

July 12, 2018

To: Board of Directors

From: Interim Executive Director

Subject: Memorandum of Agreement (MOA) Regrading Coordination on the Establishment of an Implementing Agency for the Temperance Flat Reservoir Project and Preconstruction Project Activities

Background

The Authority became a member of the San Joaquin Valley Water Infrastructure Authority (SJWIA) in part to support the SJWIA in its application to the California Water Commission (CWC) for Proposition 1 funding for the Temperance Flat Reservoir Project (Project). The CWC has now approved the final scores for the proposed storage projects and Temperance Flat received a score of 73 which places the project in the "Rank 2" category and is eligible for full funding of \$171.33M. The CWC process is now concluding and there is desire by project proponents to establish a new organization to be the Project proponent to its implementation phase. There is now an immediate need to have the Project proponents to coordinate on funding and feasibility determination at the Federal level as the Federal Feasibility Study is nearing completion and request for WIIN funding is being processed.

Proposal

The project proponents have a desire to establish a mechanism for collaborating on preconstruction activities related to the Project, including on the development of a new implementing governance entity agency such as a Joint Powers Authority. This mechanism is to enter into a Memorandum of Agreement (MOA)(attached). The proposed parties that may execute the MOA are the San Luis & Delta-Mendota Water Authority, Friant Water Authority (FWA), San Joaquin River Exchange Contractor Authority (SJRECWA), Westlands Water District and Fresno Irrigation District. Both FWA and the SJRECWA have approval to execute the MOA.

The activities purposed under the MOA are:

- Work on establishment of the Project JPA
- Serve as the lead non-federal group representing the Project until the Project JOA or other implementing entity is formed
- Coordinate on Project-related matters with federal, state, and local agencies whose approvals will be needed in order to carry out the Project or that have jurisdiction over matters related or necessary to the Project.
- Coordinate, fund, and manage such other Project-related preconstruction activities as the Parties may deem necessary.

The MOA has a term of one-year and has no financial obligation without each Parties' Board approval on specific activity recommended by the MOA Coordination Group. Each party will have a representative on the Coordination Group.

Recommendation

Staff recommends the Authority Board authorize execution of the MOA to allow the Authority to participate in the establishment of an implementing agency. Although the Authority does not yet have commitment from any member agencies with the exception of the Exchange Contractors interested in Temperance Flat at this time, it is prudent for the Authority to participate and cooperate in the discussions to develop an implementing entity in the event our members determine there are benefits to pursue the project at a later date.

MEMORANDUM OF AGREEMENT

REGARDING COORDINATION ON THE ESTABLISHMENT OF AN IMPLEMENTING AGENCY FOR THE TEMPERANCE FLAT RESERVOIR PROJECT AND PRECONSTRUCTION PROJECT ACTIVITIES

This Memorandum of Agreement (“**MOA**”) is entered into by and between the public agencies listed on the attached Exhibit A, which are referred to in this MOA individually as a “**Party**” and collectively as the “**Parties**,” and is effective as of _____, 2018 (“**Effective Date**”).

RECITALS

A. Each of the initial Parties is a public agency organized and operating under the laws of the State of California.

B. The United States Bureau of Reclamation (“**Reclamation**”), as part of the Central Valley Project (“**CVP**”), constructed the Friant Dam located northeast of the City of Fresno in Fresno and Madera Counties, California, to store water from the San Joaquin River and its tributaries. The water stored behind Friant Dam is known as Millerton Lake.

C. The Parties, Reclamation, and other public agencies have for a number of years investigated the feasibility of constructing a second dam along the San Joaquin River upstream of Friant Dam to, among other things, increase water storage capacity on the San Joaquin River for increasing available water supplies and operational flexibility.

D. The location of the proposed second dam and reservoir is in an area commonly known as Temperance Flat. As such, the proposed project pertaining to the feasibility studies, design, permitting, construction, management, and ultimately operation of a dam and reservoir and related facilities at Temperance Flat is referred to in this MOA as the “**Temperance Flat Reservoir Project**” or “**Project**.”

E. The Parties desire by this MOA to provide a mechanism for collaborating on preconstruction activities related to the Project, including on the preparation of formation documents for a new governance entity, likely a joint powers agency, which if formed would implement the Project (“**Project JPA**”).

AGREEMENT

In consideration of the mutual promises, covenants, and conditions set forth in the MOA, the Parties agree as follows:

1. **EFFECTIVE DATE AND TERM**

1.1. **Term.** Unless extended by the Parties under Section 10.6, this MOA will remain in effect from the Effective Date until the sooner to occur of: (a) termination of the MOA in accordance with Section 5.1, (b) the formation of the Project JPA; or (c) one year from the Effective Date.

2. PURPOSE

2.1 **Purpose.** The purpose of this MOA is to provide a framework to cooperatively discuss the Project, which will include the preparation of documents that could be used to form the Project JPA, and may involve coordination on Project-related preconstruction activities, collectively set forth in the “**MOA Activities**” listed in the attached Exhibit B.

2.2 **No Separate Entity.** This MOA does not create a legal entity under the Joint Exercise of Powers Act (Government Code sections 6500 and following) or any other law, which would authorize the execution of contracts, provide the right to sue or be sued, or otherwise create a separate legal entity under the laws of California. Instead, this MOA establishes a mutual understanding to collectively carry out the MOA Activities, which the Parties believe could provide a variety of benefits to communities that they serve and the region.

2.3 **No Implied Effect on Rights:** Nothing in this MOA may be construed as affecting the existing rights or obligations of the Parties, including but not limited to any rights or obligations pursuant to contracts for delivery of water, including but not limited deliveries under the CVP or contracts for water supplies from a State water facility described in California Water Code section 12934(d) (“**State Water Project**” or “**SWP**”), or any riparian or appropriative water rights.

3. PARTIES

3.1. **Eligible Agencies.** The following public agencies are eligible to become a Party to this MOA: any public agency (as defined in Government Code section 6500) that has a demonstrable interest in the potential benefits arising from the Project (each an “**Eligible Agency**” and collectively, “**Eligible Agencies**”).

3.2. **Additional Parties:** Following the Effective Date of this MOA, other Eligible Agencies will subsequently become a Party to this MOA upon: (a) the unanimous agreement of all of the Parties, (b) the Eligible Agency’s execution of this MOA, as it may be amended, and (c) payment of a contribution, if any, as requested by the Parties.

3.3. **Party Duties.** Each Party agrees to:

3.3.1. Designate Representatives. Designate a primary and alternate representative (“**Representative**”) to represent the Party’s interests on the Coordination Group.

3.3.2. Notice of Designated Representative. Communicate its initial primary and alternative Representative selections, and any subsequent changes in Representatives, to the other Parties in writing.

3.3.3. Cooperate. Make good faith, commercially reasonable efforts to cooperate with the other Parties to achieve the purposes of this MOA.

4. COORDINATION

4.1. **Coordination Group.** The designated Representative of each Party will participate

in the “**Coordination Group**” that is established to coordinate and provide direction on the MOA Activities.

4.2. **Activities.** The Coordination Group will hold meetings as-needed. The Coordination Group will direct and manage the MOA Activities. The Coordination Group may identify workgroups, which may include non-Parties, as deemed necessary to analyze issues in greater detail and report back to the full Coordination Group.

4.3. **Decision Process.** MOA Activities will be pursued by the Parties only if there is unanimous agreement of the Coordination Group Representatives. Representatives need not be physically present at a meeting and may express their agreement by phone or other means of electronic communication (e.g., email, fax).

4.4. **Funding.** In determining to pursue any MOA Activities, the Coordination Group may unanimously determine an appropriate amount of funding and the proper share of funding for an MOA Activity. Any such funding and cost share determination is subject to final approval by the governing body of each Party, and will be documented via amendment to this Agreement or a new, separate agreement among the Parties.

5. **TERMINATION; WITHDRAWAL**

5.1 **Mutual Termination.** This MOA may be terminated upon the express written agreement of all Parties. If this MOA is terminated, (1) any outstanding expenses for MOA activities in excess of existing contributions must be paid by the Parties by paying their proportionate share of such expenses, and (2) any remaining assets will be distributed to the Parties in proportion to their contributions to expenses. The Parties will each have full rights to all completed and incomplete data, work and other records performed or arising under this MOA.

5.2 **Withdrawal of a Party.** A Party may withdraw from this MOA by giving at least 30 days’ written notice of its election to do so to all Parties (“**Withdrawal Effective Date**”). Upon receipt of such notice of withdrawal (“**Notice of Withdrawal Date**”), and, notwithstanding any other provision in this MOA, such Party will have no further obligations for any costs, if any, incurred pursuant to this MOA subsequent to the Notice of Withdrawal Date. Prior to the Withdrawal Effective Date or as soon as an accounting can be completed, the withdrawing Party must pay its proportionate share of any outstanding expenses, if any, incurred under this MOA through the Notice of Withdrawal Date. Alternatively, to the extent that the withdrawing Party has made contributions in excess of its proportionate share of expenses incurred through the Notice of Withdrawal Date and there are no other known or reasonably foreseeable claims, demands, damages or liability incurred prior to the Notice of Withdrawal Date, then the withdrawing Party will be entitled to a refund of that excess contribution.

6. **MISCELLANEOUS PROVISIONS**

6.1 **Notices.** Any notices, invoices, or reports relating to this MOA, and any request, demand, statement, or other communication required or permitted under this MOA must be in writing and must be delivered to the Representatives of the Parties at the addresses set forth in the attached Exhibit A. The Parties must promptly notify each other of any change of contact

information provided in Exhibit A. Written notice includes notice delivered via e-mail. A notice will be deemed to have been received on (i) the date of delivery, if delivered by hand during regular business hours, or by e-mail; or (ii) on the third business day following mailing by registered or certified mail (return receipt requested) to the addresses set forth in Exhibit A.

6.2 Confidentiality of Documents. The Parties acknowledge and agree that some of the reports and work product to be prepared under this MOA may be proprietary, privileged, or otherwise confidential (collectively, “**Confidential Records**”) and therefore not subject to disclosure to third parties, including under the California Public Records Act (“**CPRA**”). Each Party agrees to hold, to the extent allowed by law, any Confidential Records in confidence and to take all reasonable precautions with regard to the storage, custody, or use of Confidential Records to ensure that the content and confidential nature is maintained and protected, including all precautions that such Party employs with respect to its own confidential and proprietary records. In the event a Party receives a request from a third party for disclosure of any Confidential Records pursuant to the CPRA or a discovery request or subpoena, such Party agrees to notify the other Parties of the request including the disclosure deadline. The Party that receives the request may disclose only that portion of the Confidential Record that it believes or by court/governmental order it is legally required to disclose. This section and the obligations and duties imposed on each Party will survive the expiration or termination of this MOA.

6.3 Relationship of the Parties. The Parties are, and will remain as to each other, wholly independent entities. No Party to this MOA has any power to incur any debt, obligation, or liability on behalf of any other Party unless expressly provided in this MOA. No employee, agent, or officer of a Party will be deemed for any purpose whatsoever to be an agent, employee, or officer of another Party.

6.4 Parties Rights to Use Consultants. The Parties acknowledge and agree that they may each contract separately with any consultant providing services under this MOA for their own independent work related to the proposed Project and that such retention will not be prohibited on any basis arising under the work performed by such consultant pursuant to this MOA.

6.5 No Precedence. Each Party’s execution of this MOA, including any amendment, and such Party’s participation in any of the activities under this MOA, is voluntary and does not ensure that such Party will have a right to participate in the Project, the Project JPA, or any related agreement or actions, nor does the execution of this MOA and participation in any of the activities under this MOA require that any Party participate in the Project, the Project JPA, or any related agreement or actions. In addition, participation in this MOA will not be deemed acquiescence to any final actions authorizing the development and implementation of the Project, as all such rights are reserved to the Parties.

6.6 Amendment of MOA. This MOA may be amended only by an affirmative vote of all of the Parties.

6.7 Assignment. The rights and duties of the Parties under this MOA may not be assigned or delegated without the advance written consent of all the other Parties, and any attempt to assign or delegate such rights or duties in contravention of this section will be null and void. This MOA inures to the benefit of, and is binding upon, the successors and assigns of the Parties. This section does not prohibit a Party from entering into an independent agreement with another public

agency regarding the funding or financing of that Party's contributions under this MOA, if any, or the disposition of the remaining funds, if any, which that Party may receive under this MOA, so long as the independent agreement does not affect or purport to affect, the rights and duties of the Parties under this MOA.

6.8 Surviving Provisions. Section 5 (Termination; Withdrawal) and Section 6.2 (Confidentiality of Documents) of this MOA will survive the withdrawal of any Party or Parties and the expiration or termination of this MOA.

6.8 Governing law. This MOA is governed by, and will be interpreted, construed, and enforced in accordance with the laws of the State of California.

6.9 Entire Agreement. This MOA constitutes the entire agreement of the Parties with respect to the subject matter of this MOA.

6.10 Waiver. Waiver by any Party to this MOA of any term, condition, or covenant of this MOA will not constitute a waiver of any other term, condition, or covenant. Waiver by any Party to any breach of the provisions of this MOA will not constitute a waiver of any other provision, nor will it constitute a waiver of any subsequent breach or violation of any provision of this MOA.

6.11 No Presumption in Drafting. All Parties have had the opportunity to have this MOA reviewed by their legal counsel. Accordingly, this MOA will be construed according to its fair language. Any ambiguities will be resolved in a collaborative manner by the Parties and will be rectified by amending this MOA as described in Section 6.6 (Amendment of MOA).

6.12 Severability. If one or more clauses, sentences, paragraphs, or provisions of this MOA is held to be unlawful, invalid or unenforceable, the remainder of the MOA will not be affected. Such clauses, sentences, paragraphs or provisions will be deemed reformed so as to be lawful, valid, and enforced to the maximum extent possible.

6.13 Execution by Counterparts. This MOA may be executed in any number of counterparts and upon execution by all Parties, each executed counterpart will have the same force and effect as an original instrument and as if all Parties had signed the same instrument. Any signature page of this MOA may be detached from any counterpart of this MOA without impairing the legal effect of any signatures thereon, and may be attached to another counterpart of this MOA identical in form hereto but have attached to it one or more signature pages. Facsimile and electronic signatures will be deemed valid and binding.

[Signatures on the following pages.]

THE UNDERSIGNED AUTHORIZED REPRESENTATIVES of the Parties have executed this MOA as of the date shown below:

CITY OF FRESNO

By: _____
Name: _____
Title: _____

Date: _____

FRIANT WATER AUTHORITY

By: _____
Name: _____
Title: _____

Date: _____

**SAN JOAQUIN RIVER EXCHANGE
CONTRACTORS WATER AUTHORITY**

By: _____
Name: _____
Title: _____

Date: _____

**SAN LUIS DELTA MENDOTA
WATER AUTHORITY**

By: _____
Name: _____
Title: _____

Date: _____

WESTLANDS WATER DISTRICT

By: _____
Name: _____
Title: _____

Date: _____

EXHIBIT A

Parties to the MOA

[As of _____, 2018]

	PARTY	CONTACT INFORMATION
1.	City of Fresno	2600 Fresno Street Fresno, CA 93271 O: 559-621-8610 F:
2.	Friant Water Authority	854 N. Harvard Ave. Lindsay, CA 93247 O: 559-562-6305 F: 559-562-3496
3.	San Joaquin River Exchange Contractors Water Authority	541 H Street P.O. Box 2115 Los Banos, CA 93635 O: 209 827-8616 F: 209 827-9703
4.	San Luis Delta Mendota Water Authority	P.O. Box 2157 Los Banos, CA. 93635 O: 209.826.9696 F: 209.826.9698 / 209.826.8040
5.	Westlands Water District	3130 N. Fresno Street P.O. Box 6056 Fresno, CA 93703-6056 O: 559-224-1523 F: 559-241-6277

Exhibit A

EXHIBIT B

MOA Activities

- Work on the establishment of the Project JPA.
- Serve as the lead non-federal group representing the Project until the Project JPA or other implementing entity is formed.
- Coordinate on Project-related matters with federal, state, and local agencies whose approvals will be needed in order to carry out the Project or that have jurisdiction over matters related or necessary to the Project.
- Coordinate with counties, cities, and other public agencies that will potentially benefit from the Project.
- Coordinate, fund, and manage such other Project-related preconstruction activities as the Parties may deem necessary.

Exhibit B

TFR MOA