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**BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT
COMMISSION OF THE STATE OF CALIFORNIA**

Application for Certification for the
High Desert Power Project

Docket No. 97-AFC-1C

HIGH DESERT POWER PROJECT, LLC

**COMMENTS ON THE COMMITTEE MEMORANDUM
ON TECHNICAL EXPERT DISCUSSION AND DATE AVAILABILITY
AND
COMMENTS ON PARTICIPATION OF PAST ADVOCATES**

INTRODUCTION

On August 18, 2016, the Committee issued its *Memo to All Parties re: Committee Conference: Technical Expert Discussion and Date Availability* (“August 18th Memorandum”) to discuss conducting a Committee Conference in September on technical issues related the High Desert Power Project’s (the “Facility”) storage and withdrawal of percolated State Water Project Water (“SWP Water”). The Committee has requested that the parties comment on the use of the model created in the early 2000’s to assess the groundwater basin. Specifically, the Committee asked for comments on whether the water injection model should be modified to track SWP Water percolation. High Desert Power Project, LLC (“HDPP” or the “Applicant”) provides the following comments.

As discussed in Section I below, the existing rules and authorities of the Mojave Water Agency (“MWA”) as Watermaster should guide the consideration of banking SWP Water by means of percolation. The groundwater banking and accounting system already in place in the Watermaster’s Rules and implemented through the *Storage Agreement Between Mojave Basin Area Watermaster and Victorville Water District*, provides the answers to the questions about percolating SWP Water. The Committee should not revert to an old model, developed for other purposes, to track SWP Water Percolation. The September Technical Workshop should refocus the proceedings on understanding the Watermaster’s existing rules and authorities that account for the banking and withdrawal of SWP Water banked through percolation. Thereafter, the Committee should issue an Order affirming that it will rely on the Watermaster’s groundwater banking and accounting system which applies to all groundwater users in the basin. The Stipulated Judgment provides for sustainable management of the Mojave Basin Area water resources through the implementation of the physical solution established by the Judgment. The physical solution is designed to address overdraft conditions present in the basins at the time of the judgment. The physical solution is also designed to maintain the historical relationship of water flows from upstream Subareas, either as surface or groundwater flow, to downstream

Subareas. As required by the court, the Watermaster produces an annual report that summarizes Watermaster activities and the water supply conditions for the entire adjudicated area.¹

Section II of these comments addresses the role of prior advocates. On June 1, 2016, the Hearing Officer issued a memorandum (“June Memorandum”) disclosing that “the Committee has consulted, and will continue to consult with various individuals for technical and other assistance in understanding and identifying the issues presented by the amendment petition.”² The June Memorandum identified three individuals who have previously served in advocacy roles in one or more past proceedings related to water supply issues for the Facility. The June Memorandum invited any party having concerns about the participation of the identified individuals to file comments. Similarly, the August 18th Memorandum stated that the Committee is open to receiving comments from the parties on the format of this public conference, any concerns relating to Ms. Linda Bond’s participation, and any conditions that may alleviate these concerns by August 26, 2016.”³ As discussed in Section II, the Applicant has concerns about the transparency of the process and suggests options for the Committee’s consideration.

Finally, the Committee requested information on the availability of the parties’ technical experts. This information is provided in Section III below.

I. RECOGNIZING AND RESPECTING THE AUTHORITY OF MWA AS WATERMASTER, THE COMMITTEE CONFERENCE SHOULD BE REFOCUSED ON UNDERSTANDING HOW WATERMASTER ACCOUNTS FOR WATER PERCOLATED CONSISTENT WITH THE JUDGMENT.

The August 18th Memorandum seeks the right information: how to account for the banking and withdrawal of SWP Water banked through percolation. The answer to this inquiry is found in understanding the role of MWA as Watermaster. The Committee should refocus the proceedings to understand the Watermaster’s existing rules as implemented through water storage agreements. The answer does not lie in the application of an old water model developed in another time (pre-Watermaster) for another purpose (injection) in this proceeding.

The Watermaster implements the Judgment according to a court-administered set of rules, the *Rules and Regulations of the Mojave Basin Area Watermaster* (the “Watermaster Rules”).⁴ Section 23 of the Watermaster Rules, *Uniform Rules for Storage Agreements*, sets forth the terms and conditions for parties to the Adjudication to enter into storage agreements to bank water via injection and percolation. Section 23 also sets forth the processes for applications for storage agreements; the general conditions for storage agreements; the determination of available storage capacity; and the priorities for use of available storage capacity.⁵

¹ Available at http://www.mojavewater.org/annual_report.html

² TN# 211693, p. 1.

³ TN# 212860, p. 1.

⁴ Available at <https://www.mojavewater.org/files/Rules.pdf>.

⁵ Watermaster Rules, Section 23, Subsections A-D.

First Priority for groundwater storage is given to supplemental water (i.e., imported surface water) ordered by the Watermaster itself to implement its obligations pursuant to the Judgment. Second Priority is afforded agreements between the Watermaster and MWA for MWA's benefit, and Third Priority is devoted to all other storage agreements. The Storage Agreement between MWA and Victorville Water District ("VWD") on behalf of HDPP discussed below is a Third Priority agreement. Each Storage Agreement must have certain standard provisions, including acknowledgement of the Watermaster's authority to control all storage and extraction of stored water and the calculations of payments to Watermaster for such storage.⁶

Significantly, the Watermaster Rules also clearly and unambiguously provide for the Watermaster to account for potential losses in stored water. Each Storage Agreement must include:

- (3) Determinations by Watermaster of, and accounting for, all losses in stored water, assuming that such stored water floats on top of the native groundwater supplies, and accounting for all losses of water which otherwise would have replenished the Basin Area. Losses shall be charged to Storage Agreement account in the inverse order of their priorities for use of storage facilities in Section 23E of these Rules and Regulations.⁷

These are the Watermaster Rules that protect the Basin.

These same Watermaster Rules are made enforceable against HDPP through the *Storage Agreement Between Mojave Basin Area Watermaster and Victorville Water District*, dated July 27, 2016 (the "Percolated Water Storage Agreement").⁸ While VWD is MWA's counterparty to the Percolated Water Storage Agreement, the agreement states that the storage agreement "is intended to allow supplemental water to be stored in the groundwater basin for later extraction by VWD for High Desert Power Project ('HDPP')."⁹

The Percolated Water Storage Agreement clearly articulates the Watermaster's responsibility to account for potential storage losses:

- E. **Watermaster Storage Accounting:** Watermaster shall calculate additions, extractions and losses of water stored under this Agreement, and maintain an annual account of all such water. Watermaster shall give due consideration to the operation of the Alto Subarea under the Physical Solution

⁶ Watermaster Rules, Section 23, Subsection F(1)-(2).

⁷ Watermaster Rules, Section 23, Subsection F(3).

⁸ HDPP is awaiting the final executed copy of the Storage Agreement and will Docket it upon receipt. To facilitate review, an unexecuted copy is attached hereto as Attachment A.

⁹ Percolated Water Storage Agreement, Recital F.

provisions of the Judgment when calculating additions, extractions and losses of water stored and extracted under this Agreement. The accounting by Watermaster shall consider the status of other Storage Agreements that may be in effect or under development.¹⁰

Using the operative language from the Watermaster Rules, the Percolated Water Storage Agreement also explains and elaborates on how the annual loss assessment is calculated:

F. Annual Loss Assessment: Watermaster shall annually determine and account for losses in stored water, and in so doing shall assume that stored water floats on top of the native ground water supplies. Accounting for all losses of water therefore assumes stored water would spill before native supplies in the event there are losses of water that would otherwise have replenished the Subarea. Stored water losses shall have an inverse priority to that specified in Paragraph G (i.e. Third Priority stored water is the first to spill).¹¹

The Watermaster controls storage and “has sole custody and control of all groundwater storage rights in the Basin Area pursuant to the Physical Solution in the Judgment, the Rules and this Agreement.”¹² Measured losses limit the recovery of water stored under the Percolated Water Storage Agreement.¹³

The “Agreement” section of the Percolated Water Storage Agreement reiterates the Watermaster’s authorities relative to storage and losses: “Watermaster Rules and Regulations Section 23.F(1) governs storage and extraction of Supplemental Water.”¹⁴ The Watermaster determines “at least annually, any losses of Supplemental Water stored pursuant to this Agreement.”¹⁵ And Watermaster considers loss factors:

9. Loss Factors Considered: Watermaster shall determine at least annually any losses of Supplemental Water stored pursuant to this Storage Agreement. Watermaster shall consider herein specified factors, including priority specified in this Agreement, affecting the loss of Supplemental Water stored pursuant to this Agreement including those that may occur at the time Supplemental Water is placed into storage.¹⁶

¹⁰ Percolated Water Storage Agreement, General Condition E.

¹¹ Percolated Water Storage Agreement, General Condition F.

¹² Percolated Water Storage Agreement, General Condition J.

¹³ Percolated Water Storage Agreement, General Condition L.

¹⁴ Percolated Water Storage Agreement, Agreement, Section 5.

¹⁵ Percolated Water Storage Agreement, Agreement, Section 8.c.

¹⁶ Percolated Water Storage Agreement, Agreement, Section 9.

These are the affirmative duties of the Watermaster in the court-administered Adjudication, implemented both through the Watermaster Rules and the Watermaster-VWD storage agreement for the benefit of HDPP. The Watermaster has successfully restored basin storage and water levels from unsustainable conditions over the past many years, which is evidence of the Watermaster's capability and sophistication in managing the groundwater resources of the Alto subbasin.

There is simply no need for the Committee to try to adapt the FEMFLOW3D model, originally developed for injection, to track water molecules. Since the Facility was certified and the old model developed, the Watermaster has commenced its management duties and matured into the prototype that the Governor and the Legislature determined is the future of groundwater regulation in California. The landmark 2014 Sustainable Groundwater Management Act ("SGMA")¹⁷ provides the structure and the certainty for other water basins already provided to the Mojave River Basin by the Judgment and the Watermaster.¹⁸ The Committee and the parties must avail themselves to these structural benefits by acknowledging and respecting the Watermaster's court-administered authorities.

There is no need for the Committee to "reinvent the wheel", especially when by law, another agency has the court-administered authority to "drive the car". Specifically, there is no need to try to adapt and modify a Turn of the Century water injection model to "track" groundwater in the Mojave Basin, when MWA has current, modern Rules in place to address this issue. Therefore, the Workshop should be focused on understanding Watermaster Rules and authorities that account for the banking and withdrawal of SWP Water banked through percolation. Thereafter, consistent with the Interim Relief granted, the Committee should issue an Order affirming that it will rely on the groundwater banking accounting system already in place in the Watermaster's Rules and implemented through the Watermaster-VWD storage agreement.

II. THE COMMITTEE SHOULD ENSURE TRANSPARENCY OF COMMUNICATIONS BETWEEN THE COMMITTEE AND PRIOR ADVOCATES IN THIS ADJUDICATORY PROCEEDING.

The June Memorandum disclosed that the Committee has been consulting with various individuals who had previously served as advocates for Energy Commission staff in Energy Commission proceedings related to the Facility.¹⁹ The June Memorandum identified three individuals--two Energy Commission staff attorneys and one consultant. As discussed at the August 11, 2016, Status Conference in this proceeding, HDPP is concerned about the lack of transparency of the advice and information that the Committee may receive from these individuals. California law generally prohibits substantive communications between prior advocates with decisionmakers in adjudicatory proceedings.

¹⁷ See Water Code § 10720.8(a)(2) exempting the Judgment and MWA from compliance with the SGMA.

¹⁸ SGMA's provision, Water Code section 10720.8(a)(2), expressly exempts the Judgment and MWA from SGMA because the MWA Watermaster model and the SGMA model for groundwater management State-wide are the same model.

¹⁹ TN# 211693, p. 1.

In the current proceeding, the Committee serves in an adjudicative capacity. California Government Code Section 11475.20 provides that “the Code of Judicial Ethics^[20] adopted by the Supreme Court pursuant to subdivision (m) of Section 18 of Article VI of the California Constitution for the conduct of judges governs the hearing and nonhearing conduct of an administrative law judge or other presiding officer to which this article applies.” The Energy Commission has expressly made the *ex parte* provisions of Article 7 of Chapter 4.5 of Part 1 of Division 3 of Title 2 of the Government Code (sections 11430.10 *et seq.*) applicable to all adjudicative proceedings, though does not appear to have expressly adopted the provisions of Article 16 (Administrative Adjudication Code of Ethics) Chapter 4.5 of Part 1 of Division 3 of Title 2 of the Government Code (sections 11470.10 *et seq.*). Nevertheless, whether or not the Code of Judicial Ethics is expressly applicable to the Energy Commission serving in an adjudicative capacity, the principles and policies upon which this Code are based are equally applicable to Energy Commission adjudicatory proceedings.

Whether the decision-makers are Appellate Judges, Energy Commissioners, Hearing Officers, or any other adjudicator, an “...independent, impartial, and honorable judiciary is indispensable to justice in our society.”²¹ All decision-makers should “...participate in establishing, maintaining, and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary is preserved.”²²

The Code of Judicial Ethics requires the disqualification of a justice, judge or presiding officer if he or she has served as a lawyer in any other proceeding *involving any of the same parties* if that other proceeding related to the *same contested issues of fact and law* as the present proceeding, or has *given advice to any party* in the present proceeding upon any issue involved in the proceeding.²³ Similar requirements apply to trial court judges in California.²⁴ Disqualification is mandatory and cannot be waived.

In addition, off the record consultation between these individuals and the Committee is a potential violation of the Commission’s *ex parte* rules. Under the *ex parte* provisions of the Administrative Procedure Act adopted by the Energy Commission, while this proceeding is pending there shall be no communication, direct or indirect, regarding any issue in the proceeding, to the presiding officer from an employee or representative of an agency that is a party or from an interested person outside the agency, without notice and opportunity for all parties to participate in the communication.²⁵

²⁰ *California Code of Judicial Ethics*; Available at: http://www.courts.ca.gov/documents/ca_code_judicial_ethics.pdf.

²¹ *California Code of Judicial Ethics*, Canon 1.

²² *Id.*

²³ *California Code of Judicial Ethics*, Canon 3E(5)(a); Emphasis added.

²⁴ The Advisory Committee Commentary for Canon 3E(5)(a) notes its consistency with the Code of Civil Procedure: “Canon 3E(5)(a) is consistent with Code of Civil Procedure section 170.1, subdivision (a)(2), which addresses disqualification of trial court judges based on prior representation of a party in the proceeding.”

²⁵ California Government Code Section 11430.10(a).

The APA makes a limited and qualified exception from this rule for communications providing advice that involves a technical issue in the proceeding and the advice is necessary for, and is not otherwise reasonably available to, the presiding officer, *provided, however*, that the content of the advice is disclosed on the record and all parties are given an opportunity to address it in the manner provided in Section 11430.50.²⁶ In the instant case, the June Memorandum provided notice of potential *ex parte* communications between the Committee and the former advocates, but the notice did not provide an opportunity for all parties to participation in these communications. Of equal importance, the June Memorandum did not demonstrate that that the technical advice received from these three individuals is not otherwise reasonably available to the presiding offer, nor has the Committee disclosed the content of the advice in the manner provided by Section 11430.50.

We encourage the Committee to develop a full understanding of the issues in this proceeding. However, by law and consistent with the *California Code of Judicial Ethics*, if the Committee finds a need to seek advice or technical assistance from third parties, particularly parties who have served as advocates in prior HDPP proceedings, the Committee should receive such advice on the record where it can be addressed in an open and transparent manner by all parties to the proceeding.

Accordingly, we suggest that there are two courses the Committee may consider. First, the Committee could decide that disqualification is appropriate and immediately cease consulting off the record with individuals who have served in an advocacy role in prior HDPP proceedings. Alternatively, if the Committee continues its consultation with these prior advocates, all extra-record communications between the Committee and these individuals should be made part of the record of these proceedings and all parties should have notice and opportunity to comment on and respond to such future advice.

Regardless of which of the two courses above is selected, as to past communications between the Committee, the Committee's advisers, and the Hearing Officer with these three individuals, the Committee should disclose the advice heretofore tendered by these individuals and provide all parties with the opportunity to respond, consistent with the requirements of Government Code Section 11430.50.

Of course, the Committee should avail itself to whatever resources it deems necessary and appropriate to bring this matter to resolution. However, it is equally clear that the receipt of undisclosed, extra-record materials is potentially prejudicial, particularly when the advice is provided by a person who has been an advocate on matters that involve contested issues in this proceeding.

The prohibition on *ex parte* communications provides that non-attorney advisors cannot be communicating with both the decisionmakers and the parties to the proceedings outside a publicly noticed forum with an opportunity to respond. For example, Ms. Bond should be available to advise the decisionmakers, in accordance with the provisions of Section 11430.50, or

²⁶ California Government Code Section 11430.30(c)(1).

the Staff, but not both. If Ms. Bond's contributions are technical, factual or evidentiary in nature, she should not be providing extra-record materials to the decisionmakers.

These are and have been highly sensitive issues and highly contested issues. As emphasized on the record at the August 11th Status Conference, HDPP is not critical of these three individuals. They are all dedicated public servants who have earned and who deserve the utmost respect. They can play a constructive role in this proceeding, but it should be a public role, to ensure the due process and transparency of this proceeding.

III. AVAILABILITY OF HDPP'S TECHNICAL EXPERTS IN SEPTEMBER.

As requested, HDPP has asked its technical experts about their availabilities for a workshop in September. Based on their current schedules, HDPP experts would be available for a workshop on the following dates: September 12, 13, 14, 20 and 21.

CONCLUSIONS

HDPP is a customer of the local water suppliers. Through these comments, we wish to help advance this proceeding in an open and transparent manner that is fair to all concerned.

Respectfully submitted,

/s/

Jeffery D. Harris
Samantha G. Neumyer
Ellison, Schneider & Harris L.L.P.
2600 Capitol Avenue, Suite 400
Sacramento, CA 95816

Attorneys for High Desert Power Project, LLC

ATTACHMENT A

**STORAGE AGREEMENT
BETWEEN
MOJAVE BASIN AREA WATERMASTER
AND
VICTORVILLE WATER DISTRICT**

Note: HDPP is awaiting the final executed copy of the Storage Agreement and will Docket the agreement on receipt. To facilitate review, an unexecuted copy is attached hereto.

**STORAGE AGREEMENT
BETWEEN MOJAVE BASIN AREA WATERMASTER AND
VICTORVILLE WATER DISTRICT**

This Storage Agreement (“Agreement”) is entered into and effective this 27th day of July, 2016 between Mojave Basin Area Watermaster (“Watermaster”) and Victorville Water District (“VWD” or “Storer”) pursuant to the Judgment After Trial in *City of Barstow, et. al. vs. City of Adelanto, et al.*, Case No. 208568, Riverside County Superior Court (“Judgment”) entered on January 10, 1996, and the Rules and Regulations of the Mojave Basin Area Watermaster (“Rules”) adopted June 30, 1994, and revised December 11, 1996, March 23, 2005 and October 29, 2008 and as may be amended from time to time.

RECITALS

- A. The Judgment in Paragraph 24.S authorizes Watermaster to enter into Storage Agreements with any Party to the Judgment in order to accommodate the acquisition of Supplemental Water.
- B. The Judgment directs Watermaster to adopt uniformly applicable rules for Storage Agreements, which are incorporated as Section 23 of the Rules and are incorporated herein.
- C. Watermaster has considered the availability of groundwater storage capacity in each Subarea and finds that capacity is available for water to be stored pursuant to this Agreement.
- D. VWD desires to enter into a Storage Agreement with the Watermaster in the Alto Subarea of the Mojave Basin, to satisfy obligations that it might incur as a Party to the Judgment.
- E. VWD is the successor to Victor Valley Water District.
- F. This Agreement is intended to allow supplemental water to be stored in the groundwater basin for later extraction by VWD for High Desert Power Project (“HDPP”). This Agreement is intended solely to address Storer’s storage and extraction of water on behalf of HDPP. Any additional uses other than stated above, will require a separate application and storage agreement between the Parties. Because this Storage Agreement is applicable only to VWD storage on behalf of HDPP, which is subject to the California Energy Commission (“CEC”) conditions, some of its terms may be inapplicable to other storage agreements.

GENERAL CONDITIONS

- A. **Terms per Judgment and Rules:** Defined terms used in this Agreement shall be incorporated from the Judgment and the Rules of the Watermaster, as may be amended from time to time.

- B. **Subarea Storage:** This Agreement shall be for the utilization of available groundwater storage capacity in the Alto Subarea by Storer for the pre-delivery of Supplemental Water to meet its obligations under this Agreement as a Party to the Judgment.
- C. **Party in Good Standing:** Storer is a Party to the Judgment and is presently and shall remain in good standing at all times while this Agreement is in effect. Should Storer fail, due to its fault including its failure to perform any obligation to which it is or may hereafter be held under the Judgment or the Rules, to meet its obligations under this Agreement, or to abide by the terms of the Judgment or the Rules, this Agreement shall be voidable, at the option of the Watermaster, and upon due notice issued and specific action by the Watermaster, and subject to Storer's reasonable opportunity to cure the same.
- D. **Stored Water Used to Meet Obligations:** Watermaster shall, if requested by Storer, credit stored Supplemental Water to meet Storer's future obligations incurred under this Agreement and the terms of the Judgment. Said credit shall be made upon application to the Watermaster Executive Officer in writing. Obligations of Storer from the prior Water Year outstanding after October 31 of the following Water Year may be debited from Storer's account by Watermaster to the extent necessary to eliminate the outstanding obligation. Subject to Storer's rights as referenced in this Agreement, the Judgment and the Rules and Regulations, only the Biological and Administrative Assessments under the Judgment shall be charged to Storer for water extracted by Storer under this Agreement. Watermaster shall not be responsible for the extraction, conveyance or treatment of water stored or extracted pursuant to this Agreement.
- E. **Watermaster Storage Accounting:** Watermaster shall calculate additions, extractions and losses of water stored under this Agreement, and maintain an annual account of all such water. Watermaster shall give due consideration to the operation of the Alto Subarea under the Physical Solution provisions of the Judgment when calculating additions, extractions and losses of water stored and extracted under this Agreement. The accounting by Watermaster shall consider the status of other Storage Agreements that may be in effect or under development.
- F. **Annual Loss Assessment:** Watermaster shall annually determine and account for losses in stored water, and in so doing shall assume that stored water floats on top of the native ground water supplies. Accounting for all losses of water therefore assumes stored water would spill before native supplies in the event there are losses of water that would otherwise have replenished the Subarea. Stored water losses shall have an inverse priority to that specified in Paragraph G (i.e. Third Priority stored water is the first to spill).
- G. **Delivery and Storage Priority for Supplemental Water:** Basin storage capacity and supplemental water delivery capacity vary from place to place. It will therefore be necessary for Watermaster to annually determine storage capacity available in each Subarea and to consult with the Mojave Water Agency ("MWA") to determine their ability to deliver supplemental water. Based upon this information, Watermaster shall maintain priorities for delivery and storage of Supplemental Water as follows:

First Priority: Supplemental Water ordered by Watermaster from MWA for direct delivery to the Basin to meet the requirements of the Judgment;

Second Priority: Supplemental Water for delivery to the Basin for storage under Storage Agreements between Watermaster and MWA;

Third Priority: Supplemental Water for delivery to individual storage accounts of Parties to the Judgment.

- H. **Second and Third Priority:** Watermaster has entered into a second priority Storage Agreement with MWA to provide Supplemental Water to Watermaster to comply with the Judgment. Watermaster shall enter into Third Priority Storage Agreements with other Parties on the basis of the date of application to Watermaster. The priority based on date of application referenced in Rule 23D (a second priority in Rule 23D is equivalent to a third priority in this Agreement) is intended to preclude the over-subscription of storage capacity in the Basin.
- I. **Pro-rations of Limited Deliveries:** Simultaneous delivery request by more than one Party with Storage Agreements of equal priority may exceed the capacity of delivery facilities available. In this event, the facility capacity not used for First and Second priority deliveries shall be utilized to deliver water for each Third Priority Storer in proportion to their maximum annual storage *as* specified in Paragraph 3. The proportion shall be determined from each Storer's relative share (percentage) of the sum of all of the maximum annual storage under Agreement of the same (Third) priority requesting delivery.
- J. **Watermaster Controls Storage:** Watermaster and Storer acknowledge that no Party shall have any direct interest in or control over storage used under this Agreement by reason of the adjudicated right of such Party. Watermaster has sole custody and control of all groundwater storage rights in the Basin Area pursuant to the Physical Solution in the Judgment, the Rules and this Agreement.
- K. **Laws Take Precedent Over this Agreement:** This Agreement does not supersede applicable Federal, State or Local regulatory requirements. Storer shall be solely responsible to meet all current and future Federal, State or Local requirements applicable to actions or consequences facilitated by this Agreement.
- L. **Measured Losses:** Measured losses will limit the recovery of water stored under this Agreement.
- M. **Water Quality:** The quality of Supplemental Water stored pursuant to this Agreement shall not be detrimental to the Subarea in which storage will occur, or to any other Party to the Judgment.
- N. **Insurance:** Storer shall provide insurance sufficient to protect Storer and Watermaster against potential liability arising from the activities contemplated by this Agreement. Said insurance shall be satisfactory to Watermaster and shall be maintained during the life of this Agreement, including future extension or amendment.

AGREEMENT

1. **Recitals and General Conditions:** The Recitals and General Conditions to this Agreement are incorporated in the Agreement as though set forth fully herein.
2. **Storage Limits:** Storer is hereby authorized by Watermaster to store not more than 13,000 acre-feet of Supplemental Water in the Alto Subarea of the Mojave Basin in any Water Year during the term of this Agreement.
3. **Duration of Agreement:** Storer may add to storage up to the amount specified until September 30, 2018. . The duration to store water may only be extended by action of Watermaster. If at the end of this term, Storer has any water remaining in storage, the term of this Agreement may be extended by action of Watermaster for five (5) additional years, allowing for the extraction of previously stored water. The full term of this Agreement shall not exceed thirty (30) years. Watermaster may approve, deny with cause, and reasonably condition time extensions of this Agreement if necessary to maintain consistency with changes to the Judgment. In considering whether to deny with cause any extension of this Agreement, the Watermaster shall review the implementation of this Agreement to date and determine that the Alto Subarea has sufficient capacity to accommodate the water that would be stored under such extension, that the extension will not have a substantial adverse impact on any Producer or on the Basin and shall not be arbitrary and capricious. Unless specifically so ordered by the Court, changes to the Judgment shall not impact the initial Agreement or the remaining term of any extension and shall not impact withdrawal of previously stored water to meet previously incurred obligations.
4. **Third Priority Storage:** Storer and Watermaster hereby agree that delivery under this Agreement shall have Third Priority under Paragraph G.
5. **Storage and Extraction:** Watermaster Rules and Regulations Section 23.F(1) governs storage and extraction of Supplemental Water. Watermaster will authorize the storage of such Supplemental Water provided that it will not cause the total stored water in the Alto Subarea pursuant to this Agreement to exceed the amounts set forth in Paragraph 3, above. The Storer's operations shall not have a substantial adverse impact on any Producer, as determined by the Watermaster.
6. At any renewal period, Watermaster may condition Storage Agreement renewal to require modifications to incorporate improved technology that is necessary to mitigate a deficiency in the collection and reporting of required data to the Watermaster.
7. **Quarterly Reporting Requirements:** Storer shall report the following to Watermaster by the last day of the month next succeeding the end of the relevant quarter, i.e. January 31, April 30, July 31 and October 31:
 - a. The amount of Supplemental Water which Storer placed into or withdrew from storage under the Agreement;
 - b. Cumulative stored water balance of the relevant quarter;

8. **Watermaster Storage Accounting:** Watermaster shall use the reported data, along with other available data to:
 - a. Perform a “First-in, First-Out” accounting of water stored under this Agreement;
 - b. Assess each proposal to store Supplemental Water under this Agreement and determine whether the potential reasonably exists for material adverse effect on other Producers within the Subarea in which storage is to occur, and whether sufficient capacity exists in that groundwater aquifer;
 - c. Determine, at least annually, any losses of Supplemental Water stored pursuant to this Agreement.
9. **Loss Factors Considered:** Watermaster shall determine at least annually any losses of Supplemental Water stored pursuant to this Storage Agreement. Watermaster shall consider herein specified factors, including priority specified in this Agreement, affecting the loss of Supplemental Water stored pursuant to this Agreement including those that may occur at the time Supplemental Water is placed into storage.
10. **Potential Special Costs:** As provided in Watermaster’s Rules and Regulations, Watermaster shall determine, annually, whether any special costs, damages or burdens have resulted from the implementation of this Agreement and shall notify Storer as to its determinations and the calculation of any amount due, and Storer shall pay such amount within thirty days.
11. **Dispute Resolution:** In the event there is a dispute between Storer and Watermaster regarding calculations, payments due, or other aspects of this Storage Agreement or its implementation that cannot be resolved, review of determinations by Watermaster shall be as per Section 36 of the Judgment. In the event any Party hereto shall commence legal proceedings against the other to enforce the terms hereof, or to declare rights hereunder, as the result of the breach of any covenant or condition of this Agreement, the prevailing Party in any such proceeding shall be entitled to recover from the losing Party his/her/its reasonable costs and attorney’s fees, incurred in connection therewith. Except as otherwise expressly provided herein, all Parties shall bear their own costs and attorney’s fees.
12. **Indemnification:** Except for resolution of disputes pursuant to Paragraph 12 above, Storer shall save and hold harmless Watermaster, its officers, agents and employees from any and all costs, damages or liability resulting from this Agreement or its implementation. Storer shall provide Watermaster with the defense, and the costs of the defense, including attorney’s fees, of any action brought against Watermaster, its officers or employees arising or alleged to arise because of such Agreement for storage of Supplemental Water.
13. **Expired and Void Agreement:** The Agreement may become void if Storer ceases to be a party in good standing pursuant to Paragraph C. An expired or void Agreement shall mean that the Storer may no longer store Supplemental Water or extract water that has previously been stored under this Agreement, except that stored water may be extracted

or credited to Storer's obligations under the Judgment within five (5) years following the date the Agreement expired or became void. Stored water not claimed by Storer within five (5) years subsequent to an expired or void Agreement shall accrue to the benefit of the storage Subarea, and not to the benefit of a specific Party or Parties.

14. **Non-Transferable:** This Agreement is not assignable or transferable, except to the lawful successor of either Party, and cannot in any way be hypothecated by Storer.
15. **Amendment:** This Agreement shall be amended only upon written agreement of the Parties.
16. **Entire Agreement:** This Agreement is the entire agreement between the Parties hereto with respect to the subject matter hereof and supersedes all prior agreements and understandings, whether oral or written, between the Parties with respect to the matters contained in this Agreement. Any waiver, modification, consent or acquiescence with respect to any provision of this Agreement shall be set forth in writing and duly executed by, or on behalf of the party to be bound thereby. No waiver by any party of any breach hereunder shall be deemed a waiver of any other or subsequent breach.
17. **Notices:** Any communication, notice or demand of any kind whatsoever which either party may be required or may desire to give to or serve upon the other shall be in writing and delivered by personal service (including courier service), by facsimile communication, by Federal Express, UPS or other overnight delivery, or by registered or certified mail, postage prepaid, return receipt requested; and shall be addressed to the General Manager of the applicable agency at its principle office. Any party may change its mailing address or facsimile number for notice by written notice given to the other in the manner provided in this Section. Any such communication, notice or demand shall be deemed to have been duly given or served on the date personally served, if by personal service; on the date of confirmed dispatch, if by facsimile communication; on the day after delivery if by "overnight courier;" on the third (3rd) day after being placed in the U.S. mail, if mailed first class, whether or not registered or certified.
18. **Governing Law:** This Agreement shall be governed by and construed in accordance with the laws of the State of California. The only venue and forum for the resolution of any dispute regarding the interpretation or enforcement of this Agreement shall be in the Superior Court of the State of California in and for the County of Riverside, Central Judicial District, California, or such other forum as the Judgment may subsequently be assigned to. The Parties expressly waive the right to remove this action to Federal Court.
19. **Construction:** The language in all parts of this Agreement shall be in all cases construed simply, according to its fair meaning, and not strictly for or against any of the Parties hereto. Section headings of this Agreement are solely for convenience of reference and shall not govern the interpretation of any of the provisions of this Agreement. References to "Paragraphs" are to Paragraphs of this Agreement, unless otherwise specifically provided.

20. **Good Faith:** The Parties agree to perform their obligations herein in “good faith” and shall do all things reasonably necessary to carry out the intent and/or to implement the terms of this Agreement.
21. **Binding Effect:** All of the terms and provisions of this Agreement shall be binding upon and shall inure to the benefit of the Parties hereto and to their respective representatives, agents and lawful successors.
22. **Numbers and Gender:** Whenever required by the context, as used in this Agreement, the singular number shall include the plural, and the masculine gender shall include the feminine and neuter.
23. **Continued Validity:** If any provision of this Agreement, or its application to any person, place, or circumstance, is held by a court of competent jurisdiction to be invalid, unenforceable, or void, such provision shall be enforced to the greatest extent permitted by law, and the remainder of this Agreement shall remain in full force and effect.

This Agreement is effective as of July 27, 2016 and shall remain in effect until September 30, 2018. This agreement may be further extended by action of Watermaster.

FOR WATERMASTER:

FOR STORER:

Kirby Brill, Executive Officer,
General Manager

Date: July 27, 2016

Date: July 27, 2016