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Decision 91-12-053 December 18, 1991

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of )  
DEL ESTE WATER COMPANY (U 175 W), a )  
corporation, for an order author- )  
izing it to execute a Memorandum of )  
Understanding with Modesto Irriga- )  
tion District and the City of )  
Modesto providing for a treated )  
water supply. )

**ORIGINAL**

Application 91-05-025  
(Filed May 9, 1991)

O P I N I O N

1. Summary of Decision

In this decision the Commission authorizes applicant Del Este Water Company (Del Este) to execute a certain Memorandum of Understanding (MOU) among Del Este, the Modesto Irrigation District (District), and the City of Modesto (City), providing for the construction of a project (the Project) which will enable the District to furnish surface water to the other parties. The Project will relieve Del Este from its dependency upon a dwindling and deteriorating supply of groundwater, presently Del Este's only water source. The Commission also finds that Del Este's execution of the MOU is reasonable and prudent, and in the best interests of its customers. This is a final order, and the proceeding is accordingly closed.

2. Background and Description  
of the Application

2.1 General

Del Este seeks the Commission's authorization to execute the MOU, which essentially provides for construction of the Project to enable the District to deliver 30 million gallons (MG) of surface water per day initially, and up to 60 MG per day

ultimately, to the City and Del Este.<sup>1</sup> Entering into the MOU will free Del Este from its total reliance upon its system of wells, from which its entire water supply now comes, and which has suffered from steadily declining water tables and degradation of water quality in recent years.

Del Este states that it needs the treated water which the Project will supply, and anticipates that this water will constitute approximately 50% of the total supply furnished to its customers in the affected service area during summer months, and 100% during the winter months. With certain stipulated conditions, the Commission's Water Utilities Branch (Branch) recommends approval of the Application. In recognition of Del Este's customers' need for a continuing supply of water which meets increasingly stringent water quality standards, and the declining availability of such water from Del Este's existing underground sources, we agree that the approval sought by Del Este is required. We therefore grant the Application on the terms and conditions set forth in the Order.

1 Del Este's receipt of California Public Utilities Commission approval to execute the MOU is an express condition precedent to Del Este's entering into the agreement. (Appendix A, p. 50.) Del Este states only that its Application is made "pursuant to the provisions of the Public Utilities Code...and General Order No. 96-A." (Application, p. 22.) Although the latter order does not, on its face, require Del Este to seek, nor authorize the Commission to give, such approval, we do so pursuant to Section 701 of the California Public Utilities Code, which states:

"The commission may supervise and regulate every public utility in the State and may do all things, whether specifically designated in this part or in addition thereto, which are necessary and convenient in the exercise of such power and jurisdiction."

## 2.2 Procedural History

This Application is an outgrowth of Del Este's request for a general rate increase in Application (A.) 91-03-024. In that proceeding Del Este made a separate motion, specifically seeking the Commission's authority to enter into the MOU. At the behest of the Branch, Del Este withdrew its motion and refiled its request in the form of the instant Application. See Decision (D.) 91-12-073 in A.91-03-024, pp. 2-3 (mimeo.).

The Commission received no protests to the Application. Branch prepared and served upon interested parties a report on the MOU dated October 1991, stating that Branch was concerned about the relative priority to be accorded Del Este's customers under the MOU, and about the possibility that they could experience adversely discriminatory treatment because their interests might not be represented adequately on the District's Board of Directors. The report also makes certain recommendations to address these concerns. By written stipulation executed November 13, 1991, Del Este and Branch agreed, *inter alia*, that the sections of the report setting forth these concerns and recommendations be deemed to have been deleted. As part of the stipulation Branch also recommends that the Commission grant Del Este's Application and find that execution of the MOU by Del Este is reasonable and prudent and in the best interests of its customers.

## 2.3 Background of the MOU

According to the Application, most of Del Este's system (and approximately 80% of its customers) are within the District's boundaries. All of Del Este's supply for that portion of its system is currently drawn from underground. A water management study dated November 1984 (the Montgomery Study), which was prepared for the District and the City by James M. Montgomery Consulting Engineers, Inc., found that Del Este's and the City's groundwater sources were limited, supplies were declining, and a continued decline in the quantity of groundwater would result in a

gradual degradation of its quality. This fact, in combination with the prospect of increasingly stringent federal and state drinking water standards, portended growing difficulty in meeting domestic water supply needs solely through the use of groundwater. The Montgomery Study therefore recommended that the City and Del Este contract with the District for treated surface water to supplement their groundwater supplies.

According to the Application, the District was formed more than 100 years ago for the purpose of providing irrigation water to serve the needs of agriculture. To that end, the District perfected water rights sufficient to meet those needs. However, in recent years population growth within the District's boundaries has reduced the irrigated acreage while increasing the demand for municipal uses of water. The portions of the service areas of the City and Del Este which would be served with water pursuant to the MOU are within the boundaries of the District. By furnishing this water under an agreement, the District would simply shift the use of its water from agricultural to domestic purposes.

Based upon these circumstances, Del Este and the City concluded that it would be in their best interests and those of their respective customers to utilize the District's available water. The District has sufficient water rights in the Tuolumne River to enable it initially to divert and deliver 30 MG per day to the City and Del Este, and to provide for future expansion to 60 MG per day, upon construction of the necessary diversion and treatment facilities.

Both Del Este and the City have in fact experienced a decline in the groundwater level in the Modesto area, and degradation in its quality. Del Este states that its existing underground supply "has become inadequate for [Del Este's] needs without reference to any allowance for future growth."

(Application, p. 3.) Del Este has brought this situation to the Commission's attention several times since preparation of the

Montgomery Study, most recently in A.91-05-024.<sup>2</sup> It now confronts what it calls a "critical" situation with respect to its underground supply. (Application p. 6.) An overdraft of the underground supply has existed for some time, and has been exacerbated by the ongoing six-year drought. "Put simply," Del Este states, "a treated surface supply is needed and needed now." (Application p. 6.)

A water supply study dated March 24, 1988, which was prepared for Del Este by Brown and Caldwell Consulting Engineers, states that tapping the surface supply available from the District under the terms of the MOU is economically the most favorable long-term alternative for Del Este's customers. It is also a matter of virtual necessity to do so, for Del Este's customers must be assured of a supply which will meet current California Department of Health (DHS) standards. As Del Este admits, "The present underground supply does not. The treated surface supply will." (Application, p. 7.) Del Este therefore believes that the Project must go forward, that Del Este's participation is essential, and that time is of the essence.<sup>3</sup>

### 3. The MOU

The MOU provides that the District supply treated surface water to the City and Del Este by means of the Project, which consists of facilities necessary for the diversion, transmission, treatment, and delivery of 30 MG per day of surface water. The parties intend that all costs related to the Project be borne by

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<sup>2</sup> See Re Del Este Water Company, D.90-12-053 (mimeo.), Re Del Este Water Company D.89-11-063, 33 CPUC 2d 508, and Re Del Este Water Company D.91-12-073 in A.91-03-024 (mimeo.).

<sup>3</sup> Excerpts from three additional reports confirming the existence of the groundwater supply and quality problems and the need for the treated surface water project contemplated by the MOU are collectively included in the Application as Exhibit B.

the City and Del Este, with neither profit nor loss accruing to the District as a consequence.

As described by the parties, the Project consists of a Design Phase, a Construction Phase, and a Commercial Operation Phase. The first phase is essentially complete, and the second may commence upon execution of the MOU. The purpose of the MOU is to memorialize the agreements among the parties with respect to the Project (including their respective obligations under the Design Phase), to provide funding by the parties for work done during the first phase, and to establish a framework for future agreements leading to the development, construction, and operation of the Project.

In the Design Phase, the District retained project engineers, environmental consultants, a financial advisor, an underwriter, and bond counsel. It also undertook to obtain permits, licenses, rights, and privileges necessary for construction, operation, and maintenance of the Project. The project engineers had to prepare preliminary design development plans and specifications, and a preliminary cost estimate for review and approval by the parties. After approval, the engineers will prepare final and complete construction documents and a final construction cost estimate. In the Construction Phase, financing and construction of the Project will be completed. Before commencement of this phase all necessary agreements, including a separate Treatment and Delivery Agreement (TDA), will be executed. Finally, the Commercial Operation Phase will begin upon commercial operation of the Project as described in the TDA.

The District will operate and maintain the Project and deliver water to the City and Del Este as provided by the TDA. Water delivered must meet all state and federal drinking water quality standards applicable to the Project. The first phase's costs and expenses will be included as an element of Project financing and will be reimbursed to District 70% by City and 30% by

applicant unless the City and Del Este agree to different proportionate shares. The MOU provides for reimbursement of a party's share upon abandonment or termination of the Project by one of the parties.

Del Este's future share of the first phase costs and expenses incurred by the District will be repaid to the District through the Project permanent financing. Del Este has already paid \$128,400 as its share (15%) of costs so far incurred by the District. The balance of the first phase costs (currently estimated to be \$5 million) will be incurred by the District in the future. Del Este believes that all of these costs will be repaid to District through permanent financing, and that its additional financial exposure upon execution of the MOU should not exceed \$1.5 million.

The MOU provides for approval of preliminary and final design work and cost estimates by the City, and Del Este, and requires the written authorization of both in order for the District to proceed under the construction contracts. The true interest cost of the debt financing is also subject to the approval of the City and Del Este. If the final financing terms exceed such true interest cost, the financing will not go forward.

The District and its staff are responsible for administering the MOU and carrying out the tasks necessary for the successful completion of each of the phases of the Project. While the District Board of Directors has the final decision-making authority with respect to the Project, the City and Del Este have the authority to approve or disapprove Project milestones, namely, engineering services, preliminary design and cost estimates, final design and cost estimates, and construction contracts. If either the City or Del Este fails to approve any of those milestones, it may terminate its involvement in the MOU and the Project. In the event of such termination, the terminating party must pay the

District its full share of Project costs to the date of Project termination.

The MOU establishes two advisory committees to assist the District with the Project, a Policy Committee consisting of representatives of the District, the City and Del Este, which exercises review functions with respect to Project milestones, budget, and major design changes, and a Technical Committee consisting of one staff person appointed by each party, which has certain consulting functions with the Project manager relating to Project design, construction, operation and maintenance, and other advisory duties.

The City and Del Este, through the Policy and Technical Committees, will participate in the annual budget preparation and approval process. Both committees have specified review and recommendation functions. If there is a dispute over the budget, the Policy Committee may submit an alternative to the objectionable budget item (or items) to the District Board, which will consider the alternatives and may adopt the annual budget only after public hearing. Either the City or Del Este may terminate the MOU prior to issuance of long-term financing if either determines that the Project is not feasible by reason of technical, engineering or economic reasons, that adequate insurance is not available at a commercially reasonable price, or that the District is not meeting its financing obligations or is failing to pursue those obligations with due diligence.

The parties expect to finalize the TDA after signing the MOU. The TDA will contain a "take or pay" undertaking, requiring the City and Del Este to pay stipulated percentages (70% and 30% respectively) of the fixed costs and debt service of the Project. This payment obligation will apply irrespective of whether the Project is fully operating or operable, but is subject to certain exclusions in the event that water is not delivered for 18 consecutive months for specified reasons other than drought. Del



Este's payment obligation to the District will include the District's actual cost of raw water at the same rate charged by the District to agricultural users, and the cost to the District of operating and maintaining the Project.<sup>4</sup>

Del Este cannot state what its payment obligation under the TDA will be, since it will depend, among other things, upon the cost of the Project, the aggregate amount, term, and effective interest rate of the debt financing, and the costs of bond insurance, raw water, operation, and maintenance of the Project. However, Del Este believes that a reasonably accurate estimate of all those costs will be available before it enters into the TDA. Del Este states that it will not execute that Agreement unless it is satisfied that the projected costs are fair and reasonable, and until it has obtained appropriate Commission authorization.

#### 4. Discussion and Conclusion

Del Este's need for treated surface water to augment or supplant its groundwater supply is unquestionable. If Del Este fails to obtain an alternative source of supply, the depletion and degradation of groundwater, its only current supply, will continue in the face of Modesto's rapid growth. Moreover, there appears to be complete agreement that diversion of the District's surface water supply from agricultural to domestic use--at a time when agricultural land is rapidly being turned over to commercial and residential development--is the best available solution to Del Este's supply problem.

Del Este estimates that the cost of treated water from the Project will require an increase in its rates of approximately

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<sup>4</sup> In addition to the foregoing, as security for its commitment under the TDA, Del Este will be required to pay the cost to the District (estimated at approximately \$40,000 per year) of bond insurance guaranteeing Del Este's payment obligation to the District.

200%. The Commission does not take lightly a request to approve an agreement that will have such a drastic impact upon Del Este's customers. But the request is justified: the higher cost of water is a price Modesto's ratepayers must pay for the region's explosive growth, which presumably brings with it corresponding ratepayer benefits.

If Modesto's needs could be met with a stable groundwater supply tapped by a limited number of wells, substantial investment in new diversion and treatment facilities would not be required. But the area has a finite supply of groundwater to meet its growing needs, and much of that is unusable because of the presence of contaminants and the strengthening of water quality standards. Since Del Este's share of the project cost will be paid for by rates charged after delivery of water from the new treatment plant, the cost of that treated water will be borne by the customers who use it.

The MOU contains adequate safeguards to insure that project costs will not be incurred imprudently, and that Del Este has a reasonable ability to control those expenditures. In this regard Del Este's rights coincide with those of the City, insuring consistency in the treatment of each by the District. Under these circumstances we authorize Del Este to enter into the MOU and to perform its obligations thereunder, and find that Del Este's execution of this agreement is reasonable and prudent and in the best interests of its customers.

As the approval herein affords complete relief to Del Este, and as the TDA is a separate document with entirely severable terms and conditions, we deny Branch's request to issue an interim decision. Consequently, this is a final decision. At such time as Del Este, the City, and the District finalize the terms of the TDA, Del Este may obtain authority from the Commission to execute that document by filing an advice letter. Branch will evaluate the

conditions of the TDA and provide its recommendation to the Commission in the form of a resolution.

Findings of Fact

1. Most of Del Este's water system, and about 80% of its customers, lie within the boundaries of the District.

2. Del Este's entire water supply for the portion of its system that lies within District's boundaries is currently drawn from underground.

3. Del Este's groundwater supply is limited.

4. Del Este's groundwater supplies are declining.

5. The continued decline in the quantity of Del Este's groundwater supply is resulting in a gradual degradation of its water quality.

6. The DHS water quality standards have been revised since the 1984 Montgomery Study, are stricter than they were at the time that study was made, and are making it more difficult for Del Este to meet minimum water quality standards, particularly in relation to the dibromochloropropane content of its water.

7. The water supply and water quality problems which Del Este has been experiencing have been exacerbated by the ongoing drought conditions in its service area.

8. The District has a sufficient supply of surface water to divert 30 MG per day initially, and 60 MG ultimately, to Del Este and the City for municipal use.

9. The surface water which is available from the District for Del Este's and the City's use requires diversion and treatment before it can be delivered for such use, and facilities for this purpose do not now exist.

10. Diversion and treatment of the surface water available from the District as provided in the MOU is the most economically favorable long-term solution to Del Este's water supply and water quality problems.

11. Treated surface water available from the District would meet all current DHS water quality standards.

12. The Stipulation for Settlement filed in this proceeding is reasonable in light of the whole record, consistent with law, and in the public interest.

13. As provided under the MOU, the Project consists of facilities for the diversion, transmission, treatment, and delivery of at least 30 MG per day of District's surface water supply to Del Este and the City.

14. The terms and conditions of the MOU are adequate to insure that Project costs will not be incurred imprudently, and that Del Este will have a reasonable ability to control those costs.

15. Del Este's execution of the MOU would be reasonable and prudent and in the best interests of its customers.

16. Since the MOU stands on its own and is severable from the terms of any related document to be executed by the parties in relation to the project, it is appropriate to issue a final decision in this proceeding at this time.

Conclusions of Law

1. Del Este should be authorized to execute the MOU, and to perform its obligations thereunder.

2. The Stipulation for Settlement should be approved.

3. This is a final decision, and the proceeding is closed.

This decision should be effective immediately, in recognition that the MOU has been executed by all of the parties thereto except Del Este, that there is an urgent need for the water to be supplied thereunder, and that time is of the essence in constructing the Project to obtain that water.

ORDER

## IT IS ORDERED that:

1. Del Este Water Company (Del Este) is authorized to execute the Memorandum of Understanding (MOU) in the form attached as Appendix A, and to perform its obligations in accordance with the terms and conditions thereof.

2. Del Este may obtain authority from the Commission to execute the Treatment and Delivery Agreement (TDA) by filing an advice letter with the Commission at such time as Del Este, the City of Modesto, and the Modesto Irrigation District finalize the term of that agreement. Branch will evaluate the conditions of the TDA and provide its recommendation to the Commission in the form of a resolution.

3. The Stipulation for Settlement is approved.

This order is effective today.

Dated December 18, 1991, at San Francisco, California.

PATRICIA M. ECKERT

President

JOHN B. OHANIAN

DANIEL W. FESSLER

NORMAN D. SHUMWAY

Commissioners

I CERTIFY THAT THIS DECISION  
WAS APPROVED BY THE ABOVE  
COMMISSIONERS TODAY

NEAL J. SHULMAN, Executive Director

APPENDIX A  
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EXHIBIT A

MEMORANDUM OF UNDERSTANDING  
BETWEEN THE CITY OF MODESTO AND THE  
DEL ESTE WATER COMPANY

MEMORANDUM OF UNDERSTANDING

AMONG

MODESTO IRRIGATION DISTRICT, CITY OF MODESTO  
AND DEL ESTE WATER COMPANY

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AMONG  
MODESTO IRRIGATION DISTRICT, CITY OF MODESTO  
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Resolution of City Authorizing Execution  
 Resolution of DEW Authorizing Execution  
 California Public Utilities Commission Approval

Corrected Copy

02/14/91 Revision

## MEMORANDUM OF UNDERSTANDING

## AMONG

MODESTO IRRIGATION DISTRICT, CITY OF MODESTO

AND DEL ESTE WATER COMPANY

**1. PARTIES.**

The Parties to this Memorandum of Understanding ("Memorandum") are the Modesto Irrigation District, a California irrigation district ("District"), the City of Modesto, a California municipal corporation ("City"), and Del Este Water Company, a California corporation ("DEW").

**2. RECITALS.**

This Memorandum is made with reference to the following facts and circumstances, among others:

**2.1. District Formation and General Purposes.** District was formed more than 100 years ago for the purpose of providing irrigation water to serve the needs of agriculture. To that end, District has perfected water rights sufficient to meet those needs. District's development of its water rights and its agricultural irrigation delivery system, and the careful attention to the needs of District's irrigators, has been prominent in making Stanislaus County one of the world's foremost agricultural areas. In recent years, population growth within District's boundaries has reduced the irrigated acreage while increasing the demand for municipal uses of water. The Parties desire to put to beneficial municipal use for the inhabitants of District certain

amounts of surface water to which District has rights. In doing so, the Parties shall be mindful of the great importance of District's water rights, and the significant role of agriculture within District. The portions of the Service Areas of City and DEW to be served with water pursuant to this Memorandum are within the Irrigation District Boundary of District. The water to be supplied by District pursuant to this Memorandum is not surplus water, but rather is water which has historically been put to beneficial use within District and is necessary for use within District.

**2.2. Water Management Study.** District and City authorized, received, and accepted a Water Management Study prepared by James M. Montgomery Consulting Engineers, Inc., dated November, 1984.

**2.3. Problems of Reliance on Groundwater.** The Study found, in part, that existing ground water sources of City and DEW are limited and supplies are declining, and that a continued decline in the quantity of ground water will result in a gradual degradation of the quality of the ground water. This degradation of quality, combined with on-going modifications to State and Federal drinking water standards, will make it increasingly difficult to meet domestic water supply demands solely through the use of ground water.

**2.4. Water Rights.** District has certain water rights as to waters of the Tuolumne River.

**2.5. Study Recommendation.** The Study recommends, in part, that City and DEW contract with District for treated surface water to supplement their ground water supplies.

2.6. Prior Agreement of March 8, 1988. District, City, and DEW entered into an agreement dated March 8, 1988 to continue feasibility studies and preliminary design of the Project which includes siting of the Project through work by Montgomery, authorized by District Resolution 86-146, and by URS Consultants, Inc., authorized by District Resolution 88-84 and as amended by District Resolution 89-36.

2.7. Use of Available Water To Carry Out Recommendations of Study. It is in the best interest of the Parties and their respective water users to utilize District's available water to give effect to the recommendations of the Study in a manner which is timely and reasonable, which is environmentally acceptable, and which is not injurious to agriculture or other interests of District.

2.8. Enterprise Fund. It is the intention of the Parties that, except as specifically provided otherwise herein, the Project shall be financially operated as an enterprise fund with costs borne by City and DEW and with neither profits nor losses accruing to District as a result of the Project.

2.9. Purpose of This Memorandum. The Parties desire to enter into this Memorandum of Understanding in order to memorialize their agreements with respect to the Project including obligations under the Design Phase (Phase I) of the Project as set forth in Section 6; to provide funding by the Parties for work done during Phase I; and to establish a framework for future agreements leading to the development, construction, and operation of the Project and the rights, responsibilities, duties, and

obligations of the Parties with regard thereto.

3. AGREEMENT.

The Parties agree as follows:

4. DEFINITIONS.

4.1. Advisory Committees: The committees created pursuant to Section 12.6.

4.2. Chief Executive Officers: The City Manager, the President of DEW, and the Chief Executive Officer of District, or their respective designees.

4.3. City: City of Modesto.

4.4. DEW: Del Este Water Company.

4.5. District: Modesto Irrigation District.

4.6. Drainage Pumping: Any pumping, including needed wells and pumps and other capital improvements or the use of existing facilities, undertaken by the District to remove water from the surface or subsurface areas in order to protect the viability of crop, including orchard crop, production and in order to prevent interference by the water with structures or utilities, if the pumping is necessitated as a result of rising water tables resulting from the Project other than within the Service Areas of City and DEW.

4.7. Drainage Review Panel: The Panel which may be established from time to time pursuant to Section 10.5.6.

4.8. EIR: The Final Environmental Impact Report for the Modesto Surface Water Treatment Plant, prepared by USR Consultants and dated March 1990, a copy of which is on file with District.

**4.9. Finance Committee:** A committee consisting of the Director of Finance of City, the Chief Financial Officer of District and a person designated by the Board of DEW who is experienced and knowledgeable as to the financial affairs of DEW, or their respective designees.

**4.10. Fixed Financing:** Long Term Project financing with fixed terms and rates extending for the length of the repayment period.

**4.11. Governing Bodies:** District's Board of Directors, City's City Council, and DEW's Board of Directors.

**4.12. Memorandum:** This Memorandum of Understanding between District, City, and DEW.

**4.13. Montgomery:** James M. Montgomery Consulting Engineers, Inc.

**4.14. Next Turnout:** The first point of diversion onto private land or into a smaller canal or pipeline below any point at which City or DEW discharges groundwater into an irrigation canal as provided in Section 8.6.

**4.15. Parties:** District, City, and DEW.

**4.16. Policy Committee:** The Committee created pursuant to Section 12.6.1 of this Memorandum.

**4.17. Project:** Alternative "A" as described in the EIR and in the adopted project described in Resolution No. 90-50 a copy of which is attached hereto as Exhibit "A". Project also includes land and right of way acquisition, environmental mitigation, including, but not limited to, Drainage Pumping established as necessary pursuant to Section 10.5, facilities, appurtenances,



except the obligation of Paragraph 8.5, and any other actions, including the defense or prosecution of litigation, necessary to the completion and operation of the Project. The nature and description of the Project may be changed and refined over time by District, subject to the approval of City and DEW and subject to compliance with applicable provisions of this Memorandum and the Treatment and Delivery Agreement. The Project shall initially have a design capacity of 30 million gallons per day. At the time, and under the terms, as the Parties agree the Project may be expanded, provided, however, that the Project shall in no event exceed actual production of 60 million gallons during any day.

**4.18. Project Manager:** Such person or entity as may be appointed pursuant to Section 12.1.2 of this Memorandum.

**4.19. Service Area:** The actual area within the District to be served by the Project as described in Section 5.3; to which, at any given time, City or DEW, respectively, is serving water.

**4.20. Siting Study:** The Modesto Surface Water Treatment Study, prepared by Montgomery, dated March, 1989.

**4.21. Study:** The Water Management Study, prepared by Montgomery, dated November, 1984.

**4.22. Sunk Costs:** Those costs associated with this Project incurred by District prior to the execution of this Memorandum, as the costs are set forth in Exhibit "B".

**4.23. Technical Committee:** The committee created pursuant to Section 12.6.2 of this Memorandum.

**4.24. TIC:** "True Interest Cost" as the term is commonly

applied in municipal finance.

4.25. Treated Water: All water delivered from the Project to City and DEW at the point or points of delivery.

4.26. Treatment and Delivery Agreement: The agreement or agreements among District, City, and DEW, or any of them, entered into pursuant to Section 13 of this Memorandum.

4.27. Variable Financing: Project Financing with variable rates and terms during the construction phase and until Fixed Financing is put in place.

4.28. Water Review Panel: The Panel which may be established, from time to time, pursuant to Section 10.7.3.

## 5. THE PROJECT.

5.1. Obligations of District and Expansion. District shall design, finance, construct, operate and maintain the Project for the purpose of treatment and delivery of water to City and DEW. The location, configuration, design, construction, and financing of the Project will be determined in accordance with this Memorandum, and subsequent agreements among the Parties hereto, all as set forth herein. In the event the Parties agree upon an expansion of the Project beyond a design capacity of 30 million gallons per day, the expansion shall not take place until the Parties have executed all agreements necessary to undertake and complete the expansion, compliance with all applicable environmental laws and regulations, obtaining all required licenses and permits, and obtaining financing.

5.2. Project Phases. Completion of the Project shall be undertaken in three (3) phases:

5.2.1. Design Phase: (Phase I); and

5.2.2. Construction Phase: (Phase II); and

5.2.3. Commercial Operation Phase: (Phase III).

5.3. Area to be Served by Project. The area to be served by the Project is depicted in Figure 2-1 of the EIR. City and DEW shall have the right to determine where within the area depicted in Figure 2-1 of the EIR, and where within their respective Service Areas, to use the water from the Project, provided, that, in no event shall water from the Project be used outside the Irrigation District Boundary of District (as opposed to the Electrical Service Area Boundary of District).

5.4. District Sole Owner. District shall be the sole owner of the Project.

5.5. Disposition of Plans in the Event of Termination. In the event that any Party terminates or abandons the Project, DEW, and City, respectively, shall be entitled to obtain copies of all reports, drawings, studies, plans, specifications, other engineering documents, and all other documents pertaining to the Project, provided that DEW or the City, as the case may be, has fully paid its share of all costs due up to the time of the termination or abandonment as those costs may be due and owing pursuant to this Memorandum or any Treatment and Delivery Agreement.

5.6. Cooperation in Proceeding with Project. District shall, to the extent it has not already done so, utilize its best efforts to acquire and maintain ownership of all easements, water conveyance rights, water rights, federal and state licenses, and

permits, and all other rights, entitlements, and privileges necessary for the construction, operation, and maintenance of the Project. City and DEW shall utilize their best efforts to promote the Project and its financing and assist the District in regard to the matters set forth in this Section 5.6 in order to facilitate the financing, construction, operation, and maintenance of the Project.

## 6. DESIGN PHASE.

6.1. Design Phase Work. To the extent items are not already completed or underway, Phase I work shall begin upon execution of this Memorandum by all Parties. During Phase I, each of the following shall occur:

6.1.1. Consultants. District shall retain a Project engineer or engineers, an environmental consultant, a financial advisor, underwriter and bond counsel, and shall also to the extent practical during Phase I obtain all licenses, permits, entitlements and privileges necessary for the construction, operation and maintenance of the Project.

6.1.2. Property Interests. District shall acquire all land, easements, and rights of way required for the construction, operation, and maintenance of the Project other than real property interests already owned by any of the Parties. City and DEW shall assist with the identification and acquisition of all water storage sites within their respective Service Areas. The Parties agree that they will use their best efforts to place water storage facilities within existing property already owned by one of the Parties.

6.1.3. Preliminary and Final Design. The Project engineer or engineers shall prepare preliminary design development plans and specifications and a preliminary cost estimate, and, after approval by the Parties of the preliminary design and cost estimate as provided in Sections 12.3 and 12.4, the engineer or engineers shall prepare final and complete construction documents and a final cost estimate.

6.1.4. Environmental Clearance. The environmental consultant and District shall take all action necessary to comply with all applicable environmental laws.

6.1.5. Preliminary Financing Work. The financial advisor, underwriter, bond counsel and District shall perform preliminary work necessary for the financing of the Project and shall make a financing proposal to City and DEW.

6.1.6. Negotiation of Treatment and Delivery Agreement. The Parties shall negotiate and approve a Treatment and Delivery Agreement in accordance with, and in furtherance of, this Memorandum.

6.2. Costs for Phase I to be Advanced. Costs for all work performed during Phase I shall be advanced in accordance with the provisions of Section 9.1.

6.3. Reimbursement of Advanced Phase I Costs. Reimbursement of the costs advanced pursuant to Section 9.1 shall be made in accordance with Section 9.2.

## 7. CONSTRUCTION PHASE II.

Phase II shall consist of finalization of the financing and the construction of the Project. Prior to the commencement of

Phase II all necessary agreements for the financing, construction, purchase, and sale of water, and operation and maintenance of the Project including, but not limited to the Treatment and Delivery Agreement, will be executed.

8. COMMERCIAL OPERATION PHASE III.

8.1. Commencement of Phase III. Phase III shall commence upon completion of the construction of the Project, as completion is defined in the Treatment and Delivery Agreement described in Section 13, and final acquisition of all the permits, licenses, entitlements, rights, and privileges required to operate and maintain the Project.

8.2. District Obligations During Phase III. During Phase III, the District shall operate and maintain the Project, and shall deliver Treated Water to the City and DEW consistent with the terms of the Treatment and Delivery Agreement.

8.3. Standards of Treated Water. Throughout the term of the Treatment and Delivery Agreement, or any successor or substitute agreement, or extensions thereof, District shall deliver to City and DEW Treated Water which meets all state and federal drinking water quality standards applicable to the Project at the time of delivery to the City or DEW system.

8.4. Obligation of City and DEW to Take Water. City and DEW at all times shall exercise their best efforts to take all Treated Water made available to them.

8.5. Expansion of Groundwater Capacity and Commingling of Groundwater. Throughout the term of the Treatment and Delivery Agreement, City and DEW shall maintain and expand their respec-

tive well systems so as to be able to meet their own customer demand as they deem necessary. Groundwater will be delivered by City and DEW through their respective same water pipelines which will carry the treated surface water supply provided by District, resulting in a physical commingling of the groundwater and surface supplies.

**8.6. Exchange of Groundwater for Treated Water.** Subject to the absolute limitation of 60 million gallons per day set forth in Paragraph 4.17, and subject to approval of District as to time and place of delivery, which approval shall not be unreasonably withheld, City and/or DEW, at their respective options, may deliver groundwater to the District irrigation canal system in exchange for an additional amount of surface water from the District equal to the quantity of groundwater delivered to the District canal; provided that each of the following conditions are met:

**8.6.1. Delivery.** Any groundwater so delivered by City or DEW shall be delivered into one of the irrigation canals of District. After blending the groundwater discharged with the water then in the canal, the quality of the water, sampled at the Next Turnout, shall be of a quality suitable for agricultural use, including without limitation, use for crops, orchards or livestock. In the event that water samples at the Next Turnout demonstrate, based upon water quality standards applicable, to the use of the water for agricultural purposes, that the quality of the groundwater after mixing is not suitable for agriculture, City or DEW shall immediately cease making those discharges which

contribute to the unsuitability of the water at the point at which the sampling occurred.

8.6.2. Costs. The Party seeking exchange pays for all costs, including additional capital facilities, if necessary, associated with delivering the groundwater supply to the District irrigation canal system, subject to the same costs and delivered in the same manner as water otherwise delivered by District to City and DEW pursuant to this Memorandum but without a charge for raw water.

8.6.3. Records. The Party seeking exchange maintains a record of the quantity of groundwater delivered to the District irrigation canal system and the quality of blended water in the canal below each point of introduction of groundwater.

8.7. Force Majeure. District shall be excused from its obligation to deliver Treated Water in the event that District is rendered unable, wholly or in part, by force majeure to carry out its obligations under the Treatment and Delivery Agreement. Upon the occurrence of an event of force majeure, District shall give notice and full particulars of the force majeure in writing, or by telephone followed by a writing. District's performance shall be suspended during the continuance of the force majeure. The term "force majeure" as used herein shall mean acts of God, strikes, lockouts, failure or refusal of any person or entity to comply with then existing agreements to obtain or ship materials or equipment, or industrial disturbances, acts of a public enemy, wars, blockades, insurrections, riots, epidemics, landslides, lightning, earthquakes, volcanic eruptions, fires, flood, wash-



outs, or other natural disasters, threat of physical harm or damage resulting in the evacuation or shutdown of facilities necessary for the supply, treatment, and distribution of water, arrests and restraints of governments and people, civil disturbances, insurrection, explosions, sabotage, restraint by court order or public authority, other than the District, having jurisdiction over the Project, and action or nonaction by, or failure to obtain authorizations or approvals from, any governmental agency or authority of competent jurisdiction, and any other causes, whether of the kind herein enumerated or otherwise, not within the control of the Party claiming force majeure and which, by the exercise of due diligence, the Party is unable to prevent or overcome. District will use its best efforts to promptly bring to an end any condition falling within the definition of force majeure. It is understood and agreed that the settlement of strikes or lockouts shall be entirely at the discretion of the Party having the difficulty. In the event of any strike or lockout which may render District unable, wholly or in part, to carry out its obligations under the Treatment and Delivery Agreement, District shall promptly implement a plan to reasonably ensure the continued operation of the Project and continued delivery of Treated Water pursuant to the Treatment and Delivery Agreement. Furthermore, in the event of a strike or lockout, District's performance under the Treatment and Delivery Agreement will not be suspended for a period of more than 60 days. If the District gives notice of a force majeure event which impacts the District's water deliveries, then the provi-

sions of Section 10.1 concerning nonpayment by the City and DEW for failure to receive their full water entitlement shall still be applicable.

9. ADVANCE OF PRE-CONSTRUCTION COST.

9.1. Advances by District, City, and DEW, Sunk Costs, and Approval of Other Costs. City and DEW shall be liable for the payment of all costs and expenses of all Phases of the Project in accordance with this Memorandum and any subsequent Treatment and Delivery Agreement. To facilitate the planning and construction of the Project, District has already advanced certain Project costs and unless otherwise agreed District, City, and DEW will advance all costs reasonably necessary for completion of all engineering and design work, feasibility studies, environmental review, permit, and licensing costs, and all other work conducted during Phase I of the Project in the following portions: District, 50%; City, 35%; DEW, 15%. Such costs shall be reimbursed by City and DEW as set forth in Section 9.2; however, in order for costs incurred by District to be reimbursed by City and DEW, the costs must be either included as Sunk Costs identified on Exhibit B or approved by City and DEW. Approval shall not be required as to costs incurred as a part of a Project milestone as provided in Sections 12.3 and 12.4. Any cost not approved by City and DEW shall be subject to further review in the manner provided in Section 12.6.

9.2. Reimbursement of Sunk Costs and Advances, Percentages.

City and DEW shall each reimburse District for all of the Sunk Costs and all costs advanced by District pursuant to Section 9.1

based upon their respective proportionate shares of the Project. Unless a Treatment and Delivery Agreement has been executed and provides otherwise, or unless City and DEW have agreed and advised the District of different percentages which still total 100%, the respective proportionate share of City's and DEW's reimbursement obligation shall be City 70% and DEW 30%. Said reimbursement shall occur upon abandonment of the Project by a Party, termination of the Project pursuant to Section 18.1.2 or 18.2 of this Memorandum, or upon execution of the Treatment and Delivery Agreement, whichever first occurs, provided, however, that in the event the Parties execute a Treatment and Delivery Agreement as set forth in Section 13, City and DEW shall each be permitted, at the option of each Party, to provide for the repayment of the Sunk Costs and all costs advanced by District through the financing obtained pursuant to Section 10.1. In the event of a termination of the Project pursuant to Section 18.2, and all Parties abandon the Project, neither City nor DEW shall be required to reimburse District pursuant to this Section 9.2. If City and DEW, or either of them, proceed on the Project without District, and provided District has delivered to City and DEW all Project drawings, documents, permits and all other materials necessary to the completion of the Project, City and DEW shall reimburse the District for all costs advanced by District in their proportionate shares of the Project.

9.3. Interest on Advances. Amounts advanced by District pursuant to Section 9.1 shall bear interest at the same average monthly yield as District earns on its general fund portfolio,

provided, however, that if at any time the District's average cost of borrowing money exceeds the District's rate of return on its general fund portfolio, the interest on amounts advanced by the District shall be the District's cost of borrowed money. In no event shall the interest charged by the District pursuant to this Section exceed the legal limit. Such interest shall accrue monthly beginning at the time District actually expends the funds on which the interest is to accrue.

9.4. Costs of Studies and Negotiation Borne by Each Party.

Costs of studies conducted by any Party for its own purposes, costs associated with the preparation and negotiation of this Memorandum or subsequent or other agreements among the Parties, including agreements relating to the delivery of water, shall be borne by the Party incurring the costs and shall not be advanced pursuant to Section 9.1, nor reimbursed pursuant to Section 9.2.

10. PROJECT FINANCING.

10.1. District to Arrange Financing, Take or Pay Provision,

Excuse from Take or Pay. The District, subject to Section 12.5,

will use its best efforts to arrange financing for the construction of the Project using bonds or other evidences of indebtedness or certificates of participation, which will be secured in part by a Treatment and Delivery Agreement with City and DEW.

The Treatment and Delivery Agreement will contain a "take or pay" provision which requires City and DEW to pay their respective agreed percentages of the fixed costs and debt service of the Project whether or not the Project or any part is operating or operable or its output or capability is suspended, interrupted,

interfered with, reduced or curtailed, or terminated in whole or in part. The payments shall not be subject to reduction whether by offset, counterclaim, recoupment, or otherwise and shall not be conditioned upon the performance or nonperformance by any Party to any agreement or for any other cause or reason whatsoever. The "take or pay" obligation of City and DEW with respect to debt service shall commence at the time that debt service payments actually commence under the applicable Project financing.

The "take or pay" obligation of City and DEW with respect to fixed costs shall commence at the time of the commencement of Phase III. Neither City nor DEW shall be required to pay for water not delivered under the following specific conditions:

10.1.1. Excuse, Fifty Percent of Contracted Water not Delivered. At least fifty percent (50%) of the City's and DEW's contracted water is not delivered for a period longer than eighteen (18) consecutive months for reasons other than drought.

10.1.2. Excuse, Eighty Percent of Water Treatment Plant Destroyed. In the event that eighty percent (80%) or more of the water treatment plant which is a part of the Project is destroyed or disabled the eighteen (18) month period shall be extended to twenty-four (24) months.

10.1.3. Excuse, Fifty Percent of Water Supply. In the event that fifty percent (50%) or more of the District's total annual water supply, as adjusted as provided in Section 11.2, is lost or unavailable for physical reasons other than drought, the eighteen (18) month period shall be extended to twenty-four (24) months.

10.1.4. New Period of Excuse. A new eighteen (18) month, and, if applicable, twenty four (24) month period, shall not occur for the purpose of this Section 10.1 until a twelve (12) month period, during which at least eighty percent (80%) of the City and DEW's water requirement has been delivered, has passed.

10.2. Variable Costs. The City and DEW will also be bound to pay for the variable costs of the Project. The portion of variable costs payable by City and DEW shall be in the same proportions as the quantity of water each Party receives during the accounting period.

10.3. City's and DEW's Payment Obligations, Treatment and Delivery Agreement. City's and DEW's payment obligations to District, will be refined and set forth in the Treatment and Delivery Agreement, and shall include all of the following components:

10.3.1. Raw Water. The actual cost of raw water which is treated and delivered, with the cost calculated at the same rate charged by the District to agricultural users.

10.3.2. Percentages. City's and DEW's respective shares (70% and 30%, respectively, unless City and DEW agree to a different split of the 100% repayment obligation) of the Project financing payments as previously approved by City and DEW.

10.3.3. Records. City's and DEW's respective shares of the costs to District of operating and maintaining the Project, provided that District shall (i) keep and maintain and provide to City and DEW detailed cost accounting reports documenting the

costs, (ii) keep and maintain separate accounting and bookkeeping records with a separate account and fund for the Project, and (iii) allow City and/or DEW and their employees, accountants, attorneys and agents to review, inspect, copy and audit the accounting and bookkeeping records, including all source documents. District shall have the right to review, inspect, copy and audit all accounting and bookkeeping records, including all source documents of City and DEW as may pertain to the receipt, delivery and sale of water received from the Project.

**10.4. Security for Payment, Rate Covenant by City.** Prior to obtaining the financing as set forth in Section 10.1, District shall be entitled to the assurances it may reasonably deem necessary, and be entitled to the financial information as may be necessary, to ascertain that each Party is in the financial condition as will allow the Party to fulfill its financial commitments to the Project. In the event that District deems necessary, District may require security for the commitment, including, but not limited to, bond insurance, letters of credit, guarantees, cash deposits, and/or bonds. Such security shall be subject to approval of existing mortgagors, lenders, bond holders, and/or the California Public Utilities Commission as necessary. It is agreed by the Parties that City's security obligation pursuant to this Section 10.4 shall be satisfied by a rate covenant in a form satisfactory to District.

**10.5. Drainage Pumping.** The payment obligations of City and DEW shall include the cost of Drainage Pumping only if, and only to the extent, determined and provided in this Section 10.5. as

follows:

10.5.1. Cost Items. The cost of Drainage Pumping shall include capital, operations, maintenance, and replacement items.

10.5.2. Inability to Now Make Determination. The Parties agree that at the time of entering into this Memorandum and the Treatment and Delivery Agreement they are not able and will not be able to determine whether Drainage Pumping will be necessary as a part of the Project nor even the proper basis on which to make a determination.

10.5.3. First Five Years. No Drainage Pumping costs shall be paid by City and DEW during the first five years of the Commercial Operation Phase or as a result of operations during the first five years of the Commercial Operation Phase.

10.5.4. Invocation of Review. During the first month of the fourth year of the Commercial Operation Phase, or during the first month of each successive year of the Commercial Operation Phase, District may initially invoke a review of whether Drainage Pumping is required as a result of the Project.

10.5.5. Review By Chief Executive Officers. During the two months following the invocation of a review, the chief executive officers of the Parties shall meet and endeavor to agree upon the determinations to be made by the Drainage Review Panel pursuant to Section 10.5.7 and 10.5.8. If the chief executive officers reach unanimous agreement, then their determinations shall apply as if made by the Panel as set forth in Section 10.5.7.

10.5.6. Drainage Review Panel. In order to review the



need for Drainage Pumping, if the Chief Executive Officers fail to agree, initially and subsequently, if requested, City and DEW together shall appoint one member of a Drainage Review Panel and District shall appoint one member of a Drainage Review Panel and the two panelists so appointed shall appoint a third panelist. If any panelist is not appointed within thirty (30) days of a request by any Party to do so, then any Party may request the American Arbitration Association to appoint the panelist. Each panelist shall be a person with extensive experience in groundwater management matters and shall also be either a California registered geologist or a California registered civil engineer.

10.5.7. Determination by Drainage Review Panel. Within six (6) months of its appointment the Panel so appointed shall determine whether the operation of the Project has resulted in a need for Drainage Pumping in order to protect the viability of crop production, including orchard crops, and in order to prevent interference with structures or utilities in any portion of the District outside the Service Areas of City and DEW and specifically if, and the extent to which, the pumping is necessitated as a result of rising water tables resulting from the Project. The Drainage Review Panel shall, among other things, consider the affected area or areas, if any, the appropriate base or comparison period, and specifically whether necessary Drainage Pumping is resulting from the Project outside the Service Areas of City and DEW. Finally the Drainage Review Panel shall determine the amount, if any, of Drainage Pumping made necessary as a result of the Project and anticipated to be made necessary during the next

five years.

10.5.8. Findings and Decision. Within six (6) months of its appointment the Drainage Review Panel shall by a unanimous or majority vote render its findings. If at least two panelists cannot agree then the determination of the third panelist appointed by the two initial panelists shall be the binding determination. If Drainage Pumping is determined to be necessary, the costs of the needed facilities including but not limited to, capital costs, depreciation of existing facilities and the cost of operations, shall be added to the costs of the Project to be borne by City and DEW in the year following the determination and each year thereafter until modified as provided in Section 10.5.9. If the Drainage Review Panel based on the previous five years (except the first five years) determines that Drainage Pumping made necessary by the Project has not been included as a Project cost during the preceding five years, or if the Drainage Review Panel determines that the Drainage Pumping cost has exceeded the actual cost of Drainage Pumping necessitated by the Project during the previous five years, then the Drainage Review Panel shall make an appropriate cost adjustment for the following five years. Conversely, if the Drainage Review Panel determines that during the previous five years that an amount has been included as a Project cost in excess of the actual cost of Drainage Pumping necessitated by the Project during the last five years, then the Drainage Review Panel shall make an appropriate cost adjustment for the following five years. The cost of the Drainage Review Panel, including reasonable professional and

clerical fees shall also be a Project cost.

10.5.9. Subsequent Determinations. In the first month of the fourth (4th) year following a determination pursuant to Section 10.5.8. and at five (5) year intervals thereafter, any Party may institute a further review of the continued need for Drainage Pumping and the amount thereof as a part of the Project which review shall be instituted and undertaken in the same manner as the initial review. A Drainage Review Panel shall be selected which may, but need not include members who served on a previous Panel.

10.6. Drainage Pumping in City and DEW Service Areas. District shall not be responsible for any Drainage Pumping necessary to maintain water tables within the respective Service Areas of City and DEW.

10.7. Marketing of Water Resulting from Drainage Pumping. If District markets Drainage Pumping water as defined in Section 4.6 outside the District, the net proceeds, if any, attributable to the marketing of water resulting from Drainage Pumping shall be credited to the Project.

10.7.1. Allocation. The parties agree that the calculation of net proceeds attributable to the marketing of water resulting from Drainage Pumping is and will be difficult at the time of entering into this Memorandum and the Treatment and Delivery Agreement without reference to specific, presently unknown future drainage, water supply, and water use conditions.

10.7.2. Review by Chief Executive Officers. In the event that District markets water outside the District during a

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period when Drainage Pumping is occurring, the District shall notify the other parties and the Chief Executive Officers of the Parties shall promptly meet and endeavor to agree upon the determinations to be made by the Water Review Panel pursuant to Section 10.7.4 and Section 10.7.5. If the Chief Executive Officers reach unanimous agreement, then their determinations shall apply as if made by the Water Review Panel as set forth in Section 10.7.4.

**10.7.3. Water Review Panel.** In order to establish the sum, if any to be credited for water marketed outside the District while Drainage Pumping is underway, if the Chief Executive Officers fail to agree, initially and subsequently, if requested by any Party, City and DEW together shall appoint one member of a Water Review Panel and District shall appoint one member of a Water Review Panel and the two panelists so appointed shall appoint a third panelist. If any panelist is not appointed within thirty (30) days of a request by any Party to do so, then any Party may request the American Arbitration Association to appoint the panelist. Each panelist shall be a person with extensive experience in drainage and water management matters and shall also be a California registered civil engineer.

**10.7.4. Determination by Water Review Panel.** Within six (6) months of its appointment, the Water Review Panel so appointed shall determine whether Drainage Pumping has generated water marketed outside the District and if so, the amount of net income fairly attributable to water resulting from Drainage Pumping as opposed to water resulting from other sources.

**10.7.5. Findings and Decision of Water Review Panel.**

Within six (6) months of its appointment, the Water Review Panel shall by a unanimous or majority vote render its findings. If at least two panelists cannot agree, then the determination of the third panelist appointed by the two initial panelists shall be the binding determination. The determination of the Water Review Panel as to whether a credit should be allowed, the calculation of a credit, and the amount of the credit shall remain in effect until any Party asks for a further review in which case an additional review shall proceed as set forth above for the initial review.

**11. DELIVERY OF WATER.**

**11.1. Water Supply to City and DEW.** Subject to Sections 4.17 and 11.2, District shall make available to City and DEW an amount of water equal to 30 million gallons per day. District shall consult with City and DEW on a regular basis during the Commercial Operation Phase to determine the schedule of deliveries, and, consistent with the terms of this Memorandum and the Treatment and Delivery Agreement, shall use its best efforts to meet the requirements of City and DEW.

**11.2. Formula for Water Entitlement.** The maximum amount of water from the Project to be made available by the District annually to City and DEW, collectively, during the Commercial Operation Phase shall be determined by a formula set forth in the Treatment and Delivery Agreement which will relate the annual entitlement of City and DEW to total water available to District, and will implement the provisions of Section 11.5. The formula

shall establish the maximum amount which District is required to deliver to City and DEW each year. Subject to Section 11.5.1, District may, in its sole discretion, deliver to City and DEW more water than the maximum amount determined by the formula calculation applicable in any year. In no event shall the District be required to make available more than 33,602.1 acre feet in any twelve-month period, and provided that if the applicable formula during any period provides for an annual entitlement of less than 33,602.1 acre feet there shall be no suspension in the payment obligations of City and DEW regardless of the length of the period and further provided that nothing contained in this Section 11.2 shall be deemed to modify in any way the District's right to suspend, curtail or reduce water deliveries as provided in Section 8.7 and in the first sentence of this Section of this Memorandum. Nothing in this Memorandum shall be construed to require District to curtail deliveries of water in any year.

**11.3. Level Deliveries.** Unless the Parties agree otherwise, the 33,602.1 acre feet annual entitlement shall be delivered at the rate of 30 million gallons per day. In the event there is an annual entitlement of less than 33,602.1 acre feet pursuant to the formula in the Treatment and Delivery Agreement then the lesser amount shall be divided by 365 and the result shall be delivered on an equal daily basis unless the Parties agree otherwise. In the event that District first determines that the water is not needed by agriculture, nothing in Section 11.2 and this Section 11.3 shall be deemed to prohibit District from

making additional quantities of water available, if either or both City and DEW are willing to accept the water.

11.4. Drought, Proportional Curtailment. The Treatment and Delivery Agreement shall address:

11.4.1. Curtailment. The curtailment of surface water deliveries in times of shortage when the District is unable to deliver 30 million gallons per day due to a drought situation.

11.4.2. Conjunctive Use. Related conjunctive use principles.

11.5. Drought. The Treatment and Delivery Agreement shall also define and clarify what constitutes a drought situation when District may reduce the 30 million gallons per day deliveries, and shall set forth the precise formula for curtailment consistent with the following basic principles:

11.5.1. Equal Priority. In a drought situation, the delivery of surface water by District for agricultural uses to its agricultural customers as compared with the delivery for municipal uses to City and DEW shall be of equal priority, with deliveries for agricultural and municipal uses being curtailed in equal proportions. The curtailment of surface water shall not affect the production of groundwater for agricultural or municipal uses.

11.5.2. Adjustment of Curtailment. In the event that water deliveries must be curtailed pursuant to Section 11.5.1, Section 11.2, or the Treatment and Delivery Agreement, the parties shall meet and confer for the purpose of reaching an agreement as to an alternative curtailment formula or water

allocation basis which more equitably and more fairly meets the then current needs of the agricultural and domestic water users within the District's boundaries. The parties shall also endeavor to reach agreement upon other terms and conditions necessary to implement such an agreement. The duration of such an adjustment agreement shall be specified in the agreement. In the event that no such agreement can be reached, the deliveries shall be curtailed in accordance with the provisions of Section 11.5.1, 11.2 and the Treatment and Delivery Agreement.

11.5.3. Exchange for Groundwater. During a drought situation, City and DEW shall continue to have the option to deliver groundwater to the irrigation canal system in exchange for additional surface water as provided by Section 8.6., subject to the standards set forth in Section 8.6.1.

11.6. Water to Remain in Irrigation District Boundary. No Treated Water delivered by District to City or DEW shall be allowed to flow outside the District's Irrigation District Boundary (as opposed to its Electric Service Area Boundary). In order to ensure that City and DEW comply herewith, at no time shall the delivery of water by either City or DEW within District's Irrigation District Boundary be less than the amount of Treated Water delivered at the time to City or DEW, as the case may be, by District. In order to demonstrate compliance with this Section 11.6, City and DEW shall maintain meters at appropriate locations on their respective water delivery systems to record (a) the amount of all water pumped from the groundwater within the Irrigation District Boundary of District, and (b) the



amount of all water transported outside the Irrigation District Boundary. City and DEW shall monitor these records to ensure that the amount recorded under (a) is at all times greater than or equal to the amount recorded under (b). The records maintained by City and DEW under this Section shall be open to reasonable inspection by District, and its agents, employees, and officers. A monthly summary of the applicable records shall be provided to District by City and DEW.

## 12. PROJECT MANAGEMENT.

### 12.1. District's Board of Directors.

12.1.1. Final Decisions. Subject to the approvals set forth in Section 12.3 and Section 12.5 and subject to the review set forth in Section 12.5 and Section 12.6, District's Board of Directors shall be the final decision making authority with regard to the Project. The Board of Directors shall consider the recommendations of the Project Manager. All decisions shall be made at duly noticed regular meetings or special meetings.

12.1.2. Project Manager. District's Board of Directors shall appoint a Project Manager, who will perform those duties set forth in Section 12.2.

### 12.2. Duties of Project Manager.

12.2.1. Implementation of Memorandum. The responsibility for implementing and administering this Memorandum and for carrying out the tasks necessary for the successful completion of each of the phases of the Project shall be vested in the Project Manager.

12.2.2. Notice to Advisory Committees. The Project

Manager, in the course of fulfilling his responsibilities, shall provide the Advisory Committees reasonable advance notice of impending major decisions as defined in Section 12.6.1.C.

**12.2.3. Specific Duties.** The Project Manager shall have the following powers, duties, and responsibilities:

**12.2.3.A. Work Plans.** Developing a work plan for each Phase of the Project.

**12.2.3.B. Progress Reports.** Submitting periodic progress reports to the Parties and to District's Board of Directors.

**12.2.3.C. Administering Contracts.** Administering the contracts as may be entered into pursuant to the Treatment and Delivery Agreement.

**12.2.3.D. Public Information.** Serving as public information officer.

**12.2.3.E. Recommending Consultants.** Recommending the hiring or utilization of consultants, engineers, contractors, attorneys, underwriters, and other services necessary to carry out the Project.

**12.2.3.F. Financial Report.** Preparing an annual financial report of the operation of the Project for review by the Advisory Committees.

**12.2.3.G. Other Duties.** Other duties as may be necessary and proper to carry out the Project.

**12.3. City and DEW Approval of Project Milestones.** Since City and DEW will be paying virtually all costs associated with the design, construction, operation, and maintenance of the

Project, the Parties agree and consent that City and DEW shall have the authority to approve or disapprove major Project milestones as follows:

12.3.1. Engineering Services. Prior to District's approval of any engineering services contract concerning the design and engineering of the Project, City and DEW shall review the contract or contracts and each shall provide District with its written authorization to proceed.

12.3.2. Review of Preliminary Design. Prior to proceeding with the final design phase under an engineering services contract, City and DEW shall review the preliminary design plans and preliminary cost estimate and each shall provide District with its written authorization to proceed.

12.3.3. Acceptance of Final Design. Prior to accepting the final design work, including construction ready final plans and specifications and final cost estimate, City and DEW shall review the final design work and cost estimate and each shall provide the District with its written authorization to proceed.

12.3.4. Construction Contracts. Prior to District's approval of a construction contract or contracts for the construction of the Project, City and DEW shall review the construction contract documents and each will provide District with its written authorization to proceed.

12.4. Processing Milestone Approvals. City and DEW shall each act promptly in giving or refusing to give any of the written authorizations to proceed set forth above. The written authorizations to proceed to be given by City and DEW shall not

be unreasonably withheld. If City or DEW fails to provide its written authorization to proceed, or written refusal of authorization, within forty-five (45) days from the date of the written request for authorization from District, then City or DEW shall be deemed to have authorized District to proceed with the milestone in question. If City or DEW refuses to authorize any of the foregoing Project milestones, the Party refusing shall set forth in writing its reason or reasons for the refusal and shall timely provide the writing to the other two Parties. Thereafter (a) District may work to address and resolve the Party's concerns and then re-request the written authorization to proceed for the particular Project milestone, or (b) any Party may seek to terminate this Memorandum pursuant to Section 18.2.

**12.5. Project Financing Approvals.** Prior to issuing bonds, certificates of participation, or other evidences of indebtedness for the purpose of financing the Project, District shall give written notice to City and DEW that the time to commence financing has arrived. Within thirty (30) days of the notice, the Finance Committee shall meet and confer at least once and within sixty (60) days of the notice City and DEW shall advise District in writing as to whether Fixed Financing or Variable Financing shall be used. If either or both City and DEW advise in writing that Fixed Financing is to be used or fail to give their written advice within sixty (60) days of the notice, then Fixed Financing shall be used.

**12.5.1. Fixed Financing.** If Fixed Financing is to be used, District shall give written notice to City and DEW that

Fixed Financing is to be used and shall request that City and DEW each give to District a not to exceed TIC within thirty (30) days of the notice and request. Within fifteen (15) days of the notice and request by District, the Finance Committee shall meet at least once. Upon receipt of a TIC from both City and DEW, District shall thereafter be responsible for marketing the financing subject to the lowest not to exceed TIC approved by City or DEW. The members of the Finance Committee shall be present at the time and place of marketing and they and their financial advisers shall consult with the persons responsible for the marketing for District and the terms and conditions of the financing, but all final decisions shall be made by District, provided, that the TIC of the issue is (a) the lowest then available, and (b) below the not to exceed TIC approved by City and DEW. In the event that either or both City and DEW fails to approve a not to exceed TIC within thirty (30) days of the notice from District that Fixed Financing is to be used then the Parties shall seek to reach agreement as to a not to exceed TIC or any Party may seek to terminate this Memorandum pursuant to Section 18.2.

12.5.2. Variable Financing. Variable Financing shall be used only during the construction period, except as otherwise provided herein. If City and DEW both agree that Variable Financing should be undertaken, the District shall issue Variable Financing for the duration of the construction period. No later than sixty days after the Commercial Operation date, as that term is defined in the Treatment and Delivery Agreement, the Variable

Financing shall be replaced entirely by Fixed Financing unless the Parties unanimously agree to the contrary.

**12.5.2.A. Initial Financing.** Variable Financing shall initially be issued in such maturities and at such interest rates as, in the judgment of the District after consulting with the Finance Committee, provides the most cost-effective combination of such maturities and interest rates. Thereafter, as the securities mature, the District shall be solely responsible for the remarketing of such securities until the issuance of the Fixed Financing.

**12.5.2.B. Conversion During Construction Period.** If Variable Financing is issued for the construction period, either City or DEW may, during such construction period, request that the District convert such Variable Financing to Fixed Financing. Such request may be conditioned upon the ability of the District to secure such Fixed Financing at a TIC specified in the request.

**12.5.2.C. Conversion Upon Commercial Operation.** If no request to convert Variable Financing to Fixed Financing has been made prior to the Commercial Operation of the Project, the District shall convert the Variable Financing to Fixed Financing on the Commercial Operation date, or within sixty days thereafter without regard to the provisions of Section 12.5.1, provided, however, that the District shall consult with the Finance Committee during the time it is converting the Variable Financing to Fixed Financing unless the Parties unanimously agree to the contrary.

12.6. Advisory Committees. In order to assist the District and the Project Manager with the implementation of the Project, the following committees are formed and shall have the following duties, responsibilities and authorities.

12.6.1. Policy Committee. A Policy Committee shall be formed consisting of two City Council members, two members of the District Board of Directors, and two officers of DEW. The Policy Committee shall meet at least twice each year, and at other times when a meeting is called by the Project Manager. Each member of the Policy Committee shall serve at the pleasure of the Party selecting that member. The Policy Committee shall function during all three phases of the Project, and shall have the following responsibilities and authority:

12.6.1.A. Project Milestones. To review and make recommendations to City and DEW concerning the request for authorization to proceed with Project milestones pursuant to Section 12.3. District and the Project Manager shall not request written authorization to proceed with any of the Project milestones until after the Policy Committee has reviewed the proposal and made a recommendation to City and DEW.

12.6.1.B. Budget Functions. To perform the functions with respect to the District budget for the Project as set forth in Section 12.7. All expenses of District concerning the Project shall be consistent with the approved budget.

12.6.1.C. Major Design Changes. To review and advise District and the Project Manager concerning major changes in the design of the Project. A major change in the design of

the Project shall be defined as any change involving an estimated increase or decrease in the cost of the Project in excess of \$100,000.

**12.6.1.D. Other Major Decisions (In Excess of \$100,000).** To review and advise District and the Project Manager concerning any major decision with respect to the Project. A major decision shall be defined as any contract, change order, purchase, change in policy, or any other action with an estimated cost in excess of \$100,000.

**12.6.2. Technical Committee.** A Technical Committee shall be formed, consisting of one staff person appointed by each Party, and one alternate member as each Party deems necessary. Each member of the Technical Committee shall serve at the pleasure of the Party selecting that member. The Technical Committee shall meet at least once each month, and at all other times as requested by the Project Manager. The Technical Committee shall function during all three phases of the Project, and shall have the following responsibilities and authority:

**12.6.2.A. Consultation with Project Manager.** To advise and consult with the Project Manager and the District, to exchange information, and to make any necessary recommendations relating to the Project design, construction, operation, and maintenance.

**12.6.2.B. Recommendations to Policy Committee.** To review and make recommendations to the Policy Committee for all matters within the scope of authority and responsibility of the Policy Committee;



12.6.2.C. Advice Relative to Minor Decisions

(\$5,000.00 to \$100,000.00). To review and advise the Project Manager concerning any minor decision affecting the Project. A minor decision shall be defined as any contract, change order, purchase, change in policy, or any other action with an estimated cost in excess \$5,000, but not in excess of \$100,000, and any action involving changes in the Treated Water quality beyond the range of normal plant operation variability.

12.7. Budget.

12.7.1. Budget Principles. In preparing and reviewing budgets for the Project, the Parties shall be guided by the principle that the Project shall be operated in as economic a manner as practical in accordance with generally accepted water-works practices as evidenced by similar sized clean water treatment plants in Northern California.

12.7.2. Budget Process.

12.7.2.A. First Budget. The first budget for the Commercial Operation Phase (Phase III) of the Project shall be prepared by the District during Phase II, allowing ample time for review by the Technical Committee and the Policy Committee, prior to the commencement of Phase III. For each subsequent fiscal year during Phase III, the District staff shall prepare a budget for the Project prior to the beginning of each fiscal year. All Project budgets shall include both operating and capital components.

12.7.2.B. Technical Committee Review and Recommendation. Prior to completion of the first administrative draft

of each year's budget by the District staff, the Project Manager shall meet with the Technical Committee at least once to discuss and receive input from the Committee concerning development of the budget. Prior to submission of the budget to the Policy Committee the Technical Committee may, if it elects to do so, make a recommendation with respect to the budget to the Policy Committee. Upon completion of the first administrative draft of a year's budget, the Project Manager shall forthwith furnish it to the members of the Technical Committee. Within 15 days of receipt of the draft budget, the Technical Committee members may individually or collectively submit to the Project Manager their recommendations and/or comments regarding the draft budget. The documents shall not be mailed to the City and DEW as provided in Section 12.7.2.C until after the expiration of this 15 day period.

12.7.2.C. Information to City and DEW. At least 20 days before the submission of each annual budget to the District Board, the Project Manager shall mail to the City and DEW copies of the proposed budget for the ensuing fiscal year and a detailed calculation of the proposed payment obligations of the City and DEW calculated pursuant to Section 10.3 and the Treatment and Delivery Agreement. Commencing after the first year of operation, the Project Manager shall also at the same time mail copies of the most recent update of the current year's expenditures and revenues, and the balance sheet and income statement for the most recent fiscal year, if available.

12.7.2.D. Policy Committee Review. Approximately

10 days before the submission of the budget to the District Board, the Policy Committee shall meet to review and discuss the proposed budget for the ensuing fiscal year. The District staff at this meeting shall explain and justify the need for all of the various budget items and proposed expenditures. At this meeting, the Parties shall strive to agree upon a budget for the ensuing fiscal year.

12.7.2.E. Consideration of Budget by Policy

Committee. The budget shall be deemed approved by the Policy Committee unless, at the meeting, the Committee by an affirmative vote of at least four members of the Committee objects to one or more of the budget items. If the Policy Committee objects to one or more budget items, the Committee members objecting shall specify the item or items of the budget which are objectionable, and why the item or items are objectionable.

12.7.2.F. Revision of Budget, Alternate Budget and

Report. If one or more budget items are objected to by the Policy Committee, the District staff shall either (a) revise the budget at the Policy Committee meeting so that it is acceptable to at least three members of the Policy Committee, (b) continue the Policy Committee meeting and thereafter consider the objections raised at the meeting and prepare a revised budget for consideration by the Policy Committee at a subsequent meeting, or (c) the District staff may determine to submit the budget to the District Board over the objections of the Policy Committee. If the District staff determines to submit the proposed budget to the District Board over the objection of four members of the

Policy Committee the District staff shall give written notice to the Policy Committee and the Policy Committee may within 10 days after receipt of this notice submit an alternative to the objectionable budget item or items to the District Board to be considered along with the budget submitted by the District staff. The alternative budget item or items shall be accompanied by a report as to the reasons the alternate budget should be adopted in place of the budget submitted by the District staff.

**12.7.3. Public Hearing.** The annual budget for the Project shall be adopted by the Board only after a public hearing for which notice has been given in the same manner as currently provided in Section 21378 of the Water Code.

**12.7.4. Appearance at Hearing.** The foregoing provisions on review concerning the budget are not intended to, and shall not, preclude the City and DEW, and their respective officers, employees and agents, from appearing before the District Board regarding the proposed budget.

**12.7.5. Augmentation.** If, during the course of any fiscal year, the District proposes to make any budget augmentation, then the provisions of Sections 12.7.1 through 12.7.2.F concerning review of budgets shall apply to the budget augmentation.

### **13. TREATMENT AND DELIVERY AGREEMENT.**

**13.1. Negotiation.** Upon execution of this Memorandum, the Parties shall begin to negotiate in good faith and to proceed with diligence to arrive at the necessary terms and conditions to enter into and execute a Treatment and Delivery Agreement, with

the objective of having said Treatment and Delivery Agreement effective no later than the start of Phase II.

13.2. Phases II and III. The Treatment and Delivery Agreement will define the working relationships between the Parties during Phase II and Phase III.

13.3. Accounting and Arbitration. Among other things, the Treatment and Delivery Agreement will also specify the treatment of depreciation, overhead, and reserves, if any, and will provide for the arbitration of specified disputes. The Treatment and Delivery Agreement shall also provide that net investment earnings from the proceeds of the issuance of bonds, certificates of participation, or other evidences of indebtedness shall be applied to costs of the Project.

13.4. Further Detail in Treatment and Delivery Agreement. It is the intention of the Parties that to the extent necessary, the general provisions of this Memorandum shall be further defined and specified in the Treatment and Delivery Agreement which shall provide for the implementation of the concepts set forth in this Memorandum.

#### 14. LIABILITY.

14.1. Insurance, General. During all phases of the Project, District shall maintain Commercial General Liability insurance or Comprehensive General Liability insurance, Automobile Liability insurance, Umbrella or Excess Liability insurance, Property insurance, and Workers Compensation insurance for the Project, including the construction, operation, and maintenance of the Project, and all operations and activities concerning all phases

of the Project. City and DEW shall be additional insureds on all policies required by this Section 14. The District's insurance coverage shall be primary insurance coverage as respects the City and DEW. Any insurance or self insurance maintained by the City and DEW shall be excess of the District's insurance and shall not contribute with it.

**14.1.1. Commercial General Liability or Comprehensive**

**General Liability Insurance.** Commercial General Liability or Comprehensive General Liability insurance shall include coverage for Premises and Operations, Contractual Liability, Personal Injury Liability, Products/Completed Operations Liability, Broad Form Property Damage and Independent Contractors Liability, in an amount not less than one million dollars (\$1,000,000) per occurrence, combined single limit, two million dollars (\$2,000,000) aggregate.

**14.1.2. Comprehensive Automobile Liability Insurance.**

Comprehensive Automobile Liability insurance including, as applicable, owned, non-owned and hired automobiles, in an amount not less than one million dollars (\$1,000,000) per occurrence combined single limit.

**14.1.3. Umbrella or Excess Liability Insurance.**

Umbrella or Excess Liability insurance in an amount not less than ten million dollars (\$10,000,000) over and above the underlying limits with the Umbrella or Excess Liability policy containing insuring agreements, exclusions and conditions of coverage substantially similar to the underlying policies.

**14.1.4. Workers Compensation Insurance.** Workers

Compensation insurance shall be written as required by the State of California, including employer's liability limits of not less than one million dollars (\$1,000,000) per accident.

14.1.5. Property Insurance. The property insurance shall cover all buildings and structures comprising the Project, and all fixtures, equipment and facilities located in, on, or connected with the Project, and shall be written on a Replacement Cost Basis.

14.1.6. Insurance Provisions. Each insurance policy required by this Agreement shall contain the following clauses:

14.1.6.A. Cancellation. This insurance shall not be cancelled, limited in scope or coverage or non-renewed until after thirty (30) days prior written notice has been given to District, City, and DEW.

14.1.6.B. District and others to be Named. The District, its directors, officers, agents, employees, representatives, and volunteers are named as insureds, except Workers Compensation insurance.

14.1.7. Approval of Insurers. The policies of insurance required under this Memorandum shall be issued by an insurer or insurers, and shall be in a form, approved by City and DEW.

14.1.8. Insurance Provision in All Contracts. In any and all contracts entered into concerning the construction, operation or maintenance of the Project, District shall include a provision in any and all contracts requiring that the contractor provide insurance protection similar to or in excess of the insurance coverage set forth above.

14.2. Indemnification and Hold Harmless. Except as provided in Sections 14.3 through 14.6, District shall indemnify, defend, protect, and hold harmless City and DEW, and their respective officers, employees, and agents, from any and all liabilities, claims, damages, losses, judgments, penalties, costs, or expenses (including attorneys' fees) arising from or in any way connected with the construction, operation or maintenance of the Project by District or by District's employees, contractors, subcontractors, consultants, or agents, or any one employed directly or indirectly by any of the foregoing, regardless of any negligence on the part of City or DEW or any of their officers, employees or agents.

14.3. Third Party Claims, Not Covered by Insurance, Willful. With respect to claims and lawsuits against one or more of the Parties by third parties concerning injury, death, or property damage resulting from the construction, operation or maintenance of the Project, which claims and lawsuits are not covered by insurance, including self insurance, maintained by District pursuant to Section 14.1, and which are the result of willful misconduct, intentional tort, or gross negligence of one of the Parties, the Party whose willful misconduct, intentional tort, or gross negligence resulted in the damage claimed by the third party shall indemnify, defend, protect, and hold harmless the other two Parties, and their respective officers, employees and agents, from any and all liabilities, claims, damages, losses, judgments, penalties, costs, or expenses (including attorneys' fees) resulting from a claim or lawsuit by a third party.



14.4. Third Party Claims, Not Covered by Insurance, Ordinary. With respect to claims and lawsuits against one or more of the Parties by third parties concerning injury, death, or property damage resulting from the construction, operation or maintenance of the Project, which claims and lawsuits are not covered by insurance, including self insurance, maintained by District pursuant to Section 14.1, and which are not the result of willful misconduct, intentional tort, or gross negligence of one of the Parties, District shall defend the claim or lawsuit on behalf of all Parties to this Memorandum which are named in the claim or lawsuit, and District shall pay any settlement entered into by District or judgment entered against District or a Party. City and DEW shall reimburse District for its defense costs (including attorneys' fees and litigation expenses), settlement and judgment amounts incurred pursuant to this provision, in accordance with their respective percentage obligations to reimburse all Project costs pursuant to this Memorandum or a subsequent Treatment and Delivery Agreement.

14.5. Claims Between Parties. With respect to claims and lawsuits by one or more of the Parties against one or more of the other Parties, the claims and lawsuits will be processed and resolved in accordance with (a) the Tort Claims Act (or general tort principles if the action is against DEW) and/or (b) breach of contract remedies provided by this Memorandum, a subsequent Treatment and Delivery Agreement, or applicable law. Nothing in this Memorandum shall relieve any Party of any contractual liability or duty imposed by this Memorandum or a subsequent

Treatment and Delivery Agreement..

14.6. Workers' Compensation Claims. Each Party shall bear the costs of discharging all liability imposed, including costs and expenses for attorneys' fees and other costs of defending, settling, or otherwise administering claims arising out of workers' compensation or employers liability claims brought by its employees.

14.7. Replacement of Pro Rata Right of Contribution. The insurance, indemnification, hold harmless, and reimbursement provisions set forth above in Sections 14.1 and through 14.4 are intended to and shall replace, and be applicable instead of, the pro rata right of contribution provisions of Government Code Section 895.6, to the extent the Section is applicable.

15. RELATIONSHIP OF PARTIES.

Except as provided in Section 14, the covenants, obligations, and liabilities of the Parties are intended to be several and not joint or collective, and nothing herein contained shall ever be construed to create an association, joint venture, trust, or partnership, or to impose a trust or partnership covenant, obligation, or liability on or with regard to any one or more of the Parties. Each Party shall be individually responsible for its own covenants, obligations, and liabilities pursuant to this Memorandum. No Party shall be under the control of or shall be deemed to control any other Party or the Parties as a group. No Party shall be the agent of or have a right or power to bind any other Party without its express written consent, except as expressly provided in this Memorandum.

16. ASSIGNMENT.

No Party shall assign or transfer its right or interest in this Project, in whole or in part, without the written consent of each of the other Parties, which consent shall not be unreasonably withheld. Any assignment or transfer by a Party without consent shall be void and shall result in a termination of that Party's right or interest. No assignee or transferee shall obtain any right or interest in this Memorandum until it assumes by written instrument all obligations under this Memorandum with respect to the right or interest transferred or assigned, and it becomes a Party to this Memorandum by executing this Memorandum or amendment thereto. Nothing in this Memorandum shall allow District to sell Treated Water from this Project to any person or entity other than City and DEW without the written consent of both City and DEW which consent shall not be unreasonably withheld. Prior to selling Treated Water from the Project to any person or entity other than the City or DEW, District shall first offer the water to City and DEW, in amounts based on each Party's relative share of the Project water and costs at that time, on the same terms as set forth in the then existing Treatment and Delivery Agreement. The price of any Treated Water sold by District to a third party shall be not less than the full cost of producing the water including capital, Sunk Costs, treatment, and administrative costs, and in any event shall not be lower than the price to City and DEW. In the event the cost of furnishing water to a third party is less than the charges to a third party, the excess revenue shall be applied to the operation of the

Project. Subject to the provisions of this Section, this Memorandum shall inure to the benefit of and be binding upon the Parties and their respective successors and assignees. Notwithstanding the foregoing provisions of this Section-16, DEW shall have the right without the prior written consent of the other Parties, to assign or transfer its right or interest in the Project to an assignee or transferee of all, or substantially all, of its public utility assets or of all, or substantially all, of those DEW public utility assets located within District's Irrigation District Boundary, provided that concurrently with such assignment or transfer, such assignee or transferee shall assume the obligations to continue to operate the utility assets so transferred and the retail water business attached thereto and provided, further, that the security required by Section 10.4 and agreed to by District and DEW either remains in place or is replaced (a) by other security in, or substantially in, comparable form and substance, or (b) if such assignee or transferee shall be City, by inclusion of other security which satisfies the rate covenant theretofore given District by City under said Section 10.4.

17. GENERAL PROVISIONS GOVERNING MEMORANDUM.

17.1. Severance. In the event that any of the terms, covenants, or conditions of this Memorandum or the application of any term, covenant or condition shall be held invalid as to any Party or circumstance by any court having jurisdiction over the Parties or subject matter of this Memorandum, all other terms, covenants or conditions of the agreements and their application shall not

be affected thereby, but shall remain in force and effect unless a court holds that the provisions are not separable from all other provisions of this Memorandum.

17.2. Waiver. The waiver at any time by any Party of its rights with respect to a default or other matter arising in connection with this Memorandum shall not be deemed a waiver with respect to any subsequent default or matter.

17.3. Counterparts. This Memorandum may be executed in counterparts. Each Party shall deliver its executed counterpart to District, which shall deliver a fully conformed counterpart to each Party.

17.4. Supporting Resolutions and PUC Approval. Each Party represents that it has legal authority to enter into this Memorandum and to perform its obligations hereunder, and shall attach to this Memorandum a duly authorized resolution evidencing the authority. The person executing this Memorandum on behalf of each Party shall also be authorized to do so by resolution of its Governing Body, which shall also be attached to this Memorandum. Prior to execution of this Memorandum, DEW shall also obtain approval to execute this Memorandum from the California Public Utilities Commission and a copy of that approval shall be attached to this Memorandum.

17.5. No Rights in Other Parties. This Memorandum is for the sole benefit of the Parties and shall not be construed as granting rights to any other person other than the Parties or, except as specifically set forth in this Memorandum, imputing to any person the obligations imposed on a Party.

17.6. Amendment. This Memorandum may be amended only by a written instrument duly executed by all of the Parties hereto.

17.7. Obligations Prior to Termination. The obligations of the Parties incurred pursuant to this Memorandum prior to termination of this Memorandum shall survive the termination.

17.8. Captions. The captions and the headings in this Memorandum are inserted merely to facilitate reference and shall have no bearing upon the interpretation of any of the terms and provisions hereof.

17.9. Additional Documents. Each Party agrees to make, execute and deliver any and all documents reasonably required to implement this Memorandum.

17.10. Each Term Independent. Each term, covenant, and condition of this Memorandum is deemed to be an independent term, covenant, and condition, and the obligation of each Party to perform all of the terms, covenants, and conditions to be kept and performed by it is not dependent upon the performance by the other Party or Parties of any or all of the terms, covenants, and conditions to be kept and performed by the other Party.

17.11. Governing Law. This Memorandum shall be interpreted, governed by, and construed under the laws of the State of California.

## 18. TERM AND TERMINATION

18.1. Execution by All Parties. This Memorandum shall not become effective until it has been executed by all Parties. At that time, this Memorandum shall continue in effect until the earlier of the following:

18.1.1. Superseded by Other Agreement. This Memorandum is superseded by a Treatment and Delivery Agreement or other agreement which, by its terms, supersedes this Memorandum.

18.1.2. Termination by Unanimous Agreement. Termination by unanimous agreement of the Parties.

18.2. Termination of Participation Prior to Financing. Notwithstanding any other provision in this Memorandum to the contrary, any Party, prior to the time District issues bonds or certificates of participation or other evidence of indebtedness for the purpose of financing the Project, upon not less than thirty (30) days written notice to the other two Parties, shall be entitled to terminate its participation in the Project at any time (a) the Party determines that the Project is not feasible because of technical, engineering, or economic reasons, or if adequate insurance is, or probably will, not be available at a commercially reasonable price, or for other reasons as would cause a reasonably prudent utility in the same or similar circumstances to terminate its participation in a project as is contemplated by this Memorandum, or (b) City or DEW determines that District has failed to meet its Phase I or, if financing has not yet been obtained, its Phase II obligations, and has failed to pursue the obligations with due diligence. If the Memorandum is terminated by DEW, then City at its sole option may maintain this Memorandum in full force and effect as between City and District by agreeing in writing to assume all of DEW's rights, entitlements, obligations and liabilities pursuant to this Memorandum. If the Memorandum is terminated by City, then DEW at its sole

option may maintain this Memorandum in full force and effect as between DEW and District by agreeing in writing to assume all of City's rights, entitlements, obligations and liabilities pursuant to this Memorandum.

19. UNDERTAKINGS.

Any undertaking by any Party to any other Party, or to the public, under any provision of this Memorandum is rendered strictly as an accommodation and shall not constitute the dedication of the system or any portion thereof by the undertaking Party to the public or to another Party or any third party, and it is understood and agreed that any undertaking under any provisions of or resulting from this Memorandum by a Party shall cease upon the termination of the Party's obligations under this Memorandum or the Treatment and Delivery Agreement.

20. WATER RIGHTS AND OWNERSHIP.

Neither City nor DEW shall own or acquire any of District's water rights, but shall be entitled to the delivery of Treated Water in accordance with the terms of this Memorandum. Neither City nor DEW shall have any ownership rights in any of the facilities of the Project.

21. NOTICES.

Any notice, demand, or request provided for in this Memorandum shall be in writing, and shall be deemed properly served, given, or made if delivered in person or if sent by registered or certified mail, postage prepaid, to the persons specified below:

District: Chief Executive Officer  
Modesto Irrigation District  
Post Office Box 4060  
Modesto, CA 95352



City:

City Manager

City of Modesto

Post Office Box 642

Modesto, CA 95353

DEW:

President

Del Este Water Company

Post Office Box 3250

Modesto, CA 95353

MODESTO-IRRIGATION-DISTRICT

Attest:

Secretary

President

Approved as to Legal Form:

Paul Baxter, Acting City Manager

Attest:

City Clerk

Approved as to Legal Form:

Stan T. Yamamoto, City Attorney

DEL ESTE WATER COMPANY  
a California corporation

President

Secretary

Approved as to Legal Form:

A.91-05-025

**Exhibit "A"**

RESOLUTION NO. 90-50

**DETERMINATION TO CARRY OUT  
THE DOMESTIC WATER PROJECT**

WHEREAS, the Board of Directors of the Modesto Irrigation District finds as follows:

Historically, the area in and around Modesto has received its municipal and industrial water supply from groundwater. In recent years, however, the area has experienced, and continues to experience, declining groundwater levels and a deterioration in the quality of groundwater. More strict water supply regulations and lower allowable limits for certain contaminants have been promulgated by state and federal authorities. The Modesto Irrigation District ("District"), the City of Modesto ("City"), and the Del Este Water Company ("Del Este") expect a continued decline in water quality and quantity unless an alternative source of water is developed.

In November, 1984, a report entitled "Modesto-Ceres Area Water Management Study", prepared by James M. Montgomery Consulting Engineers, Inc., and Leedshill-Herkenhoff, Inc., (the "1984 Montgomery Study") recommended a two-phase program for conjunctive use of groundwater and treated surface water to meet the water supply needs of the area.

In March, 1989, a report entitled "Modesto Surface Water Treatment Study", prepared by James M. Montgomery Consulting

Engineers, Inc., (the "1989 Montgomery Study") utilizing the findings of the 1984 Montgomery Study, made recommendations regarding the size and location of a water treatment plant and related transmission facilities, and suggested various alternative treatment plant sites to be considered. That study recommended that a site near Modesto Reservoir be the preferred alternative in the EIR prepared for the project.

Because the course of action recommended in the studies could have significant environmental effects, as defined by the California Environmental Quality Act ("CEQA") the District caused to be prepared an Environmental Impact Report ("EIR") to consider various project alternatives. The EIR was duly completed, and on April 10, 1990, at its regular board meeting, the District's Board of Directors certified the Final EIR has having been completed in compliance with the CEQA (Public Resources Code §21000 et seq.) and the Guidelines for the Implementation of the California Environmental Quality Act (Title 14 C.C.R. §15000 et seq.)

A Pilot Plant Study was conducted at the Modesto Reservoir site to determine the recommended process train for the proposed water treatment plant. The Pilot Plant Study concluded that direct filtration treatment, with pre-ozonation and chlorination for final disinfection would meet all water quality and process performance criteria. The Pilot Plant Study was presented to and

accepted by the District's Board of Directors on April 12, 1990.

The Board has duly reviewed and considered the information contained in the 1984 Montgomery Study, the 1989 Montgomery Study, the Pilot Plant Study, and the Final EIR.

Implementation of the project at the Modesto Reservoir site will have certain significant environmental impacts. The EIR identifies certain mitigation measures that can be implemented to reduce or eliminate each of the impacts. A list of each of the significant environmental impacts that are likely to occur, and the mitigation measures for each such impact, are set forth in Exhibit "A", attached hereto and incorporated herein by this reference.

Based upon the material presented in the Final EIR, including without limitation the Draft EIR, the comments and the responses thereto, as well as information presented to the Board at its meetings of April 10, 1990 and April 17, 1990, the Board finds that the mitigation measures set forth in Exhibit "A" will mitigate or avoid the significant environmental effects identified in the Final EIR. The Board also finds, based upon the same information, as well as the Pilot Plant Study and the information presented at its meeting of April 12, 1990, that the best alternative is the Modesto Reservoir site. A complete statement of findings with regard to the mitigation and avoidance of the significant environmental impacts is set forth in Exhibit "B", attached hereto and incorporated herein by this reference.

The California Environmental Quality Act requires the District to adopt a Mitigation Monitoring Plan when it determines to carry out a project which will have significant environmental effects. A Mitigation Monitoring Program has been prepared which will ensure that the mitigation measures identified in Exhibit "A" will be carried out. The Mitigation Monitoring Plan is set forth in Exhibit "C", attached hereto and incorporated herein by this reference.

Now, therefore, BE IT RESOLVED that the Board of Directors of the Modesto Irrigation District:

1. The Modesto Irrigation District shall carry out the Modesto Surface Water Treatment Project; the Project shall be located at Modesto Reservoir, and shall utilize the direct filtration process with pre-ozonation and chlorination for final disinfection;
2. The mitigation measures described in Exhibit "A" shall be incorporated into the Project;
3. Such mitigation measures will eliminate or substantially lessen the significant environmental effects of the Project identified in the Final EIR;
4. The findings set forth in Exhibit "B" are hereby adopted;
5. The Mitigation Monitoring Program set forth in Exhibit "C" is hereby adopted, and the District's Chief Executive Officer

is hereby appointed Environmental Monitor for purposes of said Mitigation Monitoring Program; and

6. A Notice of Determination shall be prepared and filed in compliance with the requirements of the California Environmental Quality Act and the CEQA Guidelines.

Moved by Director Cowan, seconded by Director Billington, that the foregoing resolution be adopted.

Upon roll call the following vote was had:

Ayes: Directors Lyons, Cowan, Beck, Billington, Kidd

Noes: Directors None

Absent: Directors None

The President declared the resolution adopted.

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I, VICKIE EHRLER, Secretary of the Board of Directors of the MODESTO IRRIGATION DISTRICT, do hereby CERTIFY that the foregoing is a full, true, and correct copy of a resolution duly adopted at a regular meeting of said Board of Directors held on the 17th day of April, 1990.

*Vickie Ehler*

Secretary of the Board of Directors  
of the Modesto Irrigation District

## SUMMARY OF MID DOMESTIC WATER PROGRAM "SUNK COSTS"

## CONSULTANT CONTRACTS

MID Board Resol. Number	Date	Contractor/ Description	Amount of Cost Shared by:			MID "Sunk Cost"
			Total Amount	City of Modesto	Del-Este Water Co.	
88-54	3/15/88	James M. Montgomery Development of a Water Treatment Plant Siting Study, including: - water requirements evaluation; - plant capacity determination; - site evaluation; and - water treatment process evaluation.	206,000.00	72,100.00	30,900.00	103,000.00
89-53	5/9/89	James M. Montgomery Authorizes completion of a pilot study of alternative water treatment processes and development of preliminary design criteria. Results of study to be used in the Environmental Impact Report and to develop preliminary design criteria for the treatment plant.	496,000.00	173,600.00	74,400.00	248,000.00
90-19	1/30/90	James M. Montgomery Brief assessment of the public information activities conducted to date for the Modesto Water Treatment Program. Subcontractor: Solen and Associates.	5,000.00	1,750.00	750.00	2,500.00
SUBTOTAL James M. Montgomery			707,000.00	247,450.00	106,050.00	353,500.00
88-84	4/26/88	URS Consultants Perform required environmental studies and prepare required environmental documents regarding the proposed municipal and industrial water treatment plant siting (EIR).	91,736.07	32,117.40	13,764.61	45,854.06
89-36	4/11/89	URS Consultants Amendment No. 1: Additional studies, including conduct rare plant survey	2,203.72	771.09	330.47	1,101.56
90-10	2/20/90	URS Consultants Items requested in URS letter of 6/22/89: - Site Analysis Report addendum, submitted to MID 1/6/89. - Additional EIR scoping meetings. - Additional EIR public hearings on project status. 2nd Review copy of Draft EIR.	11,889.00 9,164.00 2,725.00	4,161.15	1,783.35	5,944.50
90-74	6/19/90	URS Consultants Amendment No. 2: Archaeological studies and additional work on response to comments on Draft EIR, as follows: - URS letter of 2/6/90 -- review of responses to Draft EIR. - URS letter of 4/30/90 -- a. cultural resources (archaeological) study at three Alternative A sites, and b. final printing, mailing and 30 additional copies of Draft EIR.	29,522.00 20,451.00 4,000.00 3,071.00	10,332.70	4,428.30	14,761.00
SUBTOTAL URS Consultants			135,350.19	47,382.34	20,306.73	67,661.12

## APPENDIX A

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## SUMMARY MID DOMESTIC WATER PROGRAM "SUNK COSTS"

## CONSULTANT CONTRACTS (CONT.)

MID Board Number	Resol. Date	Contractor/ Description	Total Amount	Amount of Cost Shared by:		MID "Sunk Cost"
				City of Modesto	Del. Este Water Co.	
90-74	6/19/90	AWC, Inc. Turbidity monitoring system: - Two turbidity meters - Installation (by MID)	10,500.00 8,750.00 1,750.00	3,062.50	1,312.50	4,375.00 1,750.00 6,125.00
SUBTOTAL AWC, Inc.			10,500.00	3,062.50	1,312.50	6,125.00
Pending	5/8/90	EIP Associates Site-specific botanical studies essential for compliance with CROA.	4,800.00	1,680.00	720.00	2,400.00
SUBTOTAL EIP Associates			4,800.00	1,680.00	720.00	2,400.00
TOTAL CONSULTANT CONTRACTS (Note: Includes installation by MID of \$1,750.)			153,650.19	299,574.84	128,389.23	429,686.12

## MID DEDICATED STAFF TIME

MID DEDICATED STAFF TIME		Amount of Cost Shared by:			MID "Sunk Cost"
Period Covered	Staff Name	Total Amount	City of Modesto	Del. Este Water Co.	
1/1-12/31/88	Lee De Lano (@ 50%)	71,941.10	0.00	0.00	71,941.10
1/1-10/15/89	Lee De Lano (@ 50%)	60,909.75	0.00	0.00	60,909.75
SUBTOTAL Lee De Lano		132,850.85	0.00	0.00	132,850.85
10/16-12/31/89	Greg Dias (@ 100%)	20,349.55	0.00	0.00	20,349.55
1/1-5/31/90	Greg Dias (@ 100%)	43,237.91	0.00	0.00	43,237.91
SUBTOTAL Greg Dias		63,587.46	0.00	0.00	63,587.46
5/29-7/31/90	Allen Short (@ 100%)	24,614.31	0.00	0.00	24,614.31
8/1-12/15/90	Allen Short (@ 100%)	53,134.35	0.00	0.00	53,134.35
SUBTOTAL Allen Short		77,748.66	0.00	0.00	77,748.66
TOTAL MID DEDICATED STAFF TIME		274,186.97	0.00	0.00	274,186.97
GRAND TOTAL, ALL COSTS		1,331,837.16	299,574.84	128,389.23	703,873.09



## APPENDIX A

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## RESOLUTION NO. 91-32

APPROVING MEMORANDUM OF UNDERSTANDING  
AMONG MODESTO IRRIGATION DISTRICT, CITY  
OF MODESTO AND DEL ESTE WATER COMPANY  
FOR THE DOMESTIC WATER PROJECT

WHEREAS, the Modesto Irrigation District "MID", City of Modesto "COM" and Del Este Water Company "DEWC" have worked together to develop a Memorandum of Understanding to govern their relationship with regard to the design, finance, construction, operation and maintenance of the surface water treatment plant and distribution system facilities; and

WHEREAS, the "MID", "COM" and "DEWC" have agreed to the final Memorandum of Understanding as presented at today's meeting to this Board of Directors for consideration.

BE IT RESOLVED, That the Board of Directors of the Modesto Irrigation District does hereby authorize and direct the President and Secretary to execute the Memorandum of Understanding among Modesto Irrigation District, City of Modesto and Del Este Water Company. Reference is hereby made to said Memorandum of Understanding, filed as Document No. 4269 in the office of the District's Secretary, for full particulars.

Moved by Director Lyons, seconded by Director Cowan, that the foregoing resolution be adopted.

Upon roll call the following vote was had:

Ayes: Directors Beck, Cowan, Billington, Kidd, Lyons

Noes: Directors None

Absent: Directors None

The President declared the resolution adopted.

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I, Vickie Ehrler, Secretary of the Board of Directors of the MODESTO IRRIGATION DISTRICT, do hereby CERTIFY that the foregoing is a full, true, and correct copy of a resolution duly adopted at a special meeting of said Board of Directors held on the 26th day of February, 1991.

*Vickie Ehrler*  
Secretary of the Board of Directors  
of the Modesto Irrigation District

MODESTO CITY COUNCIL  
RESOLUTION NO. 91-126

A RESOLUTION APPROVING A MEMORANDUM OF UNDERSTANDING WITH MODESTO IRRIGATION DISTRICT AND DEL ESTE WATER COMPANY FOR DESIGN, FINANCING AND CONSTRUCTION OF A SURFACE WATER TREATMENT PLANT, TRANSMISSION PIPELINES AND RESERVOIRS

BE IT HEREBY RESOLVED by the Council of the City of Modesto that the Memorandum of Understanding with Modesto Irrigation District and Del Este Water Company for design, financing and construction of a surface water treatment plant, transmission pipelines and reservoirs be, and it is hereby approved.

BE IT FURTHER RESOLVED that the execution of said Memorandum of Understanding by the designated city officials be authorized.

The foregoing resolution was introduced at a regular meeting of the Council of the City of Modesto held on the 26th day of February, 1991, by Councilmember Patterson, who moved its adoption, which motion being duly seconded by Councilmember Muratore, was upon roll call carried and the resolution adopted by the following vote:

AYES: Councilmembers: Bird, Dobbs, Irizarry, Lang, Muratore, Patterson, Mayor Whiteside

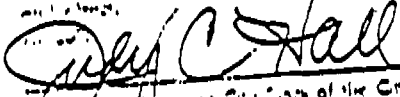
NOES: Councilmembers: None

ABSENT: Councilmembers: None

ATTEST: Original Signed By

NORRINE COYLE, City Clerk

The foregoing is a correct copy of the original on file in this office which has not been revoked and is now in full force and effect.

  
Jay C. Hall, City Clerk of the City of Modesto, County of Stanislaus, State of California.