

FROM (DEPT/ DIVISION): County Counsel

SUBJECT: Cooks Land and Water Consulting Contract

<p>Background:</p> <p>The county contracted with Cooks Land and Water Consulting to provide consulting services for water planning services, including the central water project. The contract is expiring, and the contract is before the Board for renewal. The proposal is to continue the contract through the completion of the water project.</p>	<p>Requested Separation Actions:</p> <p>Review and approve contract with Cooks Land and Water Consulting</p>
---	--

ATTACHMENTS: Proposed Agreement

*****For Internal Use Only*****

Checkoffs:

- () Dept. Heard (copy)
- () Human Resources (copy)
- (X) Legal (copy)
- () (Other - List:)

To be notified of Meeting:

Needed at Meeting:

Scheduled for meeting on: December 15, 2021

Action taken:

Follow-up:

CONTRACT FOR SERVICE AGREEMENT

Umatilla County

THIS AGREEMENT is made between:

- a) **Umatilla County** with offices at 216 SE 4th Street, Pendleton, Oregon 97801 (“County/Client”); and
- b) **Cooks Land and Water Consulting, LLC** (DBA CL&W) with offices at 75930 HWY 207, Echo, Oregon 97826 and mailing address at P.O. Box 1026, Pendleton, Oregon 97801; Tel: (541) 969-8026; cookslandw@gmail.com (“Contractor”)

1 SERVICES TO BE PERFORMED

- 1.1 Client requires strategic advice and development consulting services for various land use planning, strategic planning, water planning and project development services. Contractor has the requisite experience, qualifications and interest to undertake the work on behalf of the Client. the Contractor agrees to fulfill the work of land use planning, asset planning and water planning pursuant to the terms of this contract. Contractor agrees to perform project development services as set out in this agreement, including the scope of work in Exhibit A.

2 TERM OF CONTRACT AND TIME FOR PERFORMANCE

- 2.1 The Term of this Contract shall commence on January 1, 2022 and shall continue in full force and effect until January 1, 2026, except as otherwise provided by this Contract or applicable Task Order terms and conditions.

3 PAYMENT

- 3.1 In consideration of Contractor's performance of these services, Client agrees to pay Contractor as follows:
 - a) Fees for Contractor project staff according to the following hourly rates: (i) J.R. Cook, \$150.00/hour;
 - b) Travel expenses allowable under the Client’s contract to include airfare, mileage (Federal Mileage Reimbursement Rate from Pendleton or place of origin), lodging/per diem (prescribed byFederalPay.org for the applicable state or region) and other miscellaneous expenses incurred in carrying out services under the contract.
- 3.2 In consideration of Contractor’s performance of work prescribed through specific Task Orders authorized by this agreement, Client agrees to pay Contractor consistent with the provisions of each executed Task Order. Payments by the Client shall be made upon receipt of properly formulated invoices from the Contractor. Contractor shall submit one monthly billing for work performed. The billings shall describe with particularity all work performed, by whom it was performed, and shall itemize and explain all expenses for which reimbursement is claimed and that this contract requires the County to pay.
- 3.3 The amount of payment is not subject to any adjustment or revision because of price or currency fluctuations or the actual costs incurred by the Contractor in the performance of the agreement.

4 INDEPENDENT CONTRACTOR

- 4.1 The parties intend Contractor to be an independent contractor in the performance of these services. Contractor shall have the right to control and determine the method and means of performing the above services; Client shall not have the right to control or determine such method or means. Contractor is not an officer, employee, or agent of County as those terms are defined in ORS 30.265.
- 4.2 Contractor shall be responsible for the payment of all taxes or retirement benefits, including Federal, State, and local taxes arising out of the activities in accordance with this Contract, including by way of illustration but not limitation, Federal and State income tax, Social Security tax, Unemployment Insurance taxes and any other taxes or business license fees as required.
- 4.3 Nothing contained in this Contract shall be construed to create a partnership, joint venture, agency, or employment relationship. Neither party shall be liable for the debts or obligations of the other. No employee of Contractor shall be deemed to be an employee of Client, and Client shall not have the right or power to hire or fire Contractor's employees.
- 4.4 Contractor shall maintain and provide all necessary insurance for its employees or subcontractors, including but not limited to unemployment and workers' compensation insurance and shall further comply with all laws, regulations and rules concerning the same.

5 OTHER CLIENTS.

- 5.1 Contractor retains the right to perform services for other clients.

6 CONFIDENTIALITY; NON-DISCLOSURE

- 6.1 In the course of carrying out Work Orders, Contractor may have access to information of a confidential nature to Client. Contractor agrees to keep such information in confidence, and when questions arise ask Client if such information is of a confidential nature or not so as to clarify its status.

7 ASSISTANTS.

- 7.1 Contractor, at Contractor's expense, may employ such assistants as Contractor deems appropriate to carry out this agreement. Contractor will be responsible for paying such assistants, as well as any expense attributable to such assistants, including income taxes, unemployment insurance, and social security taxes, and will maintain workers' compensation insurance for such employees.

8 EQUIPMENT AND SUPPLIES.

- 8.1 Contractor, at Contractor's own expense, will provide all equipment, tools, and supplies necessary to perform the above services, and will be responsible for all other expenses required for the performance of those services, unless these are explicitly provided for in the individual Terms of Reference that are developed for specific Task Orders or as work progresses.

9 CONTRACTOR'S REPRESENTATIONS AND WARRANTIES

- 9.1 Contractor shall comply with all applicable international, federal, state, and local laws, ordinances, regulations and rules pertaining to the matters arising under this Contract and the performance thereof. By way of example but not limitation, Contractor shall comply with all applicable copyright and other intellectual property laws. Contractor understands that it may be subject to immediate termination under this Contract and further be subject to penalties for breach of relevant statutory provisions.

9.2 The representations and warranties herein made by Contractor shall survive termination of this Contract.

10.0 Default and Termination

10.1 Time is of the essence under this contract.

10.2 Default by Contractor.

(1) Contractor shall be in default under this Contract if:

(A) Contractor institutes or has instituted against it insolvency, receivership or bankruptcy proceedings, makes an assignment for the benefit of creditors, or ceases doing business on a regular basis; or

(B) Contractor no longer holds a license or certificate that is required for Contractor to perform its obligations under the Contract and Contractor has not obtained such license or certificate within fourteen (14) calendar days after County's notice or such longer period as County may specify in such notice; or

(C) Contractor commits any material breach or default of any covenant, warranty, obligation or agreement under this Contract, fails to perform the work under this contract within the time specified, or so fails to pursue the work as to endanger Contractor's performance under this contract in accordance with its terms, and such breach, default or failure is not cured within fourteen (14) calendar days after County's notice, or such longer period as County may specify in such notice.

(2) County's Remedies for Contractor's Default. In the event Contractor is in default under this Paragraph 13.2, County may, at its option, pursue any or all of the remedies available to it under this Contract and at law or in equity, including, but not limited to:

(A) Termination of this Contract under Paragraph 13.4;

(B) Withholding all monies due for work and work products that Contractor has failed to deliver within any scheduled completion dates or has performed inadequately or defectively;

(C) Initiation of an action or proceeding for damages, specific performance, or declaratory or injunctive relief;

(D) Exercise of its right of setoff.

These remedies are cumulative to the extent the remedies are not inconsistent, and County may pursue any remedy or remedies singly, collectively, successively or in any order. If a court determines that Contractor was not in default under this paragraph 13.2, then Contractor shall be entitled to the same remedies as if this contract was terminated pursuant to paragraph 13.4.

10.3 Default by County.

(1) County shall be in default under this Contract if:

(A) County fails to pay Contractor any amount pursuant to the terms of this contract, and County fails to cure such failure within fourteen (14) calendar days after Contractor's notice or such longer period as Contractor may specify in such notice; or

(B) County commits any material breach or default of any covenant, warranty, or obligation under this Contract, and such breach or default is not cured within fourteen (14) calendar days after Contractor's notice or such longer period as Contractor may specify in such notice.

(2) Contractor's Remedies for County's Default. In the event County terminates the Contract under paragraph 13.4, or in the event County is in default under this paragraph 13.3 and whether or not Contractor elects to exercise its right to terminate the Contract under paragraph 13.4, Contractor's sole monetary remedy shall be (a) with respect to services compensable on an hourly basis, a claim for unpaid invoices, hours worked within any limits set forth in this contract but not yet billed, authorized expenses incurred and interest within the limits permitted under ORS 82.010; and (b) with respect to deliverable-based work, a claim for the sum designated for completing the deliverable multiplied by the percentage of Work completed and accepted by County, less previous amounts paid and any claim(s) that County has against Contractor. In no event shall County be liable to Contractor for any expenses related to termination of this contract or for anticipated profits. If previous amounts paid to Contractor exceed the amount due to Contractor under this paragraph 13.3, Contractor shall pay immediately any excess to County upon written notice sent in accordance with paragraph 3.0.

10.4 Termination.

(1) County's Right to Terminate at its Discretion. At its sole discretion, County may terminate this Contract:

(A) For its convenience upon thirty (30) days' prior written notice by County to Contractor;

(B) Immediately upon written notice if County fails to receive funding, appropriations, limitations, allotments or other expenditure authority at levels sufficient to pay for the work or work products; or

(C) Immediately upon written notice if federal or state laws, regulations, or guidelines are modified or interpreted in such a way that the County's purchase of the work or work products under this Contract is prohibited or County is prohibited from paying for such work or work products from the planned funding source.

(2) County's Right to Terminate for Cause. In addition to any other rights and remedies County may have under this Contract, County may terminate this Contract immediately upon written notice by County to Contractor, or at such later date as County may establish in such notice, or upon expiration of the time period and with such notice as provided below, upon the occurrence of any of the following events:

(A) Contractor is in default under paragraph 13.2 because Contractor institutes or has instituted against it insolvency, receivership or bankruptcy proceedings, makes an assignment for the benefit of creditors, or ceases doing business on a regular basis;

(B) Contractor is in default under paragraph 13.2 because Contractor no longer holds a license or certificate that is required for it to perform services under the Contract and Contractor has not obtained such license or certificate within fourteen (14) calendar days after County's notice or such longer period as County may specify in such notice; or

(C) Contractor is in default under paragraph 13.2 because Contractor commits any material breach or default of any covenant, warranty, obligation or agreement under this Contract, fails to perform the Work under this Contract within the time specified herein or any extension thereof, or so fails to pursue the Work as to endanger Contractor's performance under this Contract in accordance with its terms, and such breach, default or failure is not cured within fourteen (14) calendar days after County's notice, or such longer period as County may specify in such notice.

(3) Contractor's Right to Terminate for Cause. Contractor may terminate this Contract with such written notice to County as provided below, or at such later date as Contractor may establish in such notice, upon the occurrence of the following events:

(A) County is in default under paragraph 13.3 because County fails to pay Contractor any amount pursuant to the terms of this Contract, and County fails to cure such failure within fourteen (14) calendar days after Contractor's notice or such longer period as Contractor may specify in such notice; or

(B) County is in default under paragraph 13.3 because County commits any material breach or default of any covenant, warranty, or obligation under this Contract, fails to perform its commitments hereunder within the time specified or any extension thereof, and County fails to cure such failure within fourteen (14) calendar days after Contractor's notice or such longer period as Contractor may specify in such notice.

10.5 Return of Property. Upon termination of this Contract for any reason, Contractor shall immediately deliver to County all of County's property (including any work or work products for which County has made payment in whole or in part) that is in the possession or under the control of Contractor in whatever stage of development and form of recordation such County property is expressed or embodied at that time.

10.6 Upon receiving a notice of termination of this Contract, Contractor shall immediately cease all activities under this Contract, unless County expressly directs otherwise in such notice of termination. Upon County's request, Contractor shall surrender to anyone County designates, all documents, research or objects or other tangible things needed to complete the work and the work products.

10.7 The failure of either party to enforce any provision of this contract shall not constitute a waiver by that party of that or any other provision.

11 NO ASSIGNMENT

11.1 No right or interest arising under this Contract shall be assigned by either party without the prior written consent of the other.

12 TAX LIABILITY

12.1 Contractor shall exonerate, indemnify, and hold harmless Client from and against, and shall assume full responsibility for, payment of self-employment taxes, all federal, state and local taxes, or contributions imposed or required under unemployment insurance, workers' compensation, social security, and income tax laws with respect to Contractor's services under this Contract.

13 GOVERNING LAW AND JURISDICTION

13.1 This Contract shall be governed by and construed under the laws of the State of Oregon, and the Circuit Court in Umatilla County, Oregon shall have exclusive jurisdiction over disputes arising hereunder.

14 OWNERSHIP OF WORK PRODUCT

All work products of the Contractor that result from this contract, including derivative works and compilations, and whether or not such work product is considered a work made for hire or an employment to invent, are the exclusive property of County. County and Contractor agree that such original works of authorship are "work made for hire" of which County is the author within the meaning of the United States Copyright Act.

15 ATTORNEY FEES

14.1 If any legal action must be taken to enforce the terms of this Contract, the prevailing party in such action shall be entitled, in addition to any other relief that may be granted, to recover from the other(s) a reasonable sum for attorney fees.

16 BINDING ON SUCCESSORS

16.1 This Contract is intended to inure to the benefit of and bind all parties and their heirs, assigns, successor in interest, and legal representatives.

17 ENTIRE AGREEMENT

17.1 This Agreement constitutes the sole and only agreement of the parties hereto and supersedes any prior understandings or written or oral agreements between the parties respecting the transaction and cannot be changed except by their written consent.

18 CONTRACTOR DATA AND CERTIFICATION

18.1 Contractor Tax Identification Information. Contractor shall provide Contractor's Social Security number or Contractor's federal tax ID number and the additional information set forth below. Social Security Numbers provided pursuant to this paragraph will be used for the administration of state, federal and local tax laws.

Name(tax filing): Cooks Land and Water Consulting, LLC

Address: PO Box 1026
Pendleton, OR 97801

Business Designation (check one):

Professional Corporation Partnership Limited Partnership Limited Liability Company Limited Liability Partnership

Sole Proprietorship Other

Federal Tax ID#: _____ - _____

County may report the information set forth above to the Internal Revenue Service (IRS) under the name and social security number or taxpayer identification number provided.

18.2. Certification. The individual signing on behalf of Contractor hereby certifies and swears under penalty of perjury that:

(a) The number shown on this form is Contractor's correct taxpayer identification;

(b) Contractor is not subject to backup withholding because (i) Contractor is exempt from backup withholding; (ii) Contractor has not been notified by the IRS that Contractor is subject to backup withholding as a result of a failure to report all interest or dividends; or (iii) the IRS has notified Contractor that Contractor is no longer subject to backup withholding;

(c) The person signing this document is authorized to act on behalf of Contractor and has the authority and knowledge regarding Contractor's payment of taxes and to the best of her/his knowledge, Contractor is not in violation of any Oregon tax laws named in ORS 305.380(4), including without limitation the state inheritance tax, gift tax, personal income tax, withholding tax, corporation income and excise taxes, amusement device tax, timber taxes, cigarette tax, other tobacco tax, 9-1-1 emergency communications tax, the homeowners and renters property tax relief program and local taxes administered by the Department of Revenue,;

(d) Contractor is an independent contractor as defined in ORS 670.600; and

(e) The supplied Contractor data is true and accurate.

18.3 CONTRACTOR, BY SIGNING THIS CONTRACT, ACKNOWLEDGES THAT CONTRACTOR HAS READ THIS CONTRACT, UNDERSTANDS IT, AND AGREES TO BE BOUND

BY ITS TERMS AND CONDITIONS.

EXECUTION

This Contract is hereby executed by Contractor and Client on the terms set forth above.

CLIENT/COUNTY:

CONTRACTOR:

Signature: _____

Signature: _____

Name: George L. Murdock, Chair, Board of Commissioners, Umatilla County

Name: J.R. Cook, Cook's Land and Water

Date: _____

Date: _____

Exhibit A Scope of Work

This is the scope of work and fee schedule for Cook's Land and Water Consulting, LLC (Contractor) to provide development services to Umatilla County (County) related to the Ordinance Regional Water Project (Ordinance). Generally, work will include, but not necessarily be limited to, project components typical of development of a large-scale capital construction project including negotiating easements, developing cost proposals, securing options and water delivery contracts, coordinating a project committee, assisting in selecting contractors and support services (engineering, legal, financial), developing options for short and long-term operations.

General Activities:

- Assist County in developing final engineering, funding packages and customer contracts for all phases of Ordinance (Central Water pipeline) project, including Phases 1, 2 and 3
- Outreach and meetings with landowners and prospective water supply customers
- Coordination with landowners and entities necessary to secure easements for pump station construction and pipeline route
- Coordination between prospective financial institutions and the County
- Formation and facilitation of a project development committee comprised of both the County and project partners
- Solicitation of and coordination with prospective contractors and service providers

Specific Activities

- Provide easement recommendations and assist the County in securing necessary easements for pump station and pipeline construction
- Advocate for and attempt to secure state and/or other public assistance to accomplish aquifer recharge testing associated with the Ordinance Project
- Facilitate process and secure final recommendation and proposal to the County to secure a minimum of 30 cfs of Columbia River in-take capacity
- Develop and make final recommendations on initial water delivery contracts for all phases of the project
- Assist County with securing a contract or contracts for operation and maintenance of the Ordinance Project.
- Facilitate and make final recommendations on short and long-term financial packages necessary to construct the Ordinance Project.
- Assist County Legal Counsel and CFO with final contracts and agreements necessary to secure financing and construct project.

The fee schedule to complete this work is as follows:

- Consulting (J.R. Cook) \$150.00 per hour
- Per Diem \$130.00 per day
- Mileage (From Echo, Oregon) \$0.60 per mile

The total amount of hourly fees will not exceed \$36,000 per annum and \$180,000 for the term of the contract without written authorization from the County. The total fees paid by County to Contractor in Calendar Years 2020 and 2021 will be deducted from the project bonus payment below until fully deducted (i.e. 2% of bonus payment minus the pay the County documents to Contractor between the date of

Contract for Service Agreement (CL&W/Umatilla County)

commencement of the contract and the date that bids/contracts are awarded for each phase of construction of the project). Once the total fees paid by the County to Contractor for the Calendar Years of 2020 and 2021 have been fully deducted there shall be no further offsets or credits of the bonus payments described below.

Completion Bonus

County shall pay a completion bonus to Contractor upon completion of each Phase of construction development activities (the "Completion Bonus") as follows:

- The Completion Bonus for each Phase will be 2% of the total construction value of each Ordinance Project Phase.
- The County will execute a completion acknowledgement form attached hereto as Exhibit C upon completion of each Ordinance Project Phase by Contractor.
- The Completion Bonus will be due and payable by County to Contractor on the date the County lets bids for construction for all or part of each Phase.
- The County can elect to pay the Completion Bonus to Contractor in a lump sum payment within 180 days of contract/bid awards or over a 5-year period at 2% interest.

The obligation to pay the Completion Bonus for development activities of each Phase that has been completed by Contractor upon termination of this Agreement survives termination for a period of ten (10) years from the date of termination.

Funding Bonus

Notwithstanding the above and regardless of progress on Phase I of the Project, Umatilla County shall pay to contractor 2% of the \$6 million (\$120,000) in funding secured in 2021, less the payments made to contract in 2020 and 2021, by no later than February, 2023 or begin payments to contractor for 5 years at 2% interest.

Exhibit B
Independent Contractor Certification Statement*

Contractor certifies that he is an independent contractor by meeting the following standards:

1. Contractor is licensed under ORS Chapter 701 to provide labor or services for which such registration is required.
2. Contractor has filed federal and state income tax returns in the name of the business or a business Schedule C as part of the personal income tax return, for the previous year, or expect to file federal and state income tax returns, for labor or services performed as an independent contractor in the previous year.
3. Contractor will furnish the tools or equipment necessary to do the contracted labor or services.
4. Contractor has the authority to hire and fire employees who perform the labor or services.
5. Contractor represents to the public that the labor or services are to be provided by my independently established business as four (4) or more of the following circumstances exist.

_____ A. The labor or services are primarily carried out at a location separate from my residence, or carried out primarily in a specific portion of the residence, which portion is set aside as the location of the business.

_____ B. Commercial advertising or business cards are purchased for the business, or I have a trade association membership.

_____ C. You use a telephone listing and service separate from your personal residence listing and service.

_____ D. You perform labor or services only pursuant to written contracts.

_____ E. You perform labor or services for two or more different persons within a period of one year.

_____ F. You assume financial responsibility for defective workmanship or for service not provided as evidenced by the ownership of performance bond, warranties, errors and omission insurance or liability insurance relating to the labor or services to be provided.

Contractor Signature

Date

Entity

*Corporations are not required to complete this form, but must sign form representing that Contractor is a corporation authorized to do business in the State of Oregon.

Exhibit C
Acknowledgment of Completion of Phase _____ of the Ordinance Project

I, _____, as the duly authorized Chair of the Board of Commissioners of Umatilla County, hereby acknowledge that Contractor has completed Phase _____ of the Ordinance Project in fulfillment of all conditions required in the Contract for Service (the "Contract") between County and Contractor for payment of the Completion Bonus as provided in the Contract.

The undersigned further acknowledges that the County owes to Contractor the Completion Bonus for completion of Phase _____ of the Ordinance Project on the date the County enters into the contract for construction of Phase _____ with the successful bidder payable as provided in the Contract.

The capitalized terms used but not otherwise expressly defined herein shall have the meanings ascribed to such terms in the Contract

UMATILLA COUNTY

By: _____
Name: _____
Chair, Board of Commissioners, Umatilla
County