

**Documentary Transfer Tax -- \$0.00
For the Benefit of:**

**FRESNO METROPOLITAN FLOOD
CONTROL DISTRICT
5469 EAST OLIVE
FRESNO CA 93727**

Recording Information

AGREEMENT FOR COMMON USE OF EASEMENTS

LOCATION: Big Dry Creek Diversion Channel to Little Dry Creek
APN: 580-020-22S and 580-020-023

THIS AGREEMENT FOR COMMON USE OF EASEMENTS (this "Agreement"), is made and entered into this ____ day of _____, 2015, by and between the CITY OF FRESNO, a municipal corporation ("CITY"), and FRESNO METROPOLITAN FLOOD CONTROL DISTRICT("FMFCD"), with reference to the following Recitals.

RECITALS:

A. FMFCD is the owner of an easement, located on Big Dry Creek Diversion Channel to Little Dry Creek, to operate, maintain, repair, and reconstruct an open channel and related appurtenances.

B. CITY has or will acquire an easement interest in certain lands in the same area as FMFCD's easement, and CITY intends to use this easement interest for the purpose of maintaining and operating an 60-inch diameter raw water pipeline for a surface water treatment plant.

C. A portion of CITY's easement will overlap FMFCD's existing easement, which overlapping portion is more specifically described as that area shown on the diagram attached hereto as **Exhibit "A"**, being hereby designated as the "Area of Common Use".

D. The improvement to be constructed by CITY within the Area of Common Use is a 60-inch diameter raw water pipeline ("Improvements").

E. CITY and FMFCD wish to establish certain conditions under which the Area of Common Use shall be used by the parties.

A G R E E M E N T

NOW, THEREFORE, it is agreed as follows:

1. **FMFCD's Consent.**

FMFCD hereby consents to the use by CITY of the Area of Common Use for purposes of maintaining and operating the Improvements. CITY's use of the Area of Common Use shall be subject to FMFCD's right to fully use the Area of Common Use for all of FMFCD's purposes, and to the terms and conditions herein contained. FMFCD does not by this Agreement subordinate any rights it may have in the Area of Common Use to any use CITY shall make of the land. CITY acknowledges that by FMFCD's consent to CITY's use of the Area of Common Use, FMFCD is making no representation or warranty regarding the existence or non-existence of any third parties claiming a right, title, or interest in the Area of Common Use.

2. **City Improvements.**

CITY shall, at its own cost and with FMFCD's prior approval, locate, construct, and maintain the Improvements in the Area of Common Use in such a manner and of such material as may be required so that it will not at any time be a source of danger to or interference with the present or future uses of FMFCD. CITY is specifically required to coordinate the construction of the Improvements so that it does not interfere with FMFCD's operations and maintenance schedules. The constructed facilities shall be in conformance with the CITY's raw water pipeline for Big Dry Creek Diversion Channel to Little Dry Creek improvement plans (incorporated herein by Reference).

The right of FMFCD to approve such construction details is solely for the benefit of FMFCD and is not intended to assign to FMFCD any responsibility for the safe and proper construction of the Improvements, such responsibility, and liability being entirely assigned to CITY. Approval by FMFCD of construction details shall not result in an assumption by FMFCD of liability for the Improvements.

3. **Ownership of Facilities.**

All of the Improvements constructed or installed pursuant to this Agreement shall be the property of CITY, and all appurtenances and facilities installed or existing in the Area of Common Use, which are related to FMFCD's facilities, shall be the property of FMFCD. Except as herein otherwise provided, neither FMFCD nor CITY shall have any right, title, or control over the other's property other than it already has under applicable law.

4. **Common Use.**

Except as expressly set forth herein, this Agreement shall not in any way alter, modify, or terminate FMFCD's easement in the Area of Common Use. Both FMFCD and CITY shall use the Area of Common Use in a manner that does not unreasonably interfere with the rights of one another and nothing herein shall be construed as a release or waiver of any claim for compensation or damages FMFCD or CITY may now have, or may hereafter acquire, resulting from the construction or alteration of existing facilities or the construction or alteration of additional facilities by either FMFCD or CITY

that causes damage to or unreasonable interference with the use of the Area of Common Use by the other party.

5. **City Reimbursement.**

CITY shall be responsible to pay, and shall reimburse FMFCD upon demand, for any reasonable cost incurred by FMFCD for work performed by FMFCD that is caused by or required by CITY's construction, maintenance, or use of the Improvements, whether such work was completed at CITY's expense or as reasonably determined to be necessary by FMFCD.

Except as described above, CITY and FMFCD shall be responsible for the maintenance, repair, alteration, improvement, or relocation of their respective facilities within the Area of Common Use.

Nothing in this Agreement shall relieve the parties of any responsibility toward the other for damage to the other's property located outside of the Area of Common Use.

6. **Indemnification.**

CITY shall indemnify, hold harmless and defend FMFCD and each of its officers, officials, employees, agents, and volunteers from any and all loss, liability, fines, penalties, forfeitures, costs, and damages (whether in contract, tort or strict liability, including but not limited to personal injury, death at any time, and property damage) incurred by FMFCD, CITY or any other person, and from any and all claims, demands, and actions in law or equity (including attorney's fees and litigation expenses), arising or alleged to have arisen directly or indirectly from the negligent or intentional acts or omissions, or willful misconduct of CITY or any of its officers, officials, employees, agents, and volunteers in the performance of this Agreement; provided nothing herein shall constitute a waiver by CITY of governmental immunities including California Government Code sections 810 et seq.

FMFCD shall indemnify, hold harmless and defend CITY and each of its officers, officials, employees, agents, and volunteers from any and all loss, liability, fines, penalties, forfeitures, costs, and damages (whether in contract, tort or strict liability, including but not limited to personal injury, death at any time, and property damage) incurred by the CITY, FMFCD or any other person, and from any and all claims, demands and actions in law or equity (including attorney's fees and litigation expenses), arising or alleged to have arisen directly or indirectly from the negligent or intentional acts or omissions, or willful misconduct of FMFCD or any of its officers, officials, employees, agents and volunteers in the performance of this Agreement; provided nothing herein shall constitute a waiver by FMFCD of governmental immunities including California Government Code sections 810 et seq.

In the event of concurrent negligence on the part of CITY or any of its officers, officials, employees, agents or volunteers, and FMFCD or any of its officers, officials, employees, agents or volunteers, the liability for any and all such claims, demands and actions in law or equity for such losses, fines, penalties, forfeitures, costs and damages

shall be apportioned under the State of California's theory of comparative negligence as presently established or as may be modified hereafter.

This section shall survive termination or expiration of this Agreement.

7. **Insurance.**

It is understood and agreed that CITY and FMFCD will maintain insurance policies or self-insurance programs to fund their respective liabilities. The parties agree that such respective programs or policy coverage for Worker's Compensation shall contain a waiver of subrogation as to the other party and each of its officers, officials, agents, employees or volunteers. Evidence of Insurance, e.g., Certificates of Insurance or other similar documentation, shall not be required of either party under this Agreement.

8. **Notice.**

Except in the event of an emergency, or for necessary maintenance, each party shall give the other reasonable notice before performing or permitting any work affecting the other's facilities in the Area of Common Use, and shall furnish the other party with plans and specifications describing the work to be done beforehand. Neither party shall permit installation of facilities by others in the Area of Common Use without the written consent of the other party. The reviewing party shall have the right to specify reasonable conditions on, or changes in, the proposed work and schedule when necessary to prevent damage to its facilities or interference with its operations in the Area of Common Use. Where such changes shall result in additional expense, such expense shall be borne by CITY. Each party agrees to repair any damage to the other party's facilities caused by work permitted, directed or performed by it within the Area of Common Use, except that where CITY's facilities within the Area of Common Use must necessarily be damaged, destroyed or removed by FMFCD to accommodate repair, maintenance, modification or replacement of FMFCD's facilities, FMFCD shall have no obligation to restore CITY's affected facilities. In the event of an emergency, no such notice shall be required and either party may proceed to do what is reasonably necessary to prevent serious loss or damage and to protect the public health and safety. An emergency shall be deemed to exist if immediate action is reasonably required to prevent serious loss or damage to life or property, or to protect the public health and safety.

9 **Termination.**

Violation of any term of this Agreement shall be cause of termination of the Agreement, and in such an event, FMFCD shall have all remedies available at law or equity to enforce FMFCD's right to unimpeded use of the Area of Common Use and the FMFCD Easement. No termination of this Agreement shall release CITY from liability hereunder, whether of indemnity or otherwise.

10 **Miscellaneous.**

(a) **Entire Agreement.** This Agreement and items incorporated herein contain all of the agreements of the parties with respect to the matters contained herein, and no prior agreement or understanding pertaining to any such matter shall be effective for

any purpose. The parties further warrant and represent that they have not relied on any inducements, promises or representations made by any party or its representative, or any other person, except for those expressly set forth herein.

(b) Amendments. No provisions of this Agreement may be amended or modified in any manner whatsoever except by an agreement in writing duly authorized by representatives of both parties.

(c) Headings. The subject headings of the paragraphs of this Agreement are included for purposes of convenience only and shall not affect the construction or interpretation of any of the provisions herein.

(d) Notices. All notices required or permitted by this Agreement or applicable law shall be in writing and may be delivered in person (by hand or by courier) or may be sent by regular, certified, or registered mail or U.S. Postal Service Express Mail, with postage prepaid, or by facsimile transmission, or by electronic transmission (email) and shall be deemed sufficiently given if served in a manner specified in this subparagraph 9(d). The addresses and addressees noted below are that party's designated address and addressee for delivery or mailing of notices.

CITY: City of Fresno
2600 Fresno Street
Fresno, CA 93721
Attn: Thomas Esqueda, Director of Public Utilities
Facsimile: (559) 621-8610

FMFCD: Fresno Metropolitan Flood Control District
c/o General Manager
5469 East Olive Avenue
Fresno, CA 93727
Facsimile: (559) 456-3194

With Copy To: Douglas B. Jensen, Esq.
Baker Manock & Jensen
5260 N. Palm Avenue, Suite 421
Fresno, CA 93704
Facsimile: (559) 432-5620

Either party may, by written notice to the other, specify a different address for notice. Any notice sent by registered or certified mail, return receipt requested, shall be deemed given on the date of delivery shown on the receipt card, or if no delivery date is shown, three (3) days after the postmark date. If sent by regular mail, the notice shall be deemed given forty-eight (48) hours after it is addressed as required in this section and mailed with postage prepaid. Notices delivered by United States Express Mail or overnight courier that guarantee next day delivery shall be deemed given twenty-four (24) hours after delivery to the Postal Service or courier. Notices transmitted by facsimile transmission or similar means (including email) shall be deemed delivered upon telephone or similar confirmation of delivery (conformation report from fax

machine is sufficient), provided a copy is also delivered via personal delivery or mail. If notice is received after 4:00 p.m. or on a Saturday, Sunday or legal holiday, it shall be deemed received on the next business day.

(e) Severability. If any provision of this Agreement is held to be illegal, invalid or unenforceable under existing or future laws, such provision shall be fully severable, and this Agreement shall be construed and enforced as if such illegal, invalid, or unenforceable provision were not a part hereof, and the remaining provisions of this Agreement shall remain in full force and effect.

(f) Construction. The parties hereto acknowledge that each party has or has had the opportunity to have counsel, of its own choosing, review and revise this Agreement, such that the normal rule of construction to the effect that any ambiguities are to be resolved against the drafting party shall not be employed in the interpretation of this Agreement or any exhibits or amendments hereto.

(g) Governing Law and Venue. This Agreement shall be governed by, and construed and enforced in accordance with, the laws of the State of California. Venue for the purposes of the filing of any action regarding the enforcement or interpretation of this Agreement and any rights and duties hereunder shall be in Fresno County, California.

(h) Waiver. No failure or delay by a party to insist on the strict performance of any provision of this Agreement, or to exercise any right or remedy consequent on a breach thereof, shall constitute a waiver of any breach or subsequent breach of such provision. The waiver by either party of a breach by the other of any provision of this Agreement shall not constitute a continuing waiver or a waiver of any subsequent breach of either the same or a different provision of this Agreement. No provisions of this Agreement may be waived unless in writing and signed by all parties to this Agreement. Waiver of any one provision herein shall not be deemed to be a waiver of any other provision herein.

(i) Assignment. Neither party hereto shall assign this Agreement, or any interest herein, without the prior written consent of the other party. Any such attempted assignment in violation of this Agreement shall be null and void.

(j) Binding Effect. This Agreement shall apply to and bind successors, assignees, contractors, subcontractors, transferees, agents, employees, and representatives of the respective parties hereto.

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IN WITNESS WHEREOF, the Parties hereto have executed this Agreement as of the day and year first above written.

"FMFCD"
FRESNO METROPOLITAN FLOOD
CONTROL DISTRICT

"CITY"
CITY OF FRESNO

By: _____
Alan Hofmann
General Manager

By: _____
Thomas C. Esqueda
Director of Public Utilities

Date: _____

Date: _____

ATTEST:
YVONNE SPENCE, CMC
City Clerk

By: _____
Deputy

APPROVED AS TO FORM:
DOUGLAS T. SLOAN
City Attorney

By: Tracy N. Parvanian
Tracy N. Parvanian
Deputy City Attorney

Date: 4-9-15

Attachment: Exhibit "A"

EXHIBIT "A"
Sheet 1 of 3

All of that portion of Parcel 1 and Parcel 2 as described in that Grant Deed recorded August 1, 1977 as Document No. 97097846, Official Records of Fresno County, situated in the west half of Section 5, Township 12 South, Range 21 East, Mount Diablo Base and Meridian, in the County of Fresno, State of California, according to the Official United States Government Township Plat thereof, being more particularly described as follows:

Commencing at the southeast corner of the northwest quarter of said Section 5; thence North 89° 39' 38" West, along the north line of the southwest quarter of said Section 5, a distance of 442.14 feet to a point on the northwesterly line of said Parcel 2, thence South 54° 31' 06" West along the northwesterly line of said Parcel 2, a distance of 74.23 feet to the most northerly corner of the easement granted to the Fresno Metropolitan Flood Control District as described in that deed recorded January 23, 1948 in Book 2611 at Page 328, Official Records of Fresno County (hereafter referred to as FMFCD "A"), said corner being the **True Point of Beginning** of this description, said point also being on the northwesterly line of the land described in the easement granted to the City of Fresno for underground pipeline purposes, recorded _____ as Document No. _____, Official Records of Fresno County (hereafter referred to as City "A"); thence

- 1) South 39° 18' 54" East along the northeasterly line of said FMFCD "A", a distance of 60.14 feet to the most easterly corner of said FMFCD "A", said point being on the southeasterly line of said City "A" and the line between said Parcel 1 and said Parcel 2, said point also being the most northerly corner of the easement granted to the Fresno Metropolitan Flood Control District as described in that deed recorded October 8, 1947 in Book 2566 at Page 301, Official Records of Fresno County (hereafter referred to as FMFCD "B"), said point also being on the northwesterly line of the land described in the easement granted to the City of Fresno for underground pipeline purposes, recorded _____ as Document No. _____, Official Records of Fresno County (hereafter referred to as City "B"); thence
- 2) South 44° 43' 08" East along the northeasterly line of said FMFCD "B", a distance of 116.50 feet to the southeasterly line of the land described in said City "B"; thence
- 3) South 54° 31' 06" West along the southeasterly line of said City "B", a distance of 343.59 feet to the beginning of a tangent curve concave northwesterly and having a radius of 555.00 feet; thence
- 4) southwesterly, along the arc of said tangent curve and the southeasterly line of said City "B", through a central angle of 10° 02' 57", and an arc distance of 97.34 feet; thence
- 5) North 40° 30' 40" West along the southeasterly line of said City "B", non-tangent to last said curve, a distance of 31.13 feet to the beginning of a non-tangent curve concave northwesterly and having a radius of 525.00 feet, a radial to said point bears South 24° 32' 55" East; thence

EXHIBIT "A"

Sheet 2 of 3

- 6) Southwesterly, along the southeasterly line of said City "B" and along the arc of said non-tangent curve, through a central angle of $8^{\circ} 15' 32''$, and an arc distance of 75.68 feet to the southwesterly line of said FMFCD "B"; thence
- 7) North $44^{\circ} 43' 08''$ West along the southwesterly line of said FMFCD "B", non-tangent to last said curve, a distance of 66.74 feet to the most westerly corner of said FMFCD "B" and the most southerly corner of FMFCD "A", said point also being on the line between said Parcel 1 and said Parcel 2; thence
- 8) North $31^{\circ} 53' 14''$ West along the southwesterly line of said FMFCD "A", a distance of 60.15 feet to the most westerly corner of said FMFCD "A" and the northwesterly line of said City "A", said point also being on the northwesterly line of said Parcel 2 and the beginning of a non-tangent curve concave northwesterly and having a radius of 1116.00 feet, a radial to said point bears South $27^{\circ} 46' 32''$ East; thence
- 9) Northeasterly, along the northwesterly line of said City "A" and the northwesterly line of said Parcel 2 and also along the arc of the last said non-tangent curve through a central angle of $7^{\circ} 43' 25''$, and an arc distance of 150.44 feet; thence
- 10) North $54^{\circ} 31' 06''$ East along the northwesterly line of said City "A" and the northwesterly line of said Parcel 2, non-tangent to last said curve, a distance of 350.41 feet to the **Point of Beginning**.

Containing an area of 1.96 acres, more or less.

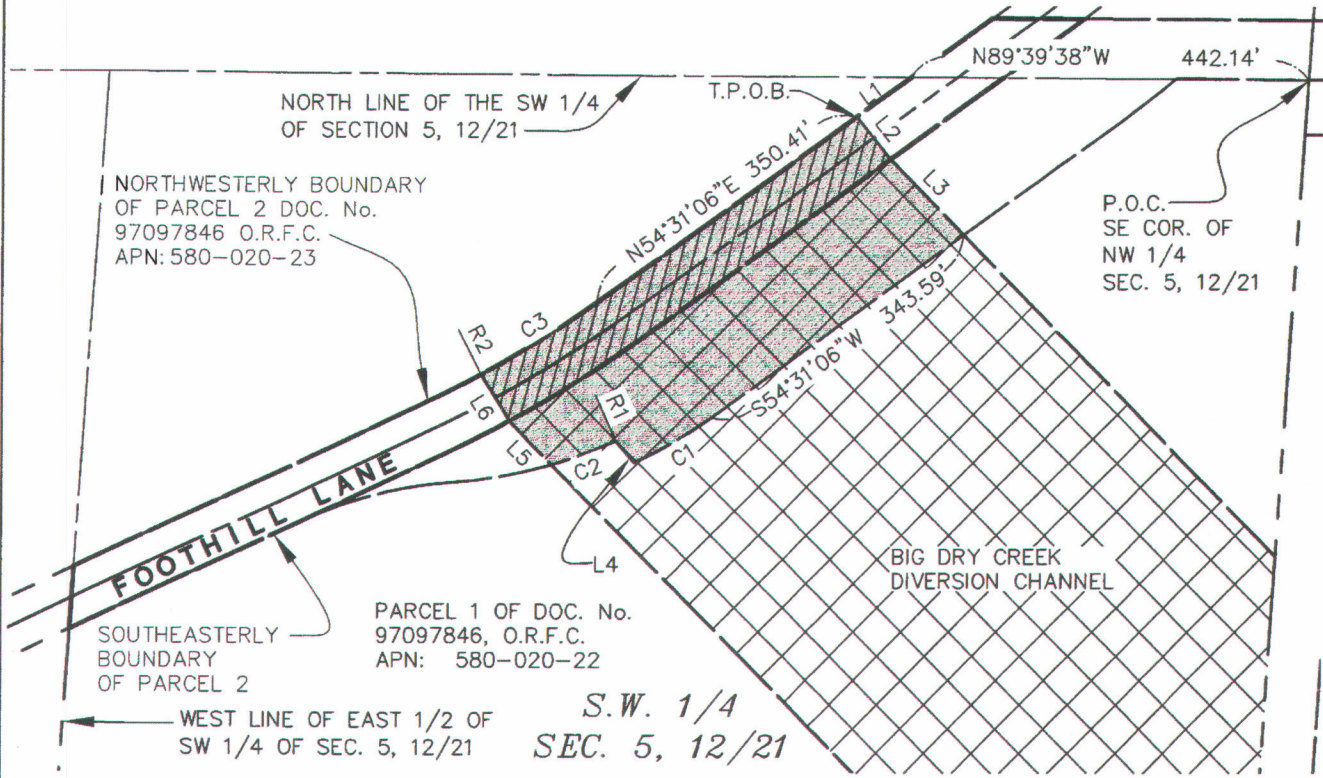
END OF DESCRIPTION



Date
Signed 4/14/2015

EXHIBIT "A"

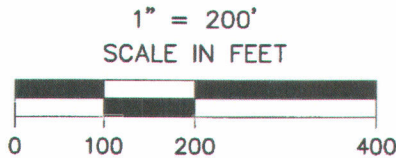
SHEET 3 OF 3



LINE TABLE		
LINE	BEARING	LENGTH
L1	S54°31'06"W	74.23'
L2	S39°18'54"E	60.14'
L3	S44°43'08"E	116.50'
L4	N40°30'40"W	31.13'
L5	N44°43'08"W	66.74'
L6	N31°53'14"W	60.15'

CURVE TABLE			
CURVE	RADIUS	LENGTH	DELTA
C1	555.00	97.34'	10°02'57"
C2	525.00	75.68'	8°15'32"
C3	1116.00	150.44'	7°43'25"

RADIAL TABLE	
RADIAL	BEARING
R1	S24°32'55"E
R2	S27°46'32"E



LEGEND

- AREA PREVIOUSLY GRANTED FOR FMFCD EASEMENT PER DOCUMENT RECORDED JANUARY 23, 1948 IN BOOK 2611 PAGE 328 ET. SEQ. O.R.F.C. (FMFCD "A")
- AREA PREVIOUSLY GRANTED FOR FMFCD EASEMENT PER DOCUMENT RECORDED OCTOBER 8, 1947 IN BOOK 2566 PAGE 301 ET. SEQ. O.R.F.C. (FMFCD "B")
- INDICATES AREA TO BE COMMONLY SHARED FOR PUBLIC STORM CHANNEL AND WATER PIPELINE/ACCESS EASEMENT PURPOSES (1.96 ACRES +/-)

- O.R.F.C. OFFICIAL RECORDS FRESNO COUNTY
- P.O.C. POINT OF COMMENCEMENT
- T.P.O.B. TRUE POINT OF BEGINNING



DATE SIGNED: 4/14/2015

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PROVOST & PRITCHARD
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www.ppmp.com

FRESNO METROPOLITAN FLOOD CONTROL DISTRICT
COMMON USE AGREEMENT

PORTION of
W. 1/2, SEC. 5, T.12 S., R.21 E., M.D.B. & M.

DR. BY MDH
CH. BY JDL
DATE 04/14/2015
SCALE 1" = 200'

SHEET NO. 3
OF 3 SHEETS
PROJECT NO. 15610702