

Resolution No. 04-20

A RESOLUTION OF THE BOARD OF DIRECTORS
OF THE TEHACHAPI-CUMMINGS COUNTY WATER DISTRICT
AMENDING THE DISTRICT'S RULES AND REGULATIONS
FOR THE SALE, USE AND DISTRIBUTION OF WATER

WHEREAS, by Resolution No. 25-16, the District amended and restated its rules and regulations for the sale, use and distribution of water (**Rules and Regulations**) pursuant to California Water Code section 31024; and

WHEREAS, the Board desires to amend the Rules and Regulations to adopt a form of Supplemental Water Purchase and Banking Agreement for greenhouse customers in the Cummings Basin;

NOW, THEREFORE, BE IT RESOLVED by the Board of Directors of the TEHACHAPI-CUMMINGS COUNTY WATER DISTRICT as follows:

1. Each of the matters set forth above is true and correct and the Board so finds and determines.

2. Part Q of the Rules and Regulations is hereby amended to read as follows:

PART Q.

Section 1. Contents. Except in circumstances requiring other forms of agreement, as determined by the Board in its discretion, Water Banking Agreements for spreading and later recovery and use of SWP water shall be substantially in form and content as set forth in Appendix 3 to these rules and regulations, and Supplemental Water Purchase and Banking Agreements for both subsurface delivery of recharged SWP water and for spreading and later recovery and use of SWP water shall be substantially in form and content as set forth in Appendix 4 to these rules and regulations.

Section 2. Policy Concerning Supplemental Water and Water Banking Customers. Not all of the SWP facilities authorized and necessary for the DWR to deliver all of the KCWA's Table A entitlement under the Master Contract (and necessary for the KCWA to deliver all of the District's Table 1 entitlement under the KCWA Contracts) have been constructed. Court decisions adverse to the DWR water supply cast further uncertainty regarding the amount and dependability of the District's SWP

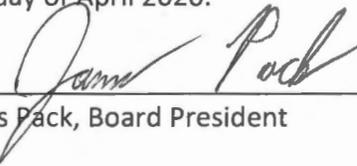
water supply. Before entering into new Water Banking Agreements, Supplemental Water Purchase and Banking Agreements, or other contracts with new customers, it is the District's policy to carefully consider whether any SWP water under the KCWA Contracts, surplus to the anticipated long term needs of the District's existing Term M&I and other contract customers, exists and will continue to exist during the entire duration of the new customer's anticipated demand. In allocating its available water supply, the District will first meet the reasonable present and future needs of its existing M&I Term customers, other existing contract customers, and existing agricultural customers. If and when such needs cannot be met, it is District's policy that new customers, as a condition of service, shall provide the District with such additional water supply as needed to meet such customer's long term water requirements.

Section 3. Substitution of Return Flows for Surface Deliveries.

Provided that sufficient District return flows are in storage and pumping of same by District customers will not adversely affect other pumpers of groundwater exercising valid rights, the District in its discretion may allow customers to pump District return flows in lieu of imported water provided that such customers and the District execute a Supplemental Water Purchase and Banking Agreement substantially in the form and content as set forth in Appendix 4 to these rules and regulations.

3. Appendix 4, as referred to in Sections 1 and 3 of Part Q as amended above, is attached hereto.

PASSED, APPROVED AND ADOPTED by the Board of Directors of TEHACHAPI-CUMMINGS COUNTY WATER DISTRICT this 15th day of April 2020.


James Pack, Board President

ATTEST:


Catherine Adams, Board Secretary

SECRETARY'S CERTIFICATION

I, Catherine Adams, Secretary of the Board of Directors of Tehachapi-Cummings County Water District do hereby certify as follows:

The forgoing is a full, true and complete copy of a resolution duly adopted at a regular meeting of the Board of Directors of the District duly and legally held at the regular meeting place thereof on April 15, 2020. All of the members of the Board of Directors received due notice of the meeting and a majority thereof was present. At the meeting the resolution was adopted by the following vote:

Ayes: Cassil, Hall, Pack, Schultz, Zanutto

Noes: None

Absent: None

Abstain: None

Attest: 
Catherine Adams, Secretary

SUPPLEMENTAL WATER PURCHASE AND BANKING AGREEMENT
[For Use With Greenhouse Customers In Cummings Basin]

THIS SUPPLEMENTAL WATER PURCHASE AND BANKING AGREEMENT (**Agreement**) is entered into as of [REDACTED], 20[REDACTED], by and between TEHACHAPI-CUMMINGS COUNTY WATER DISTRICT, a California county water district (**District**) and [REDACTED], a [REDACTED] (**Water User**), and is conditioned on and shall become effective immediately after the later of the following three events: (i) both parties have executed this Agreement, (ii) Water User has executed a Stipulation for Entry of the District's proposed Amended and Restated Judgment and Physical Solution in *Tehachapi-Cummings County Water District v. Frank Armstrong, et al.*, Kern County Superior Court Case No. 97209 (**Amended Judgment**), and (iii) the Amended Judgment is entered by a court and becomes final (**Effective Date**).

A. Recitals.

(i) The District has a State Water Project (**SWP**) water supply pursuant to water supply contracts between the District and the Kern County Water Agency (**KCWA**) both dated December 16, 1966 (**SWP Water Supply Contracts**). SWP water purchased by the District is "**Imported Water**." The District owns and operates (i) an Imported Water Delivery System by means of which SWP water is diverted from the Edmund G. Brown Aqueduct at the base of the Tehachapi Mountains and pumped to Jacobsen Reservoir (commonly referred to as Brite Lake) in the Brite Basin, California, for further delivery to lands throughout the District and (ii) recharge facilities in the Tehachapi and Cummings Basins by means of which the District artificially replenishes such basins with Imported Water.

(ii) Water User owns or rents real property in the Cummings Basin consisting of approximately [REDACTED] acres more particularly described in **Exhibit A** hereto from which it pumps groundwater for beneficial use as contemplated by Article X, Section 2 of the State of California Constitution (**Beneficial Use**) thereon (**Water User's Land**) in exercise of rights pursuant to the Amended and Restated Judgment and Physical Solution (**Amended Judgment**) entered in *Tehachapi-Cummings County Water District v. Frank Armstrong, et al.*, Kern County Superior Court Case No. 97209. Water User's Land includes approximately [REDACTED] acres more particularly described in **Exhibit B** hereto (**Water User's Greenhouse Land**), which is occupied by a greenhouse (**Greenhouse**).

(iii) Paragraph 8 of the Amended Judgment provides: "Except as to CDCR [the California Department of Corrections and Rehabilitation], which will be agreed to by contract, the District owns and may hereafter Extract all Imported Water which has entered the Cummings Basin before entry of this Amended Judgment, or which may thereafter enter into the Cummings Basin through Artificial Replenishments or as Return Flows following use of Imported Water on the surface in the Cummings Basin Area."

(iv) Pursuant to Part K of the District's Rules and Regulations, as amended, the District claims all right, title and interest in and to all return flows and direct recharge of Imported Water into any groundwater basin within the District's boundaries, whether by means of waste,

seepage or percolation before or after delivery, use or reuse, or from the District's intentional recharge of Imported Water in District spreading areas, together with the right to recapture and otherwise utilize same. All such return flows and recharge of Imported Water are hereafter called **Recharge Water**.

(v) To supplement Water User's aforementioned groundwater rights, Water User desires to purchase Recharge Water annually from the District which Water User will extract from the Cummings Basin for Beneficial Use by Water User within Water User's Greenhouse Land. Water User also desires to purchase from the District additional Recharge Water and Imported Water, which the District will recharge into the Cummings Basin, for later extraction and Beneficial Use on Water User's Land.

(vi) This is a "Supplemental Water Purchase and Banking Agreement" entered into pursuant to the District's Rules and Regulations.

(vii) Pursuant to Section 3 of Part Q of the District's Rules and Regulations, as amended, the District in its discretion may elect to allow users having a Supplemental Water Purchase and Banking Agreement with the District to pump Recharge Water in lieu of taking surface deliveries of Imported Water.

(viii) In accordance with the longstanding holdings of the California Supreme Court (*City of Los Angeles v. City of Glendale* (1943) 23 Cal. 2d 68, 76-77 and *City of Los Angeles v. City of San Fernando* (1975) 14 Cal. 3d 199, 257-261), and of other Courts, the District and the Water User have the right to recharge, store and withdraw Imported Water from the Cummings Basin.

B. Agreement.

Now, therefore, it is agreed between the parties, in consideration of the terms hereof, as follows:

1. Supplemental Water Purchases. On an annual basis for the Term of this Agreement as provided in Section 10 below, Water User agrees to purchase from the District all water required for and used on Water User's Greenhouse Land in excess of the Annual Irrigation Allocation for Water User's Greenhouse Land, as "Annual Irrigation Allocation" is defined and limited in Section 1.(a) hereof, (hereinafter referred to as the **Net Supplemental Requirement**) provided, however, District shall have no obligation to sell to Water User more than [REDACTED]¹ acre feet (**AF**) of Recharge Water in any annual period.

¹ This quantity should be no more than the District can reasonably commit to supplying annually for the term of the agreement based on existing amounts of recharge water in storage and demands of existing customers, up to the anticipated maximum amount of supplemental water that the customer would need based on the customer's current greenhouse operation.

(a). “**Annual Irrigation Allocation**” shall be the total annual Irrigation allocation for the parcels constituting Water User’s Greenhouse Land as determined by the Watermaster pursuant to Paragraph 5(b) of the Amended Judgment.

(b). Place and Purpose of Use. During the term of this Agreement, Water User shall use Recharge Water purchased pursuant to this Section 1 to meet its annual Net Supplemental Requirement within Water User’s Greenhouse Land and for no other purpose.

(c). Scheduling. On or before November 1 of each year during the term of this Agreement, Water User shall furnish to District a written estimate of its total water needs for Water User’s Greenhouse Land for the next calendar year. This estimate shall not constitute a contractual obligation to take the estimated quantity over the Annual Irrigation Allocation. On or before February 28 of each year, the District shall notify Water User of the estimated amount of Recharge Water that is available to Water User in such calendar year. By May 1 of each year, the District shall invoice Water User for the amount due for the Recharge Water for that year. The Recharge Water purchased pursuant to this Section 1 each year shall be deemed delivered to Water User upon payment in full to the District for the invoiced amount.

2. Banked Water Reserve Account. In addition to Recharge Water purchased pursuant to Section 1 above, Water User may purchase Imported Water and Recharge Water pursuant to the terms and conditions in this Section 2 to establish and maintain a Banked Water Reserve Account (**BWRA**).

(a). Initial Banked Water Purchase. Subject to Section 2(c) of this Agreement, Water User agrees to purchase from the District and the District agrees to sell to Water User up to [REDACTED] AF of Recharge Water (**Initial Banked Water Purchase**) to establish Water User’s BWRA. The District shall invoice Water User for the Initial Banked Water Purchase within 30 days of the Effective Date based on the Price specified in Section 6 of this Agreement. Upon the Water User’s payment of the invoice in full, all rights and title to and interest in the Initial Banked Water Purchase shall be deemed to have transferred from the District to Water User and shall be in Water User’s BWRA, subject to the provisions of this Agreement, including without limitation subsections (d), (f) and (g) below.

(b). Annual Banked Water Purchases. In addition to the Initial Banked Water Purchase, on an annual basis during the term of this Agreement, Water User may purchase from the District Imported Water which the District will artificially recharge into the Cummings Basin for Water User’s BWRA. Water User may spread and store water for its BWRA in its own recharge facilities in whole or in part in lieu of directing the District to spread its BWRA water in District spreading facilities.

(c). Carryover and Optional Refund for Unused Supplemental Water. Any Recharge Water purchased pursuant to Section 1 hereof that Water User does not produce in any given year shall be credited to Water User’s BWRA, except any portion of such credit that would cause the balance of Water User’s BWRA to exceed [REDACTED]² AF, in which circumstance the District will have the right, at its option, to refund to Water User the amount paid for such excess

² The maximum amount of banked water should not be allowed to exceed 16 AF per acre owned

unproduced Recharge Water and, to the extent the District exercises its refund option, the unproduced Recharge Water will remain the property of the District.

(d). Water User shall pump and draw from its BWRA whenever the District is unable to supply all of the Water User's Net Supplemental Requirement on account of drought, damage to SWP or District facilities, or any other event.

(e). Scheduling and Banking Water Priority. By November 1 of each year, Water User shall provide the District written notice of the amount desired for banking in the following year. By May 1, the District shall provide written notice to all water users having placed orders for banking water of the total amount available for purchase and the amount allocated to each purchaser together with an invoice for the water. To the extent Water User has used water in its BWRA in prior years, Water User shall have first priority among agricultural water users to banking water that is available for purchase to a quantity of such water sufficient to restore Water User's BWRA to its previous highest balance (a so-called "top off" right). "Top-off" rights from agricultural users who enter into agreements with the District in the future shall be subject to Water User's priority "top off right." Otherwise, allocations shall be based on the acreage owned by each water user and enrolled by this Agreement or other banking agreement and then based upon the priorities set forth in Section B.9. of this Agreement. If payment is not received by June 1, that water user's allocation will be offered to other water users. If payment for the second-offer water is not received by July 1, the District will retain the allocation.

(f). Maximum Quantity in BWRA and Place of Use. Water User may store up to [REDACTED]³ AF of water under this Agreement. During the Term of this Agreement, Water User may pump and draw from its BWRA for Beneficial Use on Water User's Land and for no other purpose.

(g). Upon termination of this Agreement, Water User shall own the water in its BWRA, subject to Section 8 hereof, and Water User may continue to store, or may pump, or may sell, or otherwise dispose of such water as it sees fit, provided the District shall have right of first refusal (**ROFR**) to purchase the water at historical cost, which is the amount the Water User actually paid, including recharge surcharge and spreading loss factor. Any time after termination of this Agreement, if Water User agrees to terms with a third party to sell water in its BWRA to the third party, the Water User must provide the District with 60 days advance written notice of the agreed sale prior to completion of such sale specifying the quantity of water offered for sale. If the District declines to purchase the water identified in the written notice or fails to respond prior to the expiration of the 60 days' notice, the District permanently waives its right to reacquire that quantity of water set forth in the written notice and Water User may sell or otherwise dispose of such water as it sees fit, provided such water is sold for Beneficial Use within the Cummings Basin. The Districts' ROFR under this Section B.2(g) shall remain in full force and effect for any quantities of water not set forth in Water User's written notice. The District shall exercise good faith and reasonable efforts in cooperating with the Water User on the allocation or transfer of any water under this Agreement.

3. Place of Delivery. Any Imported Water or Recharge Water supplied by the

³ Same number as in 2.(c) above.

District pursuant to this Agreement shall be delivered underground in the Cummings Basin at the depth of groundwater as it fluctuates in Water User's Well[s]. Water User shall be responsible for all costs, liability and expense of pumping Recharge Water to the surface and transporting the same for use on Water User's Land. "**Water User's Well[s]**" means that [those] certain well[s] in the Cummings Basin as listed in **Exhibit C** hereto, as such list may be modified from time to time as a result of Water User constructing or acquiring new wells and/or abandonment of then existing wells, provided, however, Water User shall obtain the District's prior written consent to change Water User's extraction wells which shall not be withheld unless the District reasonably determines that such new well or wells will substantially interfere with another well or wells in the vicinity. Water User reserves the right to challenge any well interference determination by the District by filing an action in the Kern County Superior Court. The Court's inquiry and scope of review in such action, sitting without a jury, shall be whether the District's interference determination was reasonable, which the Court shall decide *de novo*.

4. Metering. The Water User shall install a meter of manufacture and model approved by the District at Water User's Well[s] and at Water User's expense. The meter shall be maintained in good working order and regularly calibrated so as to comply with the standards of the American Water Works Association per their manuals M6, M33 and M36. Water User shall provide the District with proof satisfactory to the District that Water User has obtained the right to exclusively operate Water User's Well[s] for the purposes set forth herein and that the owner of Water User's Well[s] and surrounding lands has conveyed to the District in writing the right to enter such lands to take meter readings at Water User's Well[s].

5. The annual period under this Agreement shall be the calendar year, and if the first annual period be less than a full calendar year, "Annual Irrigation Allocation" for that short annual period shall be in such proportion as the number of days under this Agreement in that calendar year bears to 365.

6. Price. Water User shall pay the District for all water purchased under this Agreement at the Agricultural Water rate for the Water User's pressure zone, plus a spreading loss factor, plus the recharge surcharge for the Cummings Basin, as such rates, surcharges and zones are established and modified from time to time by the District's Board of Directors.

7. Spreading Loss Factor. For all water spread, whether in the District's or the Water User's spreading facilities, a spreading loss factor as determined and adjusted by the District from time to time (currently 6%) will be imposed pursuant to Section 1 of Part B of the District's Rules and Regulations for losses on account of evaporation, phreatophyte consumption and any other losses incurred in the transportation and spreading of such water.

8. Disclaimer and Ownership of Return Flows. Any and all return flows of water sold hereunder following beneficial use by Water User shall be the property of the District, and Water User hereby disclaims and renounces any claim thereto.

9. Water Priority, Availability, Order of Use, and Reduction or Termination of Substitute Deliveries.

(a). Water User shall not acquire any priority right to Recharge Water or Imported Water by reason of this Agreement.

(b). With the exception of the Initial Banked Water Purchase, the District's obligation to supply water hereunder is conditioned upon the availability of either (i) sufficient Imported Water under the SWP Water Supply Contracts to enable the District to meet all of its customers' Imported Water demands and Water User's demand, or (ii) stored Recharge Water in the District's reserves in the Cummings Basin in a quantity equal to five times the average annual M&I demand for Imported Water in the Cummings Basin over the immediately preceding five years. In the event the District in any year has insufficient water available to meet the full needs of Water User pursuant to the terms of this Agreement and its other customers, the District's available Imported Water and Recharge Water in that year shall be allocated in accordance with the District's Rules and Regulations or other policies adopted by the District from time to time, provided that such policies recognize: (i) that Water User's Net Supplemental Requirement shall be met before water is made available for purchases by other water uses for banking in the same year, (ii) the principles and priorities regarding District water sales for agricultural water use for food crops grown in greenhouses (also referred to as hothouses in District ordinances) relative to other agricultural water uses, including field crops, specified by the District in its Ordinance 2019-1, and (iii) any priorities mandated by statute or recognized under the SWP Water Supply Contracts or KCWA's contract with the State of California referenced therein; provided also that the Water User shall draw upon Water User's BWRA to make up any such shortages.

(c). During the term of this Agreement, Water User shall be deemed to use water that Water User produces from the Cummings Basin for use on Water User's Greenhouse Lands in the following order: (i) first, Water User's Annual Irrigation Allocation, (ii) second, Recharge Water purchased pursuant to Section 1 of this Agreement, and (iii) third, Recharge Water in Water User's BWRA.

(d). If the District is unable to meet Water User's Net Supplemental Requirement in any given year, to the extent there is capacity within the District's delivery system, the District shall permit Water User to wheel water through the District's facilities on terms and at prices to be negotiated between the District and Water User. Water User shall not produce water from the Cummings Basin except the Annual Irrigation Allocation, water purchased from the District pursuant to this Agreement, water stored in Water User's BWRA, or purchases of third-party water pursuant to all necessary District approvals.

(e). In the event a third party demonstrates that new or increased pumping by Water User of Recharge Water or water drawn from Water User's BWRA account is causing significant impacts on the third party's existing well or wells, the Water User shall confer with such third party and mitigate such impacts to a level acceptable to such third party, failing which the District in its sole discretion may determine the rate of pumping and quantities of Recharge Water or BWRA water which Water User may extract; provided, however, the District shall provide Water User with fifteen (15) days prior written notice of any reduction or termination of allowed pumping of water hereunder and Water User reserves the right to challenge any such determination by the District by filing an action in the Kern County Superior Court. The Court's inquiry and scope of review in such action, sitting without a jury, shall be whether the District's

determination was reasonable, which the Court shall decide *de novo*.

10. Term. This Agreement shall have a term ending December 31, 20__ (**Initial Term**)⁴; provided that the Initial Term shall be extended automatically by consecutive one-year terms (each, an **Extension Term**), unless, at least 90 days prior to the expiration of the Initial Term or any Extension Term either party provides written notice to the other Party that it will not consent to extension of this Agreement, in which case the Agreement shall terminate upon the expiration of the Initial Term or the Extension Term, as applicable, and, provided further, that this Agreement shall terminate upon the earlier of (i) the termination of the SWP Water Supply Contracts (December 31, 2039) unless and to the extent the terms of such Contracts are extended, or (ii) December 31, 2045.

11. This Agreement is subject to all the provisions of the District's Rules and Regulations, including all future amendments thereof, except to the extent inconsistent with a material term of this Agreement.

12. Successors and Assigns. Upon written notice to the District, Water User may assign this Agreement to any successors or assigns of all of Water User's Land or in connection with any security or financing arrangement of Water User or its affiliates that pertains to Water User's Land. Water User may not assign this Agreement to any successor or assign of less than all of Water User's Land unless Water User obtains the District's prior written consent to such assignment, which consent shall not be unreasonably withheld.

13. Breach. If the Water User or the District should at any time substantially breach the terms of this Agreement (**Breaching Party**), the **Non-Breaching Party** shall provide the Breaching Party written notice of such breach and request that the breach be cured. If the Breaching Party does not cure any failure to pay amounts owed under this Agreement within 10 days, or cure any other breach within 30 days of written notice (**Cure Period**), the Non-Breaching Party may elect to terminate this Agreement; provided, however, that where the alleged breach is not capable of being cured within 30 days of the written notice, the Cure Period will be extended to 60 days. If the Water User should at any time substantially fail to comply with this Agreement and fail to cure the breach within the timeframes provided in this Section 13, and District on account thereof terminates this Agreement, or should Water User elect to terminate the Agreement for any reason, Water User shall be obligated to pay to District within 30 days after the termination date any amounts then owed to the District under this Agreement. Nothing herein contained is intended to foreclose the District from seeking such damages as it may sustain from any breach, substantial or not, of this Agreement by the Water User whether or not such breach leads to the District's termination of this Agreement. Additionally, nothing contained herein is intended to foreclose the District or the Water User from seeking injunctive, specific performance or other equitable relief for a breach of this Agreement, or from asserting the claim or defense that the Non-Breaching Party has an adequate remedy at law.

WHEREFORE, the parties have executed this Agreement as of the dates opposite their respective signatures.

⁴ No more than 10 years for Initial Term.

Dated: _____

TEHACHAPI-CUMMINGS COUNTY
WATER DISTRICT

By _____
President

By _____
Secretary
("District")

Dated: _____

By _____
[Name] _____
[Title] _____

("Water User")