

AGREEMENT FOR PAYMENT OF CONSTRUCTION COSTS FOR THE MID-CANAL STORAGE PROJECT, PHASE 2

This Agreement for Payment of Construction Costs for the Mid-Canal Storage Project is made by and between Coachella Valley Water District (CVWD) and The San Luis Rey River Indian Water Authority (Indian Water Authority), each herein referred to individually as a “Party” and collectively as the “Parties.”

RECITALS

- A. WHEREAS the Allocation Agreement was executed on October 10, 2003; and
- B. WHEREAS the Coachella Canal Lining Project (CCLP) was constructed, placed into service in 2007, and accepted and transferred to an Operation and Maintenance status by The United States of America Department of Interior, Bureau of Reclamation (Reclamation) in 2011; and
- C. WHEREAS the Mid-Canal Storage Project is designed to (1) remedy the concrete panel cracking occurring in the most vulnerable 4.9 -mile portion of the Coachella Canal (2) avoid creating risks to water supply reliability during panel repairs, and (3) provide approximately 728 acre-ft (AF) of storage to buffer flow variations caused by changes in supply and demand; and
- D. WHEREAS the Parties intend that water conserved from the Coachella Canal Lining Project as improved by the Mid-Canal Storage Project, Phase 2, will continue to be allocated pursuant to the Allocation Agreement, and that no change is being made to the provisions of the Allocation Agreement; and
- E. WHEREAS the Parties intend that the Allocation Agreement will continue to be in full force and effect for its term; and
- F. WHEREAS the Parties intend that nothing in this Agreement is intended to alter, abridge or affect any rights or obligations of the United States, The Metropolitan Water District of Southern California, CVWD, Imperial Irrigation District, San Diego County Water Authority (SDCWA), the La Jolla, Pala, Pauma, Rincon and San Pasqual Bands of Mission Indians, the Indian Water Authority, City of Escondido or Vista Irrigation District under the Allocation Agreement; and
- G. WHEREAS on January 24, 2022, CVWD and Reclamation entered into Agreement No. 21-XX-30-W0716 providing for the funding, from CVWD to Reclamation, of the costs incurred by Reclamation to perform a seepage analysis on the Mid-Canal Storage Project and report of the findings of the analysis, with the understanding that if the analysis and report found the Mid-Canal Storage Project would result in a reduction to the amount of the CCLP Conserved Water previously determined by Reclamation in accordance with

Title II and the Allocation Agreement, CVWD would either design the Mid-Canal Storage Project such that there is no reduction in the quantity of water so that the parties to the Allocation Agreement are not harmed, or not pursue the Mid-Canal Storage Project; and

- H. WHEREAS Reclamation completed the seepage analysis on the Mid-Canal Storage Project and produced a report entitled “Coachella Canal Mid-Canal Storage Project – Seepage Analysis,” dated April 2022, which anticipates the Mid-Canal Storage Project will not result in an increase in seepage and therefore no reduction to the amount of the CCLP Conserved Water; and
- I. WHEREAS on May 19, 2022, CVWD and Reclamation entered into an Agreement No. 21-XX-30-W0722 providing for the funding of environmental compliance and review and oversight of design and construction of the Mid-Canal Storage Project and also establishing that it is the intent of CVWD and Reclamation that an amount of water equivalent to the amount of water conserved by the Mid-Canal Storage Project, as determined by the Secretary of the Interior, will be delivered by the Secretary of the Interior as provided in the Allocation Agreement and the Colorado River Water Delivery Agreement; and
- J. WHEREAS the Parties and SDCWA entered into an Agreement for Cost-Sharing Activities related to Design and Environmental Review of the Potential Mid-Canal Storage Project, Phase 1 (“The Phase 1 Agreement”), dated September 29, 2021, and agreed to fund the design and environmental review for the Mid-Canal Storage Project, Phase 1; and
- K. WHEREAS CVWD has completed the design of the Mid-Canal Storage Project and all required environmental review under the California Environmental Quality Act; and
- L. WHEREAS there are no permitting requirements for the Mid-Canal Storage Project as contemplated in The Phase 1 Agreement; and
- M. WHEREAS the Parties and SDCWA now intend to proceed with the Construction of the Mid-Canal Storage Project and CVWD and the Indian Water Authority desire to allocate their proportionate, respective shares of the costs of construction as set forth in this Agreement; and
- N. WHEREAS CVWD will concurrently with execution of this Agreement enter into the Contract Between The United States of America Department of Interior, Bureau of Reclamation for the Repayment of Extraordinary Maintenance Costs for the Mid-Canal Storage Project attached as Exhibit 1 hereto under which the United States will provide CVWD with funds up to \$7,500,000.00 for the anticipated cost of the Mid-Canal Storage Project, Phase 2 pursuant to that repayment contract; and CVWD and SDCWA will

concurrently with the execution of this Agreement enter into an agreement to allocate between them their proportionate shares of the cost of construction as set forth therein;

- O. WHEREAS the Parties desire to enter into this Agreement to provide for payment by the Indian Water Authority to CVWD of the Indian Water Authority's share of the construction costs, which funds will be used by CVWD to provide for the repayment to the United States of the funds advanced under the Repayment Contract and payment of any other costs related to the construction of the Mid-Canal Storage Project on the Coachella Canal between Siphons 11 and 14, that may exceed the funds advanced by the United States.

AGREEMENT

NOW, THEREFORE, in consideration of the mutual covenants and conditions contained herein, the Parties hereby agree as follows:

1. Recitals. CVWD and the Indian Water Authority agree that the above-stated Recitals are true and correct. The Recitals are incorporated herein and made an operative part of this Agreement.

2. Definitions

2.1 Incorporated Definitions. Except as otherwise provided herein, the terms with initial capital letters that are used in this Agreement shall have the same meaning as set forth in Article 3 of the Allocation Agreement, and the Word Usage and Rules of Construction of section 3.62 of the Allocation Agreement are incorporated herein by reference.

2.2 Additional Definitions. As used in this Agreement, in addition to the defined terms in the Allocation Agreement, the following terms shall have the meanings set forth below:

2.2.1 "Allocation Agreement" shall mean the Agreement dated October 10, 2003, among the Secretary and the other parties thereto, concerning the allocation of Conserved Water created as a result of the lining of the All-American Canal and the Coachella Canal, with such changes to such agreement as may be from time to time agreed upon in writing in accordance with such agreement.

2.2.2 "Construction Costs" shall mean all costs incurred by CVWD in construction of the Mid-Canal Storage Project.

2.2.3 "Mid-Canal Storage Project" shall mean removal of the concrete lining between Siphons 11 and 14 of the Coachella Canal, replacement of the lining in portions of that section with a clay lining, and widening of the Coachella Canal prism between Siphons 11 and 14 for inline water storage to provide operational flexibility.

2.2.4 "Repayment Contract" shall refer to the Contract Between The United States of America Department of Interior, Bureau of Reclamation and the Coachella Valley Water

District for the Repayment of Extraordinary Maintenance Costs for the Mid-Coachella Canal Storage Project, Contract No. 22-XX-30-WO735 attached as Exhibit 1 hereto, as revised by the Contracting Officer from time to time.

2.2.5 “Repayment Obligation” shall mean the entire sum of funds disbursed by the United States to CVWD plus accrued interest, all as determined by the Contracting Officer in accordance with the Repayment Contract.

3. Cost Sharing of Net Additional Operational, Maintenance and Replacement Costs. As set forth in Recital E, CVWD and the Indian Water Authority agree to continue the allocation of Net Additional OM&R Costs to be determined and allocated pursuant to the Allocation Agreement and that no change is being made to the provisions of the Allocation Agreement which will continue to be in full force and effect;
4. Project Responsibility. CVWD will act as the lead in all respects for the Mid-Canal Storage Project, and has the responsibility for design, permitting (if necessary,), insurance and construction. In consultation with the other Parties, CVWD will be responsible for hiring the contractor and any necessary consultants for the construction of the Project. Any contractor or consultant engaged by CVWD will not be a party to this Agreement and will not be an employee or agent of CVWD or the Indian Water Authority, either as a result of this Agreement or as a result of a professional services agreement between CVWD and the contractor or consultant. Any contractor or consultant engaged as contemplated in this agreement will be an independent contractor to CVWD.

CVWD will provide key information to the Indian Water Authority on an agreed-on basis. All documents related to the contractor and their work shall be open and available for inspection and copying by any of the Parties upon reasonable notice to CVWD. CVWD will provide monthly financial summary reports of expenditure to the Indian Water Authority specifying the work being done on the Mid-Canal Storage Project. CVWD will consult with the Indian Water Authority to ensure that key information is being communicated. The Indian Water Authority shall be invited to participate in the Mid-Canal Storage Project related meetings, including those with the United States.

5. Changes to the Construction Contract. In the event of changes to the construction contract for the Mid-Canal Storage Project, CVWD may need to issue change orders to the construction contract that are consistent with the contract documents and within the scope of the Project specifications. CVWD may issue change orders on Indian Water Authority’s behalf as long as the change orders do not exceed the Indian Water Authority’s overall share of the project cost, as described in Section 6, and complies with Section 5.1. CVWD shall document all change orders and promptly furnish an executed copy of each change order to the Indian Water Authority. If a change order request results in the Construction Cost exceeding the Indian Water Authority’s share of the project cost as described in Section 6,

then CVWD shall request the Indian Water Authority's written approval prior to issuing the change order to the contractor. The Indian Water Authority shall not unreasonably withhold its consent.

5.1. Change Order Approvals. For change orders exceeding \$100,000, CVWD will provide to the Indian Water Authority for review and approval. Upon receiving the change order request, the Indian Water Authority shall have 10 business days to approve. If no response is received by CVWD from the Indian Water Authority within 10 business days, the change order shall be deemed approved by the Indian Water Authority, and CVWD shall proceed with the change order in accordance with the cost share provisions in Section 6 and 6.1. CVWD may proceed at its own risk without approval of the Indian Water Authority within the 10 business day approval period.

6. Payment of Construction Costs. The estimated cost of the Mid-Canal Storage Project, Phase 2 is \$7.5 million. The Indian Water Authority shall pay CVWD 13% of the total Construction Cost, not to exceed \$975,000, in three installment payments as set forth in Section 6.1. CVWD shall pay 26% of the total Construction Cost, not to exceed \$1,950,000, and it is anticipated that SDCWA will pay 61% of the total Construction Cost, not to exceed \$4,575,000. It is anticipated that CVWD and SDCWA shall use proceeds from the federal loan for their share of the Construction Cost in accordance with a separate funding agreement between those agencies.

If, upon receipt of construction bids for the Project, the Construction Cost for the Project exceeds the estimated cost of \$7.5 million, then CVWD shall request written approval from the Indian Water Authority to increase the Indian Water Authority's "not to exceed" estimated share of its Construction Cost based on the updated, actual Project Construction Cost prior to commencing the Project.

6.1 Installment Payments by the Indian Water Authority. The Indian Water Authority shall pay its obligations in three installments. CVWD shall update the "not to exceed" agreed upon estimated Construction Cost at the beginning of the project based on the construction bids. In accordance with Section 6, Payment of Construction Costs, CVWD will invoice the Indian Water Authority for one-third of that agreed upon estimated Construction Cost amount at the beginning of construction. CVWD will invoice the Indian Water Authority for one-third of that agreed upon estimated Construction Cost amount when 50% of construction has been completed. After completion of construction and acceptance of the work by CVWD, CVWD will invoice the Indian Water Authority for the balance of its share of the actual agreed upon Construction Cost. The Indian Water Authority shall pay the amounts of the invoices received within 30 days of receipt of its respective invoice. In the event that any payment is delinquent, an additional charge equal to one percent of such delinquent payment for each month shall be assessed, and the Party shall pay such charge in addition to the amount of such delinquent payment. Invoices for delinquencies including additional charges shall be mailed no later than the tenth day following the Due Day.

6.2. Payment of Construction Costs in Dispute. If the Indian Water Authority disputes an amount in an invoice, it shall give notice to CVWD of the disputed amount and shall pay within 30 days of receipt of the invoice, the undisputed amount and 50% of the disputed amount. The determination of the propriety of the disputed amount shall be subject to the provisions of Article 10 of this Agreement.

7. Term of Agreement – This Agreement shall become effective upon the execution of this Agreement by both parties hereto and shall continue in force until all Construction Costs have been paid as obligated herein.

8. Assumption of Risk. CVWD agrees to bear the risk through a reduction in the amount of Colorado River water delivered to CVWD if the quantity of water conserved by the CCLP decreases based on the United States Secretary of the Interior's determination upon Project completion. CVWD further agrees, upon a determination of a decrease in the quantity of conserved water, to memorialize the modified water delivery obligation to CVWD in a new or amended contract and/or agreement with the United States Secretary of the Interior.

9. Accounting, Audit and Limitation on Use of Funds

9.1 Audit of Construction Costs. CVWD shall keep separate records of such funds and expenditures thereof for the Construction Costs associated with the Mid-Canal Storage Project in accordance with generally accepted accounting practices and such records shall be open for inspection by the Parties

9.2 Limitation of Use of Funds. Funds provided by the Indian Water Authority under this Agreement shall not be used by CVWD for any purpose other than paying the Repayment Obligation and Construction Costs.

10. Dispute Resolution

10.1 Informal Resolution. CVWD and the Indian Water Authority shall attempt to resolve any dispute relating to this Agreement through a meeting of the parties. A party requesting resolution of a dispute shall send written notice to the other party, which shall set forth in detail the position of the party requesting resolution. Within 30 days of the notice being sent, the General Manager of CVWD and the Chief Executive Officer of the Indian Water Authority, or each of their respective authorized representatives, shall meet and attempt to resolve the dispute. Any resolution shall be in writing and be binding on the parties. To the extent the dispute is not resolved by the parties' representatives within 40 days of the conclusion of the dispute resolution meeting, the parties shall try in good faith to settle the dispute in accordance with Section 10.2 herein before resorting to litigation.

10.2 Mediation. To the extent any dispute is not resolved by a meeting or, following the meeting, by written communications among the parties' representatives in accordance with Section 10.1 herein, the parties shall try in good faith to settle the dispute by mediation under the Commercial Mediation Rules of the American Arbitration Association, each party to bear its own fees and costs.

10.3 Arbitration. If the above resolution procedures do not resolve the issues, then any dispute involving this Agreement shall be submitted to binding arbitration under the Commercial Arbitration Rules of the American Arbitration Association (AAA), with each party to bear its own fees and costs. However, the costs of the arbitrator and AAA shall be allocated to the Parties on the same percentages as the Estimated Costs. The Arbitration shall be limited to the consideration and resolution of the issue(s) submitted. The arbitrator shall not rewrite, change, or amend this Agreement, nor shall the arbitrator change or amend in any way the Allocation Agreement.

10.4 Judicial Remedies Not Foreclosed. Except as provided in Section 10 of this Agreement nothing herein shall be construed (1) as depriving any party from pursuing and prosecuting any remedy in any appropriate court of the United States or State which would otherwise be available to such Party, or (2) as depriving any party of any defense thereto which would otherwise be available.

11. Representations and Warranties

11.1 Legal Power and Authority. Each party warrants that it has the authority to enter into this Agreement and to perform its obligations hereunder and that the person executing this Agreement on behalf of that party has the authority to do so.

11.2 Valid and Binding Agreement. This Agreement constitutes a valid and binding agreement of each party, enforceable against each party in accordance with its terms. This Agreement may be signed by electronic means, and such signatures or copies thereof shall be considered originals.

12. Applicable Law -This Agreement shall be interpreted, governed by and construed under the Laws of the State and applicable Federal law, including Public Law 100-675 as amended. In case of conflict between Federal and State law, Federal law controls.

13. Notices

13.1 Forms of Notices and Addresses for Notice. All notices, requests, demands, or other communications under this Allocation Agreement must be in writing and sent to the addresses of each entity or party set forth below. Notice will be sufficiently given for all purpose as follows:

Personal Delivery. When personally delivered to the recipient. Notice is effective on delivery.

Certified Mail. When mailed certified mail, return receipt requested. Notice is effective on receipt, if a return receipt confirms delivery.

Overnight Delivery. When delivered by an overnight delivery service such as Federal Express, charges prepaid or charged to the sender's account, Notice is effective on delivery, if delivery is confirmed by the delivery service.

Facsimile Transmission. Notice is effective on receipt, provided that the facsimile machine provides the sender a notice that indicates the transmission was successful, and that a copy is mailed by first-class mail on the facsimile transmission date.

If to CVWD:

By personal service or overnight delivery:

Coachella Valley Water District
Attention: General Manager
75-515 Hovley Lane
Palm Desert, CA 92211

By U.S. mail:

P. O. Box 1058
Coachella, CA 92236

If to San Luis Rey River
Indian Water Authority:

San Luis Rey River Indian Water Authority
Attention: Chief Executive Officer
P O Box 428
Pauma Valley, CA 92061

13.2 Refused, Unclaimed or Undeliverable Notices. A correctly addressed notice that is refused, unclaimed, or undeliverable because of an act or omission by the Party to be notified will be deemed effective as of the first date that notice was refused, unclaimed, or deemed undeliverable by the postal authorities, messenger, or overnight delivery service.

13.3 Change of Address. Any party or entity may change its address for notice by written notice given to the other in the manner provided in Section 13.1 herein.

13.4 Signatures. This Agreement may be signed via original, facsimile, or e-mailed signatures, each of which shall be construed as an original.

Coachella Valley Water District

Date: _____

By: _____
J.M. Barrett, General Manager

The San Luis Rey River Indian
Water Authority

Date: _____

By: _____
Bo Mazzetti, President of the Board of
Directors