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5/22/13

CITY OF FRESNO
City Clerk's Office (Original)

AGREEMENT FOR TRANSFER AND EXCHANGE OF WATER

This Agreement for Transfer and Exchange of Water ("Agreement") is made and effective as of May 30, 2013 by and between (i) the City of Fresno, a California municipal corporation ("City"), (ii) Lower Tule River Irrigation District, a California irrigation district ("Lower Tule"), and (iii) the Tulare Lake Basin Water Storage District, a California water storage district ("Tulare") with reference to the following facts:

A. City has the right to receive Class 1 water from the Friant Division of the Central Valley Project ("CVP") under Contract No. 14-06-200-8901D ("City CVP Contract Water").

B. On or about September 13, 2006, a Stipulation of Settlement was entered in the litigation entitled Natural Resources Defense Council, et al. v. Kirk Rodgers, et al., United States District Court, Eastern District of California, No. CIV. S-88-1658-LKK/GGH ("SJ River Settlement").

C. In March 2009, the San Joaquin River Restoration Settlement Act (Public Law 111-11 (H.R. 146); "SJ River Restoration Act") was enacted as required by and as a mechanism to implement certain portions of the SJ River Settlement.

D. Together, the SJ River Settlement and the SJ River Restoration Act provide for certain environmental restoration activities along the main stem of the San Joaquin River, referred to as the "San Joaquin River Restoration Program" or the "Restoration Program". Pursuant to the Restoration Program, the United States Bureau of Reclamation ("Reclamation") periodically releases a portion of the Friant Division CVP water supplies, including those associated with the City CVP Contract, to supplement San Joaquin River flow ("Restoration Flows").

E. Also pursuant to the SJ River Settlement and the SJ River Restoration Act, a portion of the Restoration Flows are recaptured by Reclamation and made available to the Friant Division contractors, including the City, in the San Luis Reservoir (the "Recaptured Water"). Through Reclamation's implementation of the Restoration Program certain parties hold the right to certain "Recovered Water Account Credits" with Reclamation.

F. To fully promote the Restoration Program and this Agreement, the City wishes to transfer a portion of its City CVP Contract Water and receive a portion of Lower Tule's Recovered Water Account Credits.

G. Lower Tule has the right to receive both Class 1 and Class 2 water from the Friant Division of the Central Valley Project ("CVP") under Contract No. 175r-2771D ("Lower Tule CVP Contract").

H. Lower Tule has the right to receive Recaptured Water pursuant to its Lower Tule CVP Contract. Through Reclamation's implementation of the Restoration Program, Lower Tule holds the right to certain Recovered Water Account Credits with Reclamation.

I. Tulare holds a contract with the California Department of Water Resources, providing Tulare the right to receive water through the California State Water Project (“SWP”). Tulare also has a right to receive water from the Kings River pursuant to certain agreements with the Kings River Water Association and its member agencies (“Kings River Water”).

J. Recaptured Water is most easily accessible at the San Luis Reservoir. Tulare is geographically best located to access and obtain delivery of Recaptured Water from San Luis Reservoir.

K. The City intends to enter into an agreement with Fresno Irrigation District (“FID”), titled “Agreement for Transfer and Exchange of Water,” (“FID Agreement”) on or before June 15, 2013, pursuant to which FID shall agree to facilitate the implementation of certain aspects of this Agreement.

L. FID holds rights to receive Kings River Water and CVP Contract Water.

M. The City and FID are parties to the “Cooperative Agreement Between Fresno Irrigation District and City of Fresno for Water Utilization and Conveyance,” dated May 25, 1976 (“Cooperative Agreement”) that provides a mechanism for the City and FID to access CVP Contract Water and Kings River Water, along with access to certain conveyance facilities and other water supplies.

N. Water Year 2013 is a critical dry (drought) year. As a result, certain regional water users anticipate having insufficient supplies to meet their minimal water requirements in certain periods during Water Year 2013.

O. Through this Agreement and the transfer and exchange of the CVP Contract Water, Recaptured Water, Kings River Water, and Recovered Water Account Credits, the City, Tulare, Lower Tule and FID intend to improve the availability of water to each entity during critical periods of Water Year 2013.

THEREFORE, the parties agree as follows:

1. Water Transfers and Exchanges. The City, Lower Tule and Tulare shall coordinate their use of the CVP Water, Recaptured Water, Recovered Water Account Credits, and Kings River Water, and undertake all reasonable efforts necessary to complete the following transfers of water:

- a. 10,000 acre-feet (“AF”) of City CVP Contract Water shall be transferred by City and made available to Lower Tule River Irrigation District; and
- b. 5,000 AF of Recaptured Water shall be transferred by Lower Tule and made available to Tulare Lake Basin Water Storage District; and

- c. 5,000 AF of Kings River Water shall be transferred from Tulare Lake Basin Water Storage District to FID, to be made available to the City; and
- d. 5,000 AF of Recovered Water Account Credits shall be transferred from Lower Tule to the City.

2. Delivery of Water. The City, Lower Tule and Tulare shall: a) provide notice and confirm any needed authorization to Reclamation, the Department of Water Resources, and other entities necessary to facilitate the water transfers provided in this Agreement; and b) make available their conveyance facilities, or any portion thereof, to facilitate the water transfers provided in this Agreement in a manner consistent with the requirements of the recipient agencies.

3. Payment.

a. Lower Tule shall make payment to City of \$300,000 (three hundred thousand dollars; \$60 per AF times 5,000 AF) within 30 days of the Effective Date.

b. The City shall make timely payment to Reclamation for the 10,000 AF of CVP Contract Water subject to the transfer set forth in Section 1.a above. The City shall be responsible for these costs as though the City accepted delivery of that portion of its CVP Contract Water for use within FID or the City. Lower Tule shall be responsible for any and all additional costs that may be associated with transfer and delivery of this portion of the CVP Contract Water ("Additional Costs") to the actual points of delivery. To the extent the City pays Reclamation Additional Costs, the City shall provide an invoice to Lower Tule for such Additional Costs, and Lower Tule shall make payment to the City for such Additional Costs within 30 days of the date of the invoice.

c. Lower Tule shall be responsible for any and all costs associated with the transfers set forth in Sections 1.b, above, including the cost of Tulare taking delivery of the associated water from San Luis Reservoir to Tulare's service area. Lower Tule shall also be responsible for any and all costs, if any, associated with the transfer of Recovered Water Account Credits to the City.

d. The City shall be responsible for any and all costs associated with the transfer set forth in Sections 1.c above such that 5,000 AF of Kings River Water shall be made available to FID within Pine Flat Reservoir.

e. The parties acknowledge and agree that each entity will or have entered into separate agreements with all or some of the recipients of the water to be transferred as provided in this Agreement, pursuant to which the City, Lower Tule, or Tulare may receive additional consideration (financial and/or water exchange rights). The City, Lower Tule, and Tulare acknowledge and agree that no party has any right or claim to the other's additional consideration that is provided under a separate agreement with each or any entity not otherwise accounted for this Agreement.

4. Transfer Instructions and Conditions Precedent. To accomplish the water transfers provided in this Agreement the following shall be undertaken by the parties. This Agreement shall be effective ("Effective Date") on the date upon which Reclamation and the Department of Water Resources provide the necessary approvals as described below. If all the approvals necessary are not obtained or confirmed by close of business on June 15, 2013, this Agreement shall be null and void, unless the parties agree in writing to an extension:

- a. The City, Tulare and Lower Tule shall deliver to Reclamation, a Notice of Transfer in a form substantially similar to Attachment A, providing notice and request for approval of the transfers of City CVP Water, Recaptured Water and Recovered Water Account Credits, as provided herein.
- b. Tulare shall obtain any approvals and consents as may be reasonably required to take delivery of the Recaptured Water from San Luis Reservoir, as provided herein. Tulare shall confirm that it is capable of taking delivery of the Recaptured Water through the Department of Water Resources California Aqueduct into the Tulare service area.
- c. The City shall have entered into the FID Agreement and Tulare shall provide notice and obtain any necessary approvals to transfer to FID the Kings River Water, to be made available at Pine Flat Dam, as provided herein. Tulare and Lower Tule shall ensure that 3,000 AF of Kings River Water shall be made available to FID on or before August 15, 2013, and the remaining 2,000 AF on or before September 15, 2013.
- d. The parties shall obtain confirmation to Tulare's satisfaction that the water obtained by Tulare from San Luis Reservoir is not subject to federal Reclamation Law restrictions.

5. Counterparts. This Agreement may be executed in counterparts by the parties. Facsimile signatures shall be binding.

6. Entire Agreement. This Agreement constitutes the entire agreement between the parties with respect to the subject matter hereof. All prior agreements with respect to that subject matter, whether verbal or written, are hereby superseded in their entirety by this Agreement and are of no further force or effect. Amendments to this Agreement shall be effective only if in writing, and then only when signed by the authorized representatives of the respective parties.

7. Time of the Essence. Time is of the essence and the performance by the parties of this Agreement.

8. Specific Performance. The parties acknowledge that the water to be transferred and exchanged under this Agreement is unique, and that the failure to perform under this Agreement may not be readily compensable in monetary damages. Therefore, in addition to any

other remedies available at law or in equity, in the event of a breach or threatened breach of this Agreement, each party shall be entitled to specific performance of this Agreement.

9. Severability. If any provision of this Agreement is determined by a court of competent jurisdiction to be void or unenforceable, and that provision cannot be reformed to be enforceable consistent with the overall intent of this Agreement, the entire Agreement shall be void and unenforceable.

10. Ambiguities. This Agreement shall be interpreted as if it had been jointly drafted. Therefore, the normal rule of construction that ambiguities are construed against the drafter is hereby waived.

11. Notices. All notices under this Agreement shall be effective (i) when personally delivered, (ii) when sent by facsimile on a business day between the hours of 8 a.m. and 5 p.m. (with written confirmation of transmission), at the numbers set forth below, provided that a copy is mailed as indicated below, or (iii) three business days after deposit in the United States mail, registered or certified, postage fully prepaid and addressed to the respective parties as follows:

To City: Martin A. Querin, PE, Assistant Director of Public Utilities
City of Fresno, Department of Public Utilities
2600 Fresno Street
Fresno, CA 93721
Facsimile No.: (559) 488-1024
Telephone No.: (559) 621-8600

To Tulare: Mark Gilkey, Manager
Tulare Lake Basin Water Storage District
1001 Chase Avenue
Corcoran, CA 93212
Facsimile No.: (559)
Telephone No.: (559)

To Lower Tule: Dan Vink, General Manager
Lower Tule Irrigation District
357 E Olive Ave
Tipton, CA 93272
Facsimile No.: (559)
Telephone No.: (559) 686-4716

or such other address or facsimile number as the parties may from time to time designate in writing. As a matter of convenience, however, communications between the parties shall, to the extent feasible, be conducted orally by telephone or in person, and/or through the parties' respective counsel, with such communications to be confirmed and made effective in writing as set forth above provided no such oral notice or communication shall be effective unless so confirmed in writing.

16. Further Action. The parties agree to perform all further acts, and to execute, acknowledge, and deliver any documents that may be reasonably necessary, appropriate or desirable to carry out the purposes of this Agreement.

17. No Third Party Beneficiaries. This Agreement does not create, and shall not be construed to create, any rights enforceable by any person, partnership, corporation, joint venture, limited liability company or other form of organization or association of any kind that is not a party to this Agreement.

18. Environmental Compliance. The obligations of the parties under this Agreement are expressly conditioned upon: (i) compliance with the California Environmental Quality Act ("CEQA") and all other applicable environmental laws with respect to the actions contemplated by this Agreement, and (ii) the receipt of all necessary governmental and third party consents and approvals for those actions. Each party shall promptly prepare all appropriate environmental documents, if any are required, for it to undertake the actions contemplated in this Agreement. The parties shall cooperate to diligently complete all environmental review required in order to implement this Agreement, and shall use reasonable efforts to reduce any overlap in analyzing, mitigating, or studying environmental impacts associated with the actions proposed in this Agreement. Notwithstanding any other provision of this Agreement, no action shall be taken to effect the actions contemplated by this Agreement, and no other action shall be taken that commits any material resources of any party, until all required environmental review is completed and all parties have independently made all findings required by CEQA and other applicable environmental laws. If, upon completion of such environmental review, a party finds one or more significant, unmitigated environmental impacts resulting from the actions contemplated by this Agreement and cannot make a finding that the benefits of the proposed project outweigh the impact or impacts, or that the impacts can be mitigated to a level below significance, then this Agreement shall terminate without further obligation or liability of any party. Neither the execution of this Agreement, nor any preliminary steps taken to implement this Agreement, shall be taken into account in determining whether mitigating or avoiding any significant impact is feasible.

19. Attorneys' Fees. In the event of any action between the parties seeking enforcement or interpretation of any of the terms and conditions of this Agreement, the prevailing party in such action shall be awarded its reasonable costs and expenses, including, but not limited to, taxable costs and reasonable attorneys' fees.

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

The parties have executed this Agreement on the day and year first above written.

CITY OF FRESNO,
a California municipal corporation

LOWER TULE IRRIGATION DISTRICT
a California irrigation district

By: 
Patrick N. Wiemiller
Director of Public Utilities

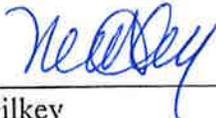
By: 
Dan Viik
General Manager

ATTEST:

**TULARE LAKE BASIN WATER
STORAGE DISTRICT**
a California water storage district

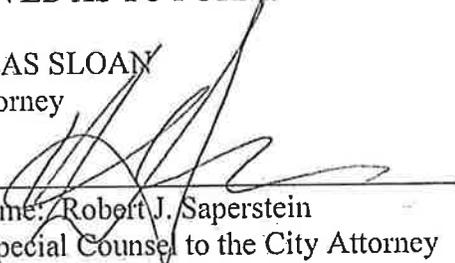
YVONNE SPENCE, CMC
City Clerk, City of Fresno

By:  Cindy Bauer 6/7/13
Deputy

By: 
Mark Gilkey
Manager

APPROVED AS TO FORM:

DOUGLAS SLOAN
City Attorney

By: 
Print Name: Robert J. Saperstein
Title: Special Counsel to the City Attorney
Date: May 30, 2013

ATTACHMENT A

NOTICE OF WATER TRANSFER 2013 WATER YEAR

THIS NOTICE OF WATER TRANSFER 2013 WATER YEAR ("Notice") is provided as of May 30, 2013, (i) the City of Fresno, a California municipal corporation ("City"), (ii) Lower Tule River Irrigation District, a California irrigation district ("Lower Tule"), and (iii) the Tulare Lake Basin Water Storage District, a California water storage district ("Tulare") with reference to the following facts:

A. City has the right to receive Class 1 water from the Friant Division of the Central Valley Project ("CVP") under Contract No. 14-06-200-8901D ("City CVP Contract Water").

B. On or about September 13, 2006, a Stipulation of Settlement was entered in the litigation entitled Natural Resources Defense Council, et al. v. Kirk Rodgers, et al., United States District Court, Eastern District of California, No. CIV. S-88-1658-LKK/GGH ("SJ River Settlement").

C. In March 2009, the San Joaquin River Restoration Settlement Act (Public Law 111-11 (H.R. 146); "SJ River Restoration Act") was enacted as required by and as a mechanism to implement certain portions of the SJ River Settlement.

D. Together, the SJ River Settlement and the SJ River Restoration Act provide for certain environmental restoration activities along the main stem of the San Joaquin River, referred to as the "San Joaquin River Restoration Program" or the "Restoration Program". Pursuant to the Restoration Program, the United States Bureau of Reclamation ("Reclamation") periodically releases a portion of the Friant Division CVP water supplies, including those associated with the City CVP Contract, to supplement San Joaquin River flow ("Restoration Flows").

E. Also pursuant to the SJ River Settlement and the SJ River Restoration Act, a portion of the Restoration Flows are recaptured by Reclamation and made available to the Friant Division contractors, including the City, in the San Luis Reservoir (the "Recaptured Water"). Through Reclamation's implementation of the Restoration Program certain parties hold the right to certain "Recovered Water Account Credits" with Reclamation.

F. To fully promote the Restoration Program and this Agreement, the City wishes to transfer a portion of the City CVP Contract Water and receive a portion of Lower Tule's Recovered Water Account Credits.

G. Lower Tule has the right to receive both Class 1 and Class 2 water from the Friant Division of the CVP under Contract No. I75r-2771D ("Lower Tule CVP Contract").

H. Lower Tule has the right to receive Recaptured Water pursuant to its Lower Tule CVP Contract. Through Reclamation's implementation of the Restoration Program, Lower Tule holds the right to certain Recovered Water Account Credits with Reclamation.

I. Tulare holds a contract with the California Department of Water Resources, providing Tulare the right to receive water through the California State Water Project ("SWP"). Tulare also

has a right to receive water from the Kings River pursuant to certain agreements with the Kings River Water Association and its member agencies ("Kings River Water").

J. Recaptured Water is most easily accessible at the San Luis Reservoir. Tulare is geographically best located to access and obtain delivery of Recaptured Water from San Luis Reservoir.

K. Water Year 2013 is a critical dry (drought) year. As a result, certain regional water users anticipate having insufficient supplies to meet their minimal water requirements in certain periods during Water Year 2013.

THEREFORE, subject to Reclamation's approval, the Parties intend to effectuate the following transfers of City CVP Contract Water, Recaptured Water and Recovered Water Account Credits:

1. To Lower Tule Irrigation District:

- a. The City does hereby transfer to Lower Tule 10,000 AF of the City CVP Contract Water allocated to the City by Reclamation, for use by Lower Tule in the 2013 water year pursuant to the schedule attached hereto as Exhibit 1.
- b. The City shall pay all Reclamation rates and charges associated with delivery of the the City CVP Contract Water to be delivered to Lower Tule's requested point(s) of delivery.
- c. Lower Tule shall ensure that the transferred CVP Contract Water is put to reasonable and beneficial use in accordance with State and Federal law, including Reclamation law.

2. To Tulare Lake Basin Water Storage District:

- a. The Lower Tule does hereby transfer to Tulare 5,000 AF of Recaptured Water allocated to Lower Tule by Reclamation, for use by Tulare in the 2013 water year by taking delivery of water from San Luis Reservoir through the Department of Water Resources California Aqueduct, into Tulare's service area, pursuant to the schedule attached hereto as Exhibit 1.
- b. The Lower Tule shall pay all Reclamation rates and charges associated with the water to be delivered to Tulare's requested point(s) of delivery.
- c. Tulare shall ensure that the transferred water is put to reasonable and beneficial use in accordance with all applicable State and Federal laws; provided however, Tulare's use of the water once obtained from San Luis Reservoir shall not be subject to federal Reclamation Law.

3. To the City of Fresno:

- a. Lower Tule does hereby transfer to the City 5,000 AF of Recovered Water Account Credits allocated to Lower Tule by Reclamation, for use by the City pursuant to separate arrangements with Reclamation.
- b. Lower Tule shall pay all Reclamation rates and charges, if any, necessary to effectuate the transfer of the Recovered Water Account Credits to the City.

IN WITNESS THEREOF, the parties, through their duly authorized representatives, have executed this Notice as of the day and year first above written.

CITY OF FRESNO
a California municipal corporation

LOWER TULE RIVER IRRIGATION DISTRICT
a California irrigation district

By: 
Patrick N. Wiemiller
Director of Public Utilities

By: 
Dan Vink
General Manager

TULARE LAKE BASIN WATER STORAGE DISTRICT
a California water storage district

By: 
Mark Gilkey
Manager

EXHIBIT 1

Delivery Schedule to Lower Tule (CVP Contract Water)

June	
July	
August	10,000 AF
September	
October	
November	
December	
January	
February	

EXHIBIT 2

Delivery Schedule to Tulare (Recaptured Water)

June	5,000 AF
July	
August	
September	
October	
November	
December	
January	
February	