

Project: Water Conservation Activities at
Fletcher Retarding Basin (E10B01)

Agreement No. D12-006

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AGREEMENT D12-006

between

Orange County Flood Control District

and

Orange County Water District

for

Fletcher Retarding Basin

April 2012

Project: Water Conservation Activities at
Fletcher Retarding Basin (E10B01)

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PRIOR AGREEMENT WITH AMENDMENT NO. 1 REVISIONS

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This AGREEMENT is made and entered into this 1st day of May, 2012,

BY and BETWEEN

The Orange County Water District, a special government district formed under the Orange County Water District Act, Chapter 924, Statutes of 1933, as amended, hereinafter referred to as "OCWD"

AND

The Orange County Flood Control District, a body corporate and politic, hereinafter referred to as "DISTRICT,"

which are sometimes individually referred to as "PARTY," or collectively referred to as "PARTIES."

RECITALS

WHEREAS, DISTRICT owns and operates the flood control facility commonly known as the Fletcher Retarding Basin (Facility E10B01) hereinafter referred to as the "BASIN". The BASIN is owned by the DISTRICT in fee and is located in the City of Orange as illustrated on the Location Map attached hereto as Exhibit A; and

WHEREAS, historically, the BASIN was a gravel pit used for sand and gravel operations. In 1951, DISTRICT acquired the pit and used it as a sinking basin. In 1962, the Fletcher Channel ("CHANNEL") was constructed connecting the BASIN to the Santa Ana River. In 1985, the BASIN was partly used to store surplus materials from the Villa Park Dam outlet and at the same time a low flow channel was created within the BASIN to direct flows to the Santa Ana River; and

WHEREAS, OCWD is managing, replenishing, regulating and protecting the groundwater supplies within its jurisdiction; and

WHEREAS, OCWD has determined that the BASIN has the potential to offer water conservation benefits and proposes to use the BASIN for ground water supplies replenishment. Therefore, in September 2009, OCWD began discussions and coordination with DISTRICT on the use of the BASIN as a flood control and groundwater recharge facility; and

WHEREAS, DISTRICT supports OCWD's intention to utilize the BASIN for water conservation and groundwater recharge as long as such intended uses do not impact DISTRICT's primary use of the BASIN for flood control purposes; and

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1 **WHEREAS**, DISTRICT and OCWD mutually desire to construct improvements within the BASIN,
2 hereinafter referred to as "IMPROVEMENTS", that allow the BASIN to operate as both a flood control detention and
3 groundwater recharging facility; and

4 **WHEREAS**, it is in the best interest of the public that the DISTRICT and OCWD cooperate in the planning,
5 design, construction, operation and maintenance of the BASIN that serves flood control and water conservation
6 purposes; and

7 **WHEREAS**, such action is consistent with DISTRICT's powers as defined in the Orange County Flood
8 Control Act (ACT 5682), Article 2.

9 **NOW, THEREFORE**, it is mutually understood and agreed by OCWD and DISTRICT as follows:

10 **1. PURPOSE**

11 The purpose of this AGREEMENT is to establish the terms, conditions and funding responsibilities between
12 DISTRICT and OCWD for the planning, design, construction, operation and maintenance of the BASIN to allow the
13 proposed joint use of the BASIN as a flood control and water conservation facility in a manner that does not
14 interfere with its primary function as a flood control facility.

15 **2. DELEGATED AUTHORITY**

16 2.1 The actions required to be taken by DISTRICT in the implementation of this AGREEMENT are
17 delegated to Director of the Orange County Public Works Department (OC Public Works) or an authorized
18 designee, hereinafter referred to as "DIRECTOR," and the actions required to be taken by OCWD in the
19 implementation of this AGREEMENT are delegated to OCWD's General Manager or designee, hereinafter
20 collectively referred to as "MANAGER."

21 2.2 PARTIES agree to discuss future modifications to this AGREEMENT that may become necessary
22 due to changes in requirements, including but not limited to design changes resulting from engineering analyses,
23 National Pollution Discharge Elimination System (NPDES) permits and regulatory agency requirements.

24 2.3 PARTIES agree that DIRECTOR and MANAGER are authorized to approve on behalf of DISTRICT
25 and OCWD, respectively, modifications to this AGREEMENT that do not materially change DISTRICT and OCWD's
26 financial and legal obligations under this AGREEMENT, including but not limited to modifications to Exhibit A which

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1 depicts the proposed site for IMPROVEMENTS and illustrates its key features.

2 **3. FLOOD CONTROL AND WATER CONSERVATION ACTIVITIES**

3 3.1 For the purpose of conserving water and replenishing the groundwater supplies that serve the
4 public, OCWD shall have the permission to divert water into and store water within BASIN up to 188 feet per 1929
5 datum in accordance with the terms of this AGREEMENT.

6 3.2 DISTRICT and OCWD mutually agree that the use of the BASIN for flood control purposes is for
7 public's health, safety or welfare and as such shall be superior to OCWD's use of the BASIN for water conservation
8 and groundwater replenishment purposes. However, DISTRICT shall make a good faith effort to cooperate with
9 OCWD's water conservation and groundwater replenishment activities and shall not unreasonably prevent or
10 restrict OCWD's activities for such uses of the BASIN.

11 ~~3.3 DISTRICT reserves the right to modify, deepen, enlarge, repair, replace or construct other~~
12 ~~improvements needed within the BASIN as authorized under the Flood Control Act. In the event such improvements~~
13 ~~conflict with proposed OCWD's activities, OCWD shall modify, remove or relocate all, or portions of~~
14 ~~IMPROVEMENTS that are in conflict, to a new location (if possible, within the BASIN) solely at OCWD's expense~~
15 ~~within one hundred eighty (180) days of receiving written notification from DISTRICT of the need to modify, remove~~
16 ~~or relocate such IMPROVEMENTS. However, should such modification or removal be deemed necessary by~~
17 ~~DISTRICT within the first ten (10) years after the completion date of IMPROVEMENTS, DISTRICT shall reimburse~~
18 ~~OCWD its initial cost of the IMPROVEMENTS as indicated in the engineer's estimate on a sliding scale beginning~~
19 ~~with 100% of said initial costs in the first year after the completion date of IMPROVEMENTS, reducing each~~
20 ~~following year by 10%, reaching zero ten years after the completion date of IMPROVEMENTS.~~

21 3.3 DISTRICT reserves the right to modify, deepen, enlarge, repair, replace or construct other
22 improvements needed within the BASIN as authorized under the Flood Control Act. In the event such improvements
23 conflict with proposed OCWD's activities, OCWD shall modify, remove or relocate all, or portions of
24 IMPROVEMENTS that are in conflict, to a new location (if possible, within the BASIN) solely at OCWD's expense
25 within one hundred eighty (180) days of receiving written notification from the Director of the need to modify,
26 remove or relocate such IMPROVEMENTS. Should such modifications or removal be deemed necessary by

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Director within the first ten (10) years after the completion date of IMPROVEMENTS, DISTRICT shall reimburse OCWD its initial construction cost to complete the IMPROVEMENTS on a sliding scale, with 100% of said initial costs in the first year after the completion date of IMPROVEMENTS, reducing each following year by 10%, reaching zero ten years after the completion date of the IMPROVEMENTS. Under no circumstances would DISTRICT be required to reimburse or otherwise pay OCWD for costs or expenses that OCWD had already received reimbursement (e.g. through the M2 Funding) nor pay OCWD for other than actual IMPROVEMENT construction costs incurred by OCWD.

3.4 OCWD agrees that if any of OCWD's IMPROVEMENTS are disturbed, damaged or removed by DISTRICT during the course of DISTRICT's operating, maintaining, repairing, improving, restoring, or enlarging DISTRICT's improvements within, upon, over or under DISTRICT's right-of-way OCWD shall replace, repair, restore or remove OCWD's IMPROVEMENTS to the satisfaction of DISTRICT solely at OCWD's expense within hundred twenty (120) calendar days of receiving written notice from DISTRICT.

4. OCWD RESPONSIBILITIES

4.1 Subject to the provisions of this AGREEMENT, OCWD may construct, operate and maintain IMPROVEMENTS within the BASIN to facilitate groundwater replenishment, water conservation and related purposes in a manner that does not impact DISTRICT's flood control use of the BASIN.

4.2 With respect to IMPROVEMENTS to be constructed within the BASIN for joint use of the facility for flood control and water conservation or related purposes, the following provisions shall apply:

4.2.1 OCWD shall be the lead agency responsible for funding at its sole cost compliance with the California Environmental Quality Act (CEQA), regulatory and encroachment permitting, utility relocation and/or protection, and construction management costs for the IMPROVEMENTS. Construction management costs funded by OCWD shall include, but not be limited to, construction surveying and inspection, construction material testing, construction contract administration and related required technical services, including but not limited to obtaining approval from the US Army Corps of Engineers (USACOE) as well as compliance with the CEQA, Public Resources Code Section 21000, et seq., with respect to, and for the issuance of all other regulatory permits and approvals

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1 required for the IMPROVEMENTS. OCWD shall not agree to any environmental mitigation for IMPROVEMENTS
2 inside DISTRICT's right of way for BASIN.

3 4.2.2 OCWD shall be responsible to enter into a contract with an A/E (Architect/Engineer) duly
4 licensed in the State of California to design the IMPROVEMENTS and prepare the necessary plans, specifications
5 and construction estimates.

6 4.2.3 OCWD shall be responsible for the cost of performing all design and engineering tasks by
7 the A/E except for the surface water Hydrology and Hydraulics portion of the needed engineering study, for which
8 OCWD shall pay only forty percent (40%) of the cost.

9 ~~4.2.4 Except for the excavation described in Paragraph 5.6 herein or otherwise discussed in this~~
10 ~~AGREEMENT, OCWD shall be responsible for half of the construction cost of the BASIN including but not limited to~~
11 ~~the inlet and outlet modification, BASIN fence and gate relocation, BASIN access road, access ramp to the bottom~~
12 ~~of the BASIN, and BASIN general construction mobilization, site clearing and traffic control.~~

13 4.2.4 OCWD shall be responsible for all construction cost of the BASIN including but not limited to
14 the inlet and outlet modification, BASIN fence and gate relocation, BASIN access road, access ramp to the bottom
15 of the BASIN, and BASIN general construction mobilization, site clearing, and traffic control.

16
17 4.2.5 OCWD shall be responsible for the full cost of construction of Pump Station and other
18 appurtenant facilities that will pump accumulated low flow nuisance water from BASIN inlet out around the BASIN
19 into the Fletcher Channel, and a water supply pipeline that delivers water, pursuant to requirements of the Regional
20 Water Quality Control Board, from OCWD's Riverview Basin to BASIN as depicted in Exhibit A-Location Map.

21 4.2.6 OCWD shall be responsible for the full cost of excavation of the BASIN, export, testing and
22 disposal of the material from 178 feet BASIN elevation down to 170 feet per 1929 datum, which excavation is only
23 needed to facilitate percolation.

24 4.2.7 OCWD shall be responsible for the full cost of a sand import/fill into BASIN to bring the
25 BASIN permeable sand layer up from an elevation of 170 feet to 184 feet per 1929 datum.

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1 4.2.8 OCWD shall ensure that all regulatory permits and approval conditions for proposed
2 IMPROVEMENTS have been reviewed and accepted by the DIRECTOR in writing, before the regulatory agencies
3 issue their final permits or approvals for such IMPROVEMENTS, in order that DISTRICT may verify that actual
4 permits issued for the IMPROVEMENTS do not contain conditions obligating DISTRICT to any future mitigation or
5 maintenance obligations that are unusual, excessive or cost prohibitive in comparison to those for similar facilities
6 which are DISTRICT's current maintenance responsibility.

7 4.2.9 OCWD shall obtain and pay fees for all permits including paying for all incidental
8 processing, reporting and/or charges (as well as for any amendments, re-application fees, etc.), as required for the
9 construction, operation and maintenance of the IMPROVEMENTS for water conservation purposes by, but not
10 limited to, the following regulatory agencies and jurisdictions:

- 11 1. United States Army Corps of Engineers
- 12 2. State of California Department of Fish and Game
- 13 3. California Regional Water Quality Control Board, Santa Ana Region
- 14 4. California Department of Transportation

15 4.2.10 OCWD shall ensure that, if any proposed permit conditions affect operation and
16 maintenance of the IMPROVEMENTS, after completion of construction ("POST-CONSTRUCTION PROJECT
17 CONDITIONS"), all such POST-CONSTRUCTION PROJECT CONDITIONS have been reviewed and accepted by
18 the DIRECTOR in writing before regulatory agencies issue final permits so that the DIRECTOR may verify that
19 actual permits issued for the IMPROVEMENTS do not contain POST-CONSTRUCTION PROJECT CONDITIONS
20 obligating DISTRICT to future maintenance obligations that are unusual, excessive or cost prohibitive in comparison
21 to those for similar facilities that are currently maintained by, or are inconsistent with, DISTRICT standards and
22 criteria.

23 4.2.11 OCWD shall be responsible for 100% of all environmental mitigation costs for the
24 IMPROVEMENTS as well as any related right-of-way costs outside DISTRICT property, mitigation monitoring, and
25 operation and maintenance costs associated with the construction of the BASIN as defined in this AGREEMENT.
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1 4.2.12 Prior to the commencement of construction of the IMPROVEMENTS, OCWD shall submit
2 the plans, specifications and engineer's cost estimates (PS&E) for the construction of the IMPROVEMENTS to
3 DISTRICT in accordance with the permit process for the review and issuance of a County Property Permit. The
4 PS&E package shall include the proposed contract bid items list which separates the items to be cost shared by
5 PARTIES in accordance with the terms of this AGREEMENT.

6 4.2.13 OCWD shall follow all applicable statutory requirements and be responsible, at its sole
7 cost, to advertise the IMPROVEMENTS for public bids, award and enter into a contract with a contractor duly
8 licensed in the State of California (hereinafter CONTRACTOR) for the construction of the IMPROVEMENTS.
9 OCWD shall submit a copy of OCWD's construction contract/agreement with CONTRACTOR to DISTRICT for
10 review prior to OCWD's approval of PS&E.

11 4.2.14 OCWD shall notify the DIRECTOR within thirty (30) calendar days from the date of
12 DISTRICT's approval of the PS&E for the IMPROVEMENTS of OCWD's estimated date of contract award.
13 Thereafter, OCWD shall provide a minimum of seventy-two (72) hours advance notice to DIRECTOR and
14 DISTRICT's designated OC Inspection Section inspector of the date the construction of the IMPROVEMENTS are
15 scheduled to commence.

16 4.2.15 OCWD shall obtain, or cause the CONTRACTOR to obtain, and furnish to DISTRICT, prior
17 to commencement of construction of the IMPROVEMENTS, evidence that all insurance required under Paragraphs
18 7.1, 7.2 and 7.3 of this AGREEMENT is in effect. All such insurance shall be obtained and held from a company or
19 companies admitted in the State of California, and shall be approved by the County of Orange Risk Management
20 Department and maintained until the DIRECTOR certifies that construction of the IMPROVEMENTS are complete.

21 4.2.16 Prior to commencement of the construction of IMPROVEMENTS, OCWD shall furnish to
22 DIRECTOR or require the CONTRACTOR to furnish to DIRECTOR, via the County Property Permit process, a
23 faithful performance bond and material performance bond(s) in accordance with Paragraph 7.3 herein, and obtain
24 DIRECTOR's written approval thereof.

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1 4.2.17 OCWD shall provide to DIRECTOR and OC Inspection Permit Section inspector at least
2 seventy-two (72) hours advance written notice of the time and location of all regularly scheduled pre-construction
3 and construction meeting(s) regarding construction of the IMPROVEMENTS.

4 4.2.18 OCWD shall provide DISTRICT and its authorized agents, employees and invitees, access
5 to the IMPROVEMENTS construction site to perform their respective responsibilities under this AGREEMENT.

6 4.2.19 OCWD shall at its sole cost be responsible for all modifications, relocations or
7 reconstruction of utilities that are necessary for construction of the IMPROVEMENTS. If any public and/or private
8 utilities installed prior to the commencement of construction of the IMPROVEMENTS conflict with construction of
9 the IMPROVEMENTS, OCWD shall, at no cost to DISTRICT, make all necessary arrangements with the owners of
10 such utilities for their protection, relocation or removal in accordance with the policy and procedure for those utilities
11 located within the limits of work providing for the improvements to DISTRICT's right-of-way.

12 ~~4.2.20 OCWD shall obtain the advance written approval of the DIRECTOR for any proposed~~
13 ~~change to the approved IMPROVEMENTS construction plans prior to the implementation of such changes. Prior to~~
14 ~~issuing its approval of any Contract Change Orders (CCOs), OCWD shall submit all CCOs to DISTRICT for review~~
15 ~~and approval and determination as to which CCOs relate to the IMPROVEMENTS' bid items that DISTRICT is~~
16 ~~responsible for in accordance with the terms of this AGREEMENT.~~

17 4.2.20 OCWD shall obtain the advance written approval of the DIRECTOR for any proposed
18 change to the approved IMPROVEMENTS construction plans prior to the implementation of such changes. Prior to
19 issuing its approval of any Contract Change Orders (CCOs), OCWD shall submit all CCO's to DISTRICT for review
20 and approval to verify that the IMPROVEMENTS will not interfere with the flood control function of the BASIN in a
21 timely manner.

22 4.2.21 OCWD shall conduct and complete the construction of the IMPROVEMENTS, and
23 substantiate its completion by obtaining written verification from the DIRECTOR that construction of the
24 IMPROVEMENTS has been completed in accordance with the approved plans.

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1 4.2.22 OCWD shall file a Notice of Completion of construction of the IMPROVEMENTS within ten
2 (10) days after the acceptance of the IMPROVEMENTS by OCWD's Board of Directors. OCWD shall provide
3 DISTRICT with two copies of that Notice of Completion.

4 4.2.23 OCWD shall at its sole cost furnish to the DIRECTOR one set of Mylar copies and
5 computer files, in a form compatible with DISTRICT's computer system, of the approved "as-built" construction
6 drawings of the IMPROVEMENTS.

7 ~~4.2.24 OCWD shall be responsible at its sole cost for the maintenance, repair and replacement of
8 all the IMPROVEMENTS constructed within the BASIN by OCWD pursuant to this AGREEMENT.~~

9 4.2.24 OCWD shall be responsible at its sole cost for the maintenance, repair, and replacement of
10 all the IMPROVEMENTS, including but not limited to the access ways and ramps, constructed within the BASIN by
11 OCWD pursuant to this AGREEMENT.

12 4.2.25 OCWD shall be responsible at its sole cost to repair any damage to DISTRICT facilities
13 caused by the construction, operation or maintenance of IMPROVEMENTS by OCWD, or the use of the BASIN for
14 water conservation and groundwater replenishment purposes.

15 ~~4.2.26 OCWD shall be responsible to make all payments in accordance with OCWD's contract
16 with the CONTRACTOR and invoice DISTRICT for the items DISTRICT has obligation to pay per the terms of this
17 AGREEMENT, in accordance with Paragraphs 6.1 through 6.4, Invoices and Payments, below.~~

18 4.2.26 OCWD shall be responsible to make all payments in accordance with OCWD's contract with
19 the CONTRACTOR.

20 4.2.27 OCWD agrees to remain at all times in compliance, and shall not offend DISTRICT's
21 compliance, with the following requirements concerning utilization of the M2 Funding: the Grant, the Comprehensive
22 Transportation Funding Programs Guidelines approved by the Orange County Transportation Authority on March
23 22, 2010, as amended, ("CTFP"), Master Funding Agreement No. C-1-2758 dated August 19, 2011, and Letter
24 Agreement dated June 30, 2014 (Agreement No. C-1-2758 M2 CTFP Master Funding Agreement-Letter
25 Agreement Number 8) with the Orange County Transportation Authority (OCTA) attached hereto as Exhibit C (the
26 "Letter Agreement").

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5. DISTRICT RESPONSIBILITIES

5.1 DISTRICT shall prepare the Scope of Work for the Hydrology and Hydraulics portion of the engineering analyses for the BASIN.

~~5.2 DISTRICT shall review the project plans and specifications, including design and engineering for the BASIN, including inlet and outlet structures and other appurtenant facilities, and if found to be satisfactory and in conformance with DISTRICT practices, standards and criteria, DIRECTOR shall approve and sign project plans and specifications for portions that will be operated and maintained by DISTRICT. Approval shall not be unreasonably withheld.~~

5.2 DISTRICT shall review the project plans and specifications, including design and engineering for the BASIN, including the inlet and outlet structures and other appurtenant facilities, and if found to be satisfactorily and in conformance with DISTRICT practices, standards and criteria, DIRECTOR shall approve and sign project plans and specifications. Such approval shall only be for evidence that the project, if constructed in accordance with the approved plans and specifications, would not interfere with the flood control function of the BASIN.

5.3 DISTRICT shall be responsible for sixty percent (60%) of the cost for performing the Hydrology and Hydraulics portion of the engineering study by the A/E.

5.4 DISTRICT shall at its cost be responsible for the review and approval of the surface water Hydrology and Hydraulics portion of the engineering study for the BASIN.

5.5 DISTRICT shall assign a qualified OC Inspection Permit Section inspector to ensure that flood control related IMPROVEMENTS are accomplished with good workmanship and in accordance with the approved plans and specifications.

~~5.6 DISTRICT shall be responsible for full cost of excavation of the BASIN from top of the BASIN elevation of 200 feet down to 178 feet per 1929 datum and export of the material. DISTRICT shall be responsible for any testing and disposal fees for this excavation, if necessary.~~

5.6 DISTRICT shall not be responsible for any cost to excavate the BASIN.

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1 ~~5.7~~ DISTRICT shall be responsible for one-half (50%) of the construction cost of the BASIN inlet and
2 outlet modification, BASIN fence and gate relocation, BASIN access road, BASIN access ramp, and BASIN general
3 construction mobilization, site clearing and traffic control.

4 5.7 DISTRICT agrees to receive the M2 Funding in accordance with the Letter Agreement. DISTRICT
5 agrees to pay or distribute the M2 Funding in accordance Section 6 below. The PARTIES agree the M2 Funding
6 award of \$ 2,525,000 has fully satisfied DISTRICT's financial contribution as to the IMPROVEMENTS. To the extent
7 there are any costs for the IMPROVEMENTS not covered by M2 Funding, such costs including any Contract
8 Change Orders (CCOs) shall be the sole responsibility of OCWD, not incurred by DISTRICT.

9 ~~5.8~~ DISTRICT shall be responsible to pay OCWD's invoices in accordance with Paragraphs 6.1
10 through 6.4, Invoices and Payments, below.

11 ~~5.9~~ DISTRICT's financial contributions to IMPROVEMENTS under this AGREEMENT are initially set
12 not to exceed three million dollars (\$3,000,000). For any increases in DISTRICT's contributions that are reviewed
13 and deemed necessary by the PARTIES, DISTRICT shall obtain prior approval from its Board of Supervisors.

14 6. INVOICES AND PAYMENTS

15 ~~6.1~~ OCWD shall manage the IMPROVEMENTS costs and payments to the CONTRACTOR as
16 prescribed in this AGREEMENT and shall invoice DISTRICT for the DISTRICT's share of the IMPROVEMENTS
17 costs on a monthly basis. OCWD's invoices shall be accompanied by supporting documentation, calculations,
18 references to bid items as well as the appropriate parts of this AGREEMENT, etc., as applicable and appropriate, in
19 order to facilitate DISTRICT's review and approval in accordance with Paragraph 6.3 herein.

20 6.1 OCWD shall submit to DISTRICT invoice(s) along with all information and supporting documentation
21 necessary for a submission to OCTA, in accordance with CFTP, to receive the amount equal to seventy-five percent
22 (75%) of the total M2 Funding.

23 ~~6.2~~ OCWD shall invoice DISTRICT for DISTRICT's share of the cost of those Contract Change Orders
24 (CCOs), if any, that relate to the bid items DISTRICT is responsible for with the same supporting documentation
25 stated in Paragraph 6.1 above. DISTRICT shall pay such invoices in accordance with Paragraph 6.3 herein.

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1 6.2 DISTRICT shall submit to OCTA invoice(s), or other CFTP payment request, for seventy-five
2 percent (75%) of the total M2 Funding, with the information and supporting documentation provided by OCWD.

3 ~~6.3 DISTRICT shall have the right to review and approve OCWD's invoices delivered per Paragraphs~~
4 ~~6.1 and 6.2 herein, and if so approved, DISTRICT shall pay said invoices within 60 days of receipt.~~

5 6.3 When IMPROVEMENTS construction has been completed, OCWD shall within four (4) months submit
6 to DISTRICT an invoice along with all information and supporting documentation necessary for a submission to
7 OCTA, in accordance with CFTP, to receive an amount equal to twenty-five percent (25%) of the total M2 Funding.
8 Within six (6) months of construction completion, DISTRICT shall submit to OCTA an invoice, or other CFTP
9 payment request, for twenty-five percent (25%) of the total M2 Funding, with the information and supporting
10 documentation provided by OCWD.

11 ~~6.4 After completion of the IMPROVEMENTS, OCWD shall provide to DISTRICT a final written~~
12 ~~accounting report, which shall include actual design and construction contract costs and all approved CCOs.~~

13 6.4 Upon receipt of a M2 Funding payment based upon submission of an OCWD invoice(s) and supporting
14 documentation, DISTRICT agrees to submit said payment in full to OCWD within thirty (30) business days upon
15 receipt from OCTA. The PARTIES acknowledge the M2 Funding does not cover all costs for construction of the
16 IMPROVEMENTS and that DISTRICT has no further responsibility or obligation to provide any addition funding or
17 contribution.

18 7. INSURANCE REQUIREMENTS

19 During the term of this AGREEMENT, OCWD shall cause its contractors to maintain insurance in accordance with
20 the insurance requirements set forth in Exhibit B.

21 7.1 Prior to the performance of any work on the IMPROVEMENTS or payment therefor, and thereafter
22 continuing during the term of this AGREEMENT, OCWD shall cause its CONTRACTOR to comply with, the
23 insurance requirements specified in this Paragraph 7 and on Exhibit B of this AGREEMENT. Further, OCWD shall,
24 in its contract with the CONTRACTOR (a) have all subcontractors working on IMPROVEMENTS comply with the
25 insurance requirements of Exhibit B of this AGREEMENT, and (b) obtain proof of insurance from such
26 subcontractors prior to allowing any subcontractor to begin work. OCWD or the CONTRACTOR shall provide

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1 DISTRICT with written proof of insurance in the form acceptable to DISTRICT prior to commencement of
2 IMPROVEMENTS construction. DISTRICT'S representative for the PROJECT shall have the right at any
3 reasonable time to inspect the proof of insurance maintained by OCWD, or the CONTRACTOR, or any of the
4 subcontractors working on the IMPROVEMENTS.

5 7.2 OCWD shall furnish to DISTRICT, or cause OCWD's authorized representatives or contractors to
6 furnish, prior to commencement of IMPROVEMENTS construction, evidence that all insurance required is in
7 accordance with Paragraph 7 ("INSURANCE REQUIREMENTS"). All insurance shall be obtained from a company
8 or companies licensed to do business in the State of California and approved by DIRECTOR, and shall be
9 maintained in full force and effect until DIRECTOR certifies that construction is complete.

10 7.3 OCWD shall cause that its contractor(s) to obtain(s) a faithful performance bond and material
11 payment bond(s) in an amount covering the entire cost of the IMPROVEMENTS and that DISTRICT is named as
12 an obligee on such faithful performance bond(s) and material payment bond(s). The performance bond shall be
13 such that DISTRICT has the right under the bond to enforce the bond to complete the IMPROVEMENTS if OCWD
14 fails to complete those IMPROVEMENTS. The performance bond and the surety are subject to approval by the
15 DIRECTOR.

16 8. INDEMNIFICATION

17 8.1 OCWD shall indemnify, defend with counsel acceptable to DISTRICT, and hold harmless
18 DISTRICT, the County of Orange (COUNTY) and the "DISTRICT/COUNTY INDEMNITEES" (as defined in
19 Paragraph 8.2 below) and each of them, from all loss, injury, liability, damages, claims, costs and expenses
20 (including attorneys' fees and court costs), whether incurred by or made against DISTRICT, COUNTY or any
21 DISTRICT/COUNTY INDEMNITEE arising out of (i) breach of this AGREEMENT by OCWD, (ii) the willful
22 misconduct or negligent acts or omissions of OCWD and/or the OCWD INDEMNITEES (as defined in Paragraph
23 8.2 below) in connection with this AGREEMENT, (iii) the materials or other things used or employed in performing
24 the construction of IMPROVEMENTS constructed under this AGREEMENT, (iv) injury to or death of any person or
25 persons (either workmen, employees of OCWD, COUNTY or their Contractors or Subcontractors or the public) or
26 damage to adjoining or other property caused by the performance of the construction of IMPROVEMENTS under

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1 this AGREEMENT, or (v) injury to or death of any person or persons (either workmen, employees of OCWD,
2 COUNTY or its Contractors or Subcontractors or the public) or damage to adjoining or other property caused by
3 OCWD's operation and maintenance activities under this AGREEMENT; provided, however, that nothing contained
4 in this Paragraph shall operate to relieve DISTRICT, COUNTY or any DISTRICT/COUNTY INDEMNITEE from any
5 loss, injury, liability, damages, claims, costs or expenses to the extent determined by a court of competent
6 jurisdiction to have been proximately caused by the willful misconduct or negligent acts or omissions of DISTRICT,
7 COUNTY or the DISTRICT/COUNTY INDEMNITEES, or any of them. This indemnity shall survive even after the
8 termination of this AGREEMENT. If judgment is entered against OCWD and/or DISTRICT, as applicable, by a court
9 of competent jurisdiction because of the concurrent active negligence of OCWD and/or DISTRICT, as applicable, or
10 DISTRICT/COUNTY INDEMNITEES, OCWD and/or DISTRICT, as applicable, agree that liability will be
11 apportioned as determined by the court. Neither party shall request a jury apportionment. Notwithstanding anything
12 stated above, nothing contained herein shall relieve OCWD of any insurance requirements or obligations created
13 elsewhere in this AGREEMENT.

14 8.2 DISTRICT shall indemnify, defend with counsel approved in writing by OCWD, and hold harmless
15 OCWD and its elected and appointed officers, employees, agents, and representatives (the "OCWD
16 INDEMNITEES"), and each of them, from all loss, injury, liability, damages, claims, costs and expenses (including
17 attorneys' fees and court costs), whether incurred by or made against OCWD or any OCWD INDEMNITEE arising
18 out of (i) breach of this AGREEMENT by DISTRICT, (ii) the willful misconduct or negligent acts or omissions of
19 DISTRICT and/or its elected and appointed officers, employees, agents, and representatives (the
20 "DISTRICT/COUNTY INDEMNITEES") in connection with this AGREEMENT, or (iii) DISTRICT's flood control
21 maintenance and other obligations with respect to the BASIN; provided, however, that nothing contained in this
22 Paragraph shall operate to relieve OCWD or any OCWD INDEMNITEE from any loss, liability, damages, claims,
23 costs, or expenses to the extent determined by a court of competent jurisdiction to have been proximately caused
24 by the willful misconduct or negligent acts or omissions of OCWD, the OCWD INDEMNITEES, or any of them. This
25 indemnity shall survive even after termination of this AGREEMENT. If judgment is entered against OCWD and
26 and/or DISTRICT, as applicable, by a court of competent jurisdiction because of the concurrent active negligence of

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1 OCWD and/or DISTRICT, as applicable, or DISTRICT/COUNTY INDEMNITEES, OCWD and DISTRICT agree that
2 liability will be apportioned as determined by the court. Neither party shall request a jury apportionment. For
3 purposes of this Paragraph 8.2, the PARTIES acknowledge and agree that DISTRICT shall not be deemed
4 negligent in the maintenance and/or operation of the BASIN if DISTRICT operates and maintains the BASIN in
5 substantial conformance with standard DISTRICT practices used for similar DISTRICT facilities. Payment shall not
6 be a condition precedent to recovery under the indemnities provided in this Paragraph.

7 **9. HAZARDOUS OR TOXIC MATERIALS**

8 9.1 Nothing in this AGREEMENT is intended nor shall anything in this AGREEMENT be construed to
9 transfer to DISTRICT or COUNTY or their successors or assigns, or to relieve OCWD or its successors, assigns or
10 predecessors in title of, any responsibility or liability OCWD or its successors, assigns or predecessors in title now
11 has, has had or comes to have with respect to human health or the environment, including but not limited to
12 responsibility or liability relating to hazardous or toxic substances or materials (as such terms as those used in this
13 sentence are defined by statute, ordinance, case law, governmental regulations or other provision of the law).
14 Furthermore, DISTRICT may exercise its right under law to bring action, if necessary, to recover clean-up costs and
15 penalties paid, if any, from OCWD or any others who are ultimately determined by a court of competent jurisdiction
16 and/or a federal, state or local regulatory or administrative governmental agency or body having jurisdiction, to have
17 responsibility for said hazardous or toxic substances or materials upon, within, or under the BASIN. Notwithstanding
18 the foregoing, DISTRICT shall be and remain liable for any hazardous or toxic substances or materials that become
19 located, because of DISTRICT's operations, upon, within, or under the BASIN.

20 9.2 Nothing in this AGREEMENT is intended nor shall anything in this AGREEMENT be construed to
21 transfer to OCWD or its successors or assigns or to relieve DISTRICT or its successors, assigns or predecessors in
22 title of, any responsibility or liability DISTRICT or its successors or assigns or predecessors in title now has, has had
23 or comes to have with respect to human health or the environment, including but not limited to responsibility or
24 liability relating to hazardous or toxic substances or materials (as such terms as those used in this sentence are
25 defined by statute, ordinance, case law, governmental regulations or other provision of the law). Furthermore,
26 OCWD may exercise its right under law to bring action, if necessary, to recover clean-up costs and penalties paid, if

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any, from DISTRICT or any others who are ultimately determined by a court of competent jurisdiction and/or a federal, state or local regulatory or administrative governmental agency or body having jurisdiction, to have responsibility for said hazardous or toxic substances or materials upon, within, or under the BASIN. Notwithstanding the foregoing, OCWD shall be and remain liable for any hazardous or toxic substances or materials that become located, because of OCWD's operations, upon, within, or under the BASIN.

10. ENCROACHMENT PERMITS

10.1 Encroachment permits from County Property Permits which authorize OCWD to commence work on property which lies within DISTRICT's rights-of-way, or which affects DISTRICT's facilities are required and shall be obtained by OCWD prior to commencing any construction or any other activity.

10.2 Permit from County Property Permits which authorize OCWD to perform ongoing operation and maintenance activities on property which lies within DISTRICT's rights-of-way, or which affects DISTRICT's facilities are required and shall be obtained by OCWD prior to commencing operation and maintenance activities.

10.3 Permit from County Property Permits is required and shall be obtained by OCWD for any proposed, future alterations of OCWD's features within the BASIN.

11. NOTICES

Notices or other communications which may be required or provided under the terms of this AGREEMENT shall be given as follows:

DISTRICT: Director
Orange County Public Works
Re: Fletcher Retarding BASIN – Agreement D12-006
County of Orange
300 North Flower Street
Santa Ana, CA 92703-5000
Facsimile No. (714) 834-2395

OCWD: General Manager
Orange County Water District
18700 Ward Street
Fountain Valley, CA 92708
Facsimile No. (714) 378-3381

All notices shall be in writing and deemed effective when delivered in person or if deposited in the United States mail, first class, postage prepaid and addressed as above, 2 days after the deposit. Notwithstanding the above, the

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1 PARTIES may also provide notices by facsimile transmittal, and any such notice so given shall be deemed to have
2 been given upon receipt during normal business hours or in the event of receipt after business hours, the following
3 business day. Any notices, correspondence, reports and/or statements authorized or required by this
4 AGREEMENT, addressed in any other fashion shall be deemed not given. Either PARTY may change its address
5 to which notices are to be sent by giving notice of such change to the other PARTY.

6 **12. INDEPENDENT CONTRACTOR STATUS**

7 This AGREEMENT is by and between DISTRICT and OCWD, and is not intended and shall not be construed so as
8 to create the relationship of agent, servant, employee, partnership, joint venture or association, as between
9 DISTRICT and OCWD.

10 **13. SUCCESSORS AND ASSIGNS**

11 This AGREEMENT shall be binding on the successors and assigns of the PARTIES hereto, and shall not be
12 assigned by either PARTY without the written consent of the other PARTY. The consent of each PARTY shall not
13 be withheld unreasonably; but, prior to approving any such assignment involving the performance of any obligation
14 pursuant to this AGREEMENT, the PARTY from whom consent is required shall be satisfied by competent evidence
15 that the assignee is technically qualified and financially able to perform those services to be assigned. Failure to
16 obtain the PARTY'S required written approval of any proposed transfer or assignment will render this AGREEMENT
17 terminated.

18 **14. WAIVER OF RIGHTS**

19 The failure of the DISTRICT and/or OCWD to insist upon the strict performance of any of the terms, covenants or
20 conditions of this AGREEMENT shall not be deemed a waiver of any right or remedy that DISTRICT and/or OCWD
21 may have with respect to any other term, covenant or condition of this AGREEMENT, and shall not be deemed a
22 waiver of the right to require strict performance of any term, covenant or condition of this AGREEMENT thereafter,
23 nor a waiver of any remedy for the subsequent breach or default of any term, covenant or condition of this
24 AGREEMENT.

25 **15. APPLICABLE LAW**

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1 This AGREEMENT has been negotiated and executed in the State of California and shall be governed by and
2 construed in accordance with the laws of the State of California. In the event of any legal action to enforce or
3 interpret this AGREEMENT, the sole and exclusive venue shall be a court of competent jurisdiction located in
4 Orange County, California, and the PARTIES hereto agree to and do hereby submit to the jurisdiction of such court,
5 notwithstanding Code of Civil Procedure Section 394. The PARTIES specifically agree that by soliciting and
6 entering into and performing services under this AGREEMENT, OCWD and DISTRICT shall be deemed to
7 constitute doing business within Orange County from the time of initiation of work, through the period when all work
8 under this AGREEMENT is completed, and continuing until the expiration of any applicable limitations period.
9 Furthermore, the PARTIES have specifically agreed, as part of the consideration given and received for entering
10 into this AGREEMENT, to waive any and all rights to request that an action be transferred for trial to another county
11 under Code of Civil Procedure Section 394.

12 **16. SEVERABILITY**

13 If any part of this AGREEMENT is held, determined or adjudicated to be illegal, void or unenforceable by a court of
14 competent jurisdiction, the remainder of this AGREEMENT shall be given effect to the fullest extent reasonably
15 possible.

16 **17. ATTORNEY FEES/COSTS**

17 Should litigation be necessary to enforce any terms or provisions of this AGREEMENT, each PARTY shall bear its
18 own litigation and collection expenses, witness fees, court costs and attorney's fees.

19 **18. EXHIBITS**

20 ~~This AGREEMENT incorporates by this reference, the following Exhibits, which are attached hereto and~~
21 ~~incorporated herein:~~

22 ~~Exhibit A — Location Map~~

23 ~~Exhibit B — Insurance Requirements~~

24 **This AGREEMENT incorporates by this reference, the following Exhibits, which are attached hereto**
25 **and incorporated herein:**

26 **Exhibit A — Location Map**

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1 **Exhibit B – Insurance Requirements**

2 **Exhibit C – Letter Agreement No.8 C-1-2758 M2 CTFP**

3 **19. WAIVER AND INTERPRETATION**

4 Titles or captions contained herein are inserted as a matter of convenience and for reference only, and in no way
5 define, limit, extend, or describe the scope of this AGREEMENT or any provisions hereof. No provision in this
6 AGREEMENT is to be interpreted for or against a PARTY because that PARTY or his legal representative drafted
7 such provision.

8 **20. AUTHORITY**

9 The PARTIES to this AGREEMENT represent and warrant that this AGREEMENT has been duly authorized and
10 executed and constitutes the legally binding obligation of their respective organization or entity, enforceable in
11 accordance with its terms.

12 **21. AMENDMENTS**

13 It is mutually understood and agreed that, except with regard to modifications and approvals delegated to the
14 DIRECTOR and MANAGER herein, no addition to, alteration of, or variation of the terms of this AGREEMENT, nor
15 any oral understanding or agreement not incorporated herein, shall be valid unless made in writing and signed and
16 approved by all the PARTIES.

17 **22. ENTIRE AGREEMENT**

18 This document sets forth the entire AGREEMENT between DISTRICT and OCWD, and may be modified only by
19 further written amendment between the PARTIES hereto, in accordance with Paragraph 21 (Amendments) of this
20 AGREEMENT.

21 **23. COUNTERPARTS**

22 This AGREEMENT may be executed in counterparts, each of which shall be deemed an original, but all of which
23 together shall constitute one and the same document.

24

25

26 **24. TERMINATION**

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1 ~~24.1 In the event that OCWD is unable to proceed with the construction of the IMPROVEMENTS in~~
2 ~~accordance with the terms of this AGREEMENT within two (2) years after the execution date of the AGREEMENT,~~
3 ~~each PARTY may terminate this AGREEMENT with or without cause, after conferring with the other PARTY and~~
4 ~~upon delivery of a thirty (30) day written notice to the other PARTY. The written Notice of Termination shall state~~
5 ~~the effective date of such termination and shall be served in accordance with Paragraph 11 (NOTICES), above.~~
6 ~~PARTIES shall, however, remain responsible for all payments for the design and expenses incurred for the~~
7 ~~IMPROVEMENTS prior to effective date of termination under the terms of this AGREEMENT. If any part(s) of~~
8 ~~DISTRICT facilities within the BASIN are altered, damaged, or realigned because of the IMPROVEMENTS, OCWD~~
9 ~~shall reconstruct to the original condition or pay DISTRICT the cost of reconstruction to the original condition of~~
10 ~~DISTRICT's facilities within the BASIN that have been altered, damaged, or realigned because of the~~
11 ~~IMPROVEMENTS.~~

12 24.1 In the event that OCWD is unable to proceed with the construction of the IMPROVEMENTS in
13 accordance with the terms of this AGREEMENT within three (3) years after the execution date of the AGREEMENT,
14 each PARTY may terminate this AGREEMENT with or without cause, after conferring with the other PARTY and
15 upon delivery of a thirty (30) day written notice to the other PARTY. The written Notice of Termination shall state
16 the effective date of such termination and shall be served in accordance with Paragraph 11 (NOTICES), above. If
17 any part(s) of DISTRICT facilities within the BASIN are altered, damaged, or realigned because of the
18 IMPROVEMENTS, OCWD shall reconstruct to the original condition or pay DISTRICT the cost of reconstruction to
19 the original condition of DISTRICT's facilities within the BASIN that have been altered, damaged, or realigned
20 because of the IMPROVEMENTS.

21 24.2 Should OCWD determine that it no longer wishes to perform water conservation and groundwater
22 replenishment in the BASIN, OCWD shall submit a written Notice of Termination to DISTRICT in accordance with
23 Paragraph 11, only after conferring with DISTRICT, and removing all its water conservation features within the
24 BASIN, solely at OCWD's cost, to DISTRICT's satisfaction in accordance with the terms of this AGREEMENT.

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IN WITNESS WHEREOF, each PARTY hereto has executed this AGREEMENT by its duly authorized representatives as of the date set forth above.

ORANGE COUNTY WATER DISTRICT,
a special governmental district

By: _____
Title: _____

By: _____
Title: _____

APPROVED AS TO FORM:
RUTAN & TUCKER, LLP

By _____
Joel D. Kuperberg
General Counsel, OCWD

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ORANGE COUNTY FLOOD CONTROL DISTRICT, a
body corporate and politic

By: _____
Chair of the Board of Supervisors
Orange County, CA

Signed and certified that a copy of this document has
been delivered to the Chair of the Board per G.C. Sec
25103, Reso 79-1534

By: _____
Susan Novak
Clerk of the Board of Supervisors
County of Orange, CA

APPROVED AS TO FORM
Office of the County Counsel
Orange County, California

Date: _____

By: _____