

**MEMORANDUM OF UNDERSTANDING REGARDING COORDINATION, COOPERATION,
AND COST SHARING ON PRECONSTRUCTION ACTIVITIES RELATED TO THE
TEMPERANCE FLAT RESERVOIR PROJECT**

This Memorandum of Understanding (“**MOU**” or “**Agreement**”) is entered into by and between the Friant Water Authority, a California joint powers authority (“**FWA**”) and the public agencies listed on the attached Exhibit A, which are referred to in this Agreement individually as a “**Party**” and collectively as the “**Parties**.”

RECITALS

A. Each of the Parties is a public agency organized and operating under the laws of the State of California.

B. Each of the Parties either: (1) contracts for water supplies from the Central Valley Project (“**CVP**”), which is a federal reclamation project operated by the United States Bureau of Reclamation (“**Reclamation**”), (2) contracts for water supplies from a State water facility described in California Water Code section 12934(d) (“**State Water Project**” or “**SWP**”), (3) has a contract with Reclamation or the State of California to convey water from CVP or SWP facilities, or (4) has a legal right to receive water directly from CVP or SWP facilities.

C. As part of the CVP, Reclamation constructed the Friant Dam located northeast of the City of Fresno in Fresno and Madera Counties, California, to store water from the San Joaquin River and its tributaries. The water stored behind Friant Dam is known as Millerton Lake.

D. The Parties, Reclamation, and other public agencies have for a number of years investigated the feasibility of constructing a second dam along the San Joaquin River behind Friant Dam to, among other things, increase water storage capacity on the San Joaquin River.

E. The location of the proposed second dam and reservoir is in an area commonly known as Temperance Flat. As such, the proposed project pertaining to the feasibility studies, design, permitting, construction, management, and ultimately operation of a dam and reservoir and related facilities at Temperance Flat is referred to in this Agreement as the “**Temperance Flat Reservoir Project**” or “**Project**.”

F. The Parties desire by this Agreement to provide a short-term mechanism for financing and managing the preparation of additional analyses and studies regarding the potential benefits and feasibility of the Project, as well as other preconstruction activities, as further detailed in the “**Scope of Work**” or “**SOW**” attached as Exhibit B.

G. It is anticipated that some or all of the Parties will ultimately become members of a joint powers agency that FWA and funding agencies may form to implement the Project (“**Project JPA**”).

AGREEMENT

In consideration of the mutual promises, covenants, and conditions set forth in the MOU, the Parties agree as follows:

1. EFFECTIVE DATE AND TERM

1.1. **Effective Date.** This Agreement will become effective upon the adoption of a resolution or the submission of other evidence of approval of the MOU to FWA by at least five Parties, not including FWA ("**Effective Date**").

1.2. **Term.** The MOU will remain in effect from the Effective Date until the sooner to occur of: (a) termination of the MOU in accordance with Section 9.1, or (b) two years from the Effective Date.

2. PURPOSE

2.1 **Purpose.** The purpose of this MOU is to cooperatively fund and manage the preconstruction activities set forth in the Scope of Work in furtherance of the Temperance Flat Project in order to, among other things, assist the Parties in making an informed determination with respect to the extent to which they (or their member agencies) may participate as long-term investors in the Project. In addition to the activities specified in the SOW, the Parties acknowledge and agree that they will coordinate on Project related matters with Reclamation and other federal and State agencies whose approvals will be needed in order to carry out the Project or that have jurisdiction over matters related or necessary to the Project.

2.2 **No Separate Entity.** This MOU does not create a legal entity under the Joint Exercise of Powers Act (Government Code sections 6500 and following) or any other law, which would authorize the execution of contracts, provide the right to sue or be sued, or otherwise create a separate legal entity under the laws of California. Instead, this MOU establishes a mutual understanding to carry out the Scope of Work in furtherance of the Project, which the Parties believe will provide a variety of benefits to communities that they serve and the region by increasing water supplies, improving the operation of the State's water system, and improving ecosystem and water quality conditions in the San Joaquin Valley and the Sacramento-San Joaquin Delta.

2.3 **No Implied Effect on Rights:** Except as expressly provided in this Agreement, nothing in this Agreement may be construed as affecting the existing rights or obligations of the Parties, including but not limited to any rights or obligations pursuant to contracts for delivery of water from the CVP or SWP.

2.4 **Project Operating Goals.** In pursuing the SOW activities under this MOU, the Parties acknowledge that the vision for the operations plan of the Project set forth in Exhibit C will guide relevant decisions related to the proposed work.

3. PARTIES

3.1. **Eligible Agencies.** The following public agencies (as defined in Section 6500 of the Joint Exercise of Powers Act) are eligible to become a party to this MOU upon execution of

the MOU and the payment of an initial contribution in the amount of \$100,000 or more to FWA within 10 days of its execution of this MOU: (a) CVP Friant Division contractors, (b) other CVP contractors, (c) SWP contractors, (d) a joint powers agency comprised of CVP or SWP contractors, and (e) agencies with a legal right to receive water from CVP or SWP facilities (collectively, “**Eligible Agencies**”). FWA will provide staff and other resources to administer and implement this MOU as provided in Section 5.3 in lieu of any monetary contributions. As a Party to the MOU, FWA will have a representative on the Steering Committee (described below) to ensure that Friant-wide interests are represented.

3.2. **Additional Parties:** Following the Effective Date of this MOU, other Eligible Agencies may subsequently become a Party to this MOU upon: (a) an affirmative vote of at least 75% of the designated Representatives of the then total number of Parties, (b) the new Party's execution of this Agreement, as it may be amended, and (c) payment of the initial contribution in the amount of \$100,000 or more.

3.3. **Cost Sharing and Coordination by a Party.** A Party may have separate agreements with other interested parties for the purpose of funding that Party's required contributions under this MOU, with the understanding that such other interested parties may have a role in the SOW activities and may have access to the SOW materials, including Project modeling; provided, however, that only one Eligible Agency under such arrangement may be a Party to the MOU and only that Party may designate a Representative on the Steering Committee.

4. **ADMINISTRATION AND COORDINATION**

4.1. **Contracting Agency Duties.** FWA will serve as the “**Contracting Agency**” for this MOU. As the Contracting Agency, FWA agrees to perform the following services:

4.1.1. Contracting. Negotiate and, following review and approval by the Parties' Representatives (defined below), enter into contracts with the various individuals or entities providing services under the SOW.

4.1.2. Administration. Monitor and manage the SOW activities and the status of the Project.

4.1.3. Expenditures. Utilize the funds deposited by the Parties only for the administration of the SOW contracts and activities.

4.1.4. Invoicing. Invoice the Parties for any additional amounts required in accordance with Section 5 (Financial Provisions) of this MOU.

4.1.5. Accounting. Provide an accounting of all contract costs and expenditures under this MOU to the Parties: (a) each month; (b) the end of each fiscal year (September 30) that this MOU remains in effect; (c) upon the request of any Party; and (d) upon the termination of the Agreement. All such accountings under (b), (c) and (d) will be provided within 20 days of the applicable event.

4.1.6. Reporting. Provide periodic reports concerning the status of the SOW activities and the Project at such frequency as the Parties may mutually agree, including at meetings of the Steering Committee.

4.2. **Party Duties.** Each Party agrees to:

4.2.1. Designate Representatives. Designate a primary and alternate representative ("**Representative**") to serve on the Steering Committee.

4.2.2. Payments. Pay their proportionate share of contributions towards the SOW activities upon invoice by FWA.

4.2.3. Cooperate. Make good faith, commercially reasonable efforts to cooperate with the other Parties to achieve the purposes of this MOU, including by providing all requested relevant public information and documentation in their possession or control.

4.3. **Steering Committee.** A committee ("**Steering Committee**") is established consisting of the designated Representative of each Party to coordinate and provide direction on the SOW contracts and activities. The Parties expect that the Steering Committee will be the principal forum within which key policy and strategy issues pertaining to the Project will be discussed and considered.

4.3.1. Notice of Designated Representative. Each Party must communicate their initial primary and alternative Representative selections, and any subsequent changes in Representatives, to FWA in writing. All Representatives serve at the pleasure of their respective Party agency.

4.3.2. Good Standing. In order to participate on the Steering Committee, each Party must be current with respect to its required contributions under Section 5 of this MOU.

4.3.3. Meetings. The Steering Committee will hold regular meetings, generally at least one meeting per month, which may be by video or tele-conference or in person, and may hold other meetings at more frequent intervals as may be necessary. The Steering Committee will elect, by simple majority, a Steering Committee Chair and Vice-Chair. The Steering Committee will direct and manage the work of the consultants through FWA staff with respect to the preparation of the technical, financial, and operational information and data necessary for the development of the Project. Technical documents, draft studies and analyses, and other relevant documents will be provided to members of the Steering Committee by FWA staff at a time that is early enough to allow for meaningful participation in meeting deliberations. The Steering Committee may elect to form subcommittees and workgroups as deemed necessary to analyze issues in greater detail and report back to the full Steering Committee.

4.3.4. Decision Process. The Parties agree that reasonable efforts should be made to ensure each matter considered is approved by a consensus of the Parties. Consensus is reached when a position reflects the predominant opinion of the Steering Committee members. In the event that a Steering Committee member opposes a proposal that has predominant support, that member must propose for further discussion an alternative that it would support. The Parties will make all reasonable efforts to prevent disputes and resolve matters by consensus in the Steering Committee. However, if consensus about a particular matter is not reached, then the majority opinion of the Steering Committee (based on one vote per Party) will control in order to maintain progress on the SOW activities and the Project. Representatives need not be physically present at a meeting to vote, and may cast their vote by phone or other means of electronic communication (e.g., email, fax).

4.4. **Reserved Authority.** The Parties acknowledge and agree that any policy decisions made by the Steering Committee with respect to the proposed implementation of the Project (i.e., non-contractual or non-fiscal decisions under this MOU related to the SOW) are preliminary, and no such action of the Steering Committee or provision of this Agreement may be construed to delegate or abrogate the authority or rights of the Parties.

5. FINANCIAL PROVISIONS

5.1. **Funding.** The Parties agree to work together to provide adequate funding to carry out the SOW activities.

5.1.1 Additional Contributions. The current estimate of the cost to complete the SOW activities is approximately \$2,000,000. Therefore, in addition to each Party's initial contribution of at least \$100,000, it is anticipated that at least two additional contributions will be required of each Party during the term of this MOU in order to complete the SOW activities. If a Party elects to provide more than the minimum contribution required at the time a contribution is due, such additional contribution will count towards that Party's share of the total contributions required of a Party under this MOU. FWA will provide written notice to the Parties of the exact amount of each additional contribution required and the purpose for which it will be used. Each Party is required to make such additional contribution within 30 days of the date the notice is sent by FWA.

5.1.2 Credit Towards Project Costs. Subject to Section 10.5 below, the Parties agree that those Parties who ultimately participate in the Project JPA will make good faith efforts when establishing such JPA to consider a Party's financial contributions under this MOU as a credit towards the costs of the Project with respect to any determination of proportionate investment in the Project for purposes of allocating any ownership interest in the Project and any corresponding rights to additional water stored by the Project.

5.1.3 Federal and State Funding Assistance. The Parties agree to cooperate in identifying and securing, where appropriate, federal and State funds to support the development and implementation of the Project.

5.2. **Special Account.** All funds collected under this MOU will be held in a separate FWA account in the name of the Project. Reports will be provided to the Steering Committee as provided in Section 4.1.5. The records of all expenditures under this MOU will be open to inspection by the Parties' Representatives or employees or agents upon reasonable notice.

5.3. **FWA General and Administrative Costs.** The costs of FWA staff time at their fully burdened rate and the actual invoiced costs of the time of FWA contractors expended on administrative activities pertaining to this MOU and the Project (i.e., not contractors retained by FWA to perform SOW services) will be charged to the Parties and collected by FWA from the funds contributed by the Parties.

6. DEBTS AND LIABILITIES

Except as specifically provided in this Agreement, no Party will be individually responsible for any of the debts, liabilities, or obligations of any other Party, nor will they have any liabilities under any contracts entered into by FWA, but each Party is responsible for paying FWA the additional contributions required under Section 5 so that FWA can administer and implement the

SOW activities.

7. INDEMNIFICATION; IMMUNITIES

7.1. **Generally.** Each Party agrees to indemnify, defend, and hold harmless each other Party, including its elected and appointed officers, employees, agents, attorneys, and designated volunteers from and against any and all liability, including, but not limited to demands, claims, actions, fees, costs, and expenses (including reasonable attorney's and expert witness fees), arising from or connected with the respective acts of each Party arising from or related to this MOU; provided, however, that no Party is obligated to indemnify another Party for that Party's own negligence or willful misconduct

7.2. **Government Code Section 895.2.** In light of the provisions of California Government Code section 895.2 imposing certain tort liability jointly upon public entities solely by reason of such entities being parties to an agreement (as defined in Government Code section 895), each of the Parties, pursuant to the authorization contained in Government Code sections 895.4 and 895.6, agrees to assume the full liability imposed upon it or any of its officers, agents, or employees, by law for injury caused by any act or omission occurring in the performance of this MOU to the same extent such liability would be imposed in the absence of Government Code section 895.2. To achieve the above stated purpose, each Party agrees to indemnify, defend, and holds harmless each other Party for any liability, cost, or expense that may be imposed upon such other Party solely by virtue of Government Code section 895.2. The provisions of California Civil Code section 2778 regarding the interpretation of indemnity provisions are made a part of this Agreement.

7.3. **Privileges and Immunities.** All of the privileges and immunities from liability, exemptions from laws, ordinances, and rules, all pension, relief, disability, worker's compensation, and other benefits which apply to the activity of officers, agents, or employees of any Party when performing their respective functions within the territorial limits of the Party, will apply to them to the same degree and extent while engaged in the performance on any of their functions and duties extraterritorially under this MOU.

8. DISPUTES

Each Party has the right to assert matters which it believes have not been undertaken in accordance with this MOU, to explain the basis for such assertion, and to receive from the other Party or Parties a justification of its position on such matters. If, on the basis of the Party's review of any terms of the MOU, any Party concludes that another Party has not complied in good faith with the terms of the MOU, then such Party may issue a written "**Notice of Non-Compliance**" specifying the grounds and all facts demonstrating such non-compliance, which Notice must be provided to the alleged noncompliant Party along with all other Parties. The alleged noncompliant Party will have 15 days to cure or remedy the non-compliance identified in the Notice of Non-Compliance, or if such cure or remedy is not reasonably capable of being cured or remedied within such 15-day period, to commence to cure or remedy the non-compliance and to diligently and in good faith prosecute such cure or remedy to completion. If the Party receiving a Notice of Non-Compliance does not believe it is out of compliance and contests the Notice, it must do so by responding in writing to the Notice within 15 days after receipt of the Notice. Any response to the Notice must be sent to all Parties. FWA will notify in writing all Parties within 15 days of any Party failing to cure any alleged non-compliance with the terms of this MOU. The compliant Parties will determine the next course of action, which may include the termination of a non-compliant Party's participation in the MOU in accordance with

Section 9.2.

9. TERMINATION; WITHDRAWAL

9.1 Mutual Termination. This MOU may be terminated upon the express written agreement of all Parties. If this MOU is terminated, all outstanding expenses under this MOU for SOW activities in excess of existing contributions must be paid by the Parties by paying their proportionate share of such expenses in accordance with Section 5. Thereafter, FWA will make an equitable redistribution of remaining funds, if any, in proportion to each Party's contributions. The Parties will each have full rights to all completed work under this MOU. Rights to uncompleted work still under contract will be assigned to the Party or Parties who may elect to fund the completion of such work.

9.2 Termination of a Party. This Agreement may be terminated with respect to any Party upon the affirmative vote of all members of the Steering Committee less one. Prior to any vote to terminate this Agreement with respect to a Party, written notice of the proposed termination and the reason(s) for such termination will be presented at a Steering Committee meeting with the opportunity for discussion. The Party subject to possible termination will have the opportunity to respond to any reasons and allegations that may be cited as a basis for termination prior to a vote. If a Party is terminated, that Party will be responsible for its share of any costs incurred under this MOU up to the date of termination.

9.3 Withdrawal of a Party. A Party may withdraw from this MOU by giving at least 30 days' written notice of its election to do so to FWA. Prior to withdrawal or as soon as an accounting can be completed, the withdrawing Party must pay its proportionate share of any outstanding expenses incurred under this MOU through the date of withdrawal. The withdrawing Party will also be responsible for any claims, demands, damages, or liability arising from this Agreement through the date of withdrawal.

9.4 Disposition of Funds upon Termination. Upon termination of this Agreement, any surplus funds in the possession of FWA for use under this Agreement, after payment of all liabilities, costs, expenses and charges incurred under this Agreement, will be returned to the then-existing Parties in proportion to the contributions made by each Party.

10. MISCELLANEOUS PROVISIONS

10.1 Notices. Any notices, invoices, or reports relating to this MOU, and any request, demand, statement, or other communication required or permitted under this MOU must be in writing and must be delivered to the Representatives of the Parties at the addresses set forth in the attached Exhibit A. The Parties must promptly notify each other of any change of contact information, including personnel changes, provided in Exhibit A. Written notice includes notice delivered via e-mail. A notice will be deemed to have been received on (i) the date of delivery, if delivered by hand during regular business hours, or by e-mail; or (ii) on the third business day following mailing by registered or certified mail (return receipt requested) to the addresses set forth in Exhibit A.

10.2 Confidentiality of Draft Documents. The Parties acknowledge and agree that some of the reports and work product to be prepared under this MOU may be proprietary, privileged, or otherwise confidential (collectively, "**Confidential Records**") and therefore not subject to disclosure to third parties, including under the California Public Records Act ("**CPRA**").

Each Party agrees to hold any Confidential Records in confidence and to take all reasonable precautions with regard to the storage, custody, or use of Confidential Records to ensure that the content and confidential nature is maintained and protected, including all precautions that such Party employs with respect to its own confidential and proprietary records. In the event a Party receives a request from a third party for disclosure of any Confidential Records pursuant to the CPRA or a discovery request or subpoena, such Party agrees to immediately give notice to FWA of such request including the disclosure deadline. FWA will have five days from the date it receives such notice to in turn notify the Party in writing that it objects to the disclosure of any specific Confidential Records. If FWA so objects, any legal action to enjoin or limit disclosure will be FWA's obligation and at FWA's sole cost and expense. A Party may disclose any Confidential Records pursuant to a proper court or governmental order, provided that such Party may disclose only that portion of the Confidential Record that is legally required to be disclosed. This section and the obligations and duties imposed on each Party will survive the expiration or termination of this MOU.

10.3 Relationship of the Parties. The Parties are, and will remain as to each other, wholly independent entities. No Party to this MOU has any power to incur any debt, obligation, or liability on behalf of any other Party unless expressly provided in this MOU. No employee, agent, or officer of a Party will be deemed for any purpose whatsoever to be an agent, employee, or officer of another Party.

10.4 No Implied Change to CVP. This Agreement is not intended to and may not be construed to modify any authority granted by statute, rule or regulation, or to make applicable to the CVP any State law that, in the absence of this Agreement, would not apply to the CVP.

10.5 No Precedence. Each Party's execution of this MOU, including any amendment, and such Party's participation in any of the activities under this MOU, is voluntary and does not ensure that such Party Parties will have a right to participate in the Project, the Project JPA, or any related agreement or actions, nor does the execution of this MOU and participation in any of the activities under this MOU require that any Party participate in the Project, the Project JPA, or any related agreement or actions. In addition, participation in this MOU will not be deemed acquiescence to any final actions authorizing the development and implementation of the Project, as all such rights are reserved to the Parties.

10.6 Amendment of Agreement. This Agreement may be amended only by an affirmative vote of at least 75% of the Representatives of the Parties on the Steering Committee. FWA will provide notice to all Parties of amendments to this Agreement, including the effective date of such amendments.

10.7 Assignment. The rights and duties of the Parties under this MOU may not be assigned or delegated without the advance written consent of all the other Parties, and any attempt to assign or delegate such rights or duties in contravention of this section will be null and void. This Agreement inures to the benefit of, and is binding upon, the successors and assigns of the Parties. This section does not prohibit a Party from entering into an independent agreement with another public agency regarding the funding or financing of that Party's contributions under this MOU, or the disposition of the remaining funds which that Party may receive under this Agreement, so long as the independent agreement does not affect or purport to affect, the rights and duties of the Parties under this Agreement.

10.8 Governing law. This MOU is governed by, and will be interpreted, construed, and

enforced in accordance with the laws of the State of California.

10.9 Entire Agreement. This MOU constitutes the entire agreement of the Parties with respect to the subject matter of this Agreement.

10.10 Waiver. Waiver by any Party to this MOU of any term, condition, or covenant of this MOU will not constitute a waiver of any other term, condition, or covenant. Waiver by any Party to any breach of the provisions of this MOU will not constitute a waiver of any other provision, nor will it constitute a waiver of any subsequent breach or violation of any provision of this MOU.

10.11 No Presumption in Drafting. All Parties have had the opportunity to have this MOU reviewed by their legal counsel. Accordingly, this MOU will be construed according to its fair language. Any ambiguities will be resolved in a collaborative manner by the Parties and will be rectified by amending this MOU as described in Section 10.6.

10.12 Severability. If one or more clauses, sentences, paragraphs or provisions of this Agreement is held to be unlawful, invalid or unenforceable, the remainder of the Agreement will not be affected. Such clauses, sentences, paragraphs or provisions will be deemed reformed so as to be lawful, valid, and enforced to the maximum extent possible.

10.13 Execution by Counterparts. This Agreement may be executed in any number of counterparts and upon execution by all Parties, each executed counterpart will have the same force and effect as an original instrument and as if all Parties had signed the same instrument. Any signature page of this Agreement may be detached from any counterpart of this Agreement without impairing the legal effect of any signatures thereon, and may be attached to another counterpart of this Agreement identical in form hereto but have attached to it one or more signature pages. Facsimile and electronic signatures will be deemed valid and binding.

THE UNDERSIGNED AUTHORIZED REPRESENTATIVES of the Parties have executed this Agreement as of the date shown below:

SIGNATURE PAGE
MEMORANDUM OF UNDERSTANDING REGARDING COORDINATION, COOPERATION
AND COST SHARING ON PRECONSTRUCTION ACTIVITIES RELATED TO THE
TEMPERANCE FLAT RESERVOIR PROJECT

PARTY NAME

Date: _____

By: _____

Name:

Title:

DRAFT

EXHIBIT A

Parties to the MOU

DRAFT

EXHIBIT B

**Scope of Work
(Attached)**

DRAFT

EXHIBIT C

Project Operating Goals

The final operations plan for the Project should:

1. Allow all Friant Division contractors – without further investment – to retain full access to all current types and quantities of Millerton Lake inflows per their contracts with Reclamation, including unstorable flows, as if the Temperance Flat Reservoir Project were not constructed.
2. Have no negative impact on the United States' ability to comply with the requirements of the San Joaquin River Settlement and authorizing legislation, the rights of the San Joaquin River Exchange Contractors as established pursuant to Contract No. Ilr-1144, as amended, or any Holding Contracts with the United States.
3. Facilitate groundwater sustainability for the seven critically overdrafted groundwater basins in the Friant Division by allowing wet year water supplies on tributaries throughout the Friant Division service area to be exchanged, stored, and managed until such water can be put to beneficial use.
4. Allow for increases in water supply reliability for CVP South of Delta contractors by allowing CVP water to be stored securely in the Temperance Flat Reservoir, through exchanges with Friant Division contractors, where such water would be less subject to spill than San Luis Reservoir.