



## MEMORANDUM

TO: SLDMWA Board of Directors, Alternates

FROM: Frances Mizuno, Special Projects Administrator

DATE: February 10, 2022

RE: Resolution Authorizing Execution of 2022 Water Purchase and Sale Agreements Pursuant to Final Long-Term Water Transfers Environmental Impact Report and Authorizing Actions Related Thereto

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### BACKGROUND

San Luis & Delta-Mendota Water Authority members with repayment contracts anticipate an initial allocation of 0% of their CVP contractual supply for agricultural uses and 50% for municipal and industrial (M&I) uses for the 2022 water year. Current projections show that subsequent increases in allocations, if any, will be made later in the season and are expected to be minimal. The Water Authority Long Term Water Transfer Activity Agreement Members requested the Water Authority to purchase transfer water from the North of Delta Sacramento River Settlement Contractors to supplement their CVP supply. Water Authority staff have been engaged for the past months negotiating with potential sellers to purchase water made available for transfer through groundwater substitution and/or crop idling/shifting.

### ISSUE FOR DECISION

Whether the Board of Directors should adopt a resolution authorizing execution of 2022 Water Purchase and Sale Agreements pursuant to the Final Long-Term Water Transfers Environmental Impact Report and authorizing actions related thereto.

### RECOMMENDATION

We recommend the Board of Directors adopt the resolution authorizing execution of 2022 Water Purchase and Sale Agreements pursuant to the Final Long-Term Water Transfers Environmental Impact Report and authorizing actions related thereto.

### ANALYSIS

We anticipate most of the 2021 sellers are willing to sell up to approximately 150,000 acre-feet of groundwater substitution and crop idling/shifting water at a price to be determined. Water Authority staff, working with the LTWT Activity Agreement Members, has been negotiating with prospective sellers. Most terms have been agreed to with the exception of the water purchase price. Pricing negotiations are still on-going.

The estimated quantity of water to be made available is based on groundwater substitution and crop idling/shifting water starting in May. In order for this water to be available in May-June, Reclamation must be able to “back-up” this water into Shasta Reservoir for storage for subsequent release in July-September during the period when the water can be pumped at Jones or Banks Pumping Plants. The call date for this water is on April 14, 2022 and conditioned on Reclamation confirming they have the ability to “back-up” the water. The transfer water “backed-up” in Shasta Reservoir will be utilized to assist in maintaining the cold-water pool for Shasta temperature management. Although this water can be released beginning in July-November to be pumped at the either the Jones or Banks Pumping Plant, there may be pressure to maintain the transfer water in storage until the fall. The Authority will be working with Reclamation to plan to make the releases necessary to meet irrigation demands needed in the July-September period.

Through adoption of the proposed resolution, the Board will approve the template Water Purchase and Sale Agreement in substantial form subject to a final water purchase pricing determination by LTWT Activity Agreement Members, and authorize execution of all other necessary agreements, including Water Transfer Approval Agreements with Reclamation and Conveyance Agreements with DWR.

#### **IMPLICATIONS**

If the Board does not authorize the Executive Director to execute water purchase agreements, approval agreements, and other agreements necessary for water transfers in 2022, certain member agencies will not have access to this supplemental water supply.

#### **BUDGET**

There is no impact to the Water Authority’s budget, as Activity Agreement participating members will pay all costs associated with the North of Delta water transfers.

**SAN LUIS & DELTA-MENDOTA WATER AUTHORITY**

**RESOLUTION NO. 2022-\_\_\_\_**

**RESOLUTION AUTHORIZING EXECUTION OF 2022 WATER PURCHASE AND SALE AGREEMENTS PURSUANT TO FINAL LONG-TERM WATER TRANSFER ENVIRONMENTAL IMPACT REPORT AND AUTHORIZING ACTIONS RELATED THERETO**

**WHEREAS**, San Luis & Delta-Mendota Water Authority (“Water Authority”) members with repayment contracts anticipate an initial allocation of 0% of their CVP contractual supply for agricultural uses and 50% for municipal and industrial (“M&I”) uses for the 2022 water year; current projections show that subsequent increases in allocations, if any, will be made later in the season and are expected to be minimal; and

**WHEREAS**, to assist its members, the Water Authority has initiated actions with the Bureau of Reclamation (“Reclamation”), the California Department of Water Resources (“DWR”), and with certain Sacramento River and Feather River contractors (such contractors being jointly referred to as the “North-of-Delta Sellers”) to make water available to members of the Water Authority during water year 2022; and

**WHEREAS**, the Board of Directors of the Water Authority (the “Board”) has considered the form of the template one-year 2022 Water Purchase and Sale Agreement, which sets forth the terms and conditions to be entered into with certain Sacramento River and Feather River contractors (collectively with any additional agreements with such North-of-Delta Sellers, the “2022 Water Purchase and Sale Agreements”), subject to the agreement having been presented to the Board and being on file with the Secretary hereof; and

**WHEREAS**, in order to implement the 2022 Water Purchase and Sale Agreements with the Sacramento River and Feather River contractors, the Water Authority intends to negotiate and enter into Water Purchase Approval Agreements by and between each proposed Sacramento River contractor North-of-Delta Seller, Reclamation, and the Water Authority (collectively, the “2022 Water Transfer Approval Agreements”); and

**WHEREAS**, pursuant to the National Environmental Policy Act (“NEPA”), Reclamation acting as Federal lead agency, and pursuant to the California Environmental Quality Act (“CEQA”), the Water Authority acting as State lead agency, prepared a joint Environmental Impact Report (“EIR”)/Supplemental Environmental Impact Statement (“SEIS”) entitled, “Long-Term Water Transfers,” analyzing the effects on the environment of a range of potential transfers over the 10-year period 2015-2024 (the Final Long-Term Water Transfers EIR-SEIS), including those to be implemented through the 2022 Water Purchase and Sale Agreements; and

**WHEREAS**, pursuant to CEQA, on April 9, 2020, the Water Authority certified the Final Long-Term Water Transfers Environmental Impact Report, and adopted findings based on its record of proceedings showing that the potentially significant effects on the environment of a range of potential transfers over the 10-year period 2015-2024, including those to be implemented through the 2022 Water Purchase and Sale Agreements, would be avoided or substantially reduced to less-than-significant levels; and

**WHEREAS**, on September 16, 2021, the Water Authority determined that the Addendum to the 2019 Final EIS/EIR, which analyzed an extended transfer window through November 30, had been completed in accordance with CEQA, and that the potential transfer activities described in the 2019 Final EIR/SEIS and modified as described in the Addendum, subject to the conditions, agreements, policies, or criteria established by the Board, may be implemented consistent with the terms of the 2019 Final EIR/SEIS and Addendum; and

**WHEREAS**, the Board has previously authorized that certain Long Term North to South Water Transfer Program Activity Agreement, establishing the terms under which the benefits and obligations of the 2022 Water Purchase Agreements will be shared by the Activity Agreement Members, which has been executed by the Water Authority and its participating members.

**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. The Board hereby approves the proposed template 2022 Water Purchase and Sale Agreement, and the Executive Director or his delegate is hereby authorized to execute an Agreement tailored for each of the North-of-Delta Sellers willing to make available water during 2022 in substantially the form that has been presented to the Board and subject to final water purchase pricing determination by the Long Term North to South Water Transfer Program Activity Agreement Participants, subject to such revisions, modifications, additions, or deletions as the executing officer may approve prior to execution, including but not limited to final pricing, call date, and any option payment terms.

Section 3. The authorizations granted to the Executive Director or his delegate under Section 2 of this Resolution are conditioned upon 1) the effects of the transfer from the respective Sacramento River or Feather River contractor having been analyzed in the 2019 Final Long-Term Water Transfers EIR-SEIS and Addendum; and 2) the written consent of at least one Long Term North to South Water Transfer Program Activity Agreement Member to purchase the water made available through the 2022 Water Purchase and Sale Agreements on the finally negotiated terms.

Section 4. The Executive Director, Chief Operating Officer, and any Water Authority employees, consultants, or agents directed by the Executive Director are further authorized and directed to take such additional steps, and to negotiate and execute such additional documents, including but not limited to 2022 Water Transfer Approval Agreements with Reclamation and any conveyance agreements with DWR required to effect the delivery of transfers authorized by this Resolution, as may be required or reasonably necessary or convenient for completing and implementing the transfer activities authorized by this Resolution.

**PASSED, APPROVED, AND ADOPTED** this 10<sup>th</sup> day of February, 2022, by the Board of Directors of the San Luis & Delta-Mendota Water Authority.

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Cannon Michael, Chairman  
San Luis & Delta-Mendota Water Authority

Attest:

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Federico Barajas, Secretary

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I hereby certify that the foregoing is a true and correct copy of a resolution duly adopted by the San Luis & Delta-Mendota Water Authority, a California joint powers agency, at a special meeting of the Board of Directors thereof duly called and held on the 10<sup>th</sup> day of February, 2022.

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Federico Barajas, Secretary

**WATER PURCHASE AND SALE AGREEMENT**  
**BY AND BETWEEN \_\_\_\_\_ AND THE SAN LUIS & DELTA MENDOTA**  
**WATER AUTHORITY**

This Agreement is entered into this \_\_\_ day of \_\_\_\_\_, 2022 by and between \_\_\_\_\_, hereinafter referred to as “**Seller**” or “\_\_\_\_\_,” and the SAN LUIS & DELTA-MENDOTA WATER AUTHORITY, hereinafter referred to as “**Buyer**” or “**Water Authority**.” \_\_\_\_\_ and the Water Authority may be referred to herein individually as a “**Party**” or jointly as “**Parties**.”

**RECITALS**

WHEREAS, \_\_\_\_\_ is a California irrigation district operating under and by virtue of Division 11 of the California Water Code and is empowered to sell and transfer water to Buyer as provided for in this Agreement; and

WHEREAS, Buyer is a California joint powers authority operating under and by virtue of Section 6500, et seq., of the California Government Code and is empowered to purchase water from Seller as provided for in this Agreement; and

WHEREAS, Buyer’s members are 27 public agencies representing approximately 1,100,000 acres of land within the western San Joaquin Valley, San Benito and Santa Clara Counties, 25 agencies of which that obtain water from the United States Bureau of Reclamation (“**Reclamation**”) through the federal Central Valley Project (“**CVP**”) under water service or repayment, exchange/settlement, or refuge contracts; and

WHEREAS, Water Authority agricultural water service contractor and repayment contractor members anticipate an initial allocation of 0% of their full contractual supply for irrigation for the 2022 water year, and current projections show that subsequent increases in allocations, if any, will be made later in the season and are expected to be minimal; and

WHEREAS, Seller holds a Sacramento River Settlement Contract with Reclamation (Contract No. \_\_\_\_\_), which governs Seller’s diversions of water from the Sacramento River and its tributaries for beneficial uses; and

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WHEREAS, Seller is willing to make water available for sale and delivery to the Water Authority by certain forbearance action or by petition to the State Water Resources Control Board under its water rights by increasing the quantity of groundwater pumped within Seller’s service area and/or idling/shifting crops, thereby reducing the amount of surface water Seller diverts and uses for irrigation within its service area in 2022; and

WHEREAS, on behalf of Water Authority participating members (the “**Transfer Participants**”), Buyer intends by this Agreement to obtain a supplemental water supply for the Transfer Participants’ use for irrigation in 2022 to provide water required for reasonable and beneficial use given the anticipated reduction in deliveries of contract quantities from the CVP; and

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WHEREAS, Seller, Buyer, and Reclamation will execute a companion consent to transfer agreement (the “**Approval Agreement**”) for 2022 to set forth the terms and conditions under which Reclamation will facilitate Seller making water available to the Water Authority via Seller’s actions in 2022; and.

WHEREAS, Seller, Buyer and the California Department of Water Resources (“**DWR**”) may execute a conveyance agreement (the “**DWR Conveyance Agreement**”) for 2022 to set forth the terms and conditions which DWR will facilitate the conveyance of the Agreement-Water utilizing the Banks Pumping Plant and the California Aqueduct.

NOW, THEREFORE, Seller and Buyer, on the terms and conditions set forth herein, agree as follows:

**AGREEMENT**

1. **DEFINITIONS:** The following definitions shall govern this Agreement:
  - a. “**Agreement-Water**” is the surface water transferred and made available to Buyer through this Agreement as a result of Seller’s actions through groundwater substitution and/or crop idling/shifting, in accordance with California Water Code Sections 380 et seq., 1745, et seq. and 22259.
  - b. “**Point of Delivery**” means Seller’s primary point of diversion of surface water at the Seller’s point of diversion on the Sacramento River.
  - c. “**Carriage Losses and Depletions**” mean water losses imposed on Agreement-Water by Reclamation or DWR. Carriage Losses and Depletions shall not, however, include the Assumed Depletion Loss defined in Paragraph 4.c.
2. **TERM:** This Agreement shall commence on the date set forth above and expire on December 31, 2022, unless terminated sooner by written agreement of the Parties pursuant to the provisions set forth herein; provided, however, that any obligations under this Agreement to be performed after December 31, 2022, shall survive the expiration of the term of this Agreement and shall be fully enforceable.
3. **AGREEMENT TO SELL:** Seller agrees to sell and make available at the Point of Delivery, and the Water Authority agrees to purchase, Agreement-Water during the term of this Agreement for the Transfer Participants’ reasonable and beneficial use, in the quantities described and subject to the terms and conditions of this Agreement.
  - a. All Agreement-Water will be used within the boundaries of Buyer’s Transfer Participants.
  - b. The Water Authority shall be solely responsible for determining the identities of its members who shall receive an allocation of the water acquired and the quantity allocated to each of them.

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4. **QUANTITY AND ADJUSTMENTS TO QUANTITY:**

- a. **Quantity.** Seller agrees to sell and make available at the Point of Delivery to Buyer up to \_\_\_\_\_ acre-feet of Agreement-Water through groundwater substitution and/or \_\_\_\_\_ acre feet of Agreement-Water through crop idling, subject to Buyer's call on Agreement-Water pursuant to Paragraphs 6 and 7, and subject to the other terms and conditions of this Agreement.
- b. **Availability.** The quantity of Agreement-Water that Seller makes available for transfer through groundwater substitution and/or crop idling actions during any month shall be as determined by Reclamation in accordance with the terms and conditions of the Approval Agreement. Following Seller's actions to make Agreement-Water available at the Point of Delivery, Reclamation shall determine and confirm the final amount of Agreement-Water made available during such month.
- c. **Groundwater Depletion.** Water pumped by Seller, if any, for use in place of the surface water made available to Buyer pursuant to this Agreement will be subject to an Assumed Depletion Loss of 13% or an alternate amount of depletion losses as determined by Reclamation in accordance with the Final Long-Term Water Transfers EIR-SEIS. Seller shall bear the cost of the Assumed Depletion Losses, and payment due to Seller is based on the net quantity of water made available to Buyer after Assumed Depletion Losses are applied. For purposes of this Agreement, "**Assumed Depletion Loss**" means the total reduction in stream flow assumed by Reclamation to result from additional groundwater pumping that may occur as a result of this Agreement. The Parties acknowledge that, as of the effective date of this Agreement, Seller does not concede that there is adequate data or analyses supporting the Assumed Depletion Loss. The Assumed Depletion Loss for this Agreement shall in no manner whatsoever constitute a precedent for any determination or allocation of depletion loss in connection with any future water transfer involving Seller, or in connection with any determinations by any regulatory agency regarding the classification of the water pumped by the Seller. Nothing in this Agreement constitutes an admission by Seller for purposes of future transfers that any regulatory requirements imposed on the transfer under this Agreement are required under applicable law.
- d. **Losses.** Buyer shall bear all other Carriage Losses and Depletions, including without limitation Delta carriage water loss and California Aqueduct/Delta-Mendota Canal conveyance losses imposed on Agreement-Water between Seller's Point of Delivery and Buyer's delivery to the Transfer Participants within Buyer's service area.
- e. **Operational/Regulatory Limitations on Buyer's Ability to Export/Litigation Termination.** If Buyer makes a final call for Agreement-Water made available by groundwater substitution, but due to regulatory or operational constraints, Reclamation is unable to store such water at Reclamation's facilities on the Sacramento River or to deliver such water to Buyer through Delta pumping facilities at the time such water is scheduled to be made available by Seller, or if Reclamation terminates the Approval

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Agreement, Buyer shall provide to Seller at least a 72-hour notification to reduce, suspend, or terminate groundwater pumping. The Parties shall promptly meet and confer regarding the details and specifics of any such regulatory and operational constraints, and cooperate in good faith to determine when Seller's groundwater pumping may resume making water available to Buyer. If the Parties cannot develop a mutually acceptable plan for the resumption of groundwater pumping and the diversion of all or a portion of the transfer water, Buyer shall still be obligated to pay for all of the water made available prior to the end of the 72-hour notification period, but not for any groundwater that has at that time not yet been pumped by Seller. Further, if Buyer and Seller mutually agree to terminate this Agreement under Paragraph 15.b or 17.b.i, Buyer may provide the same 72-hour notification and shall be obligated to pay for all of the water made available up to the end of the 72-hour notification period, but not for any groundwater that has not yet been pumped by Seller at the end of the 72-hour period.

5. **PURCHASE PRICE:** Subject to Buyer's call on Agreement-Water under Paragraphs 6 and 7, Buyer agrees to purchase and pay for Agreement-Water at the Point of Delivery. The purchase price shall be \$ \_\_\_\_ per acre-foot for water made available by Seller and that Reclamation determines is transferrable.

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Notwithstanding the foregoing, the price per acre-foot will not be lower than the price Buyer pays to any other Seller in the Sacramento Valley in 2022 for groundwater substitution or crop idling/shifting transfers.

6. **CALL DATE AND "TAKE OR PAY" OBLIGATION FOR WATER MADE AVAILABLE THROUGH CROP IDLING/SHIFTING:**

**CHECK THIS BOX IF YOU ARE MAKING WATER AVAILABLE THROUGH CROP IDLING/SHIFTING, AND THIS SECTION 6 WILL APPLY TO THIS AGREEMENT.**

- a. **Call.** Provided Reclamation is able to confirm prior to April 12, 2022 its ability to "back-up" water to be made available prior to July 1, 2022 and store the water in Shasta Reservoir for release after July 1, 2022, Seller shall notify Buyer and Reclamation, in writing, of the quantity of Agreement-Water offered by April 13, 2022. On or before 5:00 p.m. on April 14, 2022, (the "**Call Date**"), Buyer shall notify Seller and Reclamation, in writing, of the quantity of offered Agreement-Water Buyer intends to purchase.
- b. **Option to Extend.** If Reclamation's ability to "back-up" Agreement-Water in Shasta Reservoir remains uncertain as of the Call Date under Paragraph 6.a, upon mutual agreement between Buyer and Seller, Buyer has the option to extend the call date to May 1, 2022 (the "**Extended Crop Idling Call Date**").
- c. **"Take or Pay" Obligation.** Buyer shall have a "take or pay" obligation upon Buyer's notification to Seller of the quantity of Agreement-Water Buyer wishes to purchase on

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the Call Date or Extended Crop Idling Call Date, and Buyer may not elect to order or pay for less than the amount specified in the notice to Seller except as provided in Paragraph 17.b.i.

- d. **Option.** Concurrently with the notice given on the Call Date or Extended Crop Idling Call Date, as applicable, Buyer shall tender to Seller an option payment of \$20 per acre-foot for the quantity of Agreement-Water Buyer has specified on such Call Date/Extended Crop Idling Call Date. All option payments will be applied to the total purchase price of water requested by Buyer on the Call Date/Extended Crop Idling Call Date; however, the option payment shall be non-refundable.

7. **CALL DATE AND “TAKE OR PAY” OBLIGATION FOR WATER MADE AVAILABLE THROUGH GROUNDWATER SUBSTITUTION:**

**CHECK THIS BOX IF YOU ARE MAKING WATER AVAILABLE THROUGH GROUNDWATER SUBSTITUTION, AND THIS SECTION 7 WILL APPLY TO THIS AGREEMENT.**

- a. **Call.** Provided Reclamation is able to confirm prior to April 12, 2022 its ability to “back-up” water made available prior to July 1, 2022 and store the water in Shasta Reservoir for release after July 1, 2022, Seller shall notify Buyer and Reclamation, in writing, of the quantity of Agreement-Water offered by April 13, 2022. On or before 5:00 p.m. on April 14, 2022, (the “**Call Date**”), Buyer shall notify Seller and Reclamation, in writing, of the quantity of offered Agreement-Water Buyer intends to purchase.

Alternatively, if Reclamation is unable to confirm the ability to “back-up” water in Shasta prior to the April 12, 2022 notification date but is able to confirm the ability to “back-up” water prior to July 1, 2022, Seller and Buyer shall agree to subsequent notification, Call Date once Reclamation confirms the ability to “back-up” water.

If Reclamation is unable to “back-up” water in Shasta Reservoir prior to July 1, 2022, Seller will notify Buyer and Reclamation, in writing, of the quantity of Agreement-Water offered by June 7, 2022. On or before 5:00 p.m. on June 11, 2022, (the “**Alternate Call Date**”), Buyer shall notify Seller and Reclamation, in writing, of the quantity of offered Agreement-Water Buyer intends to purchase. Buyer shall provide further notice, on or before 5:00 p.m. on June 25, 2022 (the “**Alternate Final Call Date**”) of the final amount of water Buyer agrees to purchase from Seller.

- b. **Option.** Concurrently with the notice given on the Call Date or Alternate Call Date, as applicable, Buyer shall tender to Seller an option payment of \$20 per acre-foot for the quantity of Agreement-Water Buyer has specified on such Call Date. All option payments will be applied to the total purchase price of water requested by Buyer on the Call Date or Alternative Call Date; however, the option payment shall be non-refundable.

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- c. **Adjustment of Call Dates.** The Parties may agree to set an earlier offer date or Call Date upon their confirmation with Reclamation that Agreement-Water may be made available during the April through June period.
- d. **“Take or Pay” Obligation.** Buyer will have a “take or pay” obligation upon Buyer’s notification to Seller of the quantity of Agreement-Water Buyer wishes to purchase on the Call Date or the Alternate Call Date, as applicable, and Buyer may not elect to order or pay for less than the amount specified in the notice to Seller, except when and to the extent Buyer has provided 72 hours’ notice under Paragraph 4.e or the Parties have mutually agreed to terminate the Agreement under Paragraphs 15.b or 17.b.i. As specified in Paragraph 4.e above, Buyer’s take or pay obligation for water that is not made available following such notice is excused.

8. **INVOICING AND PAYMENTS:** The Buyer shall make payment(s) directly to the Seller as set forth in this Paragraph.

- a. Seller shall invoice Buyer on a monthly basis following the end of each calendar month for the Agreement-Water made available during such calendar month based on the \$ [redacted] per acre-foot rate. Buyer shall pay such invoices within forty-five (45) days of Buyer’s receipt of the invoice and interest shall be paid at the annual interest rate of 10% on any invoices that remain unpaid forty-five (45) days after receipt of the invoice. Payment shall be made to:

Name  
Address  
Email

- b. Buyer will retain ten percent (10%) of invoice amounts pending Reclamation’s final confirmation that the quantity of Agreement-Water was made available at the Point of Delivery. Based upon the final confirmation of Agreement-Water made available at Seller’s Point of Delivery, Buyer is authorized to calculate the total payments due from Buyer to Seller, to withhold any overpayment, and to remit the balance of the 10% withheld. Interest shall not accrue as to amounts withheld pursuant to this subsection. Buyer shall remit the final ten percent, adjusted as may be provided in this Paragraph, within thirty (30) days following Reclamation’s final confirmation of Agreement-Water made available at the Point of Delivery.
- c. Seller shall provide Buyer with detailed invoices supporting all expenses incurred pursuant to Paragraph 17 on a monthly basis following the end of each calendar month, and Buyer shall pay such invoices per Paragraph 8.a. Seller shall provide Buyer all invoices for reimbursable expenses pursuant to Paragraph 17 no later than ninety (90) days after the termination of this Agreement. Notwithstanding the foregoing, invoices specifically related to reimbursable expenses for preparation and completion of the final 2022 water transfer report required under the Approval Agreements, shall be provided no later than one-hundred and eighty (180) days after the termination of the Agreement.

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- d. Failure by Seller to make Agreement-Water available at the Point of Delivery as provided under this Agreement will reduce Buyer's obligation to make payment for Agreement-Water on a per-acre foot basis.
9. **REFUNDS:** In the event Seller fails to provide the amount of Agreement-Water Buyer has purchased in accordance with Paragraphs 6 and 7, subject to Seller's right to terminate for shortages as stated in Paragraph 11, Seller will promptly refund to Buyer any payments made for purchased water not provided at the Point of Delivery by Seller. Any refunds shall include interest at the Local Agency Investment Fund rate for the period the money was held.
10. **WATER QUALITY:** The Seller makes no warranty or representations as to the quality or fitness for use of the Agreement-Water. Buyer, at its own expense, shall be responsible for all necessary measures for the testing, treatment, and other steps required for the intended uses of the Agreement-Water by the Buyer.
11. **SHORTAGE PROVISION/TERMINATION:** If the Seller's surface water supplies are reduced below 75% of its contract quantities or if Seller is unable to make available the full quantity of Agreement-Water listed in Paragraph 4.a due to unforeseen circumstances or for reasons beyond Seller's control, Seller, at its sole discretion, may terminate this Agreement or, may suspend, reduce, or cease groundwater pumping. Prior to termination or, as applicable, as quickly as possible following any action to suspend, reduce or cease groundwater pumping, Seller and Buyer shall confer to determine if, as an alternative to termination, the amount or price of Agreement-Water to be made available by Seller under this Agreement can be adjusted.
12. **WATER SCHEDULING:** Buyer, in coordination with Seller and Reclamation, will develop a schedule for delivery of Agreement-Water called upon by Buyer, made available by Seller at the Point of Delivery in accordance with the Approval Agreement, and to assure, to the extent possible, that Agreement-Water made available by Seller can be pumped at the C.W. "Bill" Jones Pumping Plant and/or the Harvey O. Banks Pumping Plant.
13. **DIVERSION COSTS:** All fees, permitting, construction, reconstruction, and maintenance costs for facilities necessary or used to divert Agreement-Water once it is delivered at the Point of Delivery by Seller shall be borne solely by Buyer. Buyer is solely responsible for all costs associated with treatment, diversion head-works, pumping facilities, etc., to divert, convey, transport, treat, and deliver Agreement-Water to the Buyer's Transfer Participants.
14. **ENVIRONMENTAL REVIEW:** Reclamation and Buyer completed the Final Long-Term Water Transfers EIR/SEIS and the Buyer certified the EIR on November 7, 2019 and Reclamation signed the Record of Decision on April 7, 2020. Reclamation and Buyer subsequently completed an Addendum to the Final EIR/SEIS, and Reclamation signed an amended Record of Decision on May 5, 2021. Together, the Final EIR/SEIS and Addendum consider the environmental effects of the transfers described in this Agreement. Buyer and Seller intend to rely on the Final EIR-SEIS and Addendum in compliance with CEQA and NEPA for the purposes of performing under this Agreement.

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15. **TERMINATION:** In the event of termination of this Agreement or Reclamation's termination of the Approval Agreement, the Parties shall thereafter be under no further obligation or responsibility hereunder, and will release the other party from further obligations under this Agreement, except for their respective shares of costs incurred prior to the effective date of termination, which includes administration expenses under Paragraph 17.a and may include certain litigation costs under paragraph 17.b and Buyer's take or pay obligation under Paragraphs 6.c and 7.d, unless limited by Paragraph 17.b.i. The Parties to this Agreement shall have the right of termination as set forth in Paragraph 11, and this Paragraph:

- a. If regulatory approval(s) and any additional required environmental review actions (e.g. CEQA and/or NEPA compliance actions) are not satisfied by May 1, 2022, either Party may, by written notice to the other Party, terminate this Agreement unless both Parties agree to extend the date for such approval(s) and/or environmental review.
- b. If, in the reasonable judgment of either Seller or Buyer, the costs of any litigation challenging this Agreement, any restrictions, fees, charges or costs imposed in the approvals of any regulatory agency, mitigation measures imposed by any agency pursuant to CEQA or NEPA, or any relief afforded to third parties in any action brought in state or federal court involving this Agreement, are too burdensome in relation to the benefits to be received under this Agreement, then that Party so determining may terminate this Agreement. If Buyer so elects to terminate the Agreement, Buyer shall still be obligated to pay for all of the Agreement-Water made available prior to such termination, for administrative expenses under Paragraph 17.a and litigation expenses under 17.b, and for Buyer's take or pay obligation under Paragraphs 6.c and 7.d; provided, if Seller terminates in accordance with 17.b.i, Buyer shall not be obligated for Buyer's take or pay obligation under Paragraph 6.c and 7.d for all Agreement-Water that has not yet been made available as of the date of such termination.

16. **CONDITIONS PRECEDENT/APPROVALS:**

- a. Except as provided in Paragraph 17 with respect to reimbursement of costs, the Parties' performance under this Agreement is contingent on the Parties obtaining any and all necessary approvals from any third-party agency for delivery of Agreement-Water.
- b. It is a condition precedent to Seller's obligations to make available Agreement-Water, and to Buyer's obligation to pay for Agreement-Water under this Agreement, that Reclamation, Seller, and Buyer execute a three-party Approval Agreement substantially in the form attached as Exhibit "A," by the terms of which Reclamation accepts Agreement-Water as water available to Reclamation for subsequent appropriation/delivery under its state water rights permits for the CVP and agrees to the terms and conditions for its delivery of such water to Buyer. If such Approval Agreement is not executed, or if the required approval of any other third party agency

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for delivery of Agreement-Water is not provided by May 1, 2022, Buyer shall have no further obligations under this Agreement, except to pay its respective share of administrative costs incurred prior to the effective date of termination per Paragraph 17.a, and for any litigation expenses assigned to Buyer under Paragraph 17.b.

- c. Seller is responsible for obtaining necessary approvals from Reclamation, the Department of Water Resources (“DWR”), and if necessary, the State Water Resources Control Board (“SWRCB”), to transfer the Agreement-Water at the Point of Delivery. Buyer is responsible for obtaining all authorizations from Reclamation and DWR for conveyance of the Agreement-Water to Buyer’s place of use.

**17. ADMINISTRATIVE AND LITIGATION EXPENSES:**

- a. **Administrative Expenses.** Buyer will reimburse Seller’s reasonable out-of-pocket expenses, including but not limited to actual legal and engineering consultants’ fees and expenses incurred by Seller in preparing, negotiating, administering, implementing, and supporting this Agreement up to a maximum of \$100,000 for quantities of Agreement-Water made available that is greater to 1,000 AF and \$50,000 for quantities of Agreement-Water made available that is equal to or less than 1,000 AF; provided, however, if Buyer provides to any other Sacramento Valley seller for a 2022 transfer a maximum reimbursement for reasonable out-of-pocket expenses greater than \$100,000 or \$50,000, that greater reimbursement maximum will be applied to Seller. In the event Seller petitions the California State Water Resources Control Board, expenses eligible for reimbursement by the Buyer will be increased by the actual petition fee expenses. Buyer shall not be required to reimburse Seller for time spent by its directors, officers or employees relating to this transfer. Seller shall be entitled to this reimbursement starting on the date of execution of the Letter of Intent regarding 2022 Water Transfers for costs incurred for the 2022 water transfer, regardless of whether Agreement-Water is transferred or if the Agreement is terminated under Paragraphs 11 or 15. If Seller fails to provide any Agreement-Water due to its own action or inaction, Seller will not be entitled to reimbursement and any reimbursements made by the Buyer will be fully refunded by the Seller to the Buyer; provided, if Seller terminates the Agreement because of a reduction in water supply under Paragraph 11, Seller shall be entitled to reimbursement despite the termination. Invoicing of administrative expenses shall be pursuant to the procedures set forth in Paragraph 8.a.

**b. Litigation, Attorneys’ Fees and Third-Party Challenges.**

- i. Subject to subsections 17.b.ii and 17.b.iii, in the event of litigation or an administrative challenge related to this Agreement, Seller and Buyer will promptly meet and confer to perform a risk assessment of the litigation/challenge, and cooperate in good faith to determine whether to terminate the Agreement due to the litigation/challenge. Either Party may elect to terminate the Agreement due to any such litigation/challenge. If Buyer so elects to terminate the Agreement due to any such litigation/challenge, Buyer shall still be obligated to pay for all of

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the Agreement-Water made available at the Point of Delivery prior to such termination; for Seller's administrative expenses in accordance with Paragraph 17.a; for any litigation expenses in having the proceeding dismissed or otherwise resolved; and for Buyer's take or pay obligation under Paragraphs 6.c and 7.d. If Seller so elects to terminate the Agreement, Buyer shall still be obligated to pay for all of the Agreement-Water made available at the Point of Delivery prior to such termination; for Seller's administrative expenses in accordance with Paragraph 17.a; and for any litigation expenses in having the proceeding dismissed or otherwise resolved; but Buyer shall not be obligated to pay for the Buyer's take or pay obligation under Paragraphs 6.c and 7.d for all Agreement-Water that has not yet been made available as of the date of such termination. Regardless of whether the agreement is terminated, and except as set forth in subsections 17.b.ii. and 18.b.iii, below, if litigation is pending, Buyer shall have primary responsibility for defending against such litigation on behalf of both Buyer and Seller, either as a defendant, respondent, real party in interest or intervenor; and Seller shall participate in defending against such litigation to the extent it deems necessary or appropriate, in Seller's sole discretion. Buyer shall bear its own costs of litigation and shall pay any monetary award, the costs of any remedial actions, and any award of challenger's attorneys' fees associated therewith, whether levied against Buyer or Seller. Buyer shall also reimburse 100% of Seller's actual out-of-pocket expenses Seller incurs for defending this Agreement and against any related litigation under this Paragraph 17.b.i.

- ii. As to claims solely challenging Seller's conduct in Seller's service area, Seller shall have primary responsibility for defending such claims on behalf of both Seller and Buyer, and Buyer shall participate in defending against such claims to the extent it deems necessary or appropriate, in Buyer's sole discretion. Buyer shall bear its own fees and costs of defending against such claims. Except as provided in Paragraph 17.a regarding general cost reimbursement, Seller shall bear its own fees and costs of defending against such claims. Seller shall pay all monetary awards associated with claims challenging Seller's conduct in Seller's service area.
- iii. To the extent litigation includes multiple claims, the Parties agree to meet and confer in good faith to determine whether or not the action includes claims described under Paragraphs 17.b.i and 17.b.ii. The Parties agree that any claim identified as subject to Paragraph 17.b.ii shall be defended as provided in Paragraph 17.b.ii and the balance of such claims shall be defended as provided in Paragraph 17.b.i.

18. **WATER RIGHTS:** The Agreement-Water transferred under this Agreement is a portion of the surface water available to Seller, and diverted in accordance with Seller's Sacramento River Settlement Contract. Consistent with the provisions of California Water Code Sections 109, 475, 1011, 1244, and 11961, the water transfer performed under this Agreement shall not confer any appropriative, public trust or other right to water on any person or entity. Nothing in this Agreement shall act as forfeiture, diminution, or impairment of any rights of

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Seller to its full diversion of water after the expiration of the Agreement, and this Agreement shall in no way prejudice any of Seller's rights thereto. The Parties agree that the water transferred under this Agreement is considered a beneficial use of water under California law.

**19. BUYER'S PAYMENT OF RECLAMATION'S COSTS, RATES, AND CHARGES:**

Buyer shall be responsible for payment of all costs incurred by Reclamation, and imposed upon Seller, for Reclamation's review, approval, implementation, and administration of this Agreement and the Approval Agreement, as set forth in a separate Letter Agreement between Buyer and Reclamation. Seller will be responsible for the payment directly to Reclamation of contract rates for any Agreement-Water made available from CVP water ("**Project Water**") under the terms of the Approval Agreement and the Letter Agreement. Buyer shall be responsible for any and all incremental costs, rates, charges and assessments that Reclamation imposes upon Seller for conveyance of Project Water to Buyer under the terms of the Approval Agreement and the Letter Agreement.

**20. BUYER'S PAYMENT OF DWR'S COSTS, RATES, AND CHARGES:**

Buyer shall be responsible for payment of all costs incurred by DWR, and imposed upon Seller, for DWR's review, approval, implementation, and administration of this Agreement and any DWR Conveyance Agreement. Buyer shall be responsible for any and all costs, rates, charges and assessments that DWR imposes upon Seller for conveyance of Agreement-Water under the terms of any DWR Conveyance Agreement.

**21. 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.

**22. WAIVER OF RIGHTS:** Any waiver, at any time, by a 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.

**23. ASSIGNMENT:** This Agreement is entered into in reliance on water supplies available to Seller, the credit of Buyer, and the need of Buyer's Transfer Participants for water, and therefore any assignment of this Agreement in whole or in part without the prior written consent of the other Party hereto is prohibited.

**24. 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 on behalf of the Seller and Buyer by such officers as they may, from time, authorize in writing to so act.

- a. Any notices to Parties required by this Agreement shall be delivered or mailed, United States first-class postage prepaid, by U.S. mail and electronic mail at the following addresses or electronic mail addresses:

Initials: \_\_\_\_\_

SELLER NAME

\_\_\_\_\_, General Manager

Address

Phone:

Fax:

Email:

**SAN LUIS & DELTA MENDOTA WATER AUTHORITY**

Jerry Robbins

San Luis & Delta Mendota Water Authority

P.O. Box 2157

Los Banos, CA 93635

Phone: (916)269-4402

Email: gerald.robbs@sldmwa.org

Pablo Arroyave, Chief Operating Officer

San Luis & Delta Mendota Water Authority

15990 Kelso Road

Byron, CA 94514

Phone: (209) 832-6200

Email: pablo.arroyave@sldmwa.org

- b. Notice shall be deemed given (a) two calendar days following mailing via regular or certified mail, return receipt requested, (b) one 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 electronic mail, 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.

25. **APPROVALS:** Where the terms of this Agreement provide for action to be based upon a judgment, approval, review, or determination of either 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.
26. **ARBITRATION:** In the event of a dispute between the Parties as to any right, alleged right, obligation or alleged obligation under this Agreement, the Parties shall make a good faith effort to resolve the dispute. In the event that a resolution of the dispute cannot be reached despite these efforts, either Party may declare an impasse and its intent to submit the matter to arbitration. Any such arbitration shall be held and conducted before one arbitrator who shall be selected by mutual agreement of the Parties. If agreement is not reached on the selection of an arbitrator within fifteen (15) days after a Party has notified the other Party of its election to submit to arbitration, then such arbitrator shall be appointed by the presiding judge of the Superior Court of Merced County upon application of either Party hereto. The award or decision of the arbitrator shall be final and judgment may be entered thereon. The provisions of Title 9 of Part 3 of the California Code of Civil Procedure, including §1283.05,

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and successor statutes, permitting expanded discovery proceedings shall be applicable to all disputes which are arbitrated pursuant to this paragraph.

- 27. **OTHER AGREEMENTS:** Nothing contained herein restricts the Seller from providing water services and sales to others as authorized by law which do not unreasonably interfere with Seller's obligations hereunder.
- 28. **ENTIRE AGREEMENT:** This Agreement constitutes the entire agreement between the Seller and Buyer and supersedes any oral agreement, statement, or promise between them relating to the specific subject matter of this Agreement that is not covered in the Approval Agreement. Any amendment, including oral modifications, must be reduced to writing and signed by both Parties to be effective.
- 29. **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.
- 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 person.
- 31. **AGREEMENT NOT PRECEDENT:** The Parties acknowledge and agree that nothing in this Agreement shall be considered precedent for any agreements for purchase and sale of water between the Parties in any future year.

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

**BUYER:** SAN LUIS & DELTA-MENDOTA WATER AUTHORITY

By: \_\_\_\_\_ Date: \_\_\_\_\_  
Federico Barajas, Executive Director

**SELLER:**

By: \_\_\_\_\_ Date: \_\_\_\_\_  
, President/General Manager

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