

**CONTRACT BETWEEN ORANGE COUNTY WATER DISTRICT AND THE CITY OF TUSTIN REGARDING CONSTRUCTION OF WELLS FOR SANTA ANA RIVER CONSERVATION AND CONJUNCTIVE USE PROGRAM (SARCCUP) WATER BANK**

This CONTRACT BETWEEN ORANGE COUNTY WATER DISTRICT AND THE CITY OF TUSTIN REGARDING CONSTRUCTION OF WELLS FOR SANTA ANA RIVER CONSERVATION AND CONJUNCTIVE USE PROGRAM WATER BANK (“Program”) is entered into as of \_\_\_\_\_, 2020 (“Effective Date”), by and between the ORANGE COUNTY WATER DISTRICT, a special governmental district organized and existing pursuant to the Orange County Water District Act, Chapter 924, Stats. 1933, as amended (“Program Agency” or “OCWD”) and the City of Tustin, (“Operating Party”) (the Program Agency and the Operating Party are collectively referred to herein as the “Parties”).

**RECITALS**

A. The Program Agency has entered into an amended agreement with the Santa Ana Watershed Project Authority (“SAWPA”) to receive grant funds from the Department of Water Resources (“DWR”) for the Santa Ana River Conservation and Conjunctive Use Program (“SARCCUP” or “Program”), a copy of which is attached hereto as Exhibit A and incorporated herein by this reference (such agreement is hereinafter referred to as the “OCWD-SAWPA Subgrantee Agreement”).

B. Pursuant to the terms of the OCWD-SAWPA Subgrantee Agreement, Program Agency may store at least 36,000 acre-feet of water (“Program Stored Water”) from SARCCUP in the Orange County Groundwater Basin (“Basin”) managed by Program Agency and may call upon Operating Party and other groundwater producers (“Producers”) in the Basin to participate in collectively extracting up to 12,000 acre-feet per year of Program Stored Water from the Basin.

C. Extraction of Program Stored Water will be facilitated by, among other things, OCWD potentially raising the Basin Production Percentage (“BPP”), for all Producers in the Basin; however, the setting of the BPP will continue to occur on an annual basis based upon Basin conditions, and future increases of the BPP do not exclude other methods and programs that OCWD could implement to facilitate Operating Parties extracting the Program Stored Water.

D. As part of the Program and based upon the grant funds Program Agency anticipates receiving from DWR, OCWD is providing funding towards the construction (not operations and maintenance costs) of five extraction wells that will assist in producing the Program Stored Water. The wells to be constructed are listed in Exhibit B.

E. The Operating Party desires to participate in the Program, provide a well site, and serve as the operator of one of the five extraction wells (“Program Well”) to be constructed in its service area for the purpose of, among other things, producing Program Stored Water from the Basin; and,

F. The Operating Party and the Program Agency have heretofore processed, or shall process, necessary documents to comply with the California Environmental Quality Act ("CEQA") with respect to the Program and construction of the Program Well.

### **EXECUTORY AGREEMENTS**

NOW, THEREFORE, in consideration of the facts recited above and the covenants, conditions and promises contained herein, the Parties hereto hereby agree as follows:

#### **SECTION 1. TERM.**

The term of this Contract (hereinafter the "Contract") shall commence as of the Effective Date, and shall expire after 30 years, unless sooner terminated pursuant to the provisions of this Contract, or as a result of actions taken by SAWPA and/or DWR per Section 23 of the OCWD-SAWPA Subgrantee Agreement.

#### **SECTION 2. OBLIGATIONS OF THE PROGRAM AGENCY.**

2.1. Fulfillment of the Terms and Conditions of the OCWD-SAWPA Subgrantee Agreement. Pursuant to this Contract, the Program Agency shall fulfill the terms of the OCWD-SAWPA Subgrantee Agreement, as it may be modified from time to time, for as long as such Agreement remains in existence.

2.2. Role as Lead for Labor Compliance. The Program Agency shall act as the lead agency to comply with the applicable Labor Compliance Program requirements described in Section 18 of the DWR-SAWPA Grant Agreement (No. 4600011515). The Operating Party is responsible, at its cost, to meet OCWD's Labor Compliance Program<sup>1</sup> applicable requirements and provide all records to Program Agency where requested by OCWD or otherwise required by this Agreement.

2.3. Grant Reimbursement. The Program Agency will submit invoices and other required documents to SAWPA on a quarterly basis. All funds to be reimbursed to Operating Party are for construction activities only (Category D of Grant). The Program Agency is not responsible for the timing of grant reimbursement from SAWPA or DWR, which could take several months, and Program Agency shall not be responsible to reimburse Operating Party's costs incurred per this Agreement until such time as Program Agency is reimbursed by SAWPA and/or DWR. As mentioned in Section 4 of the OCWD-SAWPA Subgrantee Agreement, work performed after January 17, 2014 is eligible for grant reimbursement and work performed to advance the Project after January 1, 2011 is eligible to be counted towards the local funding match.

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<sup>1</sup> OCWD's LCP is attached hereto, and incorporated herein as Exhibit C.

### **SECTION 3. OBLIGATIONS OF THE OPERATING PARTY.**

3.1. Obligations of Operating Party as Condition of Receiving SARCCUP Funds. The Operating Party is required to construct and obtain permitting for one Program Well on land owned or otherwise controlled by Operating Party. Following construction and permitting, Operating Party must properly staff, operate and maintain the SARCCUP funded Program Well as part of its public water system for the duration of this Contract.<sup>2</sup> Operating Party shall—by virtue of its entry into this Contract—assume all obligations that OCWD has under OCWD-SAWPA Subgrantee Agreement with regard to staffing, operating, maintaining and repairing the Program Well. Operating Party agrees that it shall be solely responsible for the proper operation, maintenance, repair and use of the Program Well per this Contract and Section 9 of the OCWD-SAWPA Subgrantee Agreement, and that Operating Party shall not take actions that cause Program Agency to violate the OCWD-SAWPA Subgrantee Agreement.

3.2. Construction. The Program Well construction plans and specifications will incorporate all mitigation requirements arising out of processing necessary CEQA documents for the Program Well. Construction plans, specifications and any other grant required documents shall be submitted to the Program Agency in a form that can be easily transmitted to SAWPA. All contracts for Program Well construction shall be let by competitive bid procedures that assure award of the contract to the lowest responsible bidder, except as may be otherwise authorized under the enabling authority for the Operating Party and/or the California Public Contract Code, and in accordance with the SAWPA-OCWD Subgrantee Agreement. Operating Party shall be responsible for required signage at each well location and ensuring that construction of the Program Well is completed no later than September 30, 2023 (unless the period for completion is extended by SAWPA and/or DWR). The design and materials utilized for the Program Well shall be consistent with all applicable regulations. Upon completion of the Program Well, the Operating Party shall transmit a written notice of completion to the Program Agency (“Notice of Completion”).

3.3. Invoicing. The Operating Party shall pay the costs of constructing the Program Well and directly related facilities. Invoices and other required documentation for Program Well construction will be submitted to the Program Agency in a format that can be easily transmitted to SAWPA for grant reimbursement. The Operating Party hereby acknowledges that the OCWD-SAWPA Subgrantee Agreement provides grant funding totaling seven million, eight hundred seventy-five thousand, seven hundred dollars (\$7,875,700) to be used towards the construction of five Program Wells that may be constructed by different Operating Parties. Each Operating Party is potentially eligible to receive up to a maximum reimbursement of one million, five hundred seventy-five thousand, one hundred forty dollars (\$1,575,140) in grant funding to be applied to well construction and equipping (Category D of Grant). The Operating Party shall expend an equal amount of its own funds towards well construction and equipping (“Local Match”). Operating Party shall, as a condition of receiving funds from Program

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<sup>2</sup> Periodic shut down of the Program Well by Operating Party is authorized for the reasons listed in Section 9 and Footnote 2 of the OCWD-SAWPA Subgrantee Agreement (as amended).

Agency, demonstrate a minimum 50/50 cost share of grant funding. Should the Local Match be less than the available grant funding per well, funding from Program Agency to Operating Party will be reduced to equal the Local Match.

3.4. Compliance with SARCCUP Agreement. The Operating Party shall comply with all applicable grant requirements described in the DWR-SAWPA Grant Agreement or OCWD-SAWPA Subgrantee Agreement to the same extent as Program Agency would be required to comply with such requirements.

3.5. Program Well Site. The Operating Party is solely responsible for providing a site for the Program Well and for completing all CEQA and other environmental permitting work that may be required to construct and operate the Program Well.

3.6. Ownership and Operation and Maintenance. The Operating Party shall own the Program Well, and at its sole cost and expense, operate and maintain the Program Well in as good and efficient condition as upon its construction, ordinary and reasonable wear and depreciation excepted, and otherwise in accordance with industry standards (and applicable standards and requirements of DWR, in its funding capacity under the OCWD-SAWPA Subgrantee Agreement), and as required by the OCWD-SAWPA Subgrantee Agreement. The Operating Party is not responsible for reductions in the Program Well operations resulting from changed groundwater basin water levels.

3.6.1. The Operating Party shall provide for all repairs, renewals, and replacements due to normal wear and tear necessary to the efficient operation of the Program Well during the term of the Contract and shall provide personnel sufficient in numbers and qualifications to operate and maintain the Program Well.

3.6.2. The Operating Party shall promptly provide requested documentation to the Program Agency regarding operation and maintenance of the Program Well, including but not limited to any documentation required under the OCWD-SAWPA Subgrantee Agreement or otherwise requested by DWR and/or SAWPA.

3.6.3. The Operating Party may use the Program Well for all purposes related to Operating Party's normal operations so long as such use does not interfere with the Program and the Operating Party maintains sufficient excess operable production capacity as necessary to meet its Program Stored Water extraction obligations as set forth in Paragraph 3.8 below.

3.7. Reports. The Operating Party shall promptly provide any and all budgeting documents and other reports pertaining to the Program Well and its overall groundwater pumping capacity or operations as may reasonably be required by the Program Agency.

3.7.1. The Operating Party shall retain books, records, and other material concerning the Project Well, and funding thereof, in accordance with generally accepted government accounting standards for a minimum of three (3) years after final payment is made by Program Agency to Operating Party.

3.8. Extraction of Program Stored Water. The Operating Party shall make reasonable and good faith efforts to extract Program Stored Water from the Program Well or any other existing wells operated by Operating Party when requested by Program Agency. The Operating Party shall pay for such produced Program Stored Water based on the sum of the then current Replenishment Assessment, Additional Replenishment Assessment and, if applicable, the Basin Equity Assessment. The extraction of Program Stored Water shall replace imported water the Operating Party was planning to purchase.

3.9. Expiration. The Operating Party's obligations under this Contract shall expire in 30 years unless sooner terminated per this Agreement or per Section 23 of the OCWD-SAWPA Subgrantee Agreement.

#### **SECTION 4. INDEMNIFICATION.**

4.1. Program Agency Indemnification Obligation. The Program Agency shall indemnify, defend and hold harmless the Operating Party and its respective officers, agents and employees, from any and all costs, damages, penalties or other liabilities resulting or alleged to result from the sole active negligence or willful misconduct of the Program Agency in the performance of the Program Agency's duties under this Contract.

4.2. Operating Party Indemnification Obligation. The Operating Party shall indemnify, defend and hold harmless the Program Agency and its respective officers, agents and employees, from any and all costs, damages, penalties or other liabilities to the extent resulting or alleged to result from: (a) Operating Party's negligence or willful misconduct; (b) actions/omissions of Operating Party that cause Program Agency to violate the OCWD-SAWPA Subgrantee Agreement, or which cause SAWPA to violate its grant agreement with DWR; (c) contractor claims associated with the Program Well; (d) Operating Party's failure, or alleged failure, to properly comply with CEQA or other environmental laws or regulations. The indemnification obligation described herein shall not arise where liability is caused by Program Agency's sole active negligence or willful misconduct.

4.3. The indemnification provisions set forth in this Section 4 shall survive the termination of the Contract and the OCWD-SAWPA Subgrantee Agreement and continue in full force.

#### **SECTION 5. INSURANCE.**

5.1. The Operating Party shall obtain and maintain for the duration of this Contract all of the applicable types of insurance that Program Agency is required to obtain under Section 30 of the OCWD-SAWPA Subgrantee Agreement, in amounts equal to or greater than the amounts specified in this Contract. Each policy shall name the Program Agency, DWR, and SAWPA as additional insureds. The insurance obligations of Operating Party shall include, but are not limited to:

5.1.1. Commercial General Liability. The Operating Party shall procure, pay for and keep in full force and effect and at all times during the term of

this Contract, commercial general liability insurance insuring against liability for personal injury, bodily injury, death and damage to property (including the Program Well) arising from the construction, operation or maintenance of the Program Well, and Operating Party's performance of its obligations under the OCWD-SAWPA Subgrantee Agreement and this Contract. Said insurance shall include coverage in an amount equal to at least Five Million Dollars (\$5,000,000), shall contain "blanket contractual liability" and "broad form property damage" endorsements, and shall name the Program Agency, DWR, and SAWPA as additional insureds.

5.1.2. Worker's Compensation Insurance. Pursuant to Section 3700 of the California Labor Code, the Operating Party shall procure, pay for and keep in full force and effect at all times during the term of the Contract workers' compensation insurance with employer's liability in the amounts required by law with respect to the construction, operation, and maintenance of the Program Well.

5.1.3. Casualty Insurance. The Operating Party shall procure, pay for and keep in full force and effect at all times during the term of this Contract, property casualty insurance (including coverage against damage to or loss of the Program Well by reason of fire, smoke, lightning, flooding, vandalism, malicious mischief and explosion) in an amount equal to the total cost of the construction of the Program Well, which policy shall provide that all proceeds thereunder shall be payable to the Program Agency.

5.1.4 Automobile Liability Insurance. The Operating Party will provide proof of automobile liability insurance as required by the State of California Department of Motor Vehicles with coverage of at least One Million Dollars (\$1,000,000).

5.2. Endorsements. Endorsements evidencing the coverage required in this Contract and showing Program Agency as additional insureds shall be furnished to the Program Agency.

5.3. Deductibles and Self-Insured Retentions. The insurance required by this Contract may contain deductibles or self-insured retentions. The Operating Party shall be solely responsible for any such deductibles and/or self-insured retentions which may be applicable to insurance coverage obtained by the Operating Party.

5.4. The Operating Party may comply with this Section 5 by providing insurance with substantially the same limits of coverage through the California Insurance Pool Authority, the Association of California Water Agencies Joint Powers Insurance Authority ("JPIA") or other like municipal self-insurance pool.

## **SECTION 6. MISCELLANEOUS.**

### **6.1. Termination Prior to Expiration of Contract.**

6.1.1. Material Breach by Operating Party. The Program Agency may terminate this Contract in the event of Operating Party's material violation of any provision of this Contract upon written notice by Program Agency to Operating Party after the failure by Operating Party to come into compliance within a reasonable time as established by Program Agency and/or SAWPA. In the event of such termination, the Operating Party, upon demand, shall, within 60 days of notification by Program Agency, repay to Program Agency an amount equal to the amount of grant funds disbursed by Program Agency to Operating Party for the Program Well. In the event of termination, prejudgment interest, unless waived by Program Agency, shall accrue on all amounts due from the date that notice of termination is mailed to the Operating Party to the date full repayment is received by Program Agency.

6.1.2. Termination of Funding for Program Well. The Program Agency may terminate this Contract prior to disbursement of funds for the Program Well should SAWPA and/or DWR terminate the "Well Component" funded via DWR Grant Agreement No. 4600011515 and the OCWD-SAWPA Subgrantee Agreement. Upon DWR or SAWPA terminating funding, Program Agency shall not be liable to Operating Party for any damages, costs or expenses resulting from such termination.

6.1.3. Early Termination by Operating Party. The Operating Party may terminate this Contract prior to the conclusion of the 30 year term if the Program Well is never constructed through no fault of Operating Party, or if the Program Well is constructed upon obtaining written permission for early termination from Program Agency, SAWPA and DWR. Program Agency will not unreasonably withhold such permission.

6.2. Notices. Any notice, instrument, payment or document required to be given or delivered under this Contract shall be given or delivered by personal delivery, by facsimile, or by depositing the same in the United States mail depository, first class postage prepaid, and addressed as follows:

If to Program Agency:

Orange County Water District  
Box 8300  
Fountain Valley, CA 92728-8300  
Attn: General Manager

If to Operating Party:

The City of Tustin, Water Services  
300 Centennial Way  
Tustin, CA 92780

Attn: Mike Grisso, Water Services Manager

or such other address as any party may direct in writing to all of the other Parties. Service of any instrument or document shall be deemed complete upon receipt if delivered personally, or forty-eight (48) hours after deposit of such instrument or document in the United States mail depository, first class postage prepaid and addressed as set forth above.

6.3. Binding Effect. All of the terms, conditions and provisions of this Contract shall inure to the benefit of, and be binding upon, the Parties hereto.

6.4. Counterparts. This Contract may be executed by the Parties in counterparts, which counterparts shall be construed together and have the same effect as if all of the Parties had executed the same instrument.

6.5. Integration. This Contract, in conjunction with the OCWD-SAWPA Subgrantee Agreement, represents the entire understanding of the Parties as to those matters contained herein. No prior oral or written understanding shall be of any force or effect with respect to those matters covered by this Contract.

6.6. Severability. If any term, provision, covenant or condition of this Contract shall be determined invalid, void or unenforceable, then this portion shall be severed and the remainder of this Contract shall not be affected and shall have full force and effect, unless the Parties otherwise agree in writing, which agreement shall not be unreasonably withheld.

6.7. Waiver. Failure of a party to insist upon the strict performance of any of the provisions of this Contract by the other party, or the failure by a party to exercise its rights upon the default of the other party, shall not constitute a waiver of such party's right to insist and demand strict compliance by the other party with the terms of this Contract thereafter.

6.8. Interpretation and Governing Law. This Contract shall be governed by the laws of the State of California and construed as if drafted by all the Parties hereto. The headings contained within this Contract are for convenience only and shall have no force or effect in the construction of this Contract.

6.9. Modification. This Contract may not be modified, altered or amended except in writing, signed by authorized officials of the Parties.

6.10. Successors in Interest. Subject to Paragraph 6.13 below, all of the terms, provisions, covenants and obligations contained in this Contract shall be binding upon and inure to the benefit of the respective party provided herein, and its respective successors and assigns.

6.11. No Third-Party Beneficiaries. This Contract is made and entered into for the sole protection and benefit of the Parties. No other person shall have any right of action based upon any provision of this Contract.

6.12. Further Assurances. Each party, upon the request of the other, agrees to perform such further acts and to execute and deliver such other documents as are reasonably necessary to carry out the provisions of the Contract, including applicable provisions of the OCWD-SAWPA Subgrantee Agreement which are incorporated herein by reference.

6.13. Assignment. Absent prior written authorization from Program Agency, and if necessary, SAWPA and DWR, no party shall transfer the Contract, in whole or in part, or any of its interests hereunder, to any other person or entity. Any attempt to transfer or assign this Contract, or any privilege hereunder, without such prior written consent, shall be void and confer no right on any person or entity that is not a party to this Contract and shall constitute a material breach of the Contract by the Party seeking to assign without the consent of the other Party. Nothing contained herein shall prevent the Parties from subcontracting for the performance of obligations hereunder, provided, however, no such subcontracting shall relieve the Parties from the performance of obligations required herein.

6.14. Authority to Execute. Each of the persons executing this Contract on behalf of the respective Parties warrants and represents that he or she has the authority to execute this Contract on behalf of that party and warrants and represents that he or she has the authority to bind that respective party to the performance of its obligations hereunder.

[SIGNATURE PAGE FOLLOWS:]

IN WITNESS WHEREOF, the Parties hereto have caused this Contract to be duly executed by their authorized officers as of the date first written above.

ATTEST:

By \_\_\_\_\_  
Secretary

**ORANGE COUNTY WATER DISTRICT**

By \_\_\_\_\_  
General Manager

APPROVED AS TO FORM  
Rutan & Tucker, LLP

\_\_\_\_\_  
General Counsel

ATTEST:

DocuSigned by:  
By Erica Yasuda  
Erica Yasuda, City Clerk

**THE CITY OF TUSTIN**

DocuSigned by:  
By Letitia Clark  
Letitia Clark, Mayor

APPROVED AS TO FORM:

DocuSigned by:  
David Kendig  
David Kendig, Tustin City Attorney

## Exhibit A – OCWD-SAWPA Subgrantee Agreement

## Exhibit B – List of Wells to be Constructed

Participating Agency	Selected Well Site	Well Site Location and Estimated Capacity
East Orange County Water District	North Well	210 N. McPherson Rd, Orange, CA. Est. 1,800 gpm capacity.
City of Fullerton	Well 7A	627 West La Palma Ave., Anaheim, CA. Replaces well 7, located at Main Plant where there are five other wells. Est. 2,000-4,000 gpm capacity.
Mesa Water	Well No. 14	3120 S. Croddy Way, Santa Ana. Est. 3,000 -4,000 gpm capacity.
City of Orange	Well 29	1715 W. Struck Ave, Orange, CA 92866. Est. 3,000 gpm capacity.
City of Tustin	Replace Beneta well	18001 Beneta Way, Tustin, Ca. 92780. Est. 1,500 gpm capacity.

## Exhibit C – OCWD Labor Compliance Program