



## MEMORANDUM

TO: SLDMWA Board of Directors, Alternates

FROM: Rebecca Akroyd, General Counsel  
Diane Rathmann, Outside Counsel  
Joe McGahan, Drainage Consultant

DATE: May 14, 2020

RE: Adoption of Resolution Authorizing Execution of Use Agreement Between the United States of America and the San Luis & Delta-Mendota Water Authority for Use of the San Luis Drain for the Grassland Bypass Project Long-Term Storm Water Management Plan, Confirming Consistency with Previously Adopted CEQA Documents, and Authorizing Actions Related Thereto

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### BACKGROUND

In October 2019 the Authority adopted an Addendum to the 2009 Final EIS/EIR for the Long-Term Storm Water Management Plan 2020-2045 in compliance with the California Environmental Quality Act (CEQA) and approved execution of the GBP Agreement for Continued Use of the San Luis Drain for the Period January 1, 2020 through December 31, 2045 (2019 or 4<sup>th</sup> Use Agreement).

After the Authority's approval, and as part of its review under the National Environmental Policy Act (NEPA), the U.S. Bureau of Reclamation (Reclamation)) shortened the potential term of the new Use Agreement to 10 years (from the originally proposed 25 years) in response to requests from the U.S Fish & Wildlife Service and the National Marine Fisheries Service.

The 4<sup>th</sup> Use Agreement was executed on December 31, 2019. The term of the 4<sup>th</sup> Use Agreement was further reduced to 6 months. The stated intent was to enter into a successive agreement for the balance of the 10-year term contemplated in the NEPA document. Since the 4<sup>th</sup> Use Agreement was executed, Authority representatives have worked with interested stakeholders and Reclamation to describe aspirational goals addressing good faith efforts to achieve selenium and salinity water quality that exceed existing water quality objectives, in order to build a broad coalition of support for the Long-Term Stormwater Management Plan. This review period has resulted in the 5<sup>th</sup> Use Agreement (referred to in the Resolution as the 2020 Use Agreement) which has a term of 9 years and 6 months to December 31, 2029.

## **ISSUE FOR DECISION**

Whether the Board of Directors should adopt a Resolution Authorizing Execution of Use Agreement between the United States of America and the San Luis & Delta-Mendota Water Authority for Use of the San Luis Drain for the Grassland Bypass Project Long-Term Storm Water Management Plan, Confirming Consistency with Previously Adopted CEQA Documents, and Authorizing Actions Related Thereto.

## **OPTIONS AND RECOMMENDATION**

Both staff and the Grassland Basin Drainage Steering Committee recommend adoption of the resolution referenced above and subsequent execution of the 5<sup>th</sup> Use Agreement.

## **ANALYSIS**

Since 1996, the Authority has entered into a continuous series of agreements with the Reclamation authorizing the Authority to use a portion of the San Luis Drain to convey agricultural drainwater around adjacent wildlife management areas to Mud Slough, a tributary of the San Joaquin River. Drainage management activities have eliminated the discharge of irrigation-season drainage beginning in 2015; however, discharge of storm-induced drainage continues to occur. A Long-Term Storm Water Management Plan was developed to address and manage these storm-related flows. The Addendum adopted by the Authority in October 2019 analyzed the effects of implementation of the Long-Term Storm Water Management Plan for the 2020-2045 period, fully covers the effects of the proposed 5<sup>th</sup> Use Agreement, and no further review under the CEQA is required. In addition, the Central Valley Regional Board has issued Order R5-2015-0094-01 establishing waste discharge requirements (WDR's); that Order continues in place and will fully cover this agreement.<sup>1</sup>

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<sup>1</sup> The North Coast Rivers Alliance and other NGOs have filed a challenge to the Authority's October 2019 Addendum in Merced County Superior Court. Given the delayed status of Superior Court proceedings because of the COVID virus, the challenge to the Addendum will not be resolved before late 2020 at the earliest. The same parties requested review by the State Water Resources Control Board; if that Board fails to act by May 6, the challengers will have to file a petition for writ of mandate in Superior Court, if they wish to proceed. In both cases, the Authority's action is presumed valid until and unless a court enters an order to the contrary. Finally, the Pacific Coast Federation of Fisherman's Associations, et al., v. Glaser case is on remand to the Federal District Court in Sacramento, where it is set to be resolved by summary judgment motion in January, 2021. The outcome of that case may affect the nature of permit required for the Use Agreement, and both the Use Agreement and the WDR's are written to take any such change into account. In each case, the Authority, acting on behalf of and funded by the Grassland Basin Drainage Management Activity Agreement participants, intends to vigorously defend its compliance with the CEQA and permitting requirements.

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During the pendency of the 2019 Use Agreement, the Grassland Basin Drainers met with stakeholders who have participated in the process for the Grassland Bypass Project for over 20 years. As a result, the Authority also plans to enter into a letter agreement committing to continue consulting with those stakeholders.

The Grassland Basin Drainers' accomplishments in terms of drainage management and water quality improvements are remarkable and provide significant environmental protection for nearby wetlands, as well as instream and downstream resources. The 5<sup>th</sup> Use Agreement therefore merits approval.

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

**RESOLUTION NO. 2020-**

**RESOLUTION AUTHORIZING EXECUTION OF USE AGREEMENT BETWEEN THE UNITED STATES OF AMERICA AND THE SAN LUIS & DELTA-MENDOTA WATER AUTHORITY FOR USE OF THE SAN LUIS DRAIN FOR THE GRASSLAND BYPASS PROJECT LONG-TERM STORM WATER MANAGEMENT PLAN, CONFIRMING CONSISTENCY WITH PREVIOUSLY ADOPTED CEQA DOCUMENTS, AND AUTHORIZING ACTIONS RELATED THERETO**

**WHEREAS**, on October 10, 2019, the Board of Directors (Board) of the San Luis & Delta-Mendota Water Authority (Water Authority), adopted Resolution No. 2019-448 approving the Grassland Bypass Project Long-Term Storm Water Management Plan 2020-2045 and modifications to the Grassland Bypass Project (GBP) as both are described in the Initial Study and Addendum to the 2009 Final Environmental Impact Statement/Environmental Impact Report (2009 Final EIS/EIR) prepared by the Water Authority.

**WHEREAS**, in adopting Resolution No. 2019-448 the Board authorized the Executive Director to execute an Agreement between the United States of America and the Water Authority for Continued Use of the San Luis Drain for the Period January 1, 2020 through December 31, 2045, and further authorized the Executive Director and the Assistant Executive Director to negotiate and execute the Use Agreement subject to such additions, deletions and revisions as the executive officers may require or approve prior to execution.

**WHEREAS**, on December 31, 2019, the Department of the Interior, Bureau of Reclamation (Reclamation) as Lead Agency completed its review pursuant to the National Environmental Policy Act and issued its Final Environmental Assessment and FONSI-19-029, 10-Year Use Agreement for the San Luis & Delta-Mendota Water Authority's Long-Term Storm Water Management Plan for the Grasslands Drainage Area (FONSI).

**WHEREAS**, on December 31, 2019, the Executive Director of the Water Authority and the United States executed an agreement for the continued use of the San Luis Drain for the GBP Long-Term Stormwater Plan, with a negotiated term of six (6) months, from January 1 2020, through June 30, 2020 (the "2019 Use Agreement").

**WHEREAS**, the 2019 Use Agreement states in Article V: "It is the intention of the Parties to enter into a subsequent Use Agreement up to the term covered by Reclamation's Finding of No Significant Impact/Environmental Assessment 19-029."

**WHEREAS**, the United States and the Water Authority have now negotiated, in substantial form, the terms of that subsequent agreement for the balance of the ten (10) year term covered in the FONSI, from July 1, 2020, through December 31, 2029 (the "2020 Use Agreement").

**WHEREAS**, the terms and conditions of the 2020 Use Agreement are consistent with the continued implementation and refinement of the GBP analyzed in the Grassland Bypass Project 2009 Final EIS/EIR, as updated by the Initial Study and Addendum adopted under the California Environmental Quality Act, and such documents remain accurate and reliable for the 2020 Use Agreement.

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

Section 1.     Declaration of Board. The Board hereby specifically finds and declares that the statements, findings, and determinations of the Water Authority set forth in the recitals above are true and correct.

Section 2.     Authorization to Execute the 2020 Use Agreement for the Period July 1, 2020 through December 31, 2029. The Board hereby authorizes the Executive Director and the Chief Operating Officer to negotiate and execute the 2020 Use Agreement subject to such additions, deletions, and revisions as the executive officers may require or approve prior to execution.

Section 3.     Additional Actions. The Executive Director and any Authority employee or consultant as he shall designate are further authorized to take such additional actions, including the execution of such additional documents, as may be reasonably necessary to perform under the Use Agreement and Long-Term Storm Water Management Plan 2020-2045.

**PASSED, APPROVED, AND ADOPTED** this 14<sup>th</sup> day of May, 2020, 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 Resolution No. 2020-\_\_\_\_ was duly and regularly adopted by the Board of Directors of the San Luis & Delta-Mendota Water Authority at the meeting thereof held on the 14th day of May, 2020.

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Federico Barajas, Secretary

**UNITED STATES DEPARTMENT OF THE INTERIOR  
BUREAU OF RECLAMATION  
San Luis Drain, San Luis Unit  
Central Valley Project**

**USE AGREEMENT BETWEEN THE UNITED STATES OF AMERICA AND  
THE SAN LUIS & DELTA-MENDOTA WATER AUTHORITY FOR USE OF  
THE SAN LUIS DRAIN FOR THE GRASSLAND BYPASS PROJECT  
LONG-TERM STORM WATER MANAGEMENT PLAN**

**THIS USE AGREEMENT** is entered into this \_\_\_\_\_ day of \_\_\_\_\_, 2020, in accordance with the Act of Congress approved June 17, 1902 (32 Stat. 388) and all Acts amendatory thereof and supplemental thereto, all such Acts commonly known as and referred to as the Federal Reclamation Law, by the United States of America (United States), acting by and through its Bureau of Reclamation, Region 10 (Reclamation), Department of the Interior, represented by the officer executing this Agreement, and the San Luis & Delta-Mendota Water Authority (Authority), a joint powers authority, duly organized, existing and acting pursuant to the laws of the State of California, acting by and through its Executive Director.

**RECITALS**

- A. **WHEREAS**, the United States has acquired certain land for and constructed the San Luis Drain as a feature of the San Luis Unit of the Central Valley Project (CVP);
- B. **WHEREAS**, the Authority entered into a transferred works operation and maintenance agreement (Transfer Agreement, Contract No. 8-07-20-X0354-X) with Reclamation whereby the Authority is responsible, among other things, for the operation and maintenance of the San Luis Drain (Drain);
- C. **WHEREAS**, pursuant to Public Law 86-488 and the CVP Authorizations Act of 1937 (Act of 1937), Reclamation and the Authority previously entered into use agreements in 1995, 2001 and 2010 (covering the period from January 1, 1996, through December 31, 2019) to allow the Authority to convey subsurface agricultural drainage water, in addition to Storm Water Flows, from the Grasslands Drainage Area (GDA) through the Drain, which is ultimately discharged into Mud Slough and then the San Joaquin River;
- D. **WHEREAS**, selenium is a naturally occurring element present throughout the Westside of the San Joaquin Valley in elevated levels. An essential nutrient in low concentrations, selenium can bioaccumulate in the food web and have significant adverse effects on sensitive species;

E. **WHEREAS**, the Authority along with certain GDA members, hereinafter referred to as the Draining Parties, developed a long-term drainage management plan, *Westside Regional Drainage Plan*, designed to provide long-term drainage service to lands within the GDA;

F. **WHEREAS**, through implementation of the *Westside Regional Drainage Plan*, since 2015 the Draining Parties have not discharged subsurface agricultural drainage water during the irrigation season;

G. **WHEREAS**, even with full implementation of the *Westside Regional Drainage Plan*, the Draining Parties expect that certain rainfall events will create Storm Water Flows that cannot be controlled entirely within the GDA;

H. **WHEREAS**, Storm Water Flows caused by these certain rainfall events are a combination of surface water runoff and shallow groundwater seepage from agricultural lands that can contain selenium, which needs to be managed so that uncontrolled ponding and discharges into wetland areas can be avoided to the extent practicable;

I. **WHEREAS**, the United States completed an Environmental Assessment (EA-19-029) pursuant to the National Environmental Policy Act to assess the effects of the use of the Drain to convey storm-related flows from the GDA for a ten (10)-year term and issued a Finding of No Significant Impact on December 31, 2019;

J. **WHEREAS**, pursuant to Public Law 86-488 and the CVP Authorizations Act of 1937 (Act of 1937), on December 31, 2019, Reclamation and the Authority entered into a use agreement for a term beginning January 1, 2019, through June 30, 2020, to allow the Authority to convey Storm Water Flows, from the Grasslands Drainage Area (GDA) through the Drain, which is ultimately discharged into Mud Slough and then the San Joaquin River;

K. **WHEREAS**, the December 31, 2019 use agreement states in Article V: “It is the intention of the Parties to enter into a subsequent Use Agreement up to the term covered by Reclamation’s Finding of No Significant Impact/Environmental Assessment 19-029;”

L. **WHEREAS**, the Authority has requested that the United States permit it to continue using a portion of the Drain beginning July 1, 2020 through December 31, 2029, as contemplated by the 2019 Use Agreement and the Finding of No Significant Impact/Environmental Assessment 19-029; and

M. **WHEREAS**, Reclamation has determined, at this time, that the continued use of the Drain for the purpose of conveying Storm Water Flows is compatible with Public Law 86-488 and the Act of 1937.

### **AGREEMENT**

Subject to the following terms, conditions, and limitations, the United States grants permission to the Authority to continue to enter upon, use, operate and maintain the Drain,

including check structures and all other land and facilities appurtenant to the Drain for the purpose of conveying Storm Water Flows from the GDA, from Milepost 105.72, Check 19 to the terminus and into Mud Slough. In addition, Reclamation grants permission to use Drain rights-of-way from the terminus (Kesterson Reservoir) to Check 19, as reasonably required in accordance with this Agreement. "Land" includes land owned and/or controlled by the United States and land in which the United States holds an interest that is affected by the Authority's activities under this Agreement.

## **I. DEFINITIONS AND REFERENCED TERMS**

For purposes of this Agreement:

A. "Drainage Area" means those agricultural lands within the geographic area shown on Appendix A, attached hereto and incorporated herein.

B. "Draining Parties" means the Authority member agencies which have entered into, and are currently participating in, the Grassland Basin Drainage Management Activity Agreement with the Authority and the parties to various Memoranda of Understanding ("MOUs") by the terms of which the parties who would discharge into the Drain have agreed to abide by the terms of this Agreement. Members of the Authority which have entered into the Grassland Basin Drainage Management Activity Agreement include the Firebaugh Canal Water District, the Pacheco Water District, the Panoche Drainage District, the Charleston Drainage District, the Camp 13 Drainage District, and any other agricultural parties which may enter into MOUs with the Authority including the owners of certain additional agricultural lands, shown in Appendix A hereto, from which lands drainage waters historically entered channels utilized to provide water to wetland habitat in the Grassland Water District and State and Federal refuges.

C. "First Use Agreement" means that certain agreement for use of the San Luis Drain Between the United States, Department of the Interior, Bureau of Reclamation and the San Luis & Delta Mendota Water Authority entered into November 3, 1995, Agreement No. 6-07-20-W1319 and any amendments thereto, including Amendment to the Use Agreement for Use of the San Luis Drain dated September 30, 1998, and Second Amendment to the Agreement for Use of the San Luis Drain dated December 30, 1998.

D. "2001 Use Agreement" means that certain agreement for use of the San Luis Drain between the United States, Department of the Interior, Bureau of Reclamation and the San Luis & Delta Mendota Water Authority entered into on September 28, 2001, Agreement No. 6-07- 20-W2075 and any amendments thereto, including Modification No. 1 to said Agreement, dated June 8, 2007.

E. "2010 Use Agreement" means that certain agreement for use of the San Luis Drain between the United States, Department of the Interior, Bureau of Reclamation and the San Luis & Delta Mendota Water Authority entered into on December 22, 2009, Agreement No. 10-WC-20-3975 and any amendments thereto, including the First Amendment dated May 20, 2015.

F. "2019 Use Agreement" means that certain agreement for use of the San Luis Drain between the United States, Department of the Interior, Bureau of Reclamation and the San Luis & Delta-Mendota Water Authority entered into on December 31, 2019, for a term beginning January 1, 2020 through June 30, 2020.

G. "Parties" means Reclamation, the Authority, and those participating in the Grassland Basin Drainage Management Activity Agreement as Members or through MOUs under the umbrella of the Authority.

H. "Regional Board Basin Plan" or the "Basin Plan" means the Regional Water Quality Control Board's Water Quality Control Plan for the Sacramento River and San Joaquin River Basins, as amended.

I. "Regional Water Quality Control Board" or "Regional Board" means the Region 5 California Regional Water Quality Control Board, Central Valley Region.

J. "Salinity" means the content of dissolved mineral salts, measured by determining the amount of total dissolved solids or by measuring the electrical conductivity and through appropriate conversion factors estimating the total dissolved solids.

K. "Salt Goal" means a goal of discharging at or below 18,000 tons of salt per month as measured at Site B (flow measured at Site B2 and water quality measured at Site B3, see Appendix C).

L. "San Luis Drain" or the "Drain" means the drain owned by the United States and consisting of approximately 28 miles from the terminus at Kesterson Reservoir to Milepost 105.72, Check 19 (near Russell Avenue).

M. "Selenium" means the metalloid element, assigned atomic number 34, in all of its chemical forms, including but not limited to selenate, selenite, selenomethionine and elemental selenium.

N. "Selenium Goals" mean (1) a goal of 2 µg/L selenium (monthly mean) in Mud Slough (North) and the San Joaquin River from the Mud Slough Confluence to the Merced River; and (2) a goal of minimizing short term excursions above 2 µg/L (7-day average) in Mud Slough (North) and the San Joaquin River from the Mud Slough Confluence to the Merced River.

O. "Storm Water" or "Storm Water Flows" means flows induced from rainfall events, including both surface runoff and shallow groundwater seepage caused by rainfall saturation of agricultural land, and includes overland flows from rainfall events that naturally flow across the Drainage Area. Residual Storm Water Flows may continue after the rainfall event has ended. The process for determining when Storm Water Flows occur is an adaptive management approach. The process and the initial triggers are shown in Appendix B.

P. "Long-Term Storm Water Management Plan" means the Long-Term Storm Water

Management Plan 2020-2045 adopted by the Authority on October 10, 2019, as described in the Initial Study and Addendum prepared by the Water Authority under the California Environmental Quality Act.

Q. "Total Dissolved Solids" or "TDS" means the non-filterable portion of the material residue remaining after a liquid sample is evaporated.

R. "Waste Discharge Requirements" or "WDRs" means the terms and conditions for discharges issued by the Regional Board pursuant to California law.

S. "1997 Storm Event Plan" is the document describing the Authority's required actions before, during and following the extraordinary conditions under which storm water discharges directly to Grassland Water District channels may occur.

## **II. PURPOSE AND SCOPE OF USE**

A. The Authority shall be permitted to use the Drain for the discharge into and transportation of Storm Water Flows discharged from the Drainage Area, in accordance with the terms and conditions of this Agreement. These flows include Storm Water Flows that originate both within and outside the Drainage Area flowing across the Drainage Area.

B. The lands to be served pursuant to this Agreement are those lands located within the geographic area shown in Appendix A (attached hereto and incorporated herein), which consists of approximately 97,400 acres.

## **III. PERMITS AND RESPONSIBILITIES**

A. Permits and Approvals. The Authority shall be responsible for obtaining all applicable permits and other approvals necessary for its continued use, operation and maintenance of the Drain in accordance with the terms and conditions of this Agreement, the then-current Waste Discharge Requirements, or any alternative form of requirements of the Regional Board, and all applicable local, State, and Federal laws and regulations.

B. Discharges into and from the Drain. The Authority shall be responsible for ensuring that only Storm Water Flows enter the Drain, and that such Storm Water Flows are controlled and monitored to ensure that their quality and composition comply with this Agreement and all applicable Federal, State, and local standards, requirements, regulations, and laws. During its use of the Drain, under this Agreement, the Authority shall be solely responsible for the proper management and disposal of all discharges into and from the Drain, subject to this Agreement and all applicable laws and regulations.

C. Check 19. For purposes of this project the Authority shall not use the Drain in any

manner that will affect water levels in or cause storm water to flow into the portions of the Drain south of Check 19. Management and control of the operation of Check 19 shall be in accordance with the Transfer Agreement.

D. **Sediment Removed by Reclamation.** Reclamation, at its sole discretion, shall, at any time during the term of this Agreement, have the option of either removing the sediment and organic materials now deposited in the Drain, or, of delegating this responsibility to the Authority. If Reclamation elects to remove the sediment during the term of this Agreement, Reclamation shall endeavor to conduct and coordinate such activities in a manner which will not unreasonably interfere with the Authority's use of the Drain. In any event, unless directed otherwise by Reclamation, the Authority shall be responsible for the management, removal and disposal, at its own and sole expense, of all sediment, organic materials and other substances accumulating in the Drain as a result of its use of the Drain pursuant to the First and subsequent use agreements. Any costs incurred by either Reclamation or the Authority for the management, removal and disposal of the sediment and other materials in the Drain shall be apportioned between Reclamation and the Authority on the basis of the total volume of materials and the total concentration of contaminants in those materials in the Drain attributable to each Party's use of the Drain.

E. **Water Conservation Programs.** All Draining Parties discharging into the Drain pursuant to this Agreement that are subject to Federal Reclamation law shall be implementing an effective water conservation and efficiency program based on that Draining Party's water management plan that has been determined by Reclamation to meet the conservation and efficiency criteria for evaluating such plans established under Federal law.

F. **Environmental Commitments:**

1. **Operational Commitments.** The Authority commits to the following:

(a) **Spill Prevention.** The structure in the Drain at Check 19 has been modified to prevent drainage waters from flowing southerly and to provide a mechanism to allow any groundwater that has seeped into the Drain south of Check 19 to be discharged downstream as necessary to prevent overtopping. The Drain will continue to be operated and maintained to prevent drainage water from flowing south of Check 19 and to allow groundwater from south of Check 19 to spill into the Drain as necessary to prevent overtopping.

(b) **Downstream Users Notification.** The Authority will make flow and monitoring data available to downstream users that have requested it. The Authority will provide advance notice to such users of operations that may cause sudden changes in flow or quality and will develop procedures to coordinate with such users on such operations. The Authority will work cooperatively with downstream users regarding the timing of discharges and establish procedures that will ensure advance notice to, and coordination with, downstream diverters of upcoming releases.

(c) Regional Archeology. Any proposed construction areas will be evaluated and cleared by Reclamation's Regional Archeologist. If, during construction, subsurface or previously unidentified archeological resources are encountered, activities will immediately be halted, and the Regional Archeologist notified. Appropriate clearance will be obtained prior to resumption of work.

(d) Protection of China Island. The Authority coordinated with the California Department of Fish and Wildlife (CDFW) under the 2009 and prior Use Agreements. The Authority entered into a MOU with CDFW relating to use of Mud Slough (North) within the boundaries of the China Island Wildlife Area. The Authority is coordinating with CDFW to comply with said MOU.

(e) Public Health Protections in Mud Slough. In the event Reclamation or the Authority receive notification from appropriate local, State or Federal authorities that a potential public health risk exists in Mud Slough or the San Joaquin River associated with Storm Water Flows discharged into the Drain from the Drainage Area, the respective party will notify resource management agencies in the affected area. Reclamation and the Authority will, in collaboration with such resource management agencies, jointly develop and implement a program to protect public health that is acceptable to those agencies. All costs of developing and implementing said program to protect public health will be borne by the Authority.

(f) Sediment. Selenium already contained in sediments in the Drain is a source of concern because flows may suspend and transport sediments; selenium may migrate into the water column; and sediments may act as a sink, and selenium may concentrate into sediment. Under normal operations, flows will be slow enough to not cause sediment movement. Monitoring activities will detect any movements or selenium migration. In the event that selenium in sediments migrates into the water column, such selenium will be measured as part of the monitoring program which will, among other things, measure selenium levels in Mud Slough downstream of the Drain (Site D). Sediments will be removed well before composite concentrations indicate hazardous material values.

## 2. Water Quality Assurances.

(a) Water quality regulations are part of the Basin Plan for the San Joaquin River watershed. Discharges under this Agreement will be subject to the requirements of the Basin Plan and waste discharge requirements issued by the Regional Board.

(b) Selenium Water Quality Objectives in Mud Slough (North) and the San Joaquin River from the Mud Slough Confluence to the Merced River are 5 µg/L (4-day average). In an effort to help determine if better water quality can be achieved in these waterbodies, the Draining Parties agree to make good faith efforts towards achieving the Selenium Goals.

(c) The Draining Parties intend to continue to manage salinity in storm water discharges in a manner similar to the way they have managed salinity during implementation of the 2010 Use Agreement and to implement additional tools outlined in the Long-Term Storm Water Management Plan. The Draining Parties also will comply with the Salt Control Program in the Sacramento/San Joaquin Basin Plan. The Draining Parties agree to make good faith efforts towards achieving the Salt Goal.

(d) Data collected in accordance with Section IV of this agreement will be used to determine the extent to which the Selenium Goals and the Salt Goal have been achieved and the results will be reported annually. If the Selenium Goals or the Salt Goal are not achieved and excursions above these goals are high in frequency, duration or magnitude, the Draining Parties will work cooperatively with Reclamation to help determine if additional reasonable management actions, consistent with the project objectives of the Draining Parties' Long-Term Storm Water Management Plan (as described on page 1-3 of the Initial Study), can be taken to achieve the goal. The Selenium Goals and the Salt Goal do not create any obligation on the part of Reclamation or the Draining Parties to achieve the goals.

3. Environmental Assessment. The Authority will implement all commitments applicable to the Authority contained in the Environmental Assessment relating to this Agreement, including but not limited to implementing all environmental, reporting, and/or monitoring requirements imposed by the National Marine Fisheries Service and the U.S. Fish and Wildlife Service.

#### **IV. MONITORING AND REPORTING**

A. The Authority shall be responsible for implementing a comprehensive monitoring program that meets the following objectives:

1. To provide water quality data for purposes of determining the Draining Parties' compliance with water quality objectives under the WDRs issued for this Agreement;
2. To provide data on sediment levels, distribution, and selenium content; and
3. To provide any additional data as required by local, State, and Federal law.

B. The Authority shall be responsible for implementing this monitoring program; provided that, nothing contained in this Agreement is intended to extend monitoring requirements downstream of Crows Landing ("Site N") on the San Joaquin River.

C. The Authority is responsible for complying with any local, State, and Federal reporting requirements associated with this Agreement.

D. A list of the relevant monitoring program components, which may evolve over time without amendment of this Agreement being required, consistent with the requirements of the WDRs, are shown in Appendix C. The Authority in coordination with Reclamation shall prepare an annual monitoring report on a timeline and containing the elements required by the WDRs and any other report(s) required for environmental compliance.

## **V. CONSTRUCTION, OPERATION AND MAINTENANCE**

A. The Authority shall be responsible for the construction, installation, operation, maintenance, and ultimate removal, if such removal is required by Reclamation, of any new facilities necessary for the Authority's use of the Drain; for the operation and maintenance of all existing features of the Drain; for the repair of any damage to the Drain arising out of its use of the Drain; and for the restoration of any land requiring restoration as a result of the Authority's use of the Drain.

B. The Authority shall furnish to Reclamation for approval the plans and specifications for all facilities or structures that are to be constructed on land owned by the United States. The Authority shall not commence construction or installation of any such facility prior to submitting the plans and specifications to Reclamation for review and obtaining written approval, which approval shall not unreasonably be withheld.

C. Reclamation shall promptly furnish to the Authority copies of documents, drawings, and other records available to Reclamation which are appropriate or necessary for the Authority's use of the Drain in accordance with this Agreement, as requested by the Authority in writing. The Authority shall revise such drawings to reflect new facilities and any modifications to existing facilities installed by the Authority and shall promptly furnish a copy of each revised drawing to Reclamation.

D. The Draining Parties shall be responsible to the Authority for payment of all operation and maintenance, administration, and construction costs arising from performance by the Authority pursuant to this Agreement, provided, that payment for baseline operation and maintenance and administration costs incurred by the Authority for the Drain pursuant to the Transfer Agreement shall be budgeted, and repayment responsibility shall be allocated, in accordance with the terms of the Transfer Agreement without regard to this Agreement.

## **VI. TERM AND TERMINATION**

A. Term. This Agreement shall become effective on July 1, 2020 and shall remain in effect through December 31, 2029.

B. This Agreement will terminate, and all rights of the Authority hereunder will cease, and the Authority will quietly deliver to the United States possession of the premises in like condition as when taken, reasonable wear and damage by the elements excepted:

1. At the expiration of either term as provided by Article VI.A; or
2. Upon occurrence of any of the specific bases for termination described in Section C of this Article VI.

C. Specific Bases for Termination.

1. Revocation by the United States. Subject to any contrary terms of the Transfer Agreement, this Agreement may be revoked by Reclamation upon sixty (60) days' written notice to the Authority if:

(a) The Authority's use of the land interferes with existing or proposed facilities; or

(b) The land contained in this Agreement is needed for any United States purpose; or

(c) The United States disposes of its interest in the land contained in this Agreement after consultation with the Authority; or

(d) Except as more specifically set forth in this Article VI, the Authority fails to comply with any other terms or conditions of this Agreement, and, upon notification of the violation, the Authority fails to adequately cure the violation in a timely manner. Reclamation will have the final determination regarding the adequacy of the cure.

2. Termination by Prohibition of Discharge. This Agreement shall terminate immediately upon any final order or action by the California State Water Resources Control Board, Regional Board, United States' Environmental Protection Agency, or any other Federal, State, or local government entity with jurisdiction over the discharge of Storm Water Flows contemplated by this Agreement that prohibits the discharge of Storm Water Flows by the Authority into the San Luis Drain, Mud Slough, or the San Joaquin River.

3. Termination for Cause Upon Annual Review. Reclamation shall review this Agreement at least annually for compliance with its terms and conditions and, except as otherwise set forth herein, may be subject to termination upon a finding that the Authority failed to comply with any of the terms or conditions of this Agreement. Reclamation shall notify the Authority of its determination and provide the Authority an adequate opportunity to refute this determination and/or to correct the non-compliance within sixty (60) days. If, in Reclamation's judgment, the Authority fails to provide sufficient evidence refuting Reclamation's determination, Reclamation may terminate this Agreement.

4. Termination after Notice of Continuing Noncompliance. Except as

otherwise set forth herein, Reclamation may terminate this Agreement upon failure of the Authority or a Draining Party to comply with any of the terms, conditions, and limitations of this Agreement, if such noncompliance is continuing sixty (60) days after written notice to the Authority of such noncompliance. The requirement of continuing noncompliance for sixty (60) days after written notice does not apply to violation of terms, conditions, and limitations of this Agreement, where such provisions state requirements that, if violated, cannot be cured by subsequent Authority action.

5. Termination for Resumption of Discharge to Wetland Channels. The parties agree that a critical purpose of this Agreement is the removal of storm water from the channels utilized to provide water to wetland habitat in the Grassland Water District and State and Federal wildlife refuges. In the event that the Draining Parties commence Storm Water discharges into those channels that are not the result of unmanageably high Storm Water Flows, as described in the Long-Term Storm Water Management Plan, Reclamation, after consulting with Grassland Water District and local representatives of the CDFW and the U.S. Fish and Wildlife Service, shall review the impact of such resumed discharge and shall recommend appropriate remedies, up to and including termination of this Agreement. In making its evaluation, Reclamation shall give special consideration to the existence of exceedances of water quality objectives in the channels and to the probable causes of such exceedances; provided, however, discharges into wetland channels pursuant to the 1997 Storm Event Plan for operating the Grassland Bypass Project shall not trigger the provisions of this Section.

6. Termination by the Authority. This Agreement may be terminated by the Authority upon thirty (30) days' written notice to Reclamation.

## **VII. AMENDMENT**

A. This Agreement may be amended only by a writing executed by Reclamation and the Authority.

B. This Agreement may be amended to provide for assignment of the obligations and benefits accruing to the Authority hereunder to a separate joint powers authority representing the Members of the Grassland Basin Drainage Management Activity Agreement, but only in the event the Regional Board also approves transferring the Authority's obligations under WDRs to that same joint powers authority.

## **VIII. RESTORATION**

Upon termination of this Agreement, at the discretion of the United States, the Authority shall remove without delay, and at the expense of the Authority, all equipment and improvements and other facilities constructed or placed upon the Land, and shall restore said Land to as nearly

the same condition as existed prior to the issuance of this Agreement and repair any damage to the Drain arising out of its use of the Drain. In the event the Authority fails to remove all equipment, improvements or facilities within a reasonable time, not to exceed sixty (60) days, the United States may remove them and restore the land and repair the Drain at the expense of the Authority.

## **IX. MISCELLANEOUS**

A. The Authority's use of the Land shall be subject to existing valid rights to such Land held by third parties.

B. Reclamation, in its discretion, may, at any time during the Authority's use of the Drain under this Agreement, have access to, or make modifications to the Drain and issue such outgrants as easements, leases, licenses, permits, or title transfer south of Check 19, so long as such access, modifications or outgrants do not unreasonably interfere with the Authority's intended use of the Drain under this Agreement; specifically, during the Authority's use of the Drain under this Agreement, Reclamation will not use or authorize the use of the Drain in such a manner as to reduce the Authority's use of the Drain with an authorized maximum flow of 150 CFS of storm water.

C. The Authority shall continue to carry out the operation and maintenance obligations of the Authority described in the Transfer Agreement created pursuant to such agreement consistent with the guidelines provided by existing design operating criteria, standard operating procedures and/or manufacturer's technical memorandums, except that any terms of this Agreement providing more specific operation and maintenance responsibilities shall supersede the Transfer Agreement. The United States acknowledges and agrees that the provisions of this Agreement regarding the obligations of the Authority for the operation and maintenance of the Drain do not have the same definition of "OM&R" as included in the Transfer Agreement, were not intended to and do not limit the delegation of authority to charge and collect for the OM&R of the Project Works as such terms are defined, and such delegation is accorded, in Article 12 of the Transfer Agreement.

D. This Agreement shall not be construed to affect the positions of Reclamation nor of Authority nor any of the Draining Parties within the Drainage Area discharging into the Drain pursuant to this Agreement concerning the question of ultimate liability for costs initially funded by the United States in undertaking management actions with respect to the Drain, nor shall this Agreement affect the positions of the United States, the Authority nor any other Draining Party utilizing the Drain concerning any contractual or legal obligation of Reclamation to provide drainage service pursuant to the San Luis Act.

E. This Agreement does not constitute a contract or an amendment of a contract as described in Section 203(a) of the Reclamation Reform Act of 1982 and the implementing rules and regulations, nor does it constitute a new contract nor an amendment of a contract for the delivery of water from the Central Valley Project within the meaning of Sections 105 and 106 of Public Law 99-546 (100 Stat. 3050, et seq.), nor does this constitute an amendment of the Second Amended Contract for Exchange of Waters dated February 14, 1968, between the United States of

America and Central California Irrigation District, Columbia Canal Company, San Luis Canal Company and Firebaugh Canal Company.

F. The United States shall not be liable for any claims for damages, cleanup, or remedial actions arising from or attributed to discharges from the Drain by or on behalf of the Authority or the Draining Parties during the Authority's use of the Drain pursuant to the term of the First Use Agreement or this Agreement.

G. The United States, its agents, employees, licensees and permittees shall not be liable for any damages to the property of the Authority under this Agreement by reason of any act committed on the land, save and except any damages to said property caused by or resulting from the negligent or willful act or omission of the United States, its agents, employees, licensees and permittees to the extent provided by the Federal Tort Claims Act, 28 U.S.C. 2671 et seq.

H. The Authority hereby agrees to indemnify and hold harmless the United States, its employees, agents, and assigns from any and all direct treatment and clean-up costs, losses, damages, claims and liabilities related thereto arising from the Authority's, or anyone or all of the Draining Party's performance or nonperformance under this Agreement; provided, that Reclamation shall exercise care to prevent any harm to personal and real property in carrying out its rights and responsibilities under this Agreement, and shall cooperate to the extent authorized by law in the resolution of any claims pursuant to the Federal Tort Claims Act, 28 U.S.C. Section 2671 et seq., arising from these activities; provided further the Authority shall have no obligation under this Section IX.H to provide a defense to the United States, nor to indemnify it for legal fees or costs incurred in legal proceedings instituted against the United States relating to use of the Drain.

I. The Use Fee for this Agreement is hereby waived in accordance with 43 CFR Part 429, Subpart F, Section 429.26(a)(7).

J. Hazardous Materials.

1. The Authority may not allow contamination or pollution of Federal lands, waters or facilities and for which the Authority has the responsibility for care, operation, and maintenance by its employees or agents and shall take reasonable precautions to prevent such contamination or pollution by third parties. Substances causing contamination or pollution shall include but are not limited to hazardous materials, thermal pollution, refuse, garbage, sewage effluent, industrial waste, petroleum products, mine tailings, mineral salts, misused pesticides, pesticide containers, or any other pollutants.

2. The Authority shall comply with all applicable Federal, State, and local laws and regulations, and Reclamation policies and directives and standards, existing or hereafter enacted or promulgated, concerning any hazardous material that will be used, produced, transported, stored, or disposed of on or in Federal lands, waters or facilities.

3. "Hazardous material" means any substance, pollutant, or contaminant listed as hazardous under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. § 9601, et seq., and the regulations promulgated pursuant to that Act.

4. Upon discovery of any event which may or does result in contamination or pollution of Federal lands, waters or facilities, the Authority shall initiate any necessary emergency measures to protect health, safety and the environment and shall report such discovery and full details of the actions taken to the Contracting Officer. Reporting may be within a reasonable time period. A reasonable time period means within twenty-four (24) hours of the time of discovery if it is an emergency or by the first working day if it is a non-emergency. An emergency is any situation that requires immediate action to reduce or avoid endangering public health and safety or the environment.

5. Violation of any of the provisions of this Article, as determined by the Contracting Officer, may constitute grounds for termination of this contract. Such violations require immediate corrective action by the Authority and shall make the Authority liable for the cost of full and complete remediation and/or restoration of any Federal resources or facilities that are adversely affected as a result of the violation.

6. The Authority agrees to include the provisions contained in paragraphs (a) through (e) of this Article in any subcontract or third-party contract it may enter into pursuant to this contract.

7. Reclamation agrees to provide information necessary for the Authority using reasonable diligence, to comply with the provisions of this Article.

K. Nothing in this Agreement shall create any rights in favor of any person or entity that is not a signatory to this Agreement, save and except for rights created pursuant to the Grassland Basin Drainage Management Activity Agreement and any MOUs between the Authority and the Draining Parties within the Drainage Area.

L. The expenditure of any money or the performance of any obligation of Reclamation under this Agreement shall be contingent upon appropriation or allotment of funds. Absence of appropriation or allotment of funds shall not relieve the Authority from any obligation under this Agreement. No liability shall accrue to the Reclamation in case funds are not appropriated or allotted.

M. No member of or delegate to Congress, or official of the Authority shall benefit from this Agreement other than as a water user or landowner in the same manner as other water users or landowners in the Authority.

N. Each provision of this Use Agreement shall be interpreted in such a manner as to be valid under applicable law, but if any provision of this Use Agreement shall be deemed or determined by competent authority to be invalid or prohibited hereunder, such provision shall be ineffective and void only to the extent of such invalidity or prohibition, but shall not be deemed ineffective or invalid as to the remainder of such provision or any other remaining provisions, or of the Use Agreement as a whole.

O. The terms and conditions in Sections III.D and F; V.D; VIII; and IX.D through H, K and L of this Agreement shall survive the use of the Drain and/or completion of the performance under this Agreement by the Authority and the Draining Parties and the termination of this Agreement for any cause.

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**THE UNITED STATES OF AMERICA**

DATED: \_\_\_\_\_

By \_\_\_\_\_  
Michael P. Jackson  
Area Manager,  
South-Central California Area Office  
Interior Region 10 - California Great Basin,  
Bureau of Reclamation

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

DATED: \_\_\_\_\_

By \_\_\_\_\_  
Federico Barajas  
Executive Director  
San Luis & Delta-Mendota Water Authority

**APPENDIX "A" - Map of Project Location**

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Agreement for Use of the Drain: Appendix A Geographic Location

