

**WATER EXCHANGE AGREEMENT
MERCED IRRIGATION DISTRICT AND CITY OF MERCED**

This Agreement for the Exchange of Water (Agreement) is made this ____ day of September, 2023 (the Effective Date), by and between the City of Merced, whose address is 678 W. 18th Street, Merced, California 95340 (hereinafter the City), and the Merced Irrigation District, whose address is 744 W. 20th Street, Merced, California 95340 (hereinafter the MID). The City and MID may be referred to herein collectively as the “parties” or singularly as a “party”.

RECITALS

WHEREAS, as of the Effective Date, the City lies almost entirely within the boundaries of, and the place of use for MID surface water, but currently relies on groundwater to meet its water supply needs; and

WHEREAS, MID owns and operates extensive irrigation water supply facilities throughout eastern Merced County, and particularly in and around the City’s boundaries, and near its wastewater treatment plant (WWTP), which is currently located at 10260 Gove Road, Merced, California; and

WHEREAS, the WWTP, and the tertiary treated recycled wastewater (recycled wastewater) produced by the WWTP is a valuable resource that MID is willing, through this Agreement, to accept in order to put it to beneficial use; and

WHEREAS, the WWTP currently discharges recycled wastewater for three (3) general uses: 1) wetlands use within a local wetland management area; 2) agricultural irrigation use by local farmers upon lands owned by the City; and 3) discharges to the Hartley Slough, which are typically captured by MID and put to beneficial use. The only water supply being acquired by MID hereunder is recycled wastewater discharged (or intended for discharge) by the City to the Hartley Slough; and

WHEREAS, in exchange for the City’s recycled wastewater, MID is willing to make available and the City is willing to accept, a combination of both MID surface and developed groundwater for City use; and

WHEREAS, for purposes of this Agreement and in the context of the Sustainable Groundwater Management Act (SGMA) and in relation to groundwater resources, MID surface water supplies that seep into and become part of the local groundwater resources are generally referred to as “Developed Water.” Developed water, or developed groundwater, is still owned and controlled by MID, and is distinct from and accounted for separately from the “natural yield” of the Merced Groundwater Subbasin; and

WHEREAS, the water exchange agreed to herein saves and preserves groundwater within the Merced Groundwater Subbasin and makes use of valuable resources owned and controlled by both the City and MID; and

WHEREAS, the primary goal of this agreement is to set a value for the units of water to be exchanged through existing infrastructure of the parties;

AGREEMENT

NOW, THEREFORE, in consideration of the forgoing Recitals and the terms, covenants and agreements hereinafter set forth, IT IS AGREED by and between the parties hereto as follows:

1. *Recitals Incorporated.*

The facts contained in the Recitals above are true and correct, and are incorporated herein.

2. *Water Exchange:*

- a) MID will make a combination of surface and Developed Groundwater available to the City, on a 1:1 ratio of recycled wastewater discharged by the City at the Hartley Slough, consistent with the terms and conditions contained herein. MID surface water may be made available from any of MID's appropriate water rights, in MID's sole discretion. This Agreement places no additional requirements or restrictions on MID's management or use of its water.
- b) Unless otherwise agreed to, MID surface water will be used for City landscape irrigation purposes only, and within MID's boundaries only. To the extent MID Developed Groundwater is used, it will be made available to the City for pumping through the City's own groundwater well network and conveyance system.
- c) The parties will work together in good faith to maximize the amount of water to be made available by each of them hereunder, however the total exchange between the parties shall not exceed 10,000 acre-feet per year. The parties estimate flow from the WWTP at the build-out of the City's Master Plan will be approximately 27 million gallons per day (mgd) (~22,000 acre-feet per year). At full build out, the projected rate of flow into the Hartley Slough from the WWTP is approximately 9 mgd (~10,000 acre-feet per year). If in the future, the parties desire to agree to increase the volume for exchange, the parties will negotiate in good faith to a written amendment hereto.
- d) The City shall make available all recycled wastewater hereunder at the existing discharge point from its WWTP to the Hartley Slough (the Point of Delivery), and at such time MID shall take ownership thereof. The City shall measure the water made available at the Point of Delivery and will report to MID monthly meter readings or provide access to telemetry meter data. MID agrees to bear all losses suffered by or imposed on recycled wastewater made available by the City after its delivery at the Point of Delivery.

- e) City shall ensure that its releases of recycled water to Hartley Slough will be no less than 30% of the total amount of recycled water produced and discharged by the WWTP, up to 10,000 acre feet per year. MID may use, control, convey, sell and resell, and otherwise manage all recycled wastewater accepted and received after the Point of Discharge in its sole discretion and without restriction.
- f) Future Recycled Water Infrastructure: Should MID determine to construct a conveyance facility that creates the ability to bypass either all or a portion of the City's discharges to Hartley Slough and instead convey the recycled water from the WWTP directly to another MID water conveyance facility(s), MID will be responsible for all required construction and CEQA work for the new conveyance facility project. In that case, the City agrees to and shall cooperate in good faith with MID, at its own cost, at the request of MID. In addition, and as part of this exchange, the City hereby agrees that it will convey to MID an easement of appropriate length and width for the installation, operation and maintenance of said facility and any associated appurtenances desired by MID.
- g) Surface Water Conveyance: MID and the City will work together in good faith to identify appropriate locations for MID to make surface water available to the City for landscape irrigation purposes, in quantities to be agreed upon.
 - (1) All surface water made available by MID hereunder shall be measured by MID at the turnout from MID's conveyance facility. MID will provide the City with monthly meter readings, and the City agrees to bear all losses suffered by or imposed on water made available by MID after its delivery at the measurement point. To the extent additional turnout(s) are needed by the City to facilitate a surface water delivery, MID hereby agrees to convey an encroachment agreement(s) to the City consistent with its normal terms and conditions, at the City's cost.
 - (a) In existing City maintained areas where MID surface water may be used, the City agrees to develop and implement projects, at its own expense, to convert the landscape irrigation system currently used from using groundwater to using nonpotable MID surface water.
 - (b) In new subdivisions, the City agrees to condition the subdivision development such that the design and construction of the development and the City's landscaped areas included therein may be connected to a nearby MID water conveyance facility, and supplied by MID surface water, so long as MID determines that service to said development is reasonably feasible. MID will inform the City whether providing landscape irrigation flows to a development is feasible as part of a "Request for Conditions" letter, which shall be sent to the City during the subdivision planning process.
- h) Availability of MID Water. Notwithstanding when water from the City is made available to MID, MID water will be made available for the irrigation of landscape areas maintained by the City as follows:

- (1) In general, MID water will be made available only during the MID irrigation season, as set by the MID Board of Directors (Board) each year. MID irrigation season is typically set between the beginning of March and end of October.
- (2) For certain agreed upon sites, MID may be able to provide the City with year-round water service for irrigation.
- (3) The City may carryover any unused developed groundwater made available by MID between April 1 and September 30 of a given year, for 1 year from the year it is made available by MID. The City may be able to carryover unused developed groundwater made available between October and March if MID is able to apply the wastewater made available by the City during the same timeframe to beneficial use, or if otherwise agreed to in writing by MID. Any developed groundwater carried over pursuant to this provision shall be carried over as developed groundwater, subject to rules and regulations set by Merced Irrigation Urban Groundwater Sustainability Agency
- (4) Any water made available in any particular year, by either party, shall only be available for use by the receiving party in that calendar year. Other than subsection (iii) above, neither party shall have the right to store, bank, exchange, divest, resell, give, loan or otherwise alienate or carryover any water from year to year.

3. *Consideration.*

There will be no funds paid for any water made available by either party under this Agreement. The consideration for the mutual obligations to supply water under this Agreement shall be the agreement of the parties to exchange water as set forth herein.

4. *Approvals and Environmental Compliance.*

The parties acknowledge that for water to be made available and acquired by each of them, certain regulatory approvals (the Approvals) may be required, including without limitation environmental review under the California Environmental Quality Act (CEQA) and potentially the approval of a water transfer permit by the California State Water Resources Control Board. The parties agree that MID will serve as lead agency for these Approvals and will keep the City apprised of their status appropriately, or upon request by the City. The parties agree to share equally in the cost of preparing necessary documentation (i.e., preparation of studies, consultants, legal review, etc.) for the Approvals, through final approval.

Compliance with CEQA and all other applicable environmental laws with respect to the actions contemplated by this Agreement shall be a condition precedent to the parties' obligations hereunder other than the parties' obligations under this Section. Each party shall promptly prepare all appropriate environmental documents, if any are required, for it to undertake the actions contemplated in this Agreement and shall dedicate, at no charge to the other, such staff as is reasonably necessary in connection therewith. The parties shall cooperate to diligently complete all environmental review required in order to implement this Agreement, and shall use reasonable efforts to reduce any overlap in analyzing, mitigating, or studying environmental

impacts associated with the actions proposed in this Agreement. No action other than continued discharge into Hartley Slough shall be taken that irrevocably commits any material resources of any party, until all required environmental review is completed and all parties have independently made all findings required by CEQA and other applicable environmental laws. If, upon completion of such environmental review, a party finds one or more significant, unmitigated environmental impacts resulting from the actions contemplated by this Agreement and cannot make a finding that the benefits of the proposed project outweigh the impact or impacts, or that the impacts can be mitigated to a level below significance, then this Agreement may be terminated at the discretion of either party without further obligation or liability of any party, and any payments theretofore made by the City for water hereunder shall be immediately returned. Neither the execution of this Agreement, nor any steps taken to implement this Agreement, shall be taken into account in determining whether mitigating or avoiding any significant impact is feasible. Nothing in this Agreement pre-commits either party to any project approval.

5. Attorneys' Fees and Third-Party Challenges.

In the event of any action between MID and the City seeking enforcement or interpretation of any of the provisions of this Agreement, the prevailing party in such action shall be awarded, in addition to damages, its reasonable costs and expenses, including without limitation actual out of pocket costs and attorneys' fees, all as ordered by the trier of fact. In the event a third party challenges this Agreement or any of the provisions hereof, whether judicially or otherwise, MID and the City shall assist one another without cost in connection therewith by providing information and witnesses as reasonably requested. Any costs of defending any such challenge, including out-of-pocket costs and attorneys' fees, shall be borne by the party incurring them except to the extent such challenge results from the gross negligence or willful misconduct of one party, in which case such party shall be responsible for all such costs and fees. Each party shall retain the right, in its sole and absolute discretion, to choose counsel, elect to defend or not defend such a challenge, and control such defense. Notwithstanding the foregoing, (i) if a party elects to not defend such a challenge, then such non-defending party may elect to terminate this Agreement by written notice to the other unless the other party elects to defend the challenge and agrees to indemnify and hold the non-defending party harmless from all damages, costs, and expenses of defending as a result of such challenge or that may be imposed on the non-defending party as a result of such challenge, in which case the non-defending party shall not have the right to terminate this Agreement, and (ii) if any judicial, administrative or regulatory proceeding or order prevents the parties from proceeding with any or all of the deliveries of Available Water contemplated by this Agreement, then either party may elect to terminate this Agreement by written notice to the other.

6. Representations and Warranties.

Each party represents and warrants to the other party that (i) it has the authority to enter into this Agreement, to make available the water being made available hereunder, and to otherwise perform as set forth herein without any court approval or consents from third parties except for the CEQA processes referenced hereinabove and approval of a water transfer permit by the California State Water Resources Control Board, (ii) the execution of this Agreement and performance of its obligations hereunder will not violate any agreement, option, covenant,

condition, obligation, court order or undertaking affecting the party or water being made available hereunder, nor to the best of the parties knowledge will it violate any law, ordinance, statute, order or regulation, (iii) to the best of the parties knowledge, there is no suit, action or arbitration, or legal, administrative, or other proceeding that affects the ability of the parties to perform hereunder and (iv) the water is free and clear of all liens and encumbrances.

The City hereby warrants and guarantees that water made available by the City shall, at a minimum, meet water quality standards as currently required in Title 22 Code of Regulations, Division 4, Environmental Health, Chapter 3, Water Recycling Criteria, which may be revised by the state from time to time, and which allows use of treated wastewater on agricultural crops. MID must be able to put to beneficial use water made available by the City, i.e., provide to customers for either agricultural irrigation or wildlife/environmental purposes.

MID expressly disclaims and makes no warranty or representation of fitness of its water made available for any particular use. The City accepts and uses MID's water, as-is.

7. Entire Agreement; Amendment.

This Agreement constitutes the entire agreement between the parties with respect to the subject matter hereof. All prior agreements with respect to that subject matter, whether verbal, written or implied, are hereby superseded in their entirety by this Agreement and are of no further force or effect. Amendments to this Agreement shall be effective only if in writing, and then only when signed by the authorized representatives of the respective parties. Amendments or modifications of this Agreement shall be made by only by mutual consent of both parties by the execution of a written amendment or addendum, signed and dated by all parties.

8. No Permanent Right; Participation in Similar Activities.

This Agreement is entered into by the parties for the purpose of maximizing the beneficial use of water by each of them. No rights in favor of the City or any other party to water controlled by MID are created hereby except as expressly set forth herein. The City acknowledges that it does not hold and will not acquire any rights to any waters of MID or the Merced River by virtue of this Agreement except as expressly set forth herein.

This instrument in no way restricts the City or MID from participating in similar water transfer agreements or exchanges with other public or private agencies, organizations, and individuals, so long as such activities or agreements do not violate the terms of this Agreement.

9. Specific Performance.

The parties acknowledge that water is unique, and that the failure of either party to perform under this Agreement may not be readily compensable in monetary damages. Therefore, in addition to any other remedies available to the parties at law or in equity, in the event of a breach or threatened breach of this Agreement by either party, the other party shall be entitled to specific performance of this Agreement.

Except for the sole gross negligence or willful misconduct of the parties, each party agrees to indemnify and hold harmless the other party, its Directors, officers, agents, servants, employees and consultants from and against any and all losses, claims, liens, demands and causes of action of every kind and character, without limitation, occurring or in any way incident to, connected with or arising directly or indirectly out of the performance or nonperformance by a party or parties to this Agreement.

Notwithstanding any other provision of this Agreement, neither party shall be liable for any failure to perform resulting from any cause outside the reasonable control of that party.

10. Severability.

If any provision of this Agreement is determined by a court of competent jurisdiction to be void or unenforceable, that provision shall be deemed automatically reformed to be enforceable to the maximum extent legally permissible, and the balance of this Agreement shall be unaffected.

11. Ambiguities.

This Agreement shall be interpreted as if it had been jointly drafted by both parties. Therefore, the normal rule of construction that ambiguities are construed against the drafter is hereby waived.

12. Notices.

All notices under this Agreement shall be effective (i) when personally delivered to MID or the City, as the case may be, (ii) when sent by email on a business day between the hours of 8 a.m. and 5 p.m. to MID or the City, as the case may be, or (iii) three business days after deposit in the United States mail, registered or certified, postage fully prepaid and addressed to the respective parties as follows:

To MID: 744 W. 20th Street
Merced, CA 95340
Telephone No.: (209) 722-5761
Attn: Bryan Kelly, Deputy General Manager, Water Resources
bkelly@mercedid.org

With copy to:
Phillip McMurray, General Counsel
744 W. 20th Street
Merced, CA 95340
pmcmurray@mercedid.org

To City: City Manager
City of Merced
678 W. 18th Street
Merced, CA 95340

Telephone No.: (209)388-8670

Attn: Stephanie R. Dietz

dietzs@cityofmerced.org

With copy to:

City Attorney

City of Merced 678 W. 18th Street

Merced, CA 95340

Attn: Brian Doyle

doyleb@cityofmerced.org

or such other address as the parties may from time to time designate in writing. As a matter of convenience, however, communications between MID and the City shall, to the extent feasible, be conducted orally by telephone or in person, and/or through the parties' respective counsel, with such communications to be confirmed and made effective in writing as set forth above; provided, no such oral notice or communication shall be effective unless so confirmed in writing.

13. *Further Action.*

The parties agree to perform all further acts, and to execute, acknowledge, and deliver any documents that may be reasonably necessary, appropriate or desirable to carry out the purposes of this Agreement. MID and the City acknowledge that the actions contemplated by this Agreement will require regular consultation and coordination and the parties shall in good faith engage in all such consultation and coordination necessary or appropriate to facilitate the arrangements contemplated by this Agreement.

14. *Third Party Beneficiaries.*

This Agreement does not create, and shall not be construed to create, any rights enforceable by any person, partnership, corporation, joint venture, limited liability company or other form of organization or association of any kind that is not a party to this Agreement.

15. *Binding Effect; Counterparts; Rules Applicable.*

This Agreement is intended to be and shall be binding upon and enforceable against each of the parties hereto.

This Agreement shall be governed by and construed in accordance with the laws of the State of California and may be signed in any number of counterparts. Facsimile and electronic signatures shall be binding. The delivery and use of MID water by the City under this Agreement shall be subject to all applicable restrictions imposed by federal, state or local law or regulation including MID Rules and Regulations Governing Distribution of Water.

16. *Expiration and Termination.*

The Term of this Agreement shall commence on the Effective Date and expire on December 31, 2073. Twelve months prior to the expiration of this Agreement, the parties hereby agree to

meet and work in good faith to determine whether or not to extend the Term hereof. If the parties cannot mutually agree to extend the Term, then this Agreement shall expire as set forth in this section. If extended, the terms of extension shall be agreeable to both parties.

If either party fails to make available water for one year, consistent with the terms and conditions contained in this Agreement, the other party, in its discretion, may terminate this Agreement by providing no less than 45 days written notice.

17. Indemnity.

City agrees to, and does hereby, hold MID, its officers and Directors harmless and agrees to defend them from any claim, legal action, or administrative proceeding arising out of a claim that the water quality delivered to MID by the City from its WWTP does not meet the required tertiary treatment regulatory requirements of the United States or the State of California or their agencies for the discharge of the water to a public waterway including MID facilities.

IN WITNESS WHEREOF, the City has executed this Agreement as of the ____ day of September, 2023.

City of Merced

By: _____ **APPROVED AS TO FORM:**
Stephanie Dietz, City Manager

By: _____  8/28/2023
City Attorney **Date**

IN WITNESS WHEREOF, the MID has executed this Agreement as of the ____ day of September, 2023.

Merced Irrigation District

By: _____
John Sweigard, General Manager