



March 7, 2018

TO: San Luis & Delta-Mendota Water Authority Board of Directors, Alternates, and Interested Parties

FROM: Jon Rubin, Secretary (by Cheri Worthy)

RE: Thursday, March 8, 2018, 9:30 a.m.
Board of Directors' Regular Meeting

Attached for your review in preparation of the March 8, 2018, Board of Directors' regular meeting are the following additional documents:

- 1) Material Related to Agreement for Release of Water By and Among MID, SLDMWA & DWR

Thank you, and please give us a call if you have any questions or concerns regarding this information.

RESOLUTION NO. 2018-

RESOLUTION AUTHORIZING EXECUTION OF AGREEMENT FOR RELEASE OF WATER BY AND AMONG THE MERCED IRRIGATION DISTRICT, THE SAN LUIS & DELTA-MENDOTA WATER AUTHORITY, AND THE CALIFORNIA DEPARTMENT OF WATER RESOURCES, MAKING FINDINGS UNDER THE CALIFORNIA ENVIRONMENTAL QUALITY ACT, AND AUTHORIZING ACTIONS RELATED THERETO

WHEREAS, for the current water year due to hydrologic and regulatory constraints, members of the San Luis & Delta-Mendota Water Authority (the “Water Authority”) who have Central Valley Project (“CVP”) water service contracts for irrigation received an initial allocation of 20% of their CVP contract total for the current water year, and members who have CVP water service contracts for municipal and industrial use received an initial allocation of 70%.

WHEREAS, the Board of Directors of the Water Authority (“Board”) has considered that certain draft Agreement for Release of Water By and Among the Merced Irrigation District (“MID”), the San Luis & Delta-Mendota Water Authority, and the California Department of Water Resources (“DWR”) (“2018 MID Agreement” or “Agreement”), a copy of which has been presented to the Board and is on file with the Secretary hereof.

WHEREAS, the 2018 MID Agreement provides for the release by MID of up to 15,000 acre feet of water from Exchequer Dam Reservoir to the Merced River.

WHEREAS, a goal of the Agreement is to provide water for an April-May fishery enhancement pulse flow on the Merced River.

WHEREAS, a second goal of the Agreement is to have additional State Water Project (“SWP”) and CVP water made available at Banks Pumping Plant and Jones Pumping Plant at a time when Reclamation and DWR can operate at a Vernalis flow-to-combined CVP and SWP pumping ratio of 1:1.

WHEREAS, the 2018 MID Agreement provides that the Water Authority shall not be obligated to pay for any water released by MID unless 1) such release has been approved and requested by Reclamation and 2) both the Water Authority and DWR designated contacts have approved the release and delivery of such water.

WHEREAS, the 2018 MID Agreement further authorizes a Party to terminate the Agreement, in which case the Water Authority is not responsible to pay for any water released after the notice of termination is given.

WHEREAS, the released water is expected to support pumping at the Jones Pumping Plant and Banks Pumping Plant on the basis of 50% available to Reclamation and 50% available to DWR, subject to any applicable restrictions or limitations imposed by Federal and State agencies with jurisdiction over CVP or SWP operations.

WHEREAS, Reclamation expects to make the CVP share of additional water that is captured available as supplemental allocation to CVP agricultural and M&I contractors that are Members of the Water Authority based upon each such CVP contractor's election to participate and agreement to accept the terms upon which the supplemental allocation will be made available by Reclamation, which terms include payment of applicable contract rates for CVP water plus payment of a premium to the Water Authority in the amount of \$200/acre foot for each acre foot released up to 15,000 acre feet.

WHEREAS, execution and implementation of the 2018 MID Agreement is in the public interest because it will support an April-May pulse flow for fishery enhancement and is in the interest of the Water Authority because it is intended to improve the water supply available to its Members and because availability of the Supplemental Allocation south of the Delta will generate additional revenues to assist the Water Authority in implementing its obligation to operate and maintain the Delta-Mendota Canal and related facilities required by its Agreement with the United States during a year of severely reduced water allocation and budget constraints related to such reductions.

WHEREAS, the Water Authority has determined that its execution and performance of the 2018 MID Agreement, including funding the supplemental instream fishery releases and delivering to its Members any supplemental CVP allocation (collectively, the "Project") resulting from the 2018 OID-SSJID Agreement will have no significant adverse environmental effects.

WHEREAS, the Project is categorically exempt from the California Environmental Quality Act ("CEQA") because it will result in the provision of supplemental instream fishery flows pursuant to 14 California Code of Regulations, section 15301(i) and in the ongoing operation of the existing system without change in operation or expansion of use pursuant to 14 California Code of Regulations, section 15301 (Class 1).

NOW, THEREFORE, BE IT RESOLVED, AS FOLLOWS, THAT:

Section 1. The facts stated in the recitals above are true and correct, and the Board so finds and determines.

Section 2. In accordance with CEQA Guidelines section 15300.2, the Project is not subject to any of the applicable exceptions to the categorical exemption for existing facilities.

A. The cumulative impacts resulting over time from successive projects of the same type in the same place are not significant because there are no additional projects identified for this water year or subsequent years for Merced River supplemental releases; and additional Merced River fishery flows could have an immediate significant beneficial effect on fish given the already dry conditions on the Merced River, whereas any cumulative impacts on carryover storage from implementation of other actions would depend on recurrence of dry conditions into the future; if there were any cumulative or successive projects for delivering water to the Water Authority Members, they would continue to be within the existing operating parameters of the parties delivering and utilizing the water; and all SWP and CVP operations will be subject to all regulatory permits applicable to CVP or SWP facilities for the benefit of the environment (§15300.2(b)).

B. Because the Project represents a one-season adjustment within the established parameters of normal operations of existing facilities to be implemented subject to all regulatory permits for the benefit of the environment, there is also no reasonable possibility that significant adverse environmental impacts will result due to unusual circumstances (§15300.2(c)).

C. No scenic resources on an officially designated scenic highway will be damaged by the Project and no “substantial adverse change in the significance of a historical resource” will be threatened because there will be no physical changes to existing facilities and all operations will be within existing parameters (§15300.2(d) and (f)).

D. The Project will not implicate any real property that may be listed as a hazardous waste site because no acquisition of real property is contemplated or required under the terms of the Agreement (§ 15300.2(e)).

Section 3. The Executive Director or the Assistant Executive Director is hereby authorized and directed to execute the 2018 MID Agreement substantially in the form presented to the Board and on file with the Secretary hereof, subject to such additions, deletions, and other revisions as the executing officer shall approve prior to execution, upon condition that at least one Member of the Water Authority has agreed to participate and has agreed to the payment terms of the final form of the 2018 MID Agreement.

Section 4. The Assistant Executive Director is hereby designated as the Water Authority contact for purposes of taking actions for and on behalf of the Water Authority, in consultation with the managers of participating Water Authority Members, including but not limited to: approving or disapproving the release and delivery of water pursuant to the 2018 MID Agreement and terminating the 2018 MID Agreement according to its terms.

Section 5. The Executive Director, Assistant Executive Director and any Water Authority employees, consultants or agents directed by the Executive Director or Assistant Executive Director hereby are further authorized and directed to take such additional steps, and to execute such additional documents, as may be required or reasonably necessary or convenient for completing and implementing the Project as authorized by this Resolution.

PASSED, APPROVED AND ADOPTED this day of **MONTH**, 2018, by the Board of Directors of the San Luis & Delta-Mendota Water Authority, by the following vote:

AYES:

NAYS:

ABSTAIN:

Cannon Michael, Chairman

SAN LUIS & DELTA-MENDOTA WATER AUTHORITY

Attest:

Jon Rubin, Secretary

**AGREEMENT FOR RELEASE OF WATER BY AND AMONG THE MERCED
IRRIGATION DISTRICT, THE SAN LUIS & DELTA-MENDOTA WATER
AUTHORITY, AND THE CALIFORNIA DEPARTMENT OF WATER
RESOURCES**

SWPAO # _____

This Agreement is entered into this ____ day of _____, 2018, by and among the Merced Irrigation District (MID), the San Luis & Delta-Mendota Water Authority (SLDMWA), and the Department of Water Resources (DWR) of the State of California.

RECITALS

WHEREAS, MID is a California irrigation district operating under and by virtue of Division 11 of the California Water Code; and

WHEREAS, DWR owns, operates and maintains water collection, storage, conveyance and delivery facilities, including but not limited to the State Water Project (SWP), and delivers water to 29 water service contractors located throughout California; and

WHEREAS, the SLDMWA is a California joint power authority operating under and by virtue of Section 6500, et seq., of the California Government Code; and

WHEREAS, the SLDMWA is comprised of 28 member agencies representing approximately 2,100,000 acres of land within the western San Joaquin Valley, San Benito and Santa Clara Counties; and

WHEREAS, 26 of the SLDMWA's 28 member agencies receive water from the federal Central Valley Project ("CVP") under water service or exchange contracts; and

WHEREAS, MID is owner of certain water rights on the Merced River, including pre-1914 appropriative rights to divert water from the Merced River, and various post-1914 appropriative rights to store water from the Merced River in various reservoirs; and

WHEREAS, DWR's current forecast for the San Joaquin Valley Water Supply Index is dry with runoff, precipitation, and snowpack below average; and

WHEREAS, the CVP south of the Delta Ag Service Contractors have currently received a 20% allocation and the State Water Project Contractors ("SWPC") have received a 20% allocation;

AGREEMENT

1. **DEFINITIONS:** The following definitions shall govern this Agreement:

(a) “Parties” means the MID, SLDMWA, and DWR, collectively. Individually, MID, SLDMWA and/or DWR may be referred to as a Party.

(b) “Delivery” means MID’ water made available at the DWR Cressey Recorder Station on the Merced River (the “Delivery Point”) in April and May 2018. MID will make releases pursuant to Paragraph 14 of this Agreement. This definition is intended to include the grammatical variations of the term “delivery” including “deliver” and “delivered,” where such term references water.

2. **TERM:** This Agreement shall become effective upon execution by all parties and shall terminate on December 31, 2018 or upon final payment by SLDMWA and DWR of all costs attributable to this Agreement, whichever occurs later.

3. **WATER AVAILABLE FOR PURCHASE:** Pursuant to this Agreement:

(a) Upon the request by the SLDMWA and DWR, MID agrees to make up to 15,000 acre-feet (but not less than 10,000 AF) of water available at the Delivery Point in the April-May time period. No water shall be released under this Agreement, and DWR and SLDMWA shall not be obligated to pay for any flows released, unless the release of water, as provided under this Agreement, has been requested and the contacts for DWR and SLDMWA listed in Paragraph 23, Notices, have approved both the release and Delivery of this water.

(b) The water made available for Delivery will be released by MID in accordance with the requirements set forth in Paragraph 14. The benefits of water released will be made available to USBR and DWR and will be shared equally 50/50 pursuant to a separate operations agreement between DWR and USBR.

4. **COMPLIANCE WITH APPLICABLE LAWS AND OBTAINING APPROVALS:**

(a) The MID, in making the water available as described in Paragraph 3, shall comply with all applicable laws and regulations, including but not limited to the California Environmental Quality Act (CEQA), California Endangered Species Act (CESA) and the Federal Endangered Species Act (FESA), to secure any required consents, permits, reports, and orders, if any, and shall provide DWR with copies of the same prior to providing the Delivery under this Agreement.

(b) The MID and SLDMWA are entering into this Agreement based on the determination of MID and of SLDMWA, as described below, that the Delivery is categorically exempt from the California Environmental Quality Act because, among other things, it will result in the provision of supplemental instream fishery flows pursuant to 14 California Code of Regulations Section 15301(i) and in the ongoing

operation of the existing system without change in operation or expansion of use pursuant to 14 California Code of Regulations, section 15301 (Class 1).

(c) MID shall be responsible for obtaining any approval from any relevant government entities that MID determine in their discretion is necessary for providing the Delivery. The MID shall email to DWR any submissions related to this Agreement that the MID make with any government entity.

(d) SLDMWA has determined the Delivery is categorically exempt from the California Environmental Quality Act because it will result in the provision of supplemental instream fishery flows pursuant to 14 California Code of Regulations Section 15301(i) and in the ongoing operation of the existing system without change in operation or expansion of use pursuant to 14 California Code of Regulations, section 15301 (Class 1).

(e) Upon execution by all Parties of this Agreement, any or all of the Parties may file a Notice of Exemption as each Party may deem appropriate, in their own discretion.

(f) If any of the Parties is required to pay a fine or civil penalty for any of its actions related to this Agreement, then that Party alone shall be responsible for paying the fine or penalty.

5. **PURCHASE PRICE**: SLDMWA and DWR agree to pay to the MID two hundred dollars (\$200) per acre foot for each acre-foot of water made available at the Delivery Point.

6. **WATER QUALITY**: The MID makes no warranty or representations as to the quality or fitness for use of the Delivery.

7. **WATER MEASUREMENT AND DELIVERY**: DWR and SLDMWA shall pay the MID to make available up to 15,000 acre-feet at the Delivery Point. The payment shall be based on the actual flows measured by DWR at DWR's Cressey Recorder Station on the Merced River. For the purposes of this Agreement, the "pulse flow" volume for which MID will be paid in accordance with Paragraph 5 will be measured as the Cressey measured flows exceeding the base required FERC flow. Through concurrence with NMFS, the timing of the pulse flow period may be shifted. The MID and SLDMWA shall coordinate with each other to determine the flow and schedule of the Delivery, and that DWR shall be responsible for verifying the flow and schedule of the Delivery.

8. **WIIN ACT**: The purpose of this sale is to assist USBR in meeting its 31-day April - May flow objectives in the 2006 SWRCB Water Quality Control Plan for the Bay-Delta. (Section 4001 b.(7)). This sale will result in flow that is in addition to flow that otherwise would occur in the absence of the voluntary sale. (Section 4001b.(7)(c).) It is the Parties' expectation that pursuant to Section 4001 (b)(7) that the water made available pursuant to this sale will be subject to an inflow to export ratio of 1:1 (See Paragraph 13).

9. **PAYMENT:**

(a) MID shall invoice SLDMWA and DWR each 50% of the cost for the Delivery up to a total of 15,000 acre-feet provided at the price identified in Paragraph 5 above after DWR has confirmed the amount of water made available and measured at the Delivery Point in accordance with Paragraph 7.

(b) SLDMWA shall pay within 60 days of receipt of the invoice.

(c) MID shall submit (1) an original of each invoice to DWR contact listed in Paragraph 22, Notices, and (2) a copy of each invoice to DWR Accounting Office, Contracts Payable Unit, P. O. Box 942836, Sacramento, California, 94236-0001. DWR shall pay undisputed invoices within 45 days of the date received by the State Water Project Analysis Office, pursuant to the Prompt Payment Act as specified in Government Code, Chapter 4.5 (commencing with Section 927).

10. **INTEREST:** SLDMWA shall pay the MID interest at the annual interest rate of ten percent on any charges that remain unpaid 60 days beyond the due date. DWR shall pay the MID late payment penalties in accordance with the Prompt Payment Act.

11. **MID' LIMITING CONDITIONS:** The MID' obligations to make available the quantity of water specified in Paragraph 3 of this Agreement will, at all times, be subject and subordinate to the following conditions:

(a) The terms and conditions of MID's water rights as they currently exist;

(b) The terms and conditions of MID's Federal Energy Regulatory Commission license(s).

(c) Applicable federal and state laws now in existence and as modified from time to time, affecting the MID' rights or obligations, and

The conditions described in (a)-(c), inclusive, above, are collectively referred to as the District Limiting Conditions. Nothing in this Agreement shall be construed so as to contradict, conflict with or otherwise be contrary to the provisions of any of the District Limiting Conditions; and in the event of any conflict between any of the District Limiting Conditions and this Agreement, the District Limiting Condition(s) shall control, and MID shall not be deemed to be in violation of this Agreement by any modifications of the Agreement, including reduced supply for SLDMWA and DWR, required to ensure compliance with any of the District Limiting Conditions.

12. **SLDMWA LIMITING CONDITION:** The obligations of MID to deliver water at the Delivery Point, and of SLDMWA and DWR to pay for Delivery are at all times subject to the USBR's approval of this Agreement. If this Agreement is terminated, SLDMWA and DWR shall only be obligated to pay MID for the quantity of water MID made available at the Delivery Point pursuant to Paragraph 7 prior to the Agreement terminating.

13. **SLDMWA and DWR LIMITING CONDITION:** The obligations of SLDMWA and DWR to pay for Delivery is subject to DWR and USBR operating at a time when Action IV.2.1 (San Joaquin River Inflow to Export Ratio) from the Reasonable and Prudent Alternative in the NMFS Biological Opinion for Continued Operations of the CVP and SWP requires USBR and DWR to implement a Vernalis flow-to-combined CVP and SWP pumping ratio of 1:1 (“1:1 ratio”). If DWR and USBR are unable to pump additional SWP or CVP water made available at Banks Pumping Plant or Jones Pumping Plant as a result of the Delivery, respectively, with or at a 1:1 ratio, the Parties may attempt to reschedule the Delivery within the Pulse Flow Period, or as an alternative, any Party may elect to terminate this Agreement by providing Notice to the other Parties consistent with Paragraph 22. If this Agreement is terminated, SLDMWA and DWR shall only be obligated to pay MID for the quantity of water MID released pursuant to Paragraph 7 prior to the Agreement terminating.

14. **DELIVERY:**

Consistent with this Agreement and specifically Paragraph 7, the MID will make the Delivery available at the Delivery Point on a schedule developed by the Parties.

15. **WATER SUPPLY REDUCTIONS:** The MID may reduce the Delivery for any of the following reasons: the District Limiting Conditions; failure of facilities; intervening acts, including litigation and stream adjudication brought by third parties, or actions of any state or federal agency exercising jurisdiction or claiming an interest and/or right to reduce and/or modify operations and/or quantities of water otherwise available to the MID; diversions outside the control of MID which may hereafter be authorized for others, and any action, legislation, ruling or determination adverse to the MID affecting the Agreement and beyond the reasonable control of the MID. MID shall make good faith efforts to avoid such reductions, but SLDMWA and DWR agree that MID shall not be liable for reductions of supply in this Agreement due to such causes. SLDMWA and DWR shall have no obligation to pay for water not Delivered because of a reduction caused by factors listed in this Paragraph.

16. **APPROVALS AND COSTS:** SLDMWA and DWR are solely responsible for any costs and losses after the water is made available at the Delivery Point. This Paragraph survives termination or expiration of this Agreement.

17. **LITIGATION COSTS:** MID agrees to defend their own interests in any litigation or regulatory action challenging the validity of MID’ water rights. The Parties shall each defend their own interests in litigation or regulatory action involving this Agreement, including environmental compliance and purchase of the Delivery. All Parties agree to reasonably cooperate with each other in the defense of any litigation that may be filed as a result of this Agreement. This Paragraph survives termination of this Agreement.

18. **EXPENSES:** The Parties shall be responsible for all their own expenses, including but not limited to legal, environmental, engineering consultant’s fees, expenses incurred to obtain any and all necessary approvals and to satisfy all environmental requirements,

including CEQA and/or NEPA, required to effectuate the Agreement, and to defend against any litigation challenging the Agreement or the approvals, water rights or environmental reviews associated with the Agreement. This Paragraph survives termination of this Agreement.

19. **COOPERATION**: To the extent reasonably required, each Party to this Agreement shall, in good faith, assist the other in obtaining all such necessary approvals and preparation of required environmental documents. The Parties agree to cooperate and assist each other in good faith in meeting such requirements of regulatory agencies as may be applicable to performance of any terms of the Agreement.

20. **WAIVER OR RIGHTS**: Any waiver, at any time, by any Party of its rights with respect to a breach or default, or any other matter arising in connection with this Agreement, shall not be deemed to be a waiver with respect to any other breach, default or matter.

21. **ASSIGNMENT**: No party may assign its rights or obligations under this Agreement, in whole or in part, without prior written consent of all Parties hereto. Any attempted assignment of this Agreement, in whole or in part, without the prior written consent of all Parties hereto is void.

22. **TERMINATION**: Any party may elect to terminate this Agreement upon Notice to the Parties by electronic mail consistent with Paragraph 23. That party providing the termination shall provide the other parties with the specific grounds on which it wishes to terminate the agreement. Termination of this Agreement is effective immediately upon actual electronic mail receipt of Notice by the Parties.

23. **NOTICES**: All notices that are required, either expressly or by implication, to be given by any Party to the other under this Agreement shall be signed for by MID and SLDMWA and DWR by such officers as they may, from time, authorize in writing to so act.

Any notices to Parties required by this Agreement shall be hand-delivered or mailed, United States first-class postage prepaid, or electronic mail followed by written notice sent by U.S. mail and addressed as follows:

MERCED IRRIGATION DISTRICT

John Sweigard, General Manager
Merced Irrigation District
744 West 20th Street
Merced, CA 95340
Email: jsweigard@mercedid.org
Phone: (209) 722-5761

SAN LUIS & DELTA- MENDOTA WATER AUTHORITY

Jon Rubin, Interim Executive Director and General Counsel

P.O. Box 2157
Los Banos, CA 95635
Email: jon.rubin@sldmwa.org
Phone: 209-826-9696

CALIFORNIA DEPARTMENT OF WATER RESOURCES

Chief, State Water Project Analysis Office
Department of Water Resources
P.O. Box 942836
Sacramento, CA 94236-0001
Phone: 916-653-0190

Notice shall be deemed given (a) two (2) calendar days following mailing via regular or certified mail, return receipt requested, (b) one (1) business day after deposit with any one-day delivery service assuring “next day” delivery, (c) upon actual receipt of notice, or (d) upon transmission, if by facsimile, whichever is earlier. The Parties shall promptly give written notice to each other of any change of address, and mailing or shipment to the addresses stated herein shall be deemed sufficient unless written notification of a change of address has been received.

24. **APPROVALS**: Where the terms of this Agreement provide for action to be based upon a judgment, approval, review or determination of any Party, such terms are not intended to be and shall never be construed as permitting such opinion, judgment, approval, review, or determination to be arbitrary, capricious or unreasonable.

25. **DISPUTE RESOLUTION**: In the event of any dispute regarding interpretation or implementation of this Agreement, the Director of DWR and authorized representatives from the MID and SLDMWA shall endeavor to resolve the dispute by meeting within 30 days after the request of a Party. If the dispute is unresolved, the Parties shall use the services of a mutually acceptable consultant in an effort to resolve the dispute. Parties involved in the dispute shall share the fees and expenses of the consultant equally. If a consultant cannot be agreed upon, or if the consultant's recommendations are not acceptable to the Parties, and unless the Parties otherwise agree, the matter may be resolved by litigation and any Party may, at its option, pursue any available legal remedy including, but not limited to, injunctive and other equitable relief.

26. **OTHER AGREEMENTS**: Nothing contained herein restricts the MID from providing water services and sales to others as authorized by law which do not unreasonably interfere with MID' obligation hereunder.

27. **ENTIRE AGREEMENT**: This Agreement constitutes the entire Agreement between the MID, SLDMWA and DWR, and supersedes any oral agreement, statement or promise between them relating to the subject matter of the Agreement. Any amendment, including oral modifications, must be reduced to writing and signed by all Parties to be effective.

28. **COUNTERPARTS:** This Agreement may be executed in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument. This Agreement shall not be effective until the execution and delivery between each of the Parties of at least one set of counterparts. The Parties authorize each other to detach and combine original signature pages and consolidate them into a single identical original. Any one of such completely executed counterparts shall be sufficient proof of this Agreement.

29. **SIGNATURE CLAUSE:**

(a) The signatories represent that they have appropriate authorization to enter into this Agreement on behalf of the Party for whom they sign.

(b) If required by internal governing rules of MID or SLDMWA, that Party as appropriate, shall deliver to DWR a copy of the Board of Directors resolution and/or other documentation authorizing that Party to enter into this Agreement.

30. **GENERAL INTERPRETATION:** The terms of this Agreement have been negotiated by the Parties hereto and the language used in this Agreement shall be deemed to be the language chosen by the Parties hereto to express their mutual intent. This Agreement shall be construed without regard to any presumption or rule requiring construction against the Party causing such instrument or any portion thereof to be drafted, or in favor of the Party receiving a particular benefit under the Agreement. No rule of strict construction will be applied against any Party.

IN WITNESS WHEREOF, the Parties have executed this Agreement effective as of the date first above written.

PARTIES:

SAN LUIS & DELTA-MENDOTA WATER AUTHORITY

By: _____

Jon Rubin, Acting Executive Director

Date _____

CALIFORNIA DEPARTMENT OF WATER RESOURCES

By: _____

, Deputy Director

Date _____

MERCED IRRIGATION DISTRICT

By: _____
John Sweigard, General Manager

Date _____

DRAFT