

## SETTLEMENT AGREEMENT AND RELEASE

This Settlement Agreement and Mutual Release of Claims ("Agreement"), effective as of the date of signing by all parties, is made by and between Plaintiff Water Audit California and any of its agents, affiliates, directors, employees, officers, principals, or other related persons or entities (collectively, "Water Audit") and defendant City of St. Helena ("City"), a political subdivision of the State of California. Water Audit and the City are sometimes hereinafter each referred to as a "Party" or collectively as the "Parties."

### RECITALS

- A. Bell Canyon Creek, located in Napa County, is a tributary to the Napa River and the San Francisco Bay. Bell Creek, as impounded in Bell Canyon Reservoir, has been the City's major water supply source for several decades.
- B. The City diverts water from Bell Creek to the Louis Stralla Water Treatment Plant pursuant to two permits and subsequent orders issued by the State Water Resources Control Board ("SWRCB"): Permit 9157, issued on or about October 31, 1952, and Permit 14810, issued on or about August 3, 1965. These water rights permits were amended on or about September 7, 1989 to include required reservoir bypass flows to improve fish habitat.
- C. Early in 2010, the City commissioned West Yost Associates to assist with review of its surface water right permits and to make recommendations for future operations to ensure compliance. In October 2013, the SWRCB issued a compliance inspection report of its inspection on June 6, 2012.
- D. The City engaged Prunuske Chatham, Inc. ("PCI") to design proposed system upgrades to collect and analyze water volume and flow rate data and to improve its methodology to accurately calculate inflows from Bell Creek. In January 2015, the City indicated that it would proceed with the work and improvements outlined in PCI's technical memorandum dated January 8, 2014, including installing real-time electronic monitoring and recording equipment (including a stilling well, pressure transducer, and remote terminal unit), recalibrating the Bell Canyon Creek bypass flow meter, integrating the measurements into an automated supervisory control and data acquisition (SCADA) system, and updating the City's bypass calculation algorithms.
- E. On May 19, 2016, Water Audit filed a Notice of Claim with the City, alleging it was in breach of its public trust and statutory duties in its operation of Bell Canyon Dam. On August 10, 2016, Water Audit filed an action consistent with the notice that is styled *Water Audit California v. City of St. Helena, et al.*, Napa County Superior Court Case number 16CV000680 ("Action"). The Action alleges that the City had not performed its public trust duty to monitor flows and bypass sufficient water to keep fish downstream of Bell Canyon Dam in good condition, and requests declaratory relief, a preliminary injunction, a permanent injunction, and a writ of mandate.

- F. The City denies all of Water Audit's allegations that the City is liable to Water Audit for any claims that were, or could have been, asserted against the City based upon the Action. The City asserts that its operation and management of Bell Canyon Dam currently meet all California Department of Fish and Wildlife requirements, all California State Water Resources Control Board requirements, and all public trust and statutory obligations and duties. The actions by the City described below are not intended as an admission of the claims alleged in the Notice Letter and are the City's best efforts to resolve all disputed issues by and between the City and Water Audit to avoid the costs and uncertainties of litigation.
- G. The Parties have expended effort and resources in investigating and evaluating allegations and claims set forth in the Action, including the exchange of information, as well as engaging in a negotiation and technical dialogue regarding settlement.
- H. The Parties now wish to resolve and settle the Action on the terms and conditions set forth below.

#### **DEFINITIONS**

- 1. "Fish" has the same meaning as defined in California Fish and Game Code ("F&G") section 45.
- 2. "Adaptive management" has the same meaning as defined in F&G section 13.5.
- 3. "Credible science" has the same meaning as defined in F&G section 33.
- 4. "Ecosystem-based management" has the same meaning as defined in F&G section 43.
- 5. "Best available technologies" has the same meaning as defined in Water Code section 5100(a).
- 6. "Best professional practices" has the same meaning as defined in Water Code section 5100(b).

#### **AGREEMENT**

**1. Incorporation of Recitals**

The Recitals and Definitions set forth above are incorporated herein as part of this Agreement.

**2. Dismissal of Litigation**

The Plaintiff agrees to dismiss this action without prejudice on the terms set forth in this Agreement at paragraph 5, below.

**3. Actions by City and Water Audit**

In exchange for the delivery, execution, and performance of this Agreement and the release and dismissal by Water Audit as provided in this Agreement, the City and Water Audit shall perform the actions described, in stages, and in the order set forth below.

The Parties acknowledge that the implementation of this Agreement will occur over a period of time and may require the performance of activities to be developed in good faith under the terms of this Agreement.

With respect to each stage described in this Section 3 of the Agreement, in the event the Parties are unable to reach agreement as to the actions described in a given stage, the Parties shall informally negotiate in good faith for a period not to exceed 30 days in an attempt to resolve the dispute with respect to the actions described in that stage. If after engaging in this informal negotiation process the Parties still cannot reach agreement with respect to a given stage, either Party may invoke the Dispute Resolution Procedure outlined in Paragraph 8.

**a. Stage 1:**

The City shall appoint Mike Podlech as a Project Coordinator ("Coordinator") who shall be tasked with coordinating the performance of the City's duties set forth herein, subject to the discretion of the City Manager and Director of Public Works. Water Audit does not object to his employment. In the event Mr. Podlech is unwilling or unable to perform these duties, the City shall, in its sole discretion, designate a replacement Coordinator, who may be City staff or an independent contractor or consultant with experience in fish and stream rehabilitation, coordinating the work of experts in environmental analysis, monitoring designs and approaches, conducting statistical analyses, data management, and sampling logistics. Notwithstanding the foregoing, the City reserves the right, in its sole discretion, to determine the persons who shall actually perform any of the described actions and the manner in which the work will be implemented. The persons appointed by the City under this paragraph shall be referred to herein as the "City's experts."

Water Audit shall appoint persons who have expertise and experience in fish and stream rehabilitation, coordinating the work of experts in environmental analysis, monitoring designs and approaches, conducting statistical analyses, data management, and/or sampling logistics. Notwithstanding the foregoing, Water Audit reserves the right, in its sole discretion, to determine the persons who shall actually perform any of the described actions and the manner in which the work will be implemented. The persons appointed by Water Audit under this paragraph shall be referred to herein as "Water Audit's experts."

The City's experts and Water Audit's experts together shall be referred to collectively as the "experts."

b. **Stage 2:**

Within ten days of the effective date of this Agreement, the City's experts shall electronically transmit to Water Audit's experts a proposed scope of work ("Scope of Work") that shall include, among other things: a proposal for an interim flow measuring and reporting system to supplement existing measuring and reporting procedures for operations and bypass flows for Bell Canyon Reservoir; installation of continuously operating water level recorders in Bell Canyon Reservoir at the stage gauge on the dam and in Bell Canyon Creek near its inlet to the reservoir; developing a stage-discharge relationship for stream flow in Bell Canyon Creek, and conducting additional hydrologic analysis of the reservoir water balance with supplemental data described above; the interim flow measurement and reporting system should be maintained through adoption and implementation of an Interim Bypass Plan, paragraph 3(d), below; creating a summary report on reservoir water balance calibration and implementation; creating a summary report on a watershed hydrologic model to simulate surface inflows to the reservoir; coordinating a stream survey, habitat survey, and supplemental geomorphic survey to assess fluvial processes that create habitat and assess evidence of impacts of flow regulation on habitat; preparation of a technical memorandum describing geomorphic conditions in Bell Creek as they relate to fish habitat and reservoir impacts; and coordinating a fish habitat-flow relationship study, including hydraulic analysis and an evaluation of habitat as a function of stream flow/bypass flow, field surveying, and modeling components; and evaluating methods to determine reservoir inflow to meet City objectives leading to recommended alternatives for interim- and long-term reservoir and bypass measuring and reporting system that meets the requirements of, and is consistent with, Water Code sections 1840 and 5100, and California Code of Regulations, title 23, sections 931 *et seq.*

The experts shall negotiate in good faith for a period not to exceed thirty (30) days to reach consensus on the Scope of Work, including the dates by which individual elements of the plan will be completed.

If the experts reach consensus, they shall make a joint recommendation to the City. If a recommendation is submitted, within thirty (30) days the City shall exercise its legislative discretion and decide whether to adopt the aforesaid experts' recommendation.

If the experts cannot reach consensus, or if the City shall reject the consensus recommendation, either Party may invoke the Dispute Resolution Procedure outlined in Paragraph 8.

c. **Stage 3:**

The experts shall negotiate in good faith for a period not to exceed forty (40) days following the effective date of this Agreement to reach consensus on the recommended form and implementation of the interim flow measuring and reporting system initially proposed by the City in Agreement paragraph 3(b), including the

dates by which individual elements of the interim measuring, monitoring and reporting system will be completed.

If the experts reach consensus on the agreement on the form and implementation of the interim flow measuring and reporting system, they shall make a joint recommendation to the City. If a recommendation is submitted, within thirty (30) days the City shall exercise its legislative discretion and decide whether to adopt the experts' recommendation.

If the experts cannot reach consensus, or if the City shall reject the consensus measuring and reporting system, either Party may invoke the Dispute Resolution Procedure outlined in Paragraph 8.

**d. Stage 4:**

Within ninety (90) days following the effective date of this Agreement the City's experts shall prepare a draft Interim Bypass Plan, and transmit a copy electronically to Water Audit's experts. In its preparation of the IBP, the City shall consider the best professional practices, the best available technologies, eco-system based management and credible science, and anticipate the use of adaptive management. The IBP shall address life history-specific instream flow needs and proportional contribution to mainstream flows.

Water Audit's experts shall be entitled to thirty (30) days to review and suggest revisions to the IBP, and electronically transmit these comments to the City's experts.

Thereafter the experts shall negotiate in good faith for a period not to exceed an additional thirty (30) days to reach consensus regarding recommended terms and conditions to be included in the IBP.

If the experts reach consensus regarding the IBP, they shall make a joint recommendation to the City. If a recommendation is submitted, within thirty (30) days the City shall exercise its legislative discretion and decide whether to adopt the recommended IBP. In the event the City adopts the recommended IBP, the adopted IBP shall prevail until the Final Bypass Plan is adopted.

In the event that the Parties are unable to agree upon an IBP, or the City fails to adopt the recommended IBP, either Party may invoke the Dispute Resolution Procedure outlined in Paragraph 8.

**e. Stage 5:**

Following adoption of the IBP, and accumulation of data detailed in the Scope of Work, the City's experts shall prepare a Final Bypass Plan ("FBP") and electronically transmit a copy of the draft FBP to Water Audit's experts for review and comment on or before August 1, 2018.

The draft FBP shall contain, at a minimum, (1) clearly articulated goals, management actions, and information needs, including long-term reservoir and bypass measuring and reporting system that meets the requirements of, and is consistent with, Water Code sections 1840 and 5100, and California Code of Regulations, title 23, sections 931 *et seq.*; (2) specific objectives; (3) flow prescriptions to serve as measurable objectives with specific quantitative attributes defined for magnitude, duration, seasonality, and frequency; and (4) adaptive management procedures utilizing associated ecosystem attributes and expected results from changed environmental flows to inform short-term monitoring and adaptive management needs. In its preparation of the draft FBP, the City shall consider the best professional practices, the best available technologies, eco-system based management and credible science, and anticipate the use of adaptive management. The FBP shall address life history-specific instream flow needs and proportional contribution to mainstream flows.

Water Audit's experts shall be entitled to thirty (30) days to review and suggest revisions to the FBP, and electronically transmit these comments to the City's experts.

Thereafter the experts shall negotiate in good faith for a period not to exceed an additional thirty (30) days to reach consensus regarding recommended terms and conditions to be included in the FBP.

If the experts reach consensus regarding the FBP, they shall make a joint recommendation to the City. If a recommendation is submitted, within ninety (90) days, the City shall exercise its legislative discretion and decide whether to adopt the recommended FBP.

In the event that the experts are unable to agree upon an FBP, either Party may invoke the Dispute Resolution Procedure outlined in Paragraph 8. If the City decides not to adopt a jointly recommended FBP, this Agreement shall automatically terminate.

The City shall bear the costs of implementing the actions described under this Section 3 except for any and all costs associated with work performed by Water Audit's experts. All costs and fees incurred by Water Audit's experts shall be the sole responsibility of Water Audit, and under no circumstances shall the City be responsible for any of those costs or fees. The Parties agree that the City may, without any restriction or objection by Water Audit, seek any public or private funding to pay for these costs.

#### **4. Water Audit's Attorneys' Fees and Costs**

Concurrently with transmission to the City of an offer of settlement consistent with the terms of this Agreement, Water Audit will make a demand for payment for its investigative, expert, and attorneys' fees and costs. Payment of the aforesaid demand shall constitute full satisfaction and payment for all of Water Audit's costs of litigation to the effective date of the Agreement, Water Audit's anticipated fees and costs to monitor compliance with this Agreement, and the fees and costs of Water Audit's experts to review, comment upon and negotiate the aforesaid Scope of Work, IBP and FBP.

Except as may be sought in a fee motion, as discussed below, and except as may be incurred during Dispute Resolution Procedures, if any, Water Audit agrees that if its demand for fees and costs is paid it will seek no fees or costs during the implementation period.

Payment shall be made within ten (10) days following acceptance of the demand by delivery of a single check payable to "Water Audit California," mailed to William McKinnon, Attorney at Law, P.O. Box 3161, Grass Valley, CA 95945-3161.

If the Parties are unable to agree regarding the attorneys' fees and costs payable by the effective date of this Agreement, either Party may invoke the Dispute Resolution Procedures. If the parties are unable to reach a mediated result, Water Audit shall be entitled to bring a motion in Superior Court for the payment of attorneys' fees in the Action. The City reserves the right to oppose such a fee motion on any and all grounds.

**5. Termination Date**

Within thirty (30) days following the effective day of this Agreement, or following the payment of attorneys' fees, whichever shall come later, Water Audit will file a dismissal of this Action "without prejudice" to future judicial action as set forth in paragraphs 1(f) above and 8 below.

This Agreement shall terminate ninety (90) days following implementation of a FBP (the "Termination Date").

**6. No Admission or Finding**

Neither this Agreement nor any payment pursuant to this Agreement shall constitute evidence or be construed as a finding, adjudication, or acknowledgment of any fact, law or liability, nor shall it be construed as an admission of violation of any law, rule or regulation. However, this Agreement and/or any payment pursuant to this Agreement may constitute evidence in actions seeking compliance with this Agreement.

**7. Release of Liability and Covenant Not to Sue**

In consideration of the faithful performance by the City as set forth above, and except for future Dispute Resolution Procedures, if any, Water Audit hereby forever and fully releases the City and its respective successors, assigns, directors, officers, agents, board members, representatives, and employees, and all persons, firms and corporations having an interest in them, from any and all claims and demands of any kind, nature, or description whatsoever, and from any and all liabilities, damages, injuries, actions or causes of action, either at law or in equity, which Water Audit has or may have against the City based upon the allegations as set forth in the Action ("Water Audit Claims") up to and including the Effective Date of this Agreement.

Beginning on the Effective Date and ending on the Termination Date, Water Audit agrees that neither Water Audit nor any organization under the control of Water Audit, its agents, affiliates, directors, employees, officers, or principals, will serve any 60-day Notice Letter or file any lawsuit against the City seeking relief related to any of the Water Audit Claims, nor will



Water Audit or its agents, affiliates, directors, employees, officers, or principals support such lawsuits against the City brought by other groups or individuals by providing financial assistance, personnel time, or any other affirmative actions except for invocation of the Dispute Resolution Procedures.

**8. Dispute Resolution Procedure**

Any disputes with respect to any of the stages contemplated in Paragraph 3, above, or any other provisions of this Agreement shall be resolved through the following procedure.

The Parties covenant and agree that, if either party believes the other is in non-compliance or violation of one or more terms of this Agreement, within ten (10) days the party shall provide notice to the other in writing of the actions or inactions they deem to be in violation of this Agreement. Within thirty (30) days of receipt of such notice, the party receiving the notice shall respond in writing. If the Parties still dispute compliance, they will informally negotiate in a good faith attempt to resolve their dispute for a period not to exceed an additional thirty (30) days.

If the Parties cannot informally resolve the dispute, they shall attempt to resolve such dispute through non-binding mediation, using a mutually agreed upon mediator.

A "Notice of Mediation" shall be served by either Party to signify that the informal negotiation was not successful, and to commence the mediation process. The Parties shall immediately attempt to agree on a mediator. If the Parties cannot agree upon a mediator within ten (10) days, and if the Parties do not promptly agree to another process, the parties shall use the Judicial Arbitration and Mediation Service to appoint a mediator.

The mediation session shall be held within 45 days of the retention of the mediator, and last for at least one full day before any party has the option to withdraw from the process. The Parties may agree to continue the mediation process beyond one day, until there is a settlement agreement, or one party states that there is no reason to continue because of an impasse that cannot be overcome and sends a "Notice of Termination of Mediation." All reasonable efforts will be made to complete the mediation within thirty (30) days of the first mediation session.

All communications, both written and oral, during the Dispute Resolution Procedure contemplated in this paragraph are confidential and shall be treated as settlement negotiations for purposes of determining the applicable rules of evidence.

Should mediation be unsuccessful, except as set forth in Water Audit's Attorneys' Fees and Costs, paragraph 4 above, then this Agreement shall terminate without further notice and Water Audit may resume judicial process.

**9. Force Majeure**

Separate from, and in addition to, any other limitations on, or amendments to, the City's obligations under this Agreement, the City's obligations to comply with any provisions of this Agreement shall be excused or deferred if compliance, or a delay in compliance, is caused by an event or circumstance beyond the reasonable control of the City or any entity controlled by the



City, including its contractors, and which event or circumstance could not have been reasonably foreseen and prevented by the exercise of due diligence by the City. Where implementation of the actions set forth in this Agreement, within the deadlines prescribed, becomes unachievable, despite the timely good faith efforts of the City, the City shall notify Water Audit in writing within sixty (60) days of the date that the City knew of the event or circumstance precluding compliance, and shall describe the reason for the non-performance. The Parties agree to meet and confer in good faith for a period not to exceed thirty (30) days concerning the non-performance and, where the Parties concur that the non-performance was or is impossible, despite the timely good faith efforts of one of the Parties, compliance shall be excused or new performance deadlines shall be established by agreement of the Parties. In the event that the Parties cannot timely agree, either party shall have the right to invoke the Dispute Resolution Procedure described in Paragraph 8 of this Agreement.

**10. General Provisions**

- A. Construction: The language in all parts of this Agreement shall be construed according to its plain and ordinary meaning, except as to those terms defined by law or specifically herein.
- B. Choice of Law: This Agreement shall be governed by the laws of the State of California.
- C. Correspondence: All notices required herein or any other correspondence pertaining to this Agreement shall be sent by regular, certified, overnight, or electronic mail as follows:

<p><u>If to Water Audit:</u></p> <p>Water Audit California          Attn: Grant Reynolds, Director          333 University Drive, Suite 200          Sacramento, CA 95825          Telephone: (916) 565-7408          Email: general@waterauditca.org</p> <p>And to:</p> <p>William McKinnon          P.O. Box 3161          Grass Valley, CA 95945-3161          Telephone: (530) 575-5335          Email: mail@williammckinnon.com</p>	<p><u>If to the City:</u></p> <p>City of St. Helena          Attn: City Manager          1480 Main Street          St. Helena, CA 94574          Telephone: (707) 967-2792          Email: admin@cityofsthelena.org</p> <p>And to:</p> <p>Thomas B. Brown          City Attorney          1901 Harrison Street, Suite 900          Oakland, CA 94612          Telephone: (510) 273-8780          Email: tbrown@bwslaw.com</p>
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Notifications of communications shall be deemed submitted on the date that they are sent by electronic mail, postmarked and sent by first-class mail, or deposited with an overnight mail/delivery service. Any change of address or addresses shall

be communicated in the manner described above for giving notices.

- D. Counterparts: This Agreement may be executed in any number of counterparts, all of which together shall constitute one original document. Telecopy, electronic, and/or facsimile copies of original signature shall be deemed to be originally executed counterparts of this Agreement.
- E. Assignment: Subject only to the express restrictions contained in this Agreement, all of the rights, duties and obligations contained in this Agreement shall inure to the benefit of and be binding upon the Parties and their successors and assigns.
- F. Modification of the Agreement: This Agreement, and any provisions herein, may not be changed, waived, discharged or terminated unless by a written instrument, signed by the Parties.
- G. Full Settlement: This Agreement constitutes a full and final settlement of this matter. It is expressly understood and agreed that this Agreement has been freely and voluntarily entered into by the Parties with and upon advice of counsel.
- H. Integration Clause: This is an integrated Agreement. This Agreement is intended to be a full and complete statement of the terms of the agreement between the Parties and expressly supersedes any and all prior oral or written agreements, covenants, representations, and warranties (express or implied) concerning the subject matter of this Agreement.
- I. Negotiated Agreement: The Parties have negotiated this Agreement, and agree that it shall not be construed against the party preparing it, but shall be construed as if the Parties jointly prepared this Agreement and any uncertainty and ambiguity shall not be interpreted against any one party.
- J. Authority: The undersigned representatives for Water Audit and the City each certify that he or she is fully authorized by the party whom he represents to enter into the terms and conditions of this Agreement.
- L. Implementation: The Parties shall each execute all such additional documents as may reasonably be necessary or desirable to carry out the provisions of this Agreement, and undertake all reasonable efforts to effectuate the provisions of this Agreement in good faith.
- M. Successors and Representatives. This Agreement is binding upon and shall inure to the benefit of the successors and assigns of each Party.
- N. Third Parties: This Agreement is not intended, and shall not be interpreted, to confer any rights on entities or persons who are not Parties hereto, or to create intended or expected third party rights.

The Parties hereby enter into this Agreement.

Date: August 7, 2017

WATER AUDIT CALIFORNIA

By: 

Name: Grant Reynolds  
Title: Director

Date: August 7, 2017

WATER AUDIT CALIFORNIA

By: 

Name: Kristen Autry  
Title: Director

Date: 2/28/18, 2017

CITY OF ST. HELENA

By: 

Name: Mark T. Prestwich

Title: City Manager

2/28/18



Alan Galbraith

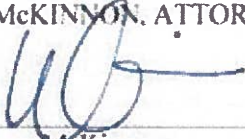
Mayor

**APPROVED AS TO FORM:**

For Water Audit California:

Date: August 7, 2017

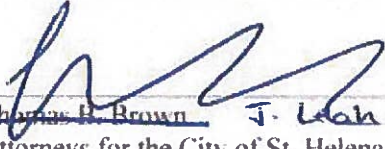
WILLIAM MCKINNON, ATTORNEY AT LAW

By:   
William McKinnon  
Attorney for Water Audit California

For the City of St. Helena:

Date: 8-22, 2017

BURKE, WILLIAMS & SORENSEN, LLP

By:   
Thomas H. Brown J. Leah Castella  
Attorneys for the City of St. Helena