents, representatives or subcontractors. Service Provider will be solely and entirely responsible for his acts and for the acts of Service Provider's agents, employees, representatives and subcontractors

during the performance of this Agreement. The City may, during the term of this Agreement, engage other independent contractors to perform the same or similar work that Service Provider performs hereunder.

4. **Project Name.** Reiter Foothills Recreation Plan Appeal
5. **Duration of Work.** Service Provider shall complete the work described in Attachment A on or before May 31, 2010.
6. **Termination.**
  - A. Termination Upon the City's Option. The City shall have the option to terminate this Agreement at any time. Termination shall be effective upon ten (10) days written notice to the Service Provider.
  - B. Termination for Cause. If Service Provider refuses or fails to complete the tasks described in Attachment A, or to complete such work in a manner unsatisfactory to the City, then the City may, by written notice to Service Provider, give notice of its intention to terminate this Agreement. After such notice, Service Provider shall have ten (10) days to cure, to the satisfaction of the City or its representative. If Service Provider fails to cure to the satisfaction of the City, the City shall send Service Provider a written termination letter which shall be effective upon deposit in the United States mail to Service Provider's address as stated below.
  - C. Rights upon Termination. In the event of termination, the City shall only be responsible to pay for all services satisfactorily performed by Service Provider to the effective date of termination, as described in the final invoice to the City. The City Manager shall make the final determination about what services have been satisfactorily performed.
7. **Nondiscrimination.** In the hiring of employees for the performance of work under this Agreement or any subcontract hereunder, Service Provider, its subcontractors or any person acting on behalf of Service Provider shall not, by reason of race, religion, color, sex, marital status, national origin or the presence of any sensory, mental, or physical disability, discriminate against any person who is qualified and available to perform the work to which the employment relates.
8. **Indemnification / Hold Harmless.** The Service Provider shall defend, indemnify and hold the City, its officers, officials, employees and volunteers harmless from any and all claims, injuries, damages, losses or suits including attorney fees, arising out of or in connection with the performance of this Agreement, except for injuries and damages caused by the sole negligence of the City.

Should a court of competent jurisdiction determine that this Agreement is subject to RCW 4.24.115, then, in the event of liability for damages arising out of bodily injury to persons or damages to property caused by or resulting from the concurrent negligence of the Service Provider and the City, its officers, officials, employees, and volunteers, the Service Provider's liability hereunder shall be only to the extent of the Service Provider's negligence. It is further specifically and expressly understood that the indemnification provided herein constitutes the Service Provider's waiver of immunity under Industrial Insurance, Title 51 RCW, solely for the purposes of this indemnification. This waiver has

been mutually negotiated by the parties. The provisions of this section shall survive the expiration or termination of this Agreement.

- 9. Insurance.** The Service Provider shall procure and maintain for the duration of the Agreement, insurance against claims for injuries to persons or damage to property which may arise from or in connection with the performance of the work hereunder by the Service Provider, their agents, representatives, employees or subcontractors.
- A. **Minimum Scope of Insurance.** Service Provider shall obtain insurance of the types described below:
1. *Automobile Liability* insurance covering all owned, non-owned, hired and leased vehicles. Coverage shall be written on Insurance Services Office (ISO) form CA 00 01 or a substitute form providing equivalent liability coverage. If necessary, the policy shall be endorsed to provide contractual liability coverage.
- B. **Minimum Amounts of Insurance.** Service Provider shall maintain the following insurance limits:
1. *Automobile Liability* insurance with a minimum combined single limit for bodily injury and property damage of \$1,000,000 per accident.
- C. **Other Insurance Provisions.** The insurance policies are to contain, or be endorsed to contain, the following provisions for Automobile Liability insurance:
1. The Service Provider's insurance coverage shall be primary insurance as respect to the City. Any insurance, self-insurance, or insurance pool coverage maintained by the City shall be excess of the Service Provider's insurance and shall not contribute with it.
  2. The Service Provider's insurance shall be endorsed to state that coverage shall not be cancelled by either party, except after thirty (30) days prior written notice by certified mail, return receipt requested, has been given to the City.
- D. **Verification of Coverage.** Service Provider shall furnish the City with original certificates and a copy of the amendatory endorsements, including but not necessarily limited to the additional insured endorsement, evidencing the insurance requirements of the Service Provider before commencement of the work.
- E. **Subcontractors.** Service Provider shall include each subcontractor as insured under its policies or shall furnish separate certifications and endorsements for each subcontractor. All coverage shall be subject to all of the same insurance requirements as stated herein for the Service Provider.
- 10. Entire Agreement.** The written provisions and terms of this Agreement, together with all documents attached hereto, shall supersede all prior verbal statements of any officer or other representative of the City, and such statements shall not be effective or be construed as entering into or forming a part of, or altering in any manner whatsoever, this Agreement.

- 11. City's Right of Supervision, Limitation of Work Performed by Service Provider.** Even though Service Provider works as an independent contractor in the performance of his duties under this Agreement, the work must meet the approval of the City and be subject to the City's general right of inspection and supervision to secure the satisfactory completion thereof. In the performance of work under this Agreement, Service Provider shall comply with all federal, state and municipal laws, ordinances, rules and regulations that are applicable to Service Provider's business, equipment, and personnel engaged in operations covered by this Agreement or accruing out of the performance of such operations.
- 12. Work Performed at Service Provider's Risk.** Service Provider shall be responsible for the safety of its employees, agents and subcontractors in the performance of the work hereunder and shall take all protections reasonably necessary for that purpose. All work shall be done at Service Provider's own risk, and Service Provider shall be responsible for any loss of or damage to materials, tools, or other articles used or held for use in connection with the work.
- 13. Ownership of Products and Premises Security.**

  - A. All reports, plans, specifications, data maps, and documents produced by the Service Provider in the performance of services under this Agreement, whether in draft or final form and whether written, computerized, or in other form, shall be the property of the City.
  - B. While working on the City's premises, the Service Provider agrees to observe and support the City's rules and policies relating to maintaining physical security of the City's premises.
- 14. Modification.** No waiver, alteration or modification of any of the provisions of this Agreement shall be binding unless in writing and signed by a duly authorized representative of the City and Service Provider.
- 15. Assignment.** Any assignment of this Agreement by Service Provider without the written consent of the City shall be void.
- 16. Written Notice.** All communications regarding this Agreement shall be sent to the parties at the addresses listed below, unless notified to the contrary. Any written notice hereunder shall become effective as of the date of mailing by registered or certified mail, and shall be deemed sufficiently given if sent to the addressee at the address stated in this Agreement or such other address as may be hereafter specified in writing.
- 17. Non-Waiver of Breach.** The failure of the City to insist upon strict performance of any of the covenants and agreements contained herein, or to exercise any option herein conferred in one or more instances shall not be construed to be a waiver or relinquishment of said covenants, agreements or options, and the same shall be and remain in full force and effect.
- 18. Resolution of Disputes, Governing Law.** Should any dispute, misunderstanding or conflict arise as to the terms and conditions contained in this Agreement, the matter shall be referred to the City Manager, whose decision shall be final. In the event of any litigation arising out of this Agreement, the prevailing party shall be reimbursed for its reasonable attorney fees from the other party. This Agreement shall be governed by and construed in accordance with the laws of the State of Washington.

**IN WITNESS WHEREOF**, the parties have executed this Agreement on the day and year above written.

**CITY OF SULTAN**

By: \_\_\_\_\_  
Carolyn Eslick, Mayor

**SERVICE PROVIDER**

By: \_\_\_\_\_  
Title: \_\_\_\_\_  
Taxpayer ID #: \_\_\_\_\_

**CITY CONTACT**

\_\_\_\_\_  
City of Sultan  
319 Main Street, Suite 200  
Sultan, WA 98294  
Phone: 360-793-2231  
Fax: 360-793-3344

**SERVICE PROVIDER CONTACT**

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
Phone: \_\_\_\_\_  
Fax: \_\_\_\_\_

**ATTEST/AUTHENTICATED**

By: \_\_\_\_\_  
City Clerk

**APPROVED AS TO FORM**

By: \_\_\_\_\_  
Office of the City Attorney

**Edwin F. Moats**  
**Public Affairs Consultant**  
**13906 228th St. NE Arlington, Wa 98223**  
**(360) 435-8561**  
**edmoats@yahoo.com**

November 8, 2009

Mayor Carolyn Eslick  
City of Sultan  
carolyneslick1@msn.com

Mayor Eslick, **SCOPE OF WORK**

For a scope of work and estimated time for the Reiter Trails matter I submit the following:

**COMMENCEMENT OF ACTION**

Petition 3 hours  
Communications 2 hours

**DISPOSITIVE MOTIONS**

Reply 2 hours  
Oral Argument 1 hour  
Communications 2 hours

**BRIEFING**

Opening Brief 2  
Reply Brief 4 hours  
Communications 2

**HEARING**

Oral Argument 2 hours  
Communicatins 1 hour

**SUBTOTAL** 21 hours

Very Truly Yours,

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Edwin F. Moats  
Public Affairs Consultant

**Edwin F. Moats  
Public Affairs Consultant  
13906 228th St. NE Arlington, Wa 98223  
(360) 435-8561  
edmoats@yahoo.com**

November 6, 2009

Mayor Carolyn Eslick  
City of Sultan  
carolyneslick1@msn.com

Mayor Eslick,

My role would be to serve the City as a retained public affairs consultant, an independent contractor not an employee, billing the city for my professional time at the rate of \$125 per hour.

You will see that my proposal is to represent the city before the state's administrative tribunals, which is lawful for a non-attorney. Please note that I am not licensed to represent the city in a judicial branch court, and if that became necessary the city would have to retain a licensed attorney.

Very Truly Yours,

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Edwin F. Moats  
Public Affairs Consultant