

**03/26/15
AMENDMENT NO. 2 to**

**Peters Canyon Wash Channel Water Capture and
Reuse Pipeline Project Agreement**

(Including Operations and Maintenance)

City of Irvine
City of Tustin
Orange County Flood Control District
County of Orange
Irvine Ranch Water District
California Department of Transportation

This **Amendment No. 2** (“**Amendment**”) to Peters Canyon Wash Channel Water Capture and Reuse Pipeline Project Agreement (“**Original Agreement**”) is made as of this ____ day of _____, 2015, (“**Effective Date**”) by and among **Irvine Ranch Water District**, a body corporate and politic (“**IRWD**”), **City of Irvine**, a charter city (“**Irvine**”), **City of Tustin**, a California municipal corporation (“**Tustin**”), **Orange County Flood Control District**, a body corporate and politic (“**OCFCD**”), **County of Orange**, a political subdivision of the State of California (“**County**”), and **California Department of Transportation**, an agency of the State of California (“**Caltrans**”), hereinafter sometimes individually referred to as “**Party**” or collectively as the “**Parties.**” OCFCD and County are each individually Parties to this Amendment, but are collectively referred to in this Amendment as OCFCD. Irvine, Tustin, OCFCD, and Caltrans are providing funds to pay capital costs and are individually referred to as a “**Funding Party**”, and are collectively referred to as the “**Funding Parties**”. OCFCD, IRWD, Irvine, and Tustin are individually referred to as an “**Excess Credit Party**”, and are collectively referred to as the “**Excess Credit Parties**”.

RECITALS

A. The Parties entered into the Original Agreement as of December 12, 2013, to: (i) set forth their respective rights and obligations with respect to financing of the Peters Canyon Wash Channel Water Capture and Reuse Pipeline Project (the “**Project**”) and completion of the Project design, at which point, subject to all necessary approvals having been obtained and compliance with applicable state and federal laws, including CEQA, and, if federal funding is provided for the Project, subject to compliance with the NEPA, the Parties will determine whether or not to proceed with construction and operation of the Project as provided for in the Agreement; and (ii) to memorialize the basis for the overall Project development and financing, including but not limited to obtaining permits from resource agencies and other government entities, design and construction of the Project, and operation and maintenance of the Pipeline, if the Parties determine to proceed with the Project.

B. The Parties entered into that certain Amendment No. 1 to the Original Agreement dated as of February 9, 2015, to (i) update the Project Schedule (Exhibit D to the Agreement), (ii) to facilitate expediting of the solicitation of bids for construction of the Project so that a reliable cost estimate for construction of the Project could be obtained by bidding, and (iii) to increase the funding for Phase 1 of the Project (design, environmental/regulatory review and approvals and access acquisition) without changing the Estimated Project Cost through the payment of a Supplemental Installment by each Funding Party. The Original Agreement and the Amendment No. 1 are collectively referred to herein as the “**Agreement.**” All capitalized terms used in this Amendment and not otherwise defined herein shall have the meanings ascribed to them in the Agreement.

C. Pursuant to the terms of the Agreement, the Funding Parties have each made the First Installment Payment and the Supplemental Installment Payment for the funding of Phase 1 of the Project.

D. At the time of entering into the Original Agreement, the Parties estimated that the total “**Capital Costs**” for the Project (the “**Estimated Project Cost**”) would not exceed \$8,678,611. As contemplated in Section 4.6 of the Agreement, IRWD advertised a contract for

construction of the Project and has received bids, which have been opened and reviewed by each of the Parties. The lowest responsive and responsible bid, together with the cost of certification and approval of all necessary environmental documents and receipt of all regulatory agency approvals, will cause the current Estimated Project Cost (which includes the 20% contingency amount) set forth in the Original Agreement to be exceeded. The Parties now estimate that the Estimated Project Cost will not exceed \$12,814,000. In accordance with Section 4.6.1 of the Agreement, the Parties have met and conferred and determined that IRWD should award a contract for construction of the Project to the lowest responsive and responsible bidder; accordingly, the Parties have determined that it is necessary to amend the Agreement to update the Estimated Project Cost, to increase the amounts of each Funding Party's respective Capital Cost Contribution and Estimated Second Installment Payment for the funding of Phase 2 (construction) of the Project and to augment and clarify certain provisions with respect to application of funds to O&M Costs and Capital Costs.

E. Through this Amendment, the Parties also wish to update the Project Schedule (Exhibit "D") to reflect the currently anticipated Project schedule, to further clarify the Parties' rights and obligations with respect to suspension of operation of the Pipeline, and to augment and clarify their rights and obligations set forth in the Agreement with respect to grant funding for the Project, including the Proposition 84 Integrated Regional Water Management Round 2 Implementation Grant Program administered by the Santa Ana Watershed Project Authority (SAWPA) One Water One Watershed (OWOW).

AMENDMENT

NOW, THEREFORE, in consideration of the foregoing Recitals, which are incorporated herein by reference, and the mutual covenants and promises among the Parties hereinafter set forth, the Parties agree as follows:

Section 1. Project Costs.

1.1. Increase of Estimated Project Cost. Notwithstanding the first sentence of Recital E of the Original Agreement, the Parties now estimate that the total cost of "Capital Costs" for the Project (referred to in the Agreement as the "Estimated Project Cost") will not exceed \$12,814,000. Accordingly, Exhibit "B" to the Agreement shall be updated as provided in Section 6, below, to reflect the revised Estimated Project Cost and the amounts of the Funding Parties' respective revised Project Capital Cost Contributions and Estimated Second Installment Payment.

1.2. In order to clarify the definition of "Capital Costs" as such term was defined in Recital E of the Original Agreement, the second sentence of Recital E is hereby amended to read as follows:

"The term "**Capital Costs**" means all design and construction costs, including without limitation construction, costs for defense of CEQA/NEPA lawsuits or construction

claims, project administration, including, but not limited to, accounting, inspection, surveying, compaction testing, geotechnical services and engineering, a reasonable and appropriate share of IRWD staff time, consultant costs, costs of permitting, bonds, rights-of-way acquisition, design, environmental compliance, mitigation identified in the approved CEQA documents for the Project excluding the supplemental water supply to the San Joaquin Marsh (subject to Sections 5.3 and 5.4), and documentation, costs related to HM Management Activities related to HM-2 (as defined in Section 1.9), management activities, construction management, startup and testing activities, project management and legal support for design, permitting and construction of the Project.”

1.3. In order to clarify the definition of “O&M Costs” as such term was defined in Recital F of the Original Agreement, Recital F of the Original Agreement is hereby amended in its entirety to read as follows:

“F. Subject to compliance with applicable state and federal laws, including the California Environmental Quality Act (California Public Resources Code § 21000 *et seq.*) (“CEQA”) and, if federal funding is provided for the Project, subject to compliance with the National Environmental Policy Act (42 U.S.C § 4231 *et seq.*) (“NEPA”), the Parties will, as described in this Agreement, jointly provide: funding of Capital Costs not funded by Grants up to the Party’s respective Project Capital Costs Contribution as defined herein; and funding of the costs to operate, maintain, and repair the Pipeline when it is placed into service, including without limitation ongoing environmental mitigation, maintenance and monitoring costs identified in the approved CEQA documents for the Project, facility failures or replacements and costs related to lawsuits or regulatory actions associated with the Pipeline, its operation, and any discharges into the Pipeline (including discharges of hazardous materials) that are unrelated to any Party’s improper or negligent act (“O&M Costs”). O&M Costs does not include the Project’s share of the cost of operating the Main Street pump station and the San Joaquin Marsh recirculation pumps (“IRWD’s Supplemental Contribution”).”

1.4 Section 1.5 of the Agreement is hereby amended in its entirety to read as follows:

“1.5 Operation and Maintenance. If the Project is constructed, IRWD shall operate and maintain the Pipeline from and after acceptance of the completed Pipeline solely for the exclusive, mutual use and benefit of the Parties. During the term of the Agreement, IRWD shall annually contribute O&M Costs in the amount of \$60,000 increased each year by the same percentage increase as reflected in the Consumer Price Index (All Items) for the Anaheim-Long Beach Area, published by the United States Department of Labor, Bureau of Labor Statistics, or if the same shall no longer be published, the most nearly equivalent official index published by said Bureau or its successor or equivalent government agency (“IRWD’s O&M Contribution”).” In addition to IRWD’s O&M Contribution, IRWD shall pay IRWD’s Supplemental Contribution.

1.5 The cost of the supplemental water supply to the San Joaquin Marsh is excluded from the definition of “Capital Costs” as amended in Section 1.2 hereof; provided, however, that should a determination be made by IRWD that such supplemental water supply is necessary to satisfy the requirements of the approved CEQA documents for the Project, IRWD shall notify the other Parties of such determination, and the Parties shall promptly act to process an amendment to the Agreement to increase the Funding Parties’ respective Project Capital Cost Contribution consistent with each Funding Party’s obligation to act in good faith and to not unreasonably refuse to amend the Agreement pursuant to Section 5.3, as reasonably required to fund a Capital Cost increase necessary to pay for such supplemental water supply.

Section 2. Amendments Pertaining to Responsibility For Operation and Maintenance of the Project and Suspension of Project Operation. Section 1.6 of the Agreement is hereby amended in its entirety to read as follows:

“1.6. Suspensions.

1.6.1 IRWD may *temporarily* suspend operation of the Project due to *an* emergency or scheduled or unscheduled maintenance. *In the event of a suspension, IRWD shall use reasonable efforts to restore operation and maintenance of the Project as soon as is reasonably possible. If IRWD suspends operation of the Project due to emergency or scheduled or unscheduled maintenance, and does not use reasonable efforts to restore normal operations and maintenance as soon as is reasonably possible, then IRWD shall be financially responsible for any loss of grant funding to the Project that may result from such suspension; provided, however, IRWD shall not be responsible if notwithstanding its reasonable efforts, the resumption of normal operations and maintenance is prevented by a Force Majeure Event, as that term is defined in Section 1.4.3.*

1.6.2 IRWD shall notify the Funding Parties promptly of the occurrence of unforeseen ~~increases in O&M Costs~~ ~~external operating expenses, regulatory conditions, or major facility failures~~ that materially increase the O&M Costs over and above IRWD’s O&M Contribution, and shall identify the estimated additional O&M Costs, and may request that each Funding Party indicate its willingness to fund its proportionate share of such increased O&M Costs as shown in the column entitled “Flow-based Percentage” in Exhibit B, *including the amount of increased O&M Costs that would be the share of any Funding Parties that do not provide a commitment as specified in the following sentence.* If IRWD has not received a commitment pursuant to Section 6 from *any* Funding Party to fund *its proportionate share of* the additional O&M Costs within 90 days of such notice, IRWD may suspend *such non-committing Funding Party’s right to use the Pipeline and Nitrogen and Selenium Offsets and/or Nitrogen and Selenium Credits generated by the Project until such commitment is received and any payment that has become due is made in full, together with payment of any unpaid interest accrued on the portion of the delinquent payment that remains outstanding, calculated as set forth in Section 4.1.* *Upon such payment, IRWD shall apportion and apply such amount and accrued interest to reimburse itself for any funds IRWD has advanced in excess of the*

IRWD O&M Contribution, and then to the Funding Parties who previously paid the delinquent share operation of the Project upon not fewer than 14 days prior written notice of suspension to the Funding Parties. During a suspension, each Funding Party whose rights have been suspended of the Parties will be responsible for finding and arranging an alternate means of disposal of its respective nitrogen and selenium discharges, and for payment of any fines, penalties or costs incurred by that Party as the result of a suspension. A Funding Party that pays all or part of another Funding Party's proportionate share of increased O&M Costs pursuant to this Subsection 1.6 in order to avoid suspension of its rights to use the Pipeline and Nitrogen and Selenium Offsets and/or Nitrogen and Selenium Credits generated by the Project may seek reimbursement from the non-funding Funding Party in accordance with the Dispute Resolution process set forth in Section 17 of this Agreement. ~~In the event of a suspension, once the cause of a suspension has been cured, IRWD shall use reasonable efforts to restore operation as soon as reasonably possible.~~

Section 3. Amendment Pertaining to Refunding of Excess Funds. Section 5.4 of the Agreement is hereby amended in its entirety to read as follows.

“5.4 A final reconciliation and detailed accounting report will be provided by IRWD upon completion of the Project work. Subject to Sections 4.7.7 and 5.3, IRWD shall invoice the Funding Parties for any shortfall in funding of Capital Costs in accordance with their respective Flow-based Percentages set forth in Exhibit B. Any excess funds remaining in the Project Fund after completion of the Pipeline shall be retained by IRWD in the Project Fund, to be applied to pay the cost of the supplemental water supply to the San Joaquin Marsh if such supply is determined to be necessary to satisfy the requirements of the approved CEQA documents for the Project. If excess funds remain in the Project Fund after a period of three (3) years has elapsed from the date of commencement of operation of the Project, and a supplemental water supply to the San Joaquin Marsh has either been completed or has not been determined to be necessary to satisfy the requirements of the approved CEQA documents for the Project, then the Parties shall meet and confer to determine whether IRWD shall release the excess funds or continue to retain them in the Project Fund; if the Parties' determination is that the excess funds should continue to be retained, the Parties shall continue to periodically meet and confer to consider release or retention of the excess funds until no excess funds remain or a determination to retain the funds is not made. Unless upon any such meeting and conferring the Parties agree that the excess funds shall continue to be retained, then the excess funds, minus any unexpended Grant funds, shall be reimbursed to the Parties pro rata in accordance with their respective Exhibit B Flow-based Percentages within forty-five (45) days of the date that the Parties so met and conferred~~Project completion~~. Notwithstanding the foregoing, unexpended Grant funds shall only be disbursed according to the Grant requirements. ~~Subject to Sections 4.7.7 and 5.3, IRWD shall invoice the Funding Parties for any shortfall in funding of Capital Costs in accordance with their respective Flow-based Percentages set forth in Exhibit B.~~”

Section 4. Amendment Pertaining to Insufficiency or Return of Grant Funds. A new Section 5.6 is hereby added to the Agreement to read as follows:

“5.6. Insufficiency or Return of Grant Funds.

5.6.1 In the event of a reduction in Grant funding due to the denial or reduction in the amount of either of the Grants following the award of a contract for construction of the Project, (a) Irvine and/or IRWD shall immediately notify the other Parties of such reduction in Grant funding, and (b) the Parties shall promptly act to process an amendment to this Agreement to increase the Funding Parties’ respective Project Capital Cost Contribution consistent with each Funding Party's obligation to act in good faith and to not unreasonably refuse to amend the Agreement pursuant to Section 5.3.

5.6.2 If, following expenditure of previously received Grant funds, such Grant funds are disallowed, in whole or in part, by the grantor for any reason, and Irvine and/or IRWD becomes obligated to repay such Grant funds and/or interest accrued thereon to the grantor, the Parties shall promptly meet and confer in good faith to attempt to reach a mutual agreement regarding allocation of such repayment amount among the Parties. In the event a mutual agreement regarding allocation of such repayment among the Parties is not reached prior to the date such Grant funds and/or interest must be repaid to the grantee, and Irvine and/or IRWD makes such repayment, each Funding Party shall reimburse Irvine and/or IRWD for such repayment in proportion to its Flow-based percentage set forth in Exhibit B, subject to the right to seek reimbursement from another Party or Parties in accordance with the terms of this Agreement, including, without limitation, Sections 8 and 17 pertaining to indemnification and dispute resolution, respectively.”

Section 5. Revision to IRWD Indemnification Obligation. Section 8.2 of the Original Agreement is hereby amended to add the following sentence at the end of the paragraph:

“IRWD further agrees to indemnify, defend and hold harmless each of the Funding Parties for any liability arising out of Irvine’s implementation and administration of the Grant Funding Contracts described in Recital E, where the liability, or potential liability, results from IRWD’s or its agents’ negligence or misconduct, or IRWD’s failure to operate, maintain, design, or construct the Project in accordance with the requirements of the Grant Funding Contracts, unless such failure is due to a Force Majeure Event, as that term is defined in Section 1.4.3.”

Section 6. Revised Exhibits. The table set forth in Exhibit 1 (Exhibit B-2) attached hereto and incorporated herein by reference will replace the table attached as Exhibit B to the Agreement. Any reference to Exhibit B in the Agreement is deemed to be a reference to the revised Exhibit B-2. The revised "Project Schedule" set forth in Exhibit 2 (Exhibit D-2) attached hereto and incorporated herein by reference will replace the table attached as Exhibit D to the Agreement. Any reference to Exhibit D in the Agreement is deemed to be a reference to the revised Exhibit D-2.

Section 7. Intent of Amendment. Except as otherwise expressly provided herein, this Amendment is not intended to affect any Party’s rights or obligations under the Agreement, including, but not limited to, the Parties’ respective termination rights under Section 18 of the Agreement. To the extent not otherwise expressly modified by this Amendment, the terms and

conditions of the Agreement shall remain in full force and effect.

Section 8. Counterparts. This Amendment may be executed in counterparts, each of which shall be deemed to be an original and all of which together shall constitute one and the same instrument.

IN WITNESS WHEREOF, the Parties hereto have executed this Agreement on the Effective Date hereinabove written.

IRVINE RANCH WATER DISTRICT, a body corporate and politic

By: _____
Name: _____
Title: _____

APPROVED AS TO FORM:
RUTAN & TUCKER, LLP

Todd O. Litfin, City Attorney

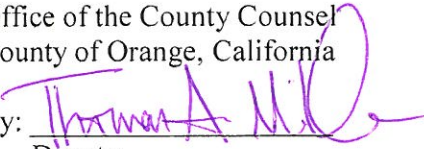
CITY OF IRVINE, a charter city

By: _____
Name: _____
Title: _____

CITY OF TUSTIN, a California municipal corporation

By: _____
Name: _____
Title: _____

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

By: 
Deputy

Date: 4/8/15

ORANGE COUNTY FLOOD CONTROL DISTRICT, a body corporate and politic

By: _____
Name: _____
Title: Chairman of the Board of Supervisors
County of Orange, California

SIGNED AND CERTIFIED THAT A COPY OF THIS AGREEMENT HAS BEEN DELIVERED TO THE CHAIR OF THE BOARD PER G.C. Sec 25103, Reso 794535

Attest:

Clerk of the Board
County of Orange, California

COUNTY OF ORANGE, a political subdivision of the state of California

By: _____
Name: _____
Title: Chairman of the Board of Supervisors
County of Orange, California

CALIFORNIA DEPARTMENT OF
TRANSPORTATION, an agency of the State
of California

By: _____

Name: _____

Title: _____

CERTIFIED AS TO FUNDS FOR THE
CALIFORNIA DEPARTMENT OF
TRANSPORTATION:

By: _____

Neda Saber Ansari
District Budget Manager

Exhibit 1 to Amendment No. 2

EXHIBIT B-2

Estimated Project Cost, Project Capital Cost Contribution, IRWD O&M Contribution, Flow-based Percentages, and Installment Payments

Party/Grant Source	Estimated Project Cost ¹	Project Capital Cost Contribution ²	IRWD O&M Contribution ³	Flow-based Percentage	Total Project Contribution	First Installment Payment	Supplemental Installment	Estimated Second Installment Payment
Caltrans		\$ <u>3,421,335</u> <u>2,223,726</u>	\$ -	29% ⁴	\$ <u>3,421,335</u> <u>2,223,726</u>	\$ -	\$ -	\$ <u>3,421,335</u> <u>2,223,726</u>
County/OCFCD		\$ <u>2,283,670</u> <u>973,222</u>	\$ -	32%	\$ <u>2,283,670</u> <u>973,222</u>	\$ 446,068	\$ 232,812	\$ <u>1,604,790</u> <u>294,342</u>
City of Irvine		\$ <u>1,906,597</u> <u>812,526</u>	\$ -	26%	\$ <u>1,906,597</u> <u>812,526</u>	\$ 372,414	\$ 194,184	\$ <u>1,339,999</u> <u>245,928</u>
City of Tustin		\$ <u>929,293</u> <u>396,033</u>	\$ -	13%	\$ <u>929,293</u> <u>396,033</u>	\$ 181,518	\$ 95,004	\$ <u>652,771</u> <u>119,511</u>
Irvine Ranch Water District		\$ -	\$ 1,008,627	0	\$ 1,008,627	n/a	n/a	n/a
Proposition 84 Grant ⁵		\$ 1,000,000	n/a	n/a	\$ 1,000,000	\$ -	\$ -	\$ 1,000,000
Orange County Transportation Agency Grant ⁶		\$ 3,273,105	n/a	n/a	\$ 3,273,105	\$ -	\$ -	\$ 3,273,105
Total	\$<u>12,814,000</u> <u>8,678,611</u>	\$ <u>12,814,000</u> <u>8,678,611</u>	\$ 1,008,627	100	\$ <u>13,822,627</u> <u>9,687,238</u>	\$1,000,000	\$ 522,000	\$<u>11,292,000</u> <u>7,156,611</u>

¹Taken from the Feasibility Study.

²Project Capital Cost Contributions are not-to-exceed amounts.

³ The IRWD O&M Contribution is the estimated present value of \$60,000/year escalated annually using a 2.5% inflation rate and a 4% discount rate. The actual IRWD O&M Contribution shall be calculated annually pursuant to Section 1.5 of this Agreement. The actual amount of IRWD's O&M Contribution calculated under Section 1.5 of the Agreement may be different than this estimate. *IRWD's O&M Contribution does not include IRWD's Supplemental Contribution, defined in Section 1.5.*

⁴ Caltrans share of the O&M Costs for the budget year shall at no instance exceed \$12,000 without an amendment to this Agreement.

⁵ Caltrans, Irvine, Tustin, OCFCD and IRWD are all partners in the OWOW Grant.

⁶ Irvine, Tustin, OCFCD and IRWD are partners in the OCTA Grant. Caltrans is not eligible to benefit from the OCTA Grant.

Exhibit 2 to Amendment No. 2

EXHIBIT D-2

Anticipated Schedule for Project Work

Task	Date
Award of Project Design Contract	January 2014
Phase 1 - Completion of design	January 2015
Phase 1 – Advertise Project	February 2015
Phase 1 – Approval of CEQA and Award Construction Contract	June 2015
<i>Phase 1 – Complete Design of Environmental Compliance Mitigation identified in the approved CEQA documents for the Project excluding the supplemental water supply to the San Joaquin Marsh</i>	<i>July 2015</i>
Phase 2 - Construction of Project	July 2015-November 2016
Operations and Maintenance	December 2016-June 2036