

1 **First Amended Agreement for the Construction and Operation of Groundwater**
2 **Replenishment Facilities**
3 **By and Between**
4 **East Valley Water District and San Bernardino Valley Municipal Water District**
5

6 This First Amended Agreement (Agreement) for the Construction and Operation of
7 Groundwater Replenishment Facilities is entered into and effective this 6th day of March, 2018
8 by and between East Valley Water District (“EVWD”) and San Bernardino Valley Municipal
9 Water District (“Valley District”). EVWD and Valley District are each sometimes referred to
10 herein as a “Party” and are collectively referred to as the “Parties.” Additional signatories to
11 this Agreement may include the City of San Bernardino Municipal Water Department. This
12 Agreement shall become effective upon execution by Valley District and EVWD, regardless of
13 whether the City of San Bernardino Municipal Water Department or any other additional
14 signatory has executed this Agreement.

15
16 Recitals
17

- 18 A. The Sustainable Groundwater Management Act of 2014 requires public agencies to
19 develop plans to ensure the sustainable long-term use of California’s groundwater resources.
20
- 21 B. In 2009, the State Water Resources Control Board adopted a Recycled Water Policy that
22 encourages public agencies to develop groundwater recharge projects using recycled water.
23
- 24 C. The Parties believe that through their cooperative work, they can treat and discharge
25 wastewater in a manner that will maximize the benefits to the Santa Ana River and to the region.
26 The Parties further believe that such wastewater discharge can be treated to levels that allow the
27 use of such recycled water for groundwater replenishment or other permissible uses within the
28 San Bernardino Basin Area, or other adjacent groundwater basins, for the benefit of the Parties
29 and their ratepayers. Achieving such groundwater objectives requires the construction of a new
30 wastewater treatment plant.
31
- 32 D. Using recycled water to replenish the San Bernardino Basin Area, which is the
33 groundwater basin serving the needs of EVWD and which includes most of the area within
34 Valley District, improves water supply reliability for EVWD and other retail water agencies
35 within Valley District’s service area and also provides a drought buffer for those agencies in the
36 event of a lengthy drought.
37
- 38 E. The Parties, together with a number of other water agencies, are working together to
39 develop a collaborative regional plan to increase the use of recycled water for groundwater
40 replenishment and other purposes. The Parties intend that this project be an integral part of that
41 regional plan. This Agreement is intended to implement the more general understandings of the
42 Parties and others as reflected in that regional plan.

43
44 F. Replenishing the San Bernardino Basin Area or other groundwater basins with recycled
45 water is consistent with article X, section 2 of the California Constitution, which requires that the
46 water resources of California be used to the fullest extent of which they are capable and is also
47 consistent with Water Code section 13576(k), which authorizes and encourages the use of
48 recycled water for groundwater replenishment. Groundwater replenishment is also within the
49 authority of both Parties.

50
51 G. The Parties wish to memorialize their agreements relating to constructing and operating a
52 wastewater treatment plant (the "Project") that will enable them to replenish the groundwater
53 resources that serve their respective ratepayers.

54
55 Agreements

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57 1. *Governance – Joint Management.*

- 58 a. The Parties agree that they will work together in good faith to complete the
59 construction of the Project no later than June 30, 2018_.
- 60 b. The Parties will then promptly enter into an agreement for the operation of the
61 Project with a term of at least ten years that will enable the Parties to replenish the
62 San Bernardino Basin Area with at least 6,000 acre-feet of recycled water.
- 63 c. In accomplishing these objectives, the Project will be managed by a Management
64 Committee composed of the General Manager of EVWD and the General
65 Manager of Valley District, or their designees. All decisions shall be made on a
66 unanimous basis.
- 67 d. Both Parties hereby authorize their respective General Managers or designees to
68 develop any administrative and operating rules and procedures that may be
69 needed to implement the terms of this Agreement and that do not require a change
70 in the terms of the Agreement without subsequent action by the Parties' governing
71 boards.

72 2. *Construction of Wastewater Treatment Plant.* The Parties agree that Valley District shall
73 serve as the lead agency for the construction and operation of the Project, as follows:

- 74 a. *Assignment of Consulting Agreements and Permits by EVWD to Valley District.*
75 Within thirty days of the effective date of this Agreement, EVWD shall assign all
76 existing consulting or other agreements other than legal, as well as any permits,
77 easements or other approvals, relating to the construction of the Project or its
78 subsequent operation to Valley District.

- 79 (1) In the event that Valley District determines, in its sole discretion, that it
80 needs to retain additional consultants in order to fulfill its obligations
81 under the terms of this Agreement, Valley District may retain such
82 consultants without the prior consent of EVWD. Valley District shall,
83 however, provide a copy of such newly retained consultant's budget,
84 scope of work and retainer agreement to EVWD within thirty days of such
85 consultant's retention.
- 86 (2) The Parties understand and agree that, throughout the construction and
87 operation of the Project, each Party will continue to be represented by its
88 own regular legal counsel. The Parties will, within thirty days of the
89 execution of this Agreement, enter into a joint defense/common interest
90 doctrine agreement that will enable them to proceed with the Project in the
91 most expeditious manner possible.
- 92 b. *Design-Build and Project Permitting.* Valley District shall design, permit and
93 construct the Project by means of one or more design/build contracts, as
94 authorized by Public Contracts Code sections 22160 *et seq.* Specifically:
- 95 (1) *Design Proposal.* Valley District shall work with one or more firms to
96 develop a design/build proposal for review and approval by EVWD no
97 later than April 30, 2016.
- 98 (a) The wastewater treatment plant shall be built on APNs 0279-211-
99 33-0000, 0279-211-25-0000, 0279-211-26-0000 and 0279-211-01-
100 0000, which are owned by EVWD. To the extent that additional
101 easements are needed by Valley District or entities acting under
102 Valley District's direction in order to complete the Project, EVWD
103 agrees to issue such easements over its own property or to be
104 responsible for obtaining such easements from neighboring
105 landowners.
- 106 (b) EVWD shall review the design/build proposal and approve it (with
107 or without changes) within thirty days of submission. If EVWD
108 fails to approve the proposal in a timely manner, Valley District
109 may, in its sole discretion, deem this Agreement to have been
110 terminated.
- 111 (2) *Permitting.* Valley District shall be responsible for obtaining all local,
112 state or federal permits that may be necessary for the construction or
113 operation of the Project in a timely manner.

- 114 (a) Such permits shall include, but are not limited to, NPDES permits,
 115 other permits necessary to use recycled water to replenish the San
 116 Bernardino Basin Area, and the permits needed to allow for the
 117 continued discharge of treated wastewater either to the Santa Ana
 118 River or other appropriate discharge points.
- 119 (b) Valley District shall also be the lead agency for the preparation of
 120 one or more environmental document(s) that may be required
 121 under the terms of the National Environmental Policy Act and/or
 122 the California Environmental Quality Act that are sufficient to
 123 support the issuance of the necessary permits for the Project.
- 124 (3) *Construction.* Valley District shall cause the Project to be constructed in a
 125 timely manner. The Parties anticipate that the Project shall be completed
 126 by June 30, 2018. Valley District shall provide monthly updates to
 127 EVWD on changes to the plans, specifications, and schedules. Valley
 128 District shall not be liable for any delays or additional costs in
 129 constructing the Project, save for the gross negligence, intentional acts and
 130 willful misconduct of Valley District and its employees, agents and
 131 contractors.
- 132 (4) *Award of Contract.* Valley District shall obtain the concurrence of EVWD
 133 prior to awarding any contract for the construction of the Project. EVWD
 134 agrees not to unreasonably delay its approval of any proposed contract.
- 135 (5) *Costs.* The Parties agree that the construction of the Project will occur at
 136 no cost to Valley District. Valley District shall be entitled to recover all of
 137 its costs (including, but not limited to, materials costs; consultants, experts
 138 and attorneys' fees; and direct expenditures) from EVWD for the
 139 construction of the Project, save for costs directly caused by the gross
 140 negligence, intentional acts and willful misconduct of Valley District and
 141 its employees, agents and contractors.
- 142 (6) *Mark-Up of Costs.* EVWD shall pay all costs incurred by Valley District
 143 in connection with the Project without any mark-up, including that EVWD
 144 shall pay Valley District's reasonable staff time for work related to the
 145 Project.
- 146 (7) *Payments Obligatory.* EVWD shall make all payments required by this
 147 Agreement as they become due, notwithstanding any individual default by
 148 its customers or users, any dispute over charges, or otherwise.

149 c. *Financing.* EVWD agrees that it will finance the full costs of all work associated
150 with or required by the Project and may make any arrangements that it deems
151 appropriate for such financing without the consent of Valley District. EVWD
152 shall keep Valley District reasonably informed as to the status of such financing.
153 Valley District will cooperate, and may assist in other ways at its discretion, with
154 EVWD's efforts to secure financing for the Project to the extent that cooperation
155 is reasonable and necessary.

156 3. *Operation of Wastewater Treatment Plant for Groundwater Replenishment.* The Parties
157 shall enter into the operations agreement for the wastewater treatment plant and for
158 groundwater replenishment referred to in paragraph 1 above no later than thirty days
159 after the completion of the construction of the wastewater treatment plant. Such
160 operations agreement shall include the following terms:

161 a. *Term*

162 (1) The operations agreement shall be for an initial term of ten years, with
163 subsequent terms of five years each. Either Party may terminate the
164 operations agreement with at least one year's written notice prior to the
165 completion of either the initial term or a subsequent term, but if no such
166 termination notice is received in a timely manner, the operations
167 agreement shall automatically renew for another five year period.

168 (2) Notwithstanding the previous subparagraph, if the San Bernardino County
169 Local Agency Formation Commission activates EVWD's authority to
170 provide wastewater treatment services to its ratepayers (Activation), this
171 Agreement shall be deemed terminated in its entirety, effective on the date
172 of Activation and neither Party to this Agreement shall have any further
173 obligation hereunder except for those obligations which have accrued as of
174 the date of Activation.

175 b. *Operation of the Wastewater Treatment Plant.* Valley District shall operate the
176 wastewater treatment plant in a good and workmanlike fashion, in full compliance
177 with all applicable local, state and federal laws and regulations.

178 (1) EVWD shall arrange, at its sole cost, for the collection and conveyance of
179 wastewater generated within EVWD's service area to the wastewater
180 treatment plant.

181 (2) EVWD shall pay all costs incurred by Valley District for the operation of
182 the wastewater treatment plant (including staff time). Valley District shall
183 invoice EVWD quarterly in arrears and EVWD shall pay Valley District
184 within thirty days of the date of each invoice.

185 c. *Public Education.* EVWD may construct facilities ancillary to the Project for the
 186 purpose of public education and programming on topics including water
 187 conservation and replenishment; Valley District will not object to the construction
 188 and operation of such public education facilities and the conduct of such
 189 programs, *provided that* such facilities and programs are conducted in such a way
 190 so as not to interfere with the ongoing operations of the wastewater treatment
 191 plant.

192 4. *Groundwater Replenishment with Recycled Water.* The Parties agree that any recycled
 193 water produced by the wastewater treatment plant shall be the sole property of EVWD.

194 5. *Facility Ownership.* EVWD shall own, in fee simple, all Project facilities *provided that*
 195 until EVWD completes payment of all construction costs to Valley District, Valley
 196 District shall be deemed to have a security interest in those facilities in an amount equal
 197 to the unpaid debt. In the event of a default in required payment by EVWD, the Parties
 198 agree that Valley District shall have the right to obtain a judgment in the amount of any
 199 default by EVWD and shall further have the right to cause EVWD to increase its water
 200 charges or to levy an assessment to pay the amount of the default.

201 6. *Indemnification*

202 a. *Indemnification by Valley District.* Valley District shall indemnify, defend and
 203 hold harmless EVWD, its directors, officers, attorneys, employees and agents
 204 from and against all damages, liabilities, claims, actions, demands, costs and
 205 expenses (including, but not limited to, costs of investigations, lawsuits and any
 206 other proceedings whether in law or in equity, settlement costs, attorneys' fees
 207 and costs), and penalties or violations of any kind, which arise out of, result from,
 208 or are related to Valley District's performance of its obligations under this
 209 Agreement.

210 b. *Indemnification by EVWD.* EVWD shall indemnify, defend and hold harmless
 211 Valley District, its directors, officers, attorneys, employees and agents from and
 212 against all damages, liabilities, claims, actions, demands, costs and expenses
 213 (including, but not limited to, costs of investigations, lawsuits and any other
 214 proceedings whether in law or in equity, settlement costs, attorneys' fees and
 215 costs), and penalties or violations of any kind, which arise out of, result from, or
 216 are related to the performance of EVWD's obligations under this Agreement.

217 c. *Indemnification Procedures.* Any Party that is an indemnified party (the
 218 "**Indemnified Party**") that has a claim for indemnification against the other Party
 219 (the "**Indemnifying Party**") under this Agreement, shall promptly notify the
 220 Indemnifying Party in writing, *provided, however,* that no delay on the part of the
 221 Indemnified Party in notifying the Indemnifying Party shall relieve the

222 Indemnifying Party from any obligation unless (and then solely to the extent) the
 223 Indemnifying Party is prejudiced. Further, the Indemnified Party shall promptly
 224 notify the Indemnifying Party of the existence of any claim, demand, or other
 225 matter to which the indemnification obligations would apply, and shall give the
 226 Indemnifying Party a reasonable opportunity to defend the same at its own
 227 expense and with counsel of its own selection, *provided* that the Indemnified
 228 Party shall at all times also have the right to fully participate in the disputed
 229 matter at its own expense. If the Indemnifying Party, within a reasonable time
 230 after notice from the Indemnified Party, fails to defend a claim, demand or other
 231 matter to which the indemnification obligations would apply, the Indemnified
 232 Party shall have the right, but not the obligation, to undertake the defense of, and
 233 to compromise or settle (exercising reasonable business judgment), the claim or
 234 other matter, on behalf, or for the account, and at the risk, of the Indemnifying
 235 Party. If the claim is one that cannot by its nature be defended solely by the
 236 Indemnifying Party, then the Indemnified Party shall make available all
 237 information and assistance to the Indemnifying Party that the Indemnifying Party
 238 may reasonably request.

239 7. *Administration of Agreement*

240 a. *Books and Records.* Each Party shall have access to and the right to examine any
 241 of the other Party's pertinent books, documents, papers or other records
 242 (including, without limitation, records contained on electronic media) relating to
 243 the performance of that Party's obligations pursuant to this Agreement or the
 244 Project.

245 (1) *Retention of Records; Preservation of Privilege.* Each Party shall retain
 246 all such books, documents, papers or other records to facilitate such
 247 review in accordance with that Party's record retention policy. Access to
 248 each Party's books and records shall be during normal business hours
 249 only. Nothing in this paragraph shall be construed to operate as a waiver
 250 of any applicable privileges.

251 (2) *Outside Auditors.* Any Party may, at any time and at its sole cost, hire an
 252 auditor to examine the accounting for work performed pursuant to this
 253 Agreement. The Parties may also agree to retain an independent auditor to
 254 review the accounting for work performed pursuant to this Agreement.
 255 The costs of such an auditor will be shared equally between the Parties.

256 b. *Disputes.* The Parties recognize that there may be disputes regarding the
 257 obligations of the Parties or the interpretation of this Agreement. The Parties
 258 agree that they may attempt to resolve disputes as follows:

- 259 (1) *Statement Describing Alleged Violation or Interruption of Agreement.* A
 260 Party alleging a violation or interruption of this Agreement (the
 261 “**Initiating Party**”) shall provide a written statement describing all facts
 262 that it believes constitute a violation or interruption of this Agreement to
 263 the Party alleged to have violated or interrupted the terms of this
 264 Agreement (the “**Responding Party**”).
- 265 (2) *Response to Statement of Alleged Violation or Interruption.* The
 266 Responding Party shall have sixty days from the date of the written
 267 statement to prepare a written response to the allegation of a violation or
 268 interruption of this Agreement and serve that response on the Initiating
 269 Party or to cure the alleged violation or interruption to the reasonable
 270 satisfaction of the Initiating Party. The Initiating Party and the
 271 Responding Party shall then meet within thirty days of the date of the
 272 response to attempt to resolve the dispute amicably.
- 273 (3) *Mediation of Dispute.* If the Initiating Party and the Responding Party
 274 cannot resolve the dispute within ninety days of the date of the written
 275 response, they shall engage a mediator, experienced in water-related
 276 disputes, to attempt to resolve the dispute. Each Party shall ensure that it
 277 is represented at the mediation by a member of its Board of Directors.
 278 These representatives of the Initiating Party and the Responding Party may
 279 consult with staff and/or technical consultants during the mediation and
 280 such staff and/or technical consultants may be present during the
 281 mediation. The costs of the mediator shall be divided equally between the
 282 Initiating Party and the Responding Party.
- 283 (4) *Prior to Claims Under California Tort Claims Act.* The Parties agree that
 284 the procedure described in this paragraph 7.b represents an effort to
 285 resolve disputes without the need for a formal claim under the California
 286 Tort Claims Act or other applicable law. The period of time for the
 287 presentation of a claim by one Party against another shall be tolled for the
 288 period from the date on which the Initiating Party files a written statement
 289 until the date upon which the mediator renders a decision.
- 290 (5) *Reservation of Rights.* Nothing in this paragraph 7.b shall require a Party
 291 to comply with a decision of the mediator and, after the completion of the
 292 mediation process described above, each Party shall retain and may
 293 exercise at any time all legal and equitable rights and remedies it may
 294 have to enforce the terms of this Agreement; provided, that prior to
 295 commencing litigation, a Party shall provide at least five calendar days’
 296 written notice of its intent to sue to the other Party.

- 297 8. *General Provisions.*
- 298 a. *Authority.* Each signatory of this Agreement represents that s/he is authorized to
299 execute this Agreement on behalf of the Party for which s/he signs. Each Party
300 represents that it has legal authority to enter into this Agreement, to perform all
301 obligations under this Agreement and that any and all appropriate Board action
302 necessary for approval of this Agreement has been taken. .
- 303 b. *Amendment.* This Agreement may be amended or modified only by a written
304 instrument executed by each of the Parties to this Agreement.
- 305 c. *Jurisdiction and Venue.* This Agreement shall be governed by and construed in
306 accordance with the laws of the State of California, except for its conflicts of law
307 rules. Any suit, action, or proceeding brought under the scope of this Agreement
308 shall be brought and maintained to the extent allowed by law in the County of San
309 Bernardino, California.
- 310 d. *Headings.* The paragraph headings used in this Agreement are intended for
311 convenience only and shall not be used in interpreting this Agreement or in
312 determining any of the rights or obligations of the Parties to this Agreement.
- 313 e. *Construction and Interpretation.* This Agreement has been arrived at through
314 negotiations and each Party has had a full and fair opportunity to revise the terms
315 of this Agreement. As a result, the normal rule of construction that any
316 ambiguities are to be resolved against the drafting Party shall not apply in the
317 construction or interpretation of this Agreement.
- 318 f. *Entire Agreement.* This Agreement constitutes the entire agreement of the Parties
319 with respect to the subject matter of this Agreement and, save as expressly
320 provided in this Agreement, supersedes any prior oral or written agreement,
321 understanding, or representation relating to the subject matter of this Agreement.
- 322 g. *Partial Invalidity.* If, after the date of execution of this Agreement, any provision
323 of this Agreement is held to be illegal, invalid, or unenforceable under present or
324 future laws effective during the term of this Agreement, such provision shall be
325 fully severable. However, in lieu thereof, there shall be added a provision as
326 similar in terms to such illegal, invalid or unenforceable provision as may be
327 possible and be legal, valid and enforceable.
- 328 h. *Successors and Assigns.* This Agreement shall be binding on and inure to the
329 benefit of the successors and assigns of the respective Parties to this Agreement.
330 No Party may assign its interests in or obligations under this Agreement without

- 331 the written consent of the other Parties, which consent shall not be unreasonably
332 withheld or delayed.
- 333 i. *Waivers.* Waiver of any breach or default hereunder shall not constitute a
334 continuing waiver or a waiver of any subsequent breach either of the same or of
335 another provision of this Agreement and forbearance to enforce one or more of
336 the rights or remedies provided in this Agreement shall not be deemed to be a
337 waiver of that right or remedy.
- 338 j. *Attorneys' Fees and Costs.* The prevailing Party in any litigation or other action
339 to enforce or interpret this Agreement shall be entitled to reasonable attorneys'
340 fees, expert witnesses' fees, costs of suit, and other and necessary disbursements
341 in addition to any other relief deemed appropriate by a court of competent
342 jurisdiction.
- 343 k. *Necessary Actions.* Each Party agrees to execute and deliver additional
344 documents and instruments and to take any additional actions as may be
345 reasonably required to carry out the purposes of this Agreement.
- 346 l. *Compliance with Law.* In performing their respective obligations under this
347 Agreement, the Parties shall comply with and conform to all applicable laws,
348 rules, regulations and ordinances.
- 349 m. *Third Party Beneficiaries.* This Agreement shall not create any right or interest in
350 any non-Party or in any member of the public as a third party beneficiary.
- 351 n. *Counterparts.* This Agreement may be executed in one or more counterparts,
352 each of which shall be deemed to be an original, but all of which together shall
353 constitute but one and the same instrument.
- 354 o. *Notices.* All notices, requests, demands or other communications required or
355 permitted under this Agreement shall be in writing unless provided otherwise in
356 this Agreement and shall be deemed to have been duly given and received on: (i)
357 the date of service if served personally or served by facsimile transmission on the
358 Party to whom notice is to be given at the address(es) provided below, (ii) on the
359 first day after mailing, if mailed by Federal Express, U.S. Express Mail, or other
360 similar overnight courier service, postage prepaid, and addressed as provided
361 below, or (iii) on the third day after mailing if mailed to the Party to whom notice
362 is to be given by first class mail, registered or certified, postage prepaid,
363 addressed as follows:
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365 *Notice to San Bernardino Valley Municipal Water District*

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Douglas Headrick, General Manager
SAN BERNARDINO VALLEY MUNICIPAL WATER DISTRICT
380 East Vanderbilt Way, San Bernardino, CA 92408
Phone: (909) 820-3701
Email: douglash@sbsvmwd.com

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Email: daladjem@downeybrand.com

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377 *Notice to East Valley Water District*

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John Mura, General Manager/CEO
EAST VALLEY WATER DISTRICT
31111 Greenspot Rd., Highland, CA 92346
Phone: 909-889-9501
Email: john@eastvalley.org

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389 **SAN BERNARDINO VALLEY MUNICIPAL WATER DISTRICT**

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By:


Susan Longville
President, Board of Directors

Dated: 3-5-18

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By:


Steve Copelan, Secretary


Dated: 3-6-18

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400 APPROVED AS TO FORM


401
402 By: 
403 David R.E. Aladjem, Esq.
404 Downey Brand, LLP
405 Counsel for San Bernardino Valley Municipal Water District

Dated: 3/7/2018

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408 EAST VALLEY WATER DISTRICT

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410 By: 
411 Chris Carrillo
412 Chairman of the Board

Dated: 3/8/18

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414 By: 
415 John Mura, General Manager/CEO

Dated: 2-28-18

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418 APPROVED AS TO FORM

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420 By: _____
421 Jean Cihigoyenette
422 The JC Law Firm
423 Counsel for East Valley Water District

Dated: _____

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APPROVED AS TO FORM

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By: 

Dated: 3/7/2018

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David R.E. Aladjem, Esq.

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Downey Brand, LLP

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Counsel for San Bernardino Valley Municipal Water District

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EAST VALLEY WATER DISTRICT

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By: _____

Dated: _____

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Chris Carrillo

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Chairman of the Board

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By: 

Dated: 2-28-18

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John Mura, General Manager/CEO

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By: 

Dated: 3-7-18

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Jean Cihigoyenetché

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The JC Law Firm

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Counsel for East Valley Water District

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By: 

David R.E. Aladjem, Esq.
Downey Brand, LLP
Counsel for San Bernardino Valley Municipal Water District

Dated: 3/7/2018


EAST VALLEY WATER DISTRICT

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By: 

Chris Carrillo
Chairman of the Board

Dated: _____

By: 

John Mura, General Manager/CEO

Dated: 2-28-18

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By: _____
Jean Cihigoyenette
The JC Law Firm
Counsel for East Valley Water District

Dated: _____

