

MEMORANDUM OF AGREEMENT

REGARDING THE ESTABLISHMENT OF AN IMPLEMENTING AGENCY FOR THE TEMPERANCE FLAT RESERVOIR PROJECT AND TO PROVIDE A FRAMEWORK FOR 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 Parties is a public agency organized and operating under the laws of the State of California and is currently a member agency of the San Joaquin Valley Water Infrastructure Authority (“**SJVWIA**”).

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, in particular, the development of a governance entity, likely a joint powers agency, which 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 9.1, or (b) three years from the Effective Date.

2. PURPOSE

2.1 **Purpose.** The purpose of this MOA is to provide a framework to cooperatively discuss and work on the establishment of the Project JPA, and to coordinate, fund and manage such other Project-related preconstruction activities as the Parties may deem necessary, as further 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 carry out the MOA Activities in furtherance of the Project, which the Parties believe will provide a variety of benefits to communities that they serve and the region by increasing water storage and supplies, improving the operation of the state’s water system, and improving ecosystem and water quality conditions in the San Joaquin Valley and the Sacramento-San Joaquin Delta.

2.3 **No Implied Effect on Rights:** Except as expressly provided in this MOA, 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 from 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 may subsequently become a Party to this MOA upon: (a) an affirmative vote of all of the designated Representatives (defined below) of the then total number of Parties, (b) the new Party’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. **Cost Sharing and Coordination by a Party.** A Party may have separate agreements with other interested parties for the purpose of funding that Party’s contributions under this MOA, with the understanding that such other interested parties may have a role in the MOA Activities and may have access to materials related to the MOA Activities; provided, however, that only one Eligible Agency under such arrangement may be a Party to the MOA and only that Party may designate a Representative on the Steering Committee.

4. ADMINISTRATION AND COORDINATION

4.1. **Contracting Agency Duties.** _____, operating at the direction of the Steering Committee (defined below), will serve as the “**Contracting Agency**” for this MOA. As the Contracting Agency, _____ agrees to perform the following services:

4.1.1. Contracting. Negotiate and, following review and approval by the Steering Committee, enter into contracts with the various individuals or entities providing services in furtherance of the MOA Activities; provided, however, that _____ may not amend any such

contract without advanced authorization from the Steering Committee.

4.1.2. Administration. Monitor and manage the MOA Activities and the status of the Project.

4.1.3. Expenditures. Utilize the funds deposited by the Parties only for the administration of any contracts entered into in furtherance of the Scope of Activities.

4.1.4. Invoicing. Invoice the Parties for any contributions required in accordance with Section 5 (Financial Provisions) of this MOA.

4.1.5. Accounting. Provide an accounting of all contract costs and expenditures under this MOA to the Parties: (a) each month; (b) upon the request of any Party; and (c) upon the termination of the MOA. All such accountings under (b) and (c) will be provided within 20 days of the applicable event.

4.1.6. Reporting. Provide periodic reports concerning the status of the MOA Activities and the Project at such frequency as the Parties may mutually agree, including at meetings of the Steering Committee.

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

4.2.1. Designate Representatives. Designate a primary and alternate representative (“**Representative**”) to serve on the Steering Committee. Each Representative must be a duly elected or appointed officer of the governing body of the applicable Party.

4.2.2. Notice of Designated Representative. Each Party must communicate their initial primary and alternative Representative selections, and any subsequent changes in Representatives, to the Contracting Agency in writing. All Representatives serve at the pleasure of the governing body of their respective Party agency.

4.2.3. Payments. Pay their proportionate share of the MOA Activities upon invoice by the Contracting Agency in accordance with Section 5 (Financial Provisions) of this MOA. For the purposes of this MOA, “proportionate share” means the shared costs of the MOA Activities divided by the number of Parties, unless all of the Parties agree to a different allocation of costs among the Parties.

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

4.3. **Steering Committee**. A committee (“**Steering Committee**”) is established consisting of the designated Representative of each Party to coordinate and provide direction on the MOA Activities. The Steering Committee will be the principal forum within which key policy and strategy issues pertaining to the MOA Activities and Project will be discussed and considered.

4.3.1. Good Standing. In order to participate on the Steering Committee, each Party must be current with respect to its required contributions under Section 5 of this MOA.

4.3.2. Meetings. The Steering Committee will hold regular meetings, generally at least one meeting per month, which may be by video or tele-conference or in person, and may

hold other meetings at more frequent intervals as may be necessary. The Steering Committee will elect, by unanimous vote, a Steering Committee Chair and Vice-Chair. The Steering Committee will direct and manage the MOA Activities. The Steering Committee may elect to form subcommittees and workgroups as deemed necessary to analyze issues in greater detail and report back to the full Steering Committee.

4.3.3. Decision Process. The Parties agree that all reasonable efforts should be made to ensure each matter considered by the Steering Committee is approved by a consensus of the Parties. Consensus is reached when a position reflects the unanimous opinion of the Steering Committee Representatives. Representatives need not be physically present at a meeting to vote, and may cast their vote by phone or other means of electronic communication (e.g., email, fax).

5. FINANCIAL PROVISIONS

5.1. **Funding**. The Parties agree to work together to provide adequate funding to carry out the MOA Activities.

5.1.1 Financial Contributions. In approving or determining to undertake any of the MOA Activities, the Steering Committee shall also determine an appropriate amount of funding required to undertake such activity, and the proportionate share of such activity to be allocated to each Party. Upon the consensus of the Steering Committee with respect to the amount and allocation of financial contributions for the activity, the Parties agree to make financial contributions to fund such activity. The Contracting Agency will provide written notice to the Parties of the exact amount of each contribution required and the purpose for which it will be used. Each Party is required to make such contribution within 30 days of the date the notice is sent by the Contracting Agency, unless the Party exercises its withdrawal right under Section 9.

5.1.2 Federal and State Funding Assistance. The Parties agree to cooperate in identifying and securing, where appropriate, federal and state funds to support the development and implementation of the Project.

5.2. **Special Account**. All funds collected under this MOA will be held in a separate Contracting Agency account in the name of the Project, and will be subject to standard accounting and auditing requirements applicable to a California public agency. Reports will be provided to the Steering Committee as provided in Section 4.1.5. The records of all expenditures under this MOA will be open to inspection by the Parties' Representatives or employees or agents upon reasonable notice.

5.3. **Contracting Agency General and Administrative Costs**. The costs of Contracting Agency staff (including its independent contractors) expended on administrative activities pertaining to this MOA and the Project will not be charged to the Parties.

6. DEBTS AND LIABILITIES

Except as specifically provided in this MOA, no Party will be individually responsible for any of the debts, liabilities, or obligations of any other Party, nor will they have any liabilities under any contracts entered into by the Contracting Agency, but each Party is responsible for paying the Contracting Agency the contributions required under Section 5 so that the Contracting Agency can administer and implement the MOA Activities.

7. INDEMNIFICATION; IMMUNITIES

7.1. **Generally.** Each Party agrees to indemnify, defend, and hold harmless each other Party, including its elected and appointed officers, employees, agents, attorneys, and designated volunteers from and against any and all liability, including, but not limited to demands, claims, actions, fees, costs, and expenses (including reasonable attorney's and expert witness fees), arising from or connected with the respective acts of each Party arising from or related to this MOA; provided, however, that no Party is obligated to indemnify another Party for that Party's own negligence or willful misconduct

7.2. **Government Code Section 895.2.** In light of the provisions of California Government Code section 895.2 imposing certain tort liability jointly upon public entities solely by reason of such entities being parties to an agreement (as defined in Government Code section 895), each of the Parties, pursuant to the authorization contained in Government Code sections 895.4 and 895.6, agrees to assume the full liability imposed upon it or any of its officers, agents, or employees, by law for injury caused by any act or omission occurring in the performance of this MOA to the same extent such liability would be imposed in the absence of Government Code section 895.2. To achieve the above stated purpose, each Party agrees to indemnify, defend, and holds harmless each other Party for any liability, cost, or expense that may be imposed upon such other Party solely by virtue of Government Code section 895.2. The provisions of California Civil Code section 2778 regarding the interpretation of indemnity provisions are made a part of this MOA.

7.3. **Privileges and Immunities.** All of the privileges and immunities from liability, exemptions from laws, ordinances, and rules, all pension, relief, disability, worker's compensation, and other benefits which apply to the activity of officers, agents, or employees of any Party when performing their respective functions within the territorial limits of the Party, will apply to them to the same degree and extent while engaged in the performance on any of their functions and duties extraterritorially under this MOA.

8. DISPUTES

Each Party has the right to assert matters which it believes have not been undertaken in accordance with this MOA, to explain the basis for such assertion, and to receive from the other Party or Parties a justification of its position on such matters. If, on the basis of the Party's review of any terms of the MOA, any Party concludes that another Party has not complied in good faith with the terms of the MOA, then such Party may issue a written "**Notice of Non-Compliance**" specifying the grounds and all facts demonstrating such non-compliance, which Notice must be provided to the alleged noncompliant Party along with all other Parties. The alleged noncompliant Party will have 15 days to cure or remedy the non-compliance identified in the Notice of Non-Compliance, or if such cure or remedy is not reasonably capable of being cured or remedied within such 15-day period, to commence to cure or remedy the non-compliance and to diligently and in good faith prosecute such cure or remedy to completion. If the Party receiving a Notice of Non-Compliance does not believe it is out of compliance and contests the Notice, it must do so by responding in writing to the Notice within 15 days after receipt of the Notice. Any response to the Notice must be sent to all Parties. The compliant Parties will determine the next course of action, which may include the termination of a non-compliant Party's participation in the MOA in accordance with Section 9.2.

9. TERMINATION; WITHDRAWAL

9.1 **Mutual Termination.** This MOA may be terminated upon the express written agreement of all Parties. If this MOA is terminated, all outstanding expenses under this MOA for the MOA activities in excess of existing contributions must be paid by the Parties by paying their proportionate share of such expenses in accordance with Section 5. Thereafter, the Contracting Agency will make an equitable redistribution of remaining funds, if any, in proportion to each Party's contributions. The Parties will each have full rights to all completed and incomplete data, work and other records performed or arising under this MOA.

9.3 **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 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 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 Contracting Agency will cause any such excess contributions to be refunded to the withdrawing Party within 60 days of the Withdrawal Effective Date. Notwithstanding any refund made to a withdrawing Party, the withdrawing Party will remain responsible for its proportionate share of any claims, demands, damages, or liability arising from this MOA through the Notice of Withdrawal Date for such Party.

9.4 **Disposition of Funds upon Termination.** Upon termination of this MOA, any surplus funds for use under this MOA, after payment of all liabilities, costs, expenses and charges incurred under this MOA, will be returned to the then-existing Parties in proportion to the contributions made by each Party.

10. MISCELLANEOUS PROVISIONS

10.1 **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.

10.2 **Confidentiality of Draft 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 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 immediately give notice to the other Parties of such request including the disclosure deadline. All other Parties will have five days from the date it receives such notice to in turn notify the Party in writing that it objects to the disclosure of any specific Confidential Records. If a Party so objects, any legal action to enjoin or limit disclosure will be the objecting Party's obligation and at their sole cost and expense. A Party may disclose any Confidential Records pursuant to a proper court or governmental order, provided that such Party may disclose only that portion of the Confidential Record that is legally required to be disclosed. This section and the obligations and duties imposed on each Party will survive the expiration or termination of this MOA.

10.3 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.

10.4 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.

10.5 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.

10.6 Amendment of MOA. This MOA may be amended only by an affirmative vote of all of the Representatives of the Parties on the Steering Committee. The Contracting Agency will provide notice to all Parties of amendments to this MOA, including the effective date of such amendments.

10.7 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, or the disposition of the remaining funds 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.

10.8 Surviving Provisions. Section 7 (Indemnification; Immunities) and Section 9 (Termination; Withdrawal) of this MOA will survive the withdrawal of any Party or Parties and the expiration or termination of this MOA.

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

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

10.11 **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.

10.12 **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 10.6.

10.13 **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.

10.14 **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.

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

CITY OF FRESNO

By: _____

Date: _____

Name:

Title:

Attest:

By: _____

Name:

Title:

FRIANT WATER AUTHORITY

By: _____

Date: _____

Name:

Title:

Attest:

By: _____

Name:

Title:

SAN JOAQUIN RIVER EXCHANGE CONTRACTORS WATER AUTHORITY

By: _____

Date: _____

Name:

Title:

Attest:

By: _____

Name:

Title:

SAN LUIS DELTA MENDOTA WATER AUTHORITY

By: _____

Date: _____

Name:

Title:

Attest:

By: _____

Name:

Title:

WESTLANDS WATER DISTRICT

By: _____

Date: _____

Name:

Title:

Attest:

By: _____

Name:

Title:

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 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.