

**CONSTRUCTION AND PERMITTING AGREEMENT FOR PHASE 2 OF THE MID-CANAL STORAGE PROJECT, AND AGREEMENT FOR PAYMENT OF CONSTRUCTION COSTS AND REPAYMENT OBLIGATION TO THE UNITED STATES**

This Construction And Permitting Agreement For Phase 2 Of The Mid-Canal Storage Project, And Agreement For Payment Of Construction Costs And Repayment Obligation To The United States (the “Phase 2 Agreement”), is made by and between the Coachella Valley Water District (CVWD) and San Diego County Water Authority (SDCWA), 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 or volumes of the Allocation Agreement; and
- E. WHEREAS the Parties intend that the determination and allocation of Net Additional OM&R Costs with respect to the completed Mid-Canal Storage Project will be determined and allocated pursuant to the Allocation Agreement, and that no change is being made to the provisions of Articles 13, 14 and 15 of the Allocation Agreement; and
- F. WHEREAS the Parties intend that the Allocation Agreement will continue to be in full force and effect for its term; and
- G. 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, SDCWA, the La Jolla, Pala, Pauma, Rincon and San Pasqual Bands of Mission Indians, San Luis Rey River Indian Water Authority (SLRRIWA), City of Escondido or Vista Irrigation District under the Allocation Agreement; and

- H. 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, Phase 2; and
- I. 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 construction of the Mid-Canal Storage Project, Phase 2 will not result in an increase in seepage and therefore no reduction is anticipated to the amount of the CCLP Conserved Water that each Party receives; and
- J. 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
- K. WHEREAS CVWD, SDCWA, and SLRRIWA 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
- L. WHEREAS the Parties have completed the design and all required environmental review under the California Environmental Quality Act; and
- M. WHEREAS CVWD represents that there are no permitting requirements for the Mid-Canal Storage Project, Phase 2, as contemplated in The Phase 1 Agreement; and
- N. WHEREAS the Parties now intend to proceed with the Construction of the Mid-Canal Storage Project, Phase 2, and to allocate the costs of construction as set forth in this Agreement; and

- O. WHEREAS CVWD will concurrently with the execution of this Agreement enter into an Agreement with the SLRRIWA that addresses the payment of construction costs for their portion of the Mid-Canal Storage Project, Phase 2 construction costs; and
- P. 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, on the Coachella Canal between Siphons 11 and 14 pursuant to that repayment contract; and
- Q. WHEREAS the Parties desire to enter into this Agreement 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, Phase 2, 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. The Parties 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, Phase 2.

2.2.3 “Mid-Canal Storage Project”, “Extraordinary Maintenance Project,” or “XM 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 CVWD for the Repayment of Extraordinary Maintenance Costs for the Mid-Coachella Canal Storage Project, Contract No. 22-XX-30-W0735 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 Repair Costs. As set forth in Recital E, the Parties 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 and they 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, Phase 2, and has the responsibility for design, permitting (if necessary), insurance, and construction. In consultation with SDCWA, CVWD will be responsible for hiring the contractor and any necessary consultants for the construction of the Project. Any consultant or contractor engaged by CVWD will not be a party to this Phase 2 Agreement and will not be an employee or agent of CVWD or SDCWA, either as a result of this Phase 2 Agreement or as a result of a professional services agreement between CVWD and the consultant or contractor. Any consultant or contractor engaged as contemplated in this agreement will be an independent contractor to CVWD.

CVWD will provide key information to the other Parties on an agreed-upon 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 expenditures to SDCWA specifying the work being done on the Mid-Canal Storage Project, Phase 2. CVWD will consult with SDCWA to ensure that key information is being communicated. SDCWA shall be invited to participate in the Mid-Canal Storage Project, Phase 2 related meetings, including those with the United States.

5. Loan Repayment Obligations and Percentages. The estimated cost of the Mid-Canal Storage Project, Phase 2 is \$7.5 million. SDCWA’s share is 61% of the total Construction Costs, not

to exceed \$4,575,000. CVWD's share is 26% of the total Construction Costs, not to exceed \$1,950,000. SLRRIWA's share is 13% of the total Construction Costs, not to exceed \$975,000. In accordance with the Funding Agreement, between CVWD and SLRRIWA, attached as Exhibit 2 hereto, SLRRIWA will provide their share of the Mid-Canal Storage, Phase 2 Project construction costs in three installments; first installment is at the beginning of the Project, second installment is at the midpoint of the Project and third installment is at the completion of the Project. The CVWD-SLRRIWA and CVWD-SDCWA agreements for the Mid-Canal Storage Project, Phase 2 are expressly conditioned on each agreement being fully executed and operative by the respective parties. Therefore, CVWD shall first apply the payment(s) from the SLRRIWA and the proceeds of the federal funds received under the Repayment Contract attached as Exhibit 1 hereto, to pay the costs of construction of the Mid-Canal Storage Project, Phase 2.

Following completion of the Mid-Canal Storage Project, Phase 2, the loan repayment obligations will begin. SDCWA shall pay to CVWD by April 15 of each year that a repayment is required under the Repayment Contract their respective percentage share of the amount listed as the scheduled payment for that year on Exhibit B of the Repayment Contract as finalized upon the Contracting Officer's issuance of written Substantial Completion Notice or as it may be subsequently revised by the Contracting Officer. 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 delinquent 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. The parties agree to pay the Repayment Obligation based on the following percentages: SDCWA – 61%, CVWD – 26%. The parties may jointly agree to make a prepayment of principal amount as permitted by Section 7.7 of the Repayment Contract.

- 5.1. Changes to the Construction Contract. In the event of a change to the construction contract for the Mid-Canal Storage Project, Phase 2, CVWD may need to issue change orders that are consistent with the contract documents and within the scope of the XM Project specifications. CVWD is approved to issue change orders it deems necessary so long as the change orders and the total Construction Costs do not exceed SDCWA's overall share of the project cost, as described in Section 5, and complies with Section 5.2. CVWD shall document all change orders and promptly furnish an executed copy of each change order to SDCWA. If a change order request would result in the Construction Costs exceeding SDCWA's share of the project cost as described in Section 6, then CVWD shall request SDCWA's written approval prior to issuing the change order to the contractor. If there are sufficient federal funds from the United States, then CVWD will use these funds to pay for the change orders to the Mid-Canal Storage Project, Phase 2 for the Parties share of the change order. SLRRIWA will be invoiced separately for their share of the change order cost as they are not participating in the repayment of the federal funds. If there are not sufficient federal funds, then CVWD shall request SDCWA's written approval prior to issuing the change order to the contractor in accordance with Section 6 and 6.1.

- 5.2. Change Order Approvals. For change orders exceeding \$100,000, CVWD will provide to SDCWA for review and approval, which approval will not be unreasonably withheld so long as the cumulative amount of the change orders do not increase SDCWA's overall payment of the Construction Costs by more than 10% of the original construction contract amount. Upon receiving the change order request, the SDCWA shall have 10 business days to approve. If no response is received by CVWD from SDCWA within 10 business days, the change order shall be deemed approved by SDCDWA, and CVWD shall proceed with the change order in accordance with the cost share provisions in Section 5 and Section 5.1. CVWD may proceed at its own expense without approval of SDCWA 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 and these costs will be paid based on the following percentages: SDCWA – 61% (or \$4,575,000), SLRRIWA – 13% (\$1,950,000), CVWD – 26% (\$1,950,000). If, upon receipt of construction bids for the Project, the Construction Costs for the Project exceed the estimated cost of \$7.5 million, then CVWD shall request written approval from SDCWA to increase the “not to exceed” share of their Construction Costs based on the updated, actual Project Construction Costs prior to commencing the Project. Subject to written approval being provided to CVWD by SDCWA, then the Construction Costs for the Project may exceed the estimated cost of \$7.5 million, and once the federal funds are exhausted during the construction of the Project, CVWD will invoice SDCWA monthly for their share of the remaining Construction Costs based upon CVWD's monthly contractor payment for the Mid-Canal Storage Project, Phase 2.
- 6.1. Payment. SDCWA 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 Costs in Dispute by a Party. If a Party 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 all of the parties and shall continue in force until the Repayment Obligation has been fully performed or discharged and all Construction Costs have been paid by the Parties as obligated herein.

8. Assumption of Risk and Indemnity for Adverse Determination. CVWD agrees to bear the risk of any reduction in the amount of Colorado River water conserved under the Allocation Agreement caused by the Mid-Canal Storage Project as determined by the United States Secretary of the Interior or any other agency or court of proper jurisdiction, and nothing related to this Project shall cause SDCWA to have any risk of such a reduction. Any resulting disputes between or among the parties to the Allocation Agreement over such a determination shall be resolved pursuant to the procedures specified in Section 17.4 of the Allocation Agreement. CVWD further agrees, upon a final determination by the Secretary or an agency or court having proper jurisdiction to determine or confirm any such reduction 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. Indemnification and Hold Harmless Agreement. CVWD agrees to the fullest extent permitted by law, to defend, indemnify and hold harmless SDCWA, its directors, officers and employees from any damage, liability, or loss, including reasonable attorneys' fees and defense costs, arising from the work that is the subject of this Agreement or related environmental review and compliance; however, this indemnity shall not apply to any acts, errors, or omissions attributable to the SDCWA or its subcontractors, or others for whom SDCWA is legally liable.
  - 9.1. Insurance. CVWD agrees to give SDCWA, its directors, officers, employees insured status (additional insured) under its construction contract that pertains to the project that is the subject of this Agreement.
  - 9.2. Third Parties. This Agreement does not create any third-party beneficiary or any rights in any person or party other than the Parties to this Agreement.
10. Accounting, Audit and Limitation on Use of Funds
  - 10.1. Audit of Costs. CVWD shall keep separate records of such funds and expenditures thereof for the Construction Costs associated with the Mid-Canal Storage Project, Phase 2, in accordance with generally accepted accounting practices and such records shall be open for inspection by the Parties.
  - 10.2. Limitation of Use of Funds. Funds provided by the SDCWA under this Agreement shall not be used by CVWD for any purpose other than paying the Repayment Obligation and Construction Costs.
11. Dispute Resolution
  - 11.1. Informal Resolution. The Parties 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 all other Parties, which shall set forth in detail the position of the Party requesting resolution. Within 30 days of the notice being sent to the General Manager of SDCWA or the General Manager of CVWD, or each of their respective authorized representatives, the Parties shall meet and attempt to resolve the dispute by a unanimous decision. In the event that all Parties' representatives are not present, a letter with the proposed action, signed by all the attending Parties' representatives, shall be sent to each absent Party's representative by certified mail, postage prepaid, return receipt requested. If no written protest from an absent Party's representative is sent to the other Parties within 30 days of the date of receipt of the letter with the proposed action, the decision shall be deemed unanimous and become final. Any written protest shall be mailed to each of the Party's representatives, and to each of the Parties by certified mail, postage prepaid, return receipt requested. Each Party shall bear its own expense for the dispute resolution process. 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 11.2 herein before resorting to litigation.

- 11.2. 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 11.1 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.
- 11.3. 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.
- 11.4. Judicial Remedies Not Foreclosed. Except as provided in Section 11 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.



## 12. Representations and Warranties

12.1. 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.

12.2. 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.

13. 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.

## 14. Notices

14.1. 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 SDCWA

San Diego County Water Authority  
Attention: General Manager  
4677 Overland Avenue  
San Diego, CA 92123

14.2 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.

14.3 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 14.1 herein.

14.4 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

San Diego County Water Authority

Date: \_\_\_\_\_

By: \_\_\_\_\_  
Sandra L. Kerl, General Manager