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## RIGHT OF ENTRY AND USE AGREEMENT

THIS RIGHT OF ENTRY AND USE AGREEMENT (“**Agreement**”) is made \_\_\_\_\_, 20\_\_\_\_, (“**Effective Date**”) by and between ORANGE COUNTY FLOOD CONTROL DISTRICT, a body corporate and politic, (“**DISTRICT**”) and \_\_\_\_\_ (“**HOLDER**”). DISTRICT and HOLDER may sometimes hereinafter individually be referred to as “**Party**” or jointly as “**Parties.**”

DISTRICT and HOLDER agree as follows:

### 1. DEFINITIONS (S)

The following words in this Agreement have the significance attached to them in this section, unless otherwise apparent from context:

- A. “**Agreement Area**” shall have that meaning set forth in Section 4 (Agreement Area) below.
- B. “**Channel**” means DISTRICT’s flood control facility (Facility No. \_\_) commonly referred to as the \_\_\_\_\_ Channel. *(Note: If Agreement Area is over a Basin or Storm Drain, substitute the word “Channel” with the word “Basin” or “Storm Drain” throughout the Agreement.)*
- C. “**County**” means the County of Orange, a political subdivision of the state of California.
- D. “**Director**” means Orange County’s Director, OC Public Works, or designee.
- E. “**HOLDER Party(ies)**” means HOLDER’s employees, representatives, member agencies, agents, contractors, operators, invitees, and any person allowed or authorized by HOLDER to conduct activities on the Agreement Area as applicable.
- F. “**Improvements**” shall have that meaning set forth in Section 5 (Use) below.

### 2. TERM (S)

The term of this Agreement shall be for \_\_\_\_\_ (\_\_) years, commencing on the Effective Date of this Agreement, renewable for \_\_\_\_\_ additional \_\_\_\_\_ year periods upon mutual agreement of HOLDER and the Director, unless sooner terminated as provided herein below.

### 3. RELOCATION/TERMINATION

- A. Termination by HOLDER. HOLDER may terminate this Agreement upon a minimum of thirty (30) days’ prior written notice to the Director.
- B. Relocation/Termination by DISTRICT. HOLDER acknowledges that the Agreement Area lies on, over or about a portion of the Channel and HOLDER further acknowledges that the primary purpose of the Agreement Area is for flood control purposes. Upon determination by the Director, in the exercise of his/her reasonable discretion, that the Improvements interfere with DISTRICT’s use of the Channel or other operational purpose, HOLDER shall, following receipt of written request (“**Notice to Relocate**”), relocate or remove its Improvements pursuant to this Agreement. DISTRICT shall, upon written request, have the Director meet and confer with HOLDER to determine whether the Improvements can remain in place or whether modifications to the Improvements may be made to avoid the need for relocation. The Director shall then utilize

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reasonable efforts to find other DISTRICT property available to HOLDER for the purpose of relocating conflicting Improvements. If Director and HOLDER mutually agree upon a relocation site on DISTRICT property outside of the Agreement Area, the Parties agree the termination of this Agreement will coincide with the effective date of a similar agreement authorizing HOLDER'S use at that new location. To the extent HOLDER cannot mitigate interference with DISTRICT'S operations to the reasonable satisfaction of the Director; DISTRICT may terminate this Agreement three hundred sixty five (365) days from the date of the Notice to Relocate.

C. Mutual Termination

1. Replacement Easement. In the circumstance where the Improvements are longitudinally along a Channel or other DISTRICT facility and Holder provided evidence to Director's satisfaction that said Improvements are critical for serving a high public good with a regional benefit, this Agreement may be replaced with an easement. HOLDER understands and acknowledges these terms are not a DISTRICT commitment or obligation to convey easement rights. Conveyance of easement rights requires approval by the Orange County Board of Supervisors or their authorized representative. If conveyance of an easement has been authorized, HOLDER shall pay DISTRICT a purchase price for said rights based upon a fair market value appraisal. HOLDER shall be responsible for all costs associated with the easement preparation and finalization. When finalizing a replacement easement, the Parties shall mutually terminate this Agreement to coincide with the effective date of that easement. Any Annual Use Fee payments received by DISTRICT under this Agreement prior to the effective date of the replacement easement shall be applied toward the purchase price.
2. Replacement Cooperative Agreement. In the circumstance where HOLDER and DISTRICT subsequently enter into a cooperative agreement to implement a collaborative water quality or other improvement project which includes the Improvements within the Agreement Area, the Parties may mutually terminate this Agreement to replace it with such cooperative agreement. At Director's discretion, that cooperative agreement may include terms that DISTRICT will not collect a use fee or rent from HOLDER for use of the Agreement Area provided DISTRICT'S contribution to that project is quantified as the amount which DISTRICT would receive under this Agreement. HOLDER understands and acknowledges these terms are not a DISTRICT commitment to enter into a project or agreement. HOLDER acknowledges any work on DISTRICT right-of-way would require a DISTRICT permit obtained through the Orange County's Property Permit ("CPP") department after payment of normal processing fees

D. Obligations Surviving Termination. The terms, covenants, and conditions set forth in Section 14 (Ownership/Disposition of Improvements); Section 16 (Hold Harmless), and Section 17 (Hazardous Materials) of this Agreement and Sections 11 (Quitclaim upon Termination) and 19 (Holding Over) of the General Conditions shall survive the expiration or sooner termination of this Agreement.

4. **AGREEMENT AREA**

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*Sample verbiage for overhead lines crossing an open channel:*

DISTRICT grants to HOLDER the non-exclusive right to use the air space *not more than* \_\_\_\_\_ (\_\_\_\_) feet above the surface of the adjacent maintenance roadway, or not more than \_\_\_\_\_ (\_\_\_\_) feet from the water surface elevation assuming that the Channel facility is at capacity, across that certain real property (“**Agreement Area**”) described in **Exhibit A** and illustrated on **Exhibit B**, both of which Exhibits are attached hereto and by this reference made a part hereof.

*Sample verbiage for subsurface use:*

DISTRICT grants to HOLDER the non-exclusive right to use the subsurface of that certain real property (“**Agreement Area**”) described in **Exhibit A** and illustrated in **Exhibit B** both of which Exhibits are attached hereto and by this reference made a part hereof.

*Sample verbiage for surface use:*

DISTRICT grants to HOLDER the non-exclusive right to use that certain real property (“**Agreement Area**”) described in **Exhibit A** and illustrated in **Exhibit B** both of which Exhibits are attached hereto and by this reference made a part hereof.

## 5. USE

*Sample verbiage for overhead lines crossing an open channel:*

HOLDER’s use of the Agreement Area shall be limited to the right to route, maintain, inspect, repair, and replace, overhead electrical supply systems facilities and equipment consisting of wires and cables (“**Improvements**”) used in the distribution of electrical energy over and across the Agreement Area as such Improvements are more particularly identified and described in **Exhibit C** and illustrated in **Exhibit D**, both of which exhibits are attached hereto and by this reference made a part hereof. All *overhead wires, cables, high voltage lines and equipment* shall at all times be maintained in such a manner so as to maintain at least a minimum vertical clearance of \_\_\_\_\_ (\_\_\_\_) feet above the *water surface elevation, with the assumption that the Channel facility is at 100-year capacity, and/or the highest point of the adjacent maintenance road in the Agreement Area.* The installation, construction and maintenance-related rights granted herein shall be subject to the provisions of Section 11(Construction/Installation/Repair/Maintenance Activities).

*Sample verbiage for subsurface gas line:*

HOLDER’s use of the Agreement Area shall be limited to the right to, maintain, inspect, repair, and replace a xx-inch (xx”) sub-surface natural gas utility pipeline with a maximum pressure of \_\_\_\_\_ placed at a minimum depth of xxx feet below ground surface with \_\_\_\_\_ (e.g. *AASHTO HL93*) load carrying capacity across the surface of the entire length of the Agreement Area. HOLDER’s natural gas pipeline, and any appurtenances to be modified or replaced must be approved in advance by Director, shall hereinafter be referred to as “**Improvements**” as more particularly identified and described in **Exhibit C** and illustrated in **Exhibit D**. The installation, construction and maintenance-related rights granted herein shall be subject to the provisions of Section 11 (Construction/Installation/Repair/Maintenance Activities).

*Sample verbiage for surface use (Note, if no equipment will be allowed to be installed within the Agreement Area,*

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*reference to “HOLDER’s Improvements” throughout the document may need to be deleted):*

HOLDER’s use of the Agreement Area shall be limited to the right to maintain, inspect, repair, and replace a \_\_\_\_\_. HOLDER’s \_\_\_\_\_, and any appurtenances approved in advance by Director, shall hereinafter be referred to as “**Improvements**” as more particularly identified and described in **Exhibit C** and illustrated in **Exhibit D** (both of which are attached hereto and incorporated by reference herein). The installation, construction and maintenance-related rights granted herein shall be subject to the provisions of Section 11 (Construction/Installation/Repair/Maintenance Activities).

HOLDER’s use of the Agreement Area shall include the non-exclusive right to use the [*existing maintenance roadway; area*] delineated on said **Exhibit B** to access the Agreement Area for maintenance and inspection purposes. Such access shall be permitted upon forty-eight (48) hours’ advanced notice to DISTRICT’s Operations and Maintenance Department by calling 714/955-0213 and shall be limited to HOLDER or a HOLDER’s Party’s utilization of the access way for non-specialized vehicles or equipment. Notwithstanding the foregoing, HOLDER shall be excused from providing 48-hour notice in an emergency situation. HOLDER shall take due care to prevent unauthorized parties from accessing the Agreement Area or access way, which care shall include but not be limited to, immediately locking any access gates upon entering or exiting the access way.

*Use the following if Agreement Area or access way is unpaved.* [Except in an emergency, HOLDER acknowledges that vehicular access over the Agreement Area or access way is prohibited during inclement weather or when the Agreement Area or access way is wet. In cases when the Agreement Area or access way becomes wet, authorized vehicular access shall not resume until the Director has determined that the Agreement Area and access way are sufficiently dry to permit vehicular access without damage to the Agreement Area or access way.]

HOLDER shall restrict vehicular speeds on and over the access way and Agreement Area to a maximum speed of ten (10) miles per hour and shall be cautious of any persons, pedestrians or cyclists on the access way. HOLDER shall not park any vehicles or equipment within the Agreement Area or on any part of the access way, nor shall HOLDER place any barriers or structures on the Agreement Area or access way without the Director’s prior written approval. Any vehicles and/or equipment parked or placed on the Agreement Area or access way in violation of the terms hereof, may be towed or removed at HOLDER expense, at the sole discretion of the Director, and without prior notice to HOLDER.

HOLDER shall, at its sole cost and to the satisfaction of Director, repair any damage to the access way, excluding normal wear and tear, caused by HOLDER or any HOLDER Party, to comparable condition as existed prior to such damage. [*Include the following if Agreement Area or access way is unpaved:* Damage to or need for repair of the Agreement Area or access way due to exercise of the rights granted under this Agreement during inclement weather or when such access way is wet shall not be considered normal wear and tear.] The Parties agree that HOLDER shall otherwise have no responsibility for the maintenance and repair of the access way.

HOLDER agrees not to use the Agreement Area for any other purpose nor to engage in or permit any other activity within or from the Agreement Area, or allow or permit any third-party collocation on the Improvements or any third party use of the Agreement Area without the Director’s prior written approval. HOLDER further agrees not to conduct or permit to be conducted any public or private nuisance in, on or from the Agreement Area. In addition, HOLDER agrees to comply with all governmental laws and

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regulations in connection with HOLDER's use of the Agreement Area and agrees that use of the Agreement Area shall be subject to all terms, conditions set forth in this Agreement.

HOLDER hereby acknowledges that the Agreement Area lies on, over or about a portion of DISTRICT's Channel and HOLDER further acknowledges that the primary purpose of the Agreement Area is for flood control purposes. HOLDER agrees to conduct all activities within the Agreement Area in such a manner that will allow for unobstructed flood control operations and maintenance of the Channel by DISTRICT.

## 6. USE FEE

*In such cases where HOLDER is a city and the sole Improvement is a public storm drain which connects laterally to a Channel for drainage purposes, this Section (Use Fee) may be reserved/omitted in consideration of possible responsibilities and legal requirements imposed by the Orange County Flood Control Act, the California Water Code and applicable drainage law and requirements.*

For the first 12-month period commencing on the Effective Date of this Agreement, HOLDER agrees to pay DISTRICT the sum of \_\_\_\_\_ Dollars (\$\_\_\_\_\_) as the fee ("Annual Use Fee") for the use of the Agreement Area. Thereafter, throughout the term of this Agreement, the Annual Use Fee shall, without prior notice or demand, be increased by two percent (2%) over the Annual Use Fee for the immediately preceding 12-month period.

The first Annual Use Fee payment shall be due and payable within fifteen (15) days following the Effective Date of this Agreement. Subsequent Annual Use Fee payments shall be due and payable without prior notice or demand on or before each anniversary of the Effective Date of this Agreement. *(In furtherance of the circumstances contemplated in Section 3C, Director may opt to defer collection of the Annual Use Fee. In such cases, revise the above terms to allow for the Annual Use Fee payment to be due and payable upon HOLDER receipt of an invoice specifying the amount and date due.)*

In the event the obligation to pay the Annual Use Fee terminates on some date other than on an anniversary of the Effective Date of this Agreement, the Annual Use Fee shall be prorated based on a 365 day year to reflect the actual period of use.

Alternatively, HOLDER may satisfy its Annual Use Fee obligation by making a one-time lump sum payment of \_\_\_\_\_ Dollars (\$\_\_\_\_\_) based upon the present value of the Annual Use Fee payments with application of the annual two percent increase for all periods within the initial term or renewal term, as applicable, discounted at the rate then used as the annual rate of return in determining the Annual Use Fee. The Annual Use Fee for a renewal period shall be the initial Annual Use Fee with application of the annual two percent (2%) increases to the period then in effect. To the extent this Agreement is terminated, DISTRICT shall refund HOLDER any prepaid use fee prorated on an annual basis to reflect the actual period this Agreement is in effect and in consideration of the discount rate used in calculation of the lump sum payment.

## 7. PAYMENT PROCEDURE

All Annual Use Fees and other payments due under this Agreement shall be delivered to the Orange County Treasurer-Tax Collector, Revenue Recovery/Accounts Receivable Unit, P. O. Box 4005, Santa Ana, California 92702-4005 (or may be delivered to 11 Civic Center Plaza, Room G58, Santa Ana 92702). The designated place of payment may be changed at any time by the Director upon (10) ten days' written notice to HOLDER. Use Fees and other payments may be made by check payable to Orange County Flood Control District. HOLDER assumes all risk of loss if payments are mailed.

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All sums due under this Agreement shall be paid in lawful money of the United States of America, without offset or deduction or prior notice or demand. No payment by HOLDER or receipt by DISTRICT of a lesser amount than the payment due shall be deemed to be other than on account of the payment due, nor shall any endorsement or statement on any check or any letter accompanying any check or payment be deemed an accord and satisfaction, and DISTRICT shall accept such check or payment without prejudice to DISTRICT's right to recover the balance of said payment or pursue any other remedy in this Agreement.

## **8. CHARGE FOR LATE PAYMENT**

HOLDER hereby acknowledges that late payment of sums due hereunder will cause DISTRICT to incur costs not contemplated by this Agreement, the exact amount of which will be extremely difficult to ascertain. Such costs include but are not limited to costs such as administrative processing of delinquent notices, increased accounting costs, etc.

Accordingly, if any payment pursuant to this Agreement is not received by DISTRICT by the due date, a late charge of one and one-half percent (1.5%) of the payment due and unpaid plus \$100 shall be added to the payment, and the total sum shall become immediately due and payable to DISTRICT. An additional charge of one and one-half percent (1.5%) of said payment, excluding late charges, shall be added for each additional month that said payment remains unpaid. HOLDER and DISTRICT hereby agree that such late charges represent a fair and reasonable estimate of the costs that DISTRICT will incur by reason of HOLDER late payment.

## **9. HOLDER EXPENSE**

HOLDER agrees to pay DISTRICT for all actual and reasonable staff costs incurred in the preparation, review, and processing of any estoppel, amendment, renewal or replacement of this Agreement, within twenty (20) days following receipt of an invoice requesting payment therefor from the Director.

*[Security deposit may not be required in all instances. If required, determine which of the following is the better fit.]*

## **10. SECURITY DEPOSIT**

A security deposit in the sum of \_\_\_\_\_ (\$\_\_\_) in the form of a Cashier's Check made payable to the Orange County Flood Control District shall be provided to DISTRICT by HOLDER. The security deposit shall guarantee HOLDER full and faithful performance of all the terms and conditions of this Agreement. DISTRICT shall not be required to keep this security deposit separate from its general funds, and HOLDER shall not be entitled to any interest on such deposit.

DISTRICT reserves the right to adjust the amount of the security deposit to reflect changes in operations or changes in use fees established by DISTRICT. Within thirty (30) days after receipt of Director's written notice to HOLDER of any change in required security deposit amount, HOLDER shall submit to DISTRICT any additional security deposit as may be required.

All or any portion of the security deposit shall be available unconditionally to Director for payment of expenses incurred by DISTRICT as a result of HOLDER failure to faithfully perform all terms and conditions of this Agreement.

In the event Director withdraws any or all of the security deposit as provided herein, HOLDER shall, within ten (10) days' written notice of any withdrawal by Director, replenish the security deposit to maintain it in the amount herein required, throughout the Agreement term. Failure to do so will result in

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the immediate termination of this Agreement.

The security deposit, less any deductions of all amounts due DISTRICT, shall be released to HOLDER within thirty (30) days following the expiration or sooner termination of this Agreement, provided HOLDER has fully vacated the Agreement Area and has otherwise fully and faithfully performed HOLDER's obligations under this Agreement.

#### 10. SECURITY DEPOSIT (S)

During the term of this Agreement and subject to the applicable provisions for adjustment as provided hereinafter, HOLDER shall provide DISTRICT with a security deposit in the sum of \_\_\_\_\_ Thousand, \_\_\_\_\_ Dollars (\$\_\_\_\_\_). The security deposit shall take one of the forms set out below and shall guarantee HOLDER's full and faithful performance of all the terms, covenants, and conditions of this Agreement:

- A. Cash
- B. The assignment to Orange County Flood Control District of a savings deposit held in a financial institution in Orange County acceptable to Director. At a minimum, such assignment shall be evidenced by the delivery to Director of the original passbook reflecting said savings deposit and a written assignment of said deposit to the Orange County Flood Control District, in a form approved by Director.
- C. A Time Certificate of Deposit from a financial institution in Orange County wherein the principal sum is made payable to Orange County Flood Control District, or order. Both the financial institution and the form of the certificate must be approved by Director.
- D. An instrument or instruments of credit from one or more financial institutions, subject to regulation by the state or federal government, pledging that funds necessary to secure performance of the Agreement terms, covenants, and conditions are on deposit and guaranteed for payment, and agreeing that said funds shall be trust funds securing HOLDER's performance and that all or any part shall be paid to the Orange County Flood Control District, or order upon demand by Director. Both the financial institution(s) and the form of the instrument(s) must be approved by Director.

Regardless of the form in which HOLDER elects to make said security deposit, all or a portion of the principal sum shall be available unconditionally to Director, for correcting any default or breach of this Agreement by HOLDER, its successors or assigns, or for payment of expenses incurred by DISTRICT as a result of the failure of HOLDER, its successors or assigns, to faithfully perform all terms, covenants, and conditions of this Agreement. Nothing contained herein is intended to deprive HOLDER of its right to assert its rights and to recover (or have DISTRICT replenish) any portion of the security deposit used by DISTRICT when it is subsequently determined by DISTRICT or other applicable authority with jurisdiction that HOLDER was not, in fact, in breach of the Agreement in connection with the matter for which the security deposit was used by Director.

HOLDER further agrees to maintain any savings deposit, Time Certificate of Deposit or instrument or instruments of credit (hereinafter collectively referred to as "**Negotiable Instrument**") described in subsections B, C and D of this Section 10, in full force and effect throughout the term of this Agreement and agrees to notify Director of any name or address change, asset transfers, assignments, or other such



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changes related to the financial institution issuing any such Negotiable Instrument, which changes may have an adverse bearing on the Negotiable Instrument.

Should HOLDER elect to assign or provide a Negotiable Instrument to fulfill the security deposit requirements of this Agreement, such assignment or issuance of a Negotiable Instrument, shall have the effect of releasing the depository or creditor therein from liability to HOLDER on account of the payment of any or all of the principal sum to the Orange County Flood Control District, or order upon demand by Director. The agreement entered into by HOLDER with a financial institution to establish the deposit necessary to permit assignment or issuance of a Negotiable Instrument as provided above may allow the payment of interest accruing on account of said deposit to HOLDER or order.

In the event Director withdraws any or all of the security deposit as provided herein, or if any Negotiable Instrument should expire, become invalid or for any reason no longer be negotiable by Director, HOLDER shall, within ten (10) days after written notice of any withdrawal by Director, replenish or replace the security deposit to maintain it at amounts as herein required throughout the Agreement term. Failure to do so shall be deemed a default and shall be grounds for immediate termination of this Agreement.

The security deposit shall be rebated, reassigned, released, or endorsed by Director to HOLDER or order, as applicable, at the end of the Agreement term, provided HOLDER has fully and faithfully performed each and every term, covenant, and condition of this Agreement.

**11. CONSTRUCTION/INSTALLATION/REPAIR/MAINTENANCE ACTIVITIES**

HOLDER shall have all construction, including the installation of any systems, facilities or equipment, repair and/or maintenance plans approved in writing by the Director, through the CPP department with payment of normal processing fees therefor, prior to commencement of any work in, on, over, under, across or about the Agreement Area; and upon completion of any such work, HOLDER shall immediately notify Director in writing of such completion.

Director's approval of HOLDER's construction, installation, repair and/or maintenance plans shall not be deemed approval from the standpoint of structural safety, suitability for purpose or conformance with building or other codes or other governmental requirements. DISTRICT is not responsible for permitting of any construction and/or maintenance, design, assumptions or accuracy of HOLDER's construction and/or maintenance plans. Director will rely on the professional expertise of the Engineer of Record when approving HOLDER's construction and/or maintenance plans.

Should it be necessary for HOLDER to conduct any inspection, reconstruction, installation, repair or maintenance activities requiring the disturbance of the surface of the Agreement Area or requiring the use of any specialized vehicles or equipment, including but not limited to cranes, within, over, under or about the Agreement Area subsequent to the completion of the initial installation of the Improvements or facilities, HOLDER agrees to notify Director in writing sixty (60) days in advance of such planned activities, obtain Director's written approval of all plans, and obtain a permit through CPP with payment of normal processing fees therefor, prior to commencement of any such activities. Said approval shall not be withheld unreasonably, nor shall said approval be necessary in any emergency situation or in conducting routine maintenance activities which do not involve use of DISTRICT property outside of the Agreement Area. However, HOLDER shall notify Director within five (5) days following commencement of any emergency repair work, and if so requested by Director, HOLDER shall secure a permit through CPP for the purpose of documenting the emergency work. For purposes of this Agreement routine maintenance shall mean those small-scale activities associated with regular (daily, weekly, monthly, etc.) and general



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upkeep of the Improvements against normal wear and tear.

## **12. MAINTENANCE/OPERATIONS (S)**

HOLDER shall, to the satisfaction of DISTRICT, and at no cost to DISTRICT, keep and maintain the Agreement Area and all Improvements of any kind in good and safe condition, free of graffiti and in substantial repair, and shall at all times conduct all operations thereon in a safe and responsible manner. It shall be HOLDER's responsibility to take all steps necessary or appropriate to maintain such standard of condition, repair and operation. HOLDER shall be responsible for installation of any utilities furnished to the Agreement Area for its use or otherwise servicing the Improvements, and shall pay prior to the delinquency date all charges for utilities supplied to the Agreement Area.

Director shall have the right to enter upon and inspect the Agreement Area at any time for cleanliness and safety.

HOLDER shall designate in writing to Director, a representative who shall be responsible for the day-to-day operation and level of maintenance and general order of the Agreement Area and any Improvements therein.

DISTRICT shall have no obligation to maintain or make any repairs or replacements to any area in, on over under or about the Agreement Area.

If HOLDER fails to maintain or make repairs or replacements as required herein, or remove any unauthorized equipment or facilities from the Agreement Area or access way, Director may notify HOLDER in writing of said failure. Should HOLDER fail to correct the situation within a reasonable time thereafter as established by Director, Director may have the necessary correction made and the cost thereof, including but not limited to the cost of labor, materials, and equipment and a fifteen percent (15%) administration fee of such costs, shall be paid by HOLDER within ten (10) days following receipt of a statement of said cost from Director. Director may, at Director's option, choose other remedies available herein, or by law.

HOLDER shall also promptly, at its sole cost and expense, repair or replace any facilities, equipment or improvements on DISTRICT's property located under, over, within or adjacent to the Agreement Area that are damaged or destroyed by HOLDER in the exercise of HOLDER's rights hereunder. Such repair or restoration shall be to approximately the same workmanship and condition as existed prior to such damage or destruction. If HOLDER shall fail to perform any such repair or restoration within thirty (30) days following written notice from Director to HOLDER, or as such repair or restoration period may be extended in writing by Director, DISTRICT may have the necessary repair or restoration made and the cost hereof, including but not limited to the cost of labor, materials, and equipment and a fifteen percent (15%) administration fee of such costs, shall be paid by HOLDER within ten (10) days following receipt of a statement of said cost from Director. Director may, at Director's option, choose other remedies available herein, or by law.

## **13. RESERVATIONS TO DISTRICT**

A. Without limiting DISTRICT's rights with respect to the Agreement Area, DISTRICT reserves for itself and its successors and assigns those rights necessary to assure proper maintenance and operation of the Channel flood control facilities and to permit any steps to be taken which the

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Director deems necessary or desirable to maintain, repair, improve, modify or reconstruct said facilities or such operations. The rights reserved to DISTRICT in this section or any other section of this Agreement shall be exercised by the Director at the Director's sole discretion. Neither DISTRICT nor any agent, employee, contractor, operator or any other person or entity acting for or on behalf of DISTRICT shall incur any liability, including, but not limited to, loss of business, damage to, destruction of, or relocation costs of the Improvements or impaired utility of the Agreement Area for any action undertaken in the maintenance, repair, operation, improvement, modification or reconstruction of said flood control facilities. HOLDER agrees that should any action undertaken in the maintenance, repair, operation, improvement, modification or reconstruction of said Channel flood control facilities, require the relocation of some or all of Improvements or facilities either on a temporary or permanent basis, HOLDER shall incur all relocation costs and expenses associated therewith. Except in an emergency situation, Director agrees to provide HOLDER with a minimum of three hundred and sixty five (365) days' written notice prior to the commencement of any maintenance, repair, operation, improvement, modification or reconstruction of said Channel flood control facilities that may require the relocation or removal of any of Improvements or facilities.

DISTRICT further reserves for itself and its successors and assigns, the right to install, lay, construct, maintain, repair, and operate such sanitary sewers; drains, storm water sewers, pipelines, manholes, and connections; water, oil, and gas pipelines; telephone and telegraph power lines; and appliances and appurtenances necessary or convenient in connection therewith, in, over, upon, through, across, under, and along the Agreement Area or any part thereof, and to enter the Agreement Area for any and all such purposes.

- B. DISTRICT also reserves the right to grant franchises, easements, rights of way, and permits in, over, upon, through, across, under, and along any and all portions of the Agreement Area. No right reserved by DISTRICT in this Section shall be so exercised as to interfere unreasonably with HOLDER's use hereunder.

DISTRICT agrees that rights granted to third parties by reason of this Section 13.B. shall contain provisions that the surface of the land shall be restored as nearly as practicable to its original condition upon the completion of any construction. DISTRICT further agrees that should the exercise of these rights temporarily interfere with the use of any or all of the Agreement Area by HOLDER, any use fee shall be reduced in proportion to the interference with HOLDER's use of the Agreement Area.

#### **14. OWNERSHIP/DISPOSITION OF IMPROVEMENTS**

All Improvements constructed placed within the Agreement Area by or on behalf of HOLDER shall be the property of HOLDER and must be kept free and clear all liens, claims, or liability for labor or material throughout the term of this Agreement. DISTRICT covenants and agrees that no part of the Improvements constructed, erected or placed in, on, under, over or above the Agreement Area by HOLDER will become, or be considered as being affixed to or a part of the Agreement Area, it being the specific intention of DISTRICT that all improvements of every kind and nature constructed erected or placed by HOLDER on the Agreement Area will be and remain the property of HOLDER and at HOLDER's option, may be removed by HOLDER at any time during the term of this Agreement, subject to the provisions of Section 11(Construction/Installation/Repair/Maintenance Activities) of this Agreement.

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No later than the expiration or sooner termination of this Agreement, HOLDER shall at HOLDER's sole cost and expense, and to Director's satisfaction, remove all of Improvements located within the Agreement Area. Said removal shall include properly backfilling the Agreement Area following the removal of any surface or underground equipment and/or facilities, and the compaction of filled excavations to ninety percent (90%) compaction to Director's satisfaction through the CPP process. HOLDER shall continue to pay the Annual Use Fee (as applicable) at the then current rate until all Improvements are removed from the Agreement Area. In no event shall the time period for removal of Improvements exceed the term of this Agreement unless expressly approved in writing by the Director.

In the event HOLDER fails to perform its obligations under this section, in addition to any other rights or remedies available to DISTRICT, Director, at Director's option after fifteen (15) days written notice to HOLDER, may cause the removal of any of Improvements or facilities from the Agreement Area, and the cost thereof, including but not limited to the cost of labor, materials, and equipment, and a fifteen percent (15%) administration fee of such costs, shall be paid by HOLDER within ten (10) days following a receipt of an statement of said costs from Director.

## 15. INSURANCE

*Note: Terms below are subject to change by the County Executive Office/Office of Risk Management*

### A. General Requirements

HOLDER agrees to purchase all required insurance or maintain a program of self-insurance at HOLDER's expense and to deposit with the Director certificates of insurance, including all endorsements required herein, necessary to satisfy DISTRICT that the insurance provisions of this Agreement have been complied with and to keep such insurance coverage and the certificates and endorsements therefor on deposit with DISTRICT during the entire term of this Agreement. This Agreement shall automatically terminate at the same time HOLDER's insurance coverage is terminated. If within ten (10) business days after termination under this Section, HOLDER obtains and provides evidence of the required insurance coverage acceptable to the County Executive Office/Office of Risk Management ("**Risk Manager**"), this Agreement may be reinstated, at the reasonable, sole discretion of the Director. HOLDER shall pay DISTRICT \_\_\_\_\_ Dollars (\$\_\_\_\_00) for processing the reinstatement of this Agreement.

HOLDER agrees that HOLDER shall not operate on the Agreement Area at any time the required insurance is not in full force and effect as evidenced by a certificate of insurance and necessary endorsements or, in the interim, an official binder being in the possession of the Director. In no case shall assurances by HOLDER, its employees, agents, including any insurance agent, be construed as adequate evidence of insurance. Director will only accept valid certificates of insurance and endorsements, or in the interim, an insurance binder as adequate evidence of insurance. HOLDER also agrees that upon cancellation, termination, or expiration of HOLDER's insurance, the Director may take whatever steps are necessary to interrupt any operation from or on the Agreement Area until such time as the Director reinstates the Agreement.

If HOLDER fails to provide Director with a valid certificate of insurance and endorsements, or binder at any time during the term of the Agreement, DISTRICT and HOLDER agree that this shall constitute a material breach of this Agreement. Whether or not a notice of default has or has not been sent to HOLDER, said material breach shall permit the Director to take whatever steps necessary to interrupt any operation from or on the Agreement Area, and to prevent any persons, including, but not limited to, members of the general public, and HOLDER's employees and

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agents, from entering the Agreement Area until such time as the Director is provided with adequate evidence of insurance required herein. HOLDER further agrees to hold DISTRICT and the County of Orange, their elected and appointed officials, officers, agents and employees when acting within the scope of their appointment or employment, harmless for any damages resulting from such interruption of business and possession, including, but not limited to, damages resulting from any loss of income or business resulting from the Director's action.

All contractors performing work on behalf of HOLDER pursuant to this Agreement shall obtain insurance subject to the same terms and conditions as set forth herein for HOLDER. HOLDER shall not allow contractors or subcontractors to work if contractors have less than the level of coverage required by DISTRICT from HOLDER under this Agreement. It is the obligation of HOLDER to provide written notice of the insurance requirements to every contractor and to receive proof of insurance prior to allowing any contractor to begin work within the Agreement Area. Such proof of insurance must be maintained by HOLDER through the entirety of this Agreement and be available for inspection by a DISTRICT representative at any reasonable time.

All self-insured retentions (SIRs) and deductibles shall be clearly stated on the Certificate of Insurance. If no SIRs or deductibles apply, indicate this on the Certificate of Insurance with a zero (0) by the appropriate line of coverage. Any self-insured retention (SIR) or deductible in excess of \$25,000 (\$5,000 for automobile liability), shall specifically be approved by County Executive Office/Office of Risk Management, or designee ("**Risk Manager**") upon review of HOLDER's current audited financial report.

HOLDER's failure to maintain insurance acceptable to DISTRICT for the full term of this Agreement may constitute a material breach of this Agreement, upon which Director may immediately suspend or terminate this Agreement and HOLDER shall return the Agreement Area to a condition in compliance with General Condition, Section 16 (Condition of Agreement Area Upon Termination).

#### B. Qualified Insurer

The policy or policies of insurance must be issued by an insurer with a minimum rating of A- (Secure A.M. Best's Rating) and VIII (Financial Size Category) as determined by the most current edition of the Best's key Rating Guide/Property-Casualty/United States or ambest.com. It is preferred, but not mandatory, that the insurer be licensed to do business in the state of California.

If the insurance carrier does not have an A.M. Best rating of A-/VIII, the Risk Manager retains the right to approve or reject a carrier after a review of the company's performance and financial ratings.

#### C. Minimum Limits

The policy of insurance or program of self-insurance maintained by the HOLDER shall provide the minimum limits and coverage as set forth below:

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<u>Coverages</u>	<u>Minimum Limits</u>
Commercial General Liability	\$1,000,000 per occurrence \$2,000,000 aggregate
Automobile Liability including coverage for owned, non-owned and hired vehicles	\$1,000,000 limit per occurrence
Workers' Compensation	Statutory
Employers' Liability Insurance	\$1,000,000 per occurrence
Environmental Pollution Liability	_____ per occurrence _____ aggregate

**D. Required Coverage Forms**

The Commercial General Liability coverage shall be written on Insurance Services Office (ISO) form CG 00 01, or a substitute form providing liability coverage at least as broad.

The Business Auto Liability coverage shall be written on ISO form CA 00 01, CA 00 05, CA 00 12, CA 00 20, or a substitute form providing liability coverage as broad.

**E Required Endorsements**

The following endorsements must be submitted with the Certificate of Insurance:

- 1) The Commercial General Liability policy shall contain an Additional Insured endorsement using ISO form CG 2010 or CG 2033 or a form at least as broad naming Orange County Flood Control District and the County of Orange, their elected and appointed officials, officers, employees, and agents as Additional Insureds.
- 2) The Commercial General Liability policy shall contain a primary non-contributing endorsement evidencing that HOLDER's insurance or self-insurance is primary and any insurance or self-insurance maintained by the Orange County Flood Control District or the County of Orange shall be excess and non-contributing.
- 3) The Workers' Compensation policy shall contain a waiver of subrogation endorsement waiving all rights of subrogation against Orange County Flood Control District and the County of Orange, their elected and appointed officials, officers, agents and employees.

All insurance policies required by this Agreement shall waive all rights of subrogation against the DISTRICT and the County of Orange, their elected and appointed officials, officers, agents and employees when acting within the scope of their appointment or employment.

HOLDER shall notify the Director in writing within thirty (30) days of any policy cancellation and within ten (10) days of any policy cancellation for non-payment of premium and provide a copy of the cancellation notice to the Director. Failure to provide written notice of cancellation may constitute a material breach of this Agreement, upon which the DISTRICT may suspend or terminate this Agreement.

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The Commercial General Liability policy shall contain a severability of interests clause, also known as a “separation of insureds” clause (standard in the ISO CG 001 policy).

Insurance certificates should be forwarded to DISTRICT’S address provided in Section 22 (Notices) of this Agreement or to an alternate address provided by the Director. HOLDER has ten (10) business days to provide adequate evidence of insurance or this Agreement may be cancelled.

DISTRICT expressly retains the right to require HOLDER to increase or decrease insurance of any of the above insurance types throughout the term of this Agreement. Any increase or decrease in insurance will be as deemed by the Risk Manager as appropriate to adequately protect DISTRICT and the County of Orange.

The Director shall notify HOLDER in writing of changes in the insurance requirements. If HOLDER does not deposit copies of acceptable certificates of insurance and endorsements with the Director, incorporating such changes within thirty (30) days following receipt of such notice, this Agreement may be in breach without further notice to HOLDER, and DISTRICT shall be entitled to all legal remedies.

The procuring of such required policy or policies of insurance, or self-insurance shall not be construed to limit HOLDER’S liability hereunder nor to fulfill the indemnification provisions and requirements of this Agreement, nor in any way to reduce the policy coverage and limits available from the insurer.

**16. HOLD HARMLESS**

HOLDER acknowledges the Agreement Area is in, on, and over DISTRICT’S Channel and may be subject to all hazards associated with flood conditions. HOLDER agrees to assume all risks, financial or otherwise, associated therewith. For purposes of this section, HOLDER acknowledges and agrees that DISTRICT shall not be deemed negligent in the maintenance and/or operation of the Channel if DISTRICT operates and maintains the Channel in substantial conformance with standard DISTRICT practices used for similar DISTRICT facilities. Payment shall not be a condition precedent to recovery under the indemnity provided in this section.

HOLDER hereby releases and waives all claims and recourse against DISTRICT and County including the right of contribution for loss of or damage to property, or injury to or death of any person arising from, growing out of or in any way connected with or related to this Agreement , including any damage to or interruption of use of any of the Improvements or facilities placed in, on, or about the Agreement Area, caused by erosion, flood, or flood overflow conditions of the Channel, or caused by the operation, maintenance, repair, reconstruction, replacement, enlargement or improvement of the Channel, or caused by DISTRICT’S flood control operations, except claims arising from the concurrent active or sole negligence, gross negligence or willful misconduct of DISTRICT and/or County, their officers, agents, employees and contractors.

HOLDER hereby agrees to indemnify, defend (with counsel approved in writing by DISTRICT), and hold harmless, DISTRICT and County, their elected and appointed officials, officers, agents, employees and contractors against any and all claims, losses, demands, damages, cost, expenses or liability for injury to any persons or property, arising out of the maintenance, use of or operations or activities conducted in, on, or over the Agreement Area, and/or the exercise of the rights under this Agreement by HOLDER or HOLDER Parties, except for liability arising out of the concurrent active or sole negligence, gross negligence or willful misconduct of DISTRICT, and/or County, their elected and appointed officials,

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officers, agents, employees or contractors including the cost of defense of any lawsuit arising therefrom. If DISTRICT and/or County is/are named as co-defendant(s) in a lawsuit, HOLDER shall notify Director of such fact and shall represent DISTRICT/County in such legal action unless DISTRICT/County undertake(s) to represent itself/themselves as co-defendant(s) in such legal action, in which event, HOLDER shall pay to DISTRICT/County its/their litigation costs, expenses, and attorney fees. If judgment is entered against DISTRICT/County and HOLDER by a court of competent jurisdiction because of the concurrent active negligence of DISTRICT/County and HOLDER, DISTRICT and HOLDER agree that liability will be apportioned as determined by the court. Neither Party shall request a jury apportionment.

HOLDER acknowledges that it is familiar with the language and provisions of California Civil Code Section 1542 which provides as follows:

*A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which, if known by him or her must have materially affected his or her settlement with the debtor.*

HOLDER, being aware of and understanding the terms of Section 1542, hereby waives all benefit of its provisions to the extent described in this section.

## 17. HAZARDOUS MATERIALS

### A. Definition of Hazardous Materials

For purposes of this Agreement, the term “**Hazardous Material(s)**” shall mean any hazardous or toxic substance, material, product, byproduct, or waste which is or shall become regulated by any governmental entity, including, without limitation, County, the State of California, or the United States government.

### B. Use of Hazardous Materials

No HOLDER Party shall cause or permit any Hazardous Materials to be brought upon, stored, kept, used, generated, released into the environment or disposed of on, under, from or about the Agreement Area (which for purposes of this Section 17 shall include the subsurface soil and ground water).

### C. HOLDER Obligations

If the presence of any Hazardous Materials on, under or about the Agreement Area caused, disturbed or permitted by HOLDER or HOLDER Parties results in (i) injury to any person, (ii) injury to or contamination of the Agreement Area (or a portion thereof), or (iii) injury to or contamination of any real or personal property wherever situated, HOLDER, at its sole cost and expense, shall promptly take all actions necessary or appropriate to return the Agreement Area and/or other property to the condition existing prior to the introduction of such Hazardous Materials in, on, or about the Agreement Area and to remedy or repair any such injury or contamination. Without limiting any other rights or remedies of DISTRICT under this Agreement, HOLDER shall pay the cost of any cleanup or remedial work performed on, under, or about the Agreement Area as required by this Agreement or by applicable laws in connection with the removal, disposal, neutralization or other treatment of such Hazardous Materials caused or permitted by HOLDER or HOLDER Parties.



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Notwithstanding the foregoing, HOLDER shall not take any remedial action in response to the presence, discharge or release, of any Hazardous Materials on, under or about the Agreement Area caused or permitted by HOLDER or HOLDER Parties, or enter into any settlement agreement, consent decree or other compromise with any governmental or quasi-governmental entity without first obtaining the prior written consent of Director. All work performed or caused to be performed by HOLDER as provided for above shall be done in good and workmanlike manner and in compliance with plans, specifications, permits, and other requirements for such work approved by Director.

D. Indemnification for Hazardous Materials

To the fullest extent permitted by law, HOLDER hereby agrees to indemnify, hold harmless, protect and defend [with attorney(s) approved in writing by Director] DISTRICT and County, their elected officials, officers, employees, agents, and independent contractors and the Agreement Area, from and against any and all liabilities, losses, damages (including, but not limited to, damages for the loss or restriction of use of rentable or usable space or any amenity of the Agreement Area or damages arising from any adverse impact on marketing and diminution in the value of the Agreement Area), judgments, fines, demands, claims, recoveries, deficiencies, costs and expenses (including, but not limited to, reasonable attorney fees, disbursements and court costs and all other professional or consultant expenses), whether foreseeable or unforeseeable, arising directly or indirectly out of the presence, use, generation, storage, treatment, on or off-site disposal or transportation of Hazardous Materials on, into, from, under or about the Agreement Area by HOLDER or HOLDER Parties. The foregoing indemnity shall also specifically include the cost of any required or necessary repair, restoration, clean-up or detoxification of the Agreement Area and/or other real property and the preparation of any closure or other required plans.

**18. BEST MANAGEMENT PRACTICES (S)**

HOLDER and all HOLDER Parties shall conduct operations under this Agreement so as to assure that pollutants do not enter municipal storm drain systems which systems are comprised of, but are not limited to curbs and gutters that are part of the street systems (“**Stormwater Drainage System**”), and to ensure that pollutants do not directly impact “**Receiving Waters**” (as used herein, Receiving Waters include, but are not limited to, rivers, creeks, streams, estuaries, lakes, harbors, bays and oceans).

The Santa Ana and San Diego Regional Water Quality Control Boards have issued National Pollutant Discharge Elimination System (“**NPDES**”) permits (“**Stormwater Permits**”) to the County of Orange, and to the DISTRICT and cities within Orange County, as co-permittees (hereinafter collectively referred to as “**County Parties**”) which regulate the discharge of urban runoff from areas within the County of Orange, including the Agreement Area. The County Parties have enacted water quality ordinances that prohibit conditions and activities that may result in polluted runoff being discharged into the Stormwater Drainage System.

To assure compliance with the Stormwater Permits and water quality ordinances, the County Parties have developed a Drainage Area Management Plan (“**DAMP**”) which includes a Local Implementation Plan (LIP) for each jurisdiction that contains Best Management Practices (“**BMPs**”) that parties using properties within Orange County must adhere to. As used herein, a BMP is defined as a technique, measure, or structural control that is used for a given set of conditions to manage the quantity and improve the quality of stormwater runoff in a cost effective manner. These BMPs are found within the County’s LIP in the

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form of Model Maintenance Procedures and BMP Fact Sheets (the Model Maintenance Procedures and BMP Fact Sheets contained in the DAMP/LIP shall be referred to hereinafter collectively as “**BMP Fact Sheets**”) and contain pollution prevention and source control techniques to eliminate non-stormwater discharges and minimize the impact of pollutants on stormwater runoff.

HOLDER and all HOLDER Parties shall, throughout the term of this Agreement, comply with all applicable BMP Fact Sheets as they exist now or are modified, and shall comply with all other requirements of the Stormwater Permits, as they exist at the time this Agreement commences or as the Stormwater Permits may be modified. HOLDER agrees to maintain current copies of all applicable BMP Fact Sheets in a location readily accessible to any or all HOLDER Parties throughout the term of this Agreement. The BMPs applicable to uses authorized under this Agreement must be performed as described within all applicable BMP Fact Sheets.

HOLDER may propose alternative BMPs that meet or exceed the pollution prevention performance of the BMP Fact Sheets. Any such alternative BMPs shall be submitted to the Director for review and approval prior to implementation.

Director may access the Agreement Area and/or review HOLDER’s records at any time to assure that activities conducted within the Agreement Area comply with the requirements of this section. HOLDER may be required to implement a self-evaluation program to demonstrate compliance with the requirements of this section.

#### **19. DISTRICT’S SUCCESSORS AND ASSIGNS (N)**

This Agreement shall bind successors and assigns of DISTRICT. In the event that the DISTRICT sells fee interest in the real property underlying the Agreement Area to a private party and HOLDER is in good standing with the terms herein, DISTRICT shall convey to HOLDER a perpetual non-exclusive easement for the uses set forth herein prior to such sale, upon receipt of a purchase price from HOLDER at its fair-market value. Such easement terms shall not include the terms set forth herein concerning the right of relocation and termination.

#### **20. TERMINATION OF PRIOR AGREEMENTS**

It is mutually agreed that this Agreement shall terminate and supersede any prior use agreements between the Parties hereto covering the use of all or any portion of the Agreement Area. The subject Agreement shall not however constitute a release of any prior easements held by OWNER. Notwithstanding the foregoing, this provision shall not release HOLDER from any obligations under any prior agreements to be performed through the Effective Date or from any obligations of indemnification based upon events occurring prior to the Effective Date nor shall this provision release HOLDER from any obligation to be performed under any CPP permit issued as a pre-condition of this Agreement or terminate any such CPP that is intended to remain in effect for any portion of the term of this Agreement.

#### **21. LIMITATIONS**

This Agreement and the rights granted HOLDER in and to the Agreement Area are subject to all covenants, conditions, restrictions, and exceptions of record or apparent from a physical inspection of the Agreement Area. Nothing contained in this Agreement or in any document related hereto shall be construed to imply

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the conveyance to HOLDER of a real property interest or rights in or to the Agreement Area; or exclusive use of the Agreement Area.

**22. NOTICES**

All notices, documents, correspondence and communications concerning this Agreement shall be addressed as set forth in this Section, or as the Parties may hereafter designate by written notice, and shall be sent through the United States mail with postage prepaid. Any such mailing shall be deemed served or delivered forty-eight (48) hours after mailing. Either Party may change the address for notices by giving the other Party at least ten (10) calendar days' prior written notice of the new address.

Notwithstanding the above, either Party may also provide notices, documents, correspondence, or such other communications to the other by personal delivery or by Federal Express or similar courier service and so given shall be deemed to have been given upon receipt.

To DISTRICT: TO: HOLDER

Orange County Flood Control District  
c/o CEO/Real Estate Services  
RE: \_\_\_\_\_ Agreement  
P.O. Box 4048  
Santa Ana, CA 92702-4048

**23. RECORDING PROHIBITED**

This Agreement may not be recorded.

**24. AUTHORITY**

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

**25. COUNTERPARTS**

This Agreement may be executed in two or more counterparts, each of which shall be an original and both of which together shall constitute one and the same instrument.

**26. GENERAL CONDITIONS (S)**

This Agreement includes the General Conditions attached hereto and by this reference made a part hereof. In the event of any conflict between the provisions of this Agreement and the provisions in the General Conditions, the provisions of the Agreement shall control.

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

DISTRICT

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Approved as to Form  
Office of the County Counsel  
Orange County, California

By: \_\_\_\_\_  
Deputy

Orange County Flood Control District,  
a body corporate and politic

By: \_\_\_\_\_  
Shane L. Silsby, P.E.  
Director OC Public Works  
Per Minute Order dated  
\_\_\_\_\_

*HOLDER's signature on following page.*

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**HOLDER**

By: \_\_\_\_\_

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GENERAL CONDITIONS--AGREEMENT

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## I. GENERAL CONDITIONS

### 1. SIGNS (S)

HOLDER agrees not to construct, maintain, or allow any signs, banners, flags, etc., upon the Agreement Area except as approved by Director. HOLDER further agrees not to construct, maintain, or allow billboards or outdoor advertising signs upon the Agreement Area. Such signs are prohibited on DISTRICT property by Resolutions F60-23 and F60-65 of DISTRICT's Board of Supervisors. Unapproved signs, banners, flags, etc., may be removed by Director, at HOLDER's expense, without prior notice to HOLDER.

### 2. PERMITS AND LICENSES (S)

HOLDER shall be required at HOLDER's sole cost and expense to obtain and maintain at all times during the term of this Agreement, any and all permits, certificates, approvals and/or licenses which may be required by any federal, state, county, city or other governmental agency, department or bureaucracy having jurisdiction over HOLDER, or HOLDER's business or operations in connection with the Agreement Area as set out herein. No permit, approval or consent given hereunder by DISTRICT shall affect or limit HOLDER's obligations hereunder nor shall any such approvals or consents given by DISTRICT, be deemed approval as to compliance or conformance with applicable, governmental codes, laws, ordinances, rules, or regulations.

### 3. ORGANIZATION (S)

The various headings and numbers herein, the grouping of provisions of this Agreement into separate clauses and paragraphs, and the organization hereof, are for the purpose of convenience only and shall not be considered otherwise.

### 4. AMENDMENTS (S)

This Agreement sets forth all of the agreements and understandings of the Parties and any modification must be written and properly executed by both Parties.

### 5. UNLAWFUL USE (S)

HOLDER agrees that no Improvements or other installations shall be erected, placed across, operated, or maintained within the Agreement Area, nor shall any business or operations be conducted or carried therein or therefrom, in violation of the terms of this Agreement, or of any regulation, order of law, statute, bylaw, or ordinance of a governmental agency, including, but not limited to, the FAA (Federal Aviation Administration), having jurisdiction in, on, over or about the Agreement Area.

### 6. LABOR CODE COMPLIANCE (N)

HOLDER acknowledges and agrees that all improvements or modifications to be performed within the Agreement Area or any such future improvements or modifications performed by HOLDER at the request of DISTRICT shall be governed by, and performed in accordance with, the provisions of Article 2 of Chapter 1, Part 7, Division 2 of the Labor Code of the State of California (Sections 1770, *et seq.*), as applicable. These provisions are applicable to improvements or modifications costing more than \$1,000.

Pursuant to the provisions of Section 1773 of the Labor Code of the State of California, the Orange County Board of Supervisors has obtained the general prevailing rate of per diem wages and the general prevailing rate for holiday and overtime work in the locality applicable to this Agreement for each craft, classification, or type of workman needed to execute the aforesaid improvements or modifications from the Director of the State Department of Industrial Relations. Copies of said prevailing wage rates may be obtained from the State of California, Department of Industrial Relations.



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HOLDER hereby agrees to pay or cause its contractors and/or subcontractors to pay said prevailing wage rates at all times for all improvements or modifications to be completed for DISTRICT within the Agreement Area, and HOLDER herein agrees that HOLDER shall post, or cause to be posted, a copy of the most current, applicable prevailing wage rates at the site where the improvements or modifications are performed. Upon request, HOLDER shall make records available to District to confirm compliance with the foregoing requirements. If HOLDER neglects, fails, or refuses to make such records available to Director for review, such occurrence shall constitute an event of default of this Agreement and DISTRICT may, notwithstanding any other termination provisions contained herein terminate this Agreement.

**7. RIGHT TO WORK AND MINIMUM WAGE LAWS (S)**

In accordance with the United States Immigration Reform and Control Act of 1986, HOLDER shall require its employees that directly or indirectly service or conduct activities on the Agreement Area pursuant to the terms and conditions of this Agreement, in any manner whatsoever, to verify their identity and eligibility for employment in the United States. HOLDER shall also require and verify that its contractors or any other persons servicing or conducting construction activities on the Agreement Area pursuant to the terms and conditions of this Agreement, in any manner whatsoever, verify the identity of their employees and their eligibility for employment in the United States.

Pursuant to the United States of America Fair Labor Standard Act of 1938, as amended, and State of California Labor Code, Section 1178.5, HOLDER shall pay no less than the greater of the Federal or California Minimum Wage to all its employees that directly or indirectly service the Agreement Area, in any manner whatsoever. HOLDER shall require and verify that all its contractors or other persons servicing the Agreement Area on behalf of the HOLDER also pay their employees no less than the greater of the Federal or California Minimum Wage.

HOLDER shall comply and verify that its contractors comply with all other Federal and State of California laws for minimum wage, overtime pay, record keeping, and child labor standards pursuant to the servicing of the Agreement Area or terms and conditions of this Agreement.

Notwithstanding the minimum wage requirements provided for in this section, HOLDER, where applicable, shall comply with the prevailing wage and related requirements, as provided for in Section 6 (Labor Code Compliance) of this Agreement.

**8. NONDISCRIMINATION (S)**

HOLDER agrees not to discriminate against any person or class of persons by reason of sex, age, race, color, creed, physical handicap, or national origin in employment practices and in the activities conducted pursuant to this Agreement.

**9. INSPECTION (S)**

DISTRICT or its authorized representative shall have the right at all reasonable times to inspect the operation to determine if the provisions of this Agreement are being complied with.

**10. TAXES AND ASSESSMENTS (S)**

Should this Agreement create a possessory interest which is subject to the payment of taxes levied on such interest, it is understood and agreed that all taxes and assessments (including but not limited to said possessory interest tax) which become due and payable in connection with this Agreement or upon the Improvements or facilities or other property used in connection with this Agreement, shall be the full responsibility of HOLDER, and HOLDER shall cause said taxes and assessments to be paid promptly.

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**11. QUITCLAIM UPON TERMINATION (S)**

Upon the expiration or sooner termination of this Agreement for any reason, HOLDER shall execute, acknowledge, and deliver to the Director, within thirty (30) days after receipt of written demand therefor, a good and sufficient termination agreement whereby HOLDER acknowledges and agrees that any rights to use or occupy any portion of the Agreement Area is terminated. Should HOLDER fail or refuse to deliver the required termination agreement to the Director, Director may prepare a notice reciting the failure of HOLDER to execute, acknowledge, and deliver such termination agreement and said notice shall be conclusive evidence of the termination of this Agreement and of all rights of HOLDER or those claiming under HOLDER in and to the Agreement Area.

**12. PARTIAL INVALIDITY (S)**

If any term, covenant, condition, or provision of this Agreement is held by a court of competent jurisdiction to be invalid, void, or unenforceable, the remainder of the provisions hereof shall remain in full force and effect and shall in no way be affected, impaired, or invalidated thereby.

**13. WAIVER OF RIGHTS (S)**

The failure of DISTRICT to insist upon strict performance of any of the terms, covenants, or conditions of this Agreement shall not be deemed a waiver of any right or remedy that DISTRICT may have, and shall not be deemed a waiver of the right to require strict performance of all the terms, covenants, and conditions of the Agreement thereafter, nor a waiver of any remedy for the subsequent breach or default of any term, covenant, or condition of the Agreement. Any waiver, in order to be effective, must be signed by the Party whose right or remedy is being waived.

**14. ATTORNEY FEES (S)**

In the event of a dispute between DISTRICT and HOLDER concerning claims arising out of this Agreement, or in any action or proceeding brought to enforce or interpret any provision of this Agreement or where any provision hereof is validly asserted as a defense, each Party shall bear its own attorney fees.

**15. AS-IS/WHERE-IS CONDITION (S)**

The Agreement Area is accepted as is and where is by HOLDER subject to any and all existing easements, encumbrances and physical characteristics. HOLDER acknowledges that except as specifically herein provided, neither DISTRICT nor any of its or County's employees, agents, or representatives has made any representations, warranties or agreements to or with HOLDER on behalf of DISTRICT as to any matters concerning the Agreement Area, access to the Agreement Area, the present use thereof, or the suitability of HOLDER's intended use of the Agreement Area.

**16. CONDITION OF AGREEMENT AREA UPON TERMINATION (S)**

Except as otherwise agreed to herein, upon termination of this Agreement HOLDER shall redeliver possession of said Agreement Area to DISTRICT in substantially the same condition that existed immediately prior to HOLDER's entry thereon, reasonable wear and tear, flood, earthquakes, war, and any act of war, excepted. If after a reasonable time, HOLDER has failed to return the Agreement Area to Director's satisfaction DISTRICT shall have the right to complete the work required to return the Agreement Area to the above stated condition, at HOLDER's cost, and HOLDER agrees to pay such costs, including but not limited to the cost of labor, materials, and equipment and a fifteen percent (15%) administration fee of such costs, within ten (10) days following a receipt of an statement of such costs from Director.

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**17. TIME (S)**

Time is of the essence of this Agreement.

**18. HOLDER ASSIGNMENT PROHIBITED (S)**

HOLDER understands that this Agreement is not an assignable right. Any attempt to assign or otherwise transfer this Agreement by HOLDER, voluntarily or by operation of law, shall be a material breach of the Agreement causing this Agreement to automatically terminate.

**19. HOLDING OVER (S)**

In the event use of the Agreement Area by HOLDER shall continue after the term of this Agreement, such use shall not be considered a renewal of this Agreement but occupancy from month to month and shall be governed by the conditions and covenants contained in this Agreement.

**20. PUBLIC RECORDS (S)**

Any and all written information submitted to and/or obtained by DISTRICT from HOLDER or any other person or entity having to do with or related to this Agreement and/or the Agreement Area, either pursuant to this Agreement or otherwise, at the option of DISTRICT, may be treated as a public record open to inspection by the public pursuant to the California Records Act (Government Code Section 6250, etc.) as now in force or hereafter amended, or any Act in substitution thereof, or otherwise made available to the public and HOLDER hereby waives, for itself, its agents, employees, and any person claiming by, through or under HOLDER, any right or claim that any such information is not a public record or that the same is a trade secret or confidential information and hereby agrees to indemnify and hold DISTRICT harmless from any and all claims, demands, liabilities, and/or obligations arising out of or resulting from a claim by HOLDER or any third party that such information is a trade secret, or confidential, or not subject to inspection by the public, including without limitation reasonable attorneys' fees and costs. Notwithstanding the foregoing, to the extent HOLDER determines that such information constitutes Critical Energy Infrastructure Information ("CEII") that is exempt from disclosure under law, HOLDER may for those records HOLDER has identified to DISTRICT in writing as being a CEII exemption, request that DISTRICT not make such information available to the public and HOLDER further agrees to indemnify and defend DISTRICT against any claims arising out of DISTRICT's failure to release such CEII information.

**21. RELATIONSHIP OF PARTIES (S)**

The relationship of the Parties hereto is that of DISTRICT and HOLDER, and it is expressly understood and agreed that DISTRICT does not in any way or for any purpose become a partner of, or a joint venture with HOLDER in the conduct of HOLDER's business or otherwise, and the provisions of this Agreement and the terms relating to Annual Use Fees payable hereunder are included solely for the purpose of providing a method by which use fee payments are to be measured and ascertained.