

REPORT TO CITY COUNCIL

Approved by:



Keith Helmuth, City Engineer



Arnaldo Rodriguez, City Manager

Council Meeting of: August 5, 2020

Agenda Number: D-2

SUBJECT:

Project Cooperation Agreement (Agreement) between the City of Madera (City) and Madera Irrigation District (MID) – Airport Basin

RECOMMENDATION:

Adopt a Resolution approving Agreement Between the City and MID – Airport Basin

SUMMARY:

Madera Irrigation District (MID) has requested that a new agreement for the Airport Basin utilized by the City of Madera (City) be prepared and executed that replaces the existing Conjunctive Use Cooperation Agreement (Conjunctive Agreement) Between the City and MID dated June 21, 2000 and its Supplemental Agreement dated February 5, 2003.

DISCUSSION:

The City and MID entered into a Conjunctive Agreement in 2000 that was later the subject of a supplemental agreement. The purpose of these agreements included but was not limited to:

- Provide a more efficient and effective way of completing future projects
- Enhance the use of local surface and groundwater supplies
- The “then” water system master plan recommended the City have a dialogue with MID with the goal of developing a comprehensive groundwater management plan.

The Conjunctive Agreement has generally met its intent during the time it was active. However, a number of concerns have been identified by MID during the time the agreement has been in effect. It is those concerns that have necessitated a need for a new Agreement.

Those concerns include:

- Need for Better Clarity on Excavation of Dirt – The City’s historical interpretation of the Cooperation Agreement was that the City had the discretion with regard to how dirt would be removed. MID has requested new language that still allows for excavation of dirt. But, unless the need is for City capital projects, the dirt shall be stockpiled for later use by MID. This change will result in either an increased cost to developers or an expense to the storm drainage account as City operating procedure has been to ask developers to remove the amount of dirt necessary to offset the amount of runoff from their site. Thus, making room for additional stormwater storage requirements. This dirt, in many cases, was used by developers to add fill dirt to their construction site. This is not considered a significant impact.
- The Agreement should be based on current contract language that has been used on a number of other agreements between the City and MID or MID and the County of Madera

While there were specific reasons that necessitated the need for the new Agreement, the Agreement does also contain a number of other changes that vary in their impact; most being of minor importance.

The following changes; however, while substantially similar in intent provide a reduced timeframe in which the City might need to vacate the basin should a termination notice be received:

A. TERM OF THE AGREEMENT – COMPARISON TO CONJUNCTIVE AGREEMENT

- **25 years** – Same; current agreement would terminate in eight years on February 5, 2028. New agreement will terminate on August 5, 2045.
- Either party may terminate with two (2) years written notice –
 - **May not be terminated prior to five (5) years after the City has funded and constructed improvements to facilitate delivery** – This provision has likely expired depending on interpretation of which improvements. Initial or every successive addition. Even under a loose interpretation, the provision has expired. MID views it as expired.
 - **Termination shall not occur until City has, using good faith efforts, secured and developed a replacement basin.** MID does not support language such as this as the original language considered too vague and open ended.
- Immediate termination if performance would result in non-compliance with, or a violation of, applicable law or regulation – **Same – Unclear as to provisions with regard to City’s need to develop new basin. MID has indicated that there is a very good argument that City has not “faithfully performed its obligations”.**
- No additional provisions that allow City time to construct a new basin - **Conjunctive Agreement provides time to develop a replacement basin and conveyance system.**

It is important to note, MID staff has been clear that MID has no interest in terminating the agreement and that they value the relationship they have with the City. For the most part the Agreement adheres to the same understanding that the City would have had when the Conjunctive Agreement was first executed. The potential existed then as now that a termination notice could be received by the City. It is the time frame, depending on the reader's interpretation, that has been compressed in which the City would need to redirect flood water; being reduced from five years to two. Should a notice ever be received, staff is currently of the opinion that the City could not vacate in two years. The ability to vacate is predicated on:

- The City's ability to fund the purchase of a new basin and construct new conveyance pipe that would redirect storm runoff to a new basin.
- The ability to purchase nearby land that minimizes the expense of relocating to a new basin

Staff's recommendation is to consider the information provided in this staff report and either approve agreement or provide staff direction.

FISCAL IMPACT:

There is no adverse fiscal impact to the City's General Fund or other Funds by virtue of entering into agreement.

Should the agreement be terminated for any reason, the potential cost to the Storm Drainage Impact Fee (DIF) fund, and the General Fund would vary. At present, termination of the agreement would result in the need to utilize primarily DIF storm drainage funds. If a termination occurred in further into the future after development has occurred on parcels that would rely on this basin, the following might be expected:

- Cost of a replacement basin will have increased.
- Land for use as a basin may be more difficult to acquire as logical choices may be reduced due to ongoing development.
- If DIF fees have not been collected specifically for a replacement basin through inclusion in the DIF program, a portion of the cost may need to be assigned to existing users. If this occurs, the City would need grants, General Fund or some other source of funding in addition to DIF funds.

CONSISTENCY WITH THE VISION MADERA 2025 PLAN:

Approval of this agreement supports:

- *Strategy 101.6* - Ensure infrastructure can sustain population growth in the development of the General Plan.

ALTERNATIVES:

1. Not approve agreement – This would likely result in a notice to vacate being served on the City in accordance with the existing Conjunctive Agreement thus requiring the City to

vacate within five years unless another provision of the Conjunctive Agreement is served upon the City based on non-compliance in which the agreement is immediately terminated. If the agreement is immediately terminated, the Conjunctive Agreement indicates the termination does not occur until the City has secured and developed a replacement basin.

2. Direct staff to pursue further negotiations regarding the timeframes in the Agreement.

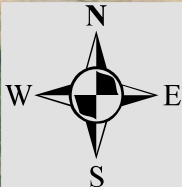
ATTACHMENTS:

1. Location Map
2. Resolution
 - a. Project Cooperation Agreement

ATTACHMENT 1

Location Map

EXHIBIT A



ATTACHMENT 2

Resolution

RESOLUTION NO. 20-_____

**A RESOLUTION OF THE COUNCIL OF THE CITY OF MADERA,
CALIFORNIA, APPROVING PROJECT COOPERATION AGREEMENT
BETWEEN THE CITY OF MADERA AND MADERA IRRIGATION
DISTRICT – AIRPORT BASIN**

WHEREAS, the City of Madera (City) and Madera Irrigation District (MID) have determined that a new Project Cooperation Agreement (Agreement) between the City of Madera (City) and Madera Irrigation District (MID) – Airport Basin is required to address areas in which the existing Conjunctive Use Cooperation Agreement (Conjunctive Agreement) Between the City and MID and its Supplemental Agreement do not clearly define the expectations of both parties to the agreement; and

WHEREAS, the City and MID acknowledge the existing Conjunctive Agreement does adhere to current contractual requirements set forth in contemporary agreements wherein the Bureau of Reclamation holds title to land associated with an agreement; and

WHEREAS, the City and MID agree that the Agreement provides benefits to both parties that may eventually result in expanded cooperation and future projects at the basin associated with this agreement.

NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF MADERA HEREBY finds, orders, and resolves as follows:

1. The above recitals are true and correct.
2. The Project Cooperation Agreement Between the City of Madera and Madera Irrigation District – Airport Basin, a copy of which is attached hereto as Exhibit 1 and referred to for particulars, is approved.
3. The Mayor is authorized to execute the Amendment as approved.
4. This resolution is effective immediately upon adoption.

* * * * *

**PROJECT COOPERATION AGREEMENT
BETWEEN THE CITY OF MADERA AND THE MADERA IRRIGATION
DISTRICT
AIRPORT BASIN**

This Project Cooperation Agreement (the “*Agreement*”) is dated as of ____, 2020, (the “*Effective Date*”) by and between the Madera Irrigation District (the “*District*”) and the City of Madera (the “*City*”). The District and the City are collectively referred to herein as the “*Parties*.”

RECITALS

WHEREAS, the United States Bureau of Reclamation (USBR) owns Parcel 013-050-001 on which the Parties operate and maintain separate basins (each basin referred to as either “*City Use Area*” or “*District Use Area*”) all of which are capable of recharging water (collectively, the “*District Facilities*”); and

WHEREAS, the Parties entered in a Conjunctive Use Cooperation Agreement on June 21, 2000 (the “*Conjunctive Use Agreement*”), to develop a groundwater recharge program to address the water supply needs of both parties now and in the future as well as current and future storm drainage needs of the City; and

WHEREAS, the Parties entered into Supplemental Agreement No. 1 on February 5, 2003 (the “*Supplemental Agreement*”) to allow City use of 12.2 acres of land located in the City of Madera at the northwest corner of Condor Drive and Avenue 16 as a stormwater retention/recharge basin; and

WHEREAS, the USBR issued a License for the Erection, Maintenance and Operation of Structures agreement dated April 25, 2003 to the City of Madera with a term of twenty-five (25) years.

WHEREAS, the Parties desire to terminate the Conjunctive Use Agreement and the Supplemental Agreement and enter into a new agreement that incorporates contemporary obligations and objectives; and

WHEREAS, under appropriate circumstances, the Parties believe that, through greater cooperation between the Parties, District Facilities may be used more efficiently, and may provide increased benefits for both the District and City, including the promotion and enhancement of groundwater recharge in the Madera Subbasin; and

WHEREAS, as part of the City’s update to the Storm Drainage System Master Plan approved on November 19, 2014, the City currently directs storm water runoff to a 12.2 acre portion of land within the District Facilities; and

AGREEMENT

1. **Term.** The term of this Agreement will commence upon the Effective Date, and will terminate on April 25, 2028 (the “*Termination Date*”) unless terminated earlier under Paragraph 8 of this Agreement. This Agreement can be extended by written documentation, prior to the Termination Date, at each Party’s sole and absolute discretion, for up to an additional twenty-five (25) years beyond the Termination Date if a new license is obtained by the City from the USBR with an expiration date beyond April 25, 2028. Upon termination of the Agreement, all facilities installed under the Agreement shall revert to the District.

2. **Operation of City Use Area.** The City shall be solely and exclusively be responsible for the operation and maintenance of the City Use Area delineated on attached Exhibit A including pipe, outfall structure or other appurtenant improvements associated with the operation of the basin located on the City Use Area, including but not limited to the costs of labor, equipment rental, and permitting subject to the terms and conditions provided herein. The City Use Area is delineated on the Airport Basin Site Map which is attached as Exhibit “A” and incorporated by reference. This Agreement supersedes the Conjunctive Use Agreement and the Supplemental Agreement which are deemed terminated upon the effective date of this Agreement.

A. Operations:

- a. The City shall operate the City Use Area, connecting pipe and other infrastructure in a manner consistent with all applicable local, state and federal laws and regulations.
- b. Each party shall comply with all applicable laws, rules and regulations now existing or that may be enacted or become applicable concerning the performance of this Agreement and the movement, storage, discharge or recharge of waters as contemplated herein. If any party has information or knowledge tending to indicate that the waters to be managed are dangerous or exceed applicable maximum contaminant levels, or that any acts contemplated herein are or would result in, a violation of applicable law, rule or regulation, that party shall promptly notify the other party of such information.
- c. The City will exercise due diligence in operating its storm drain collection system, including prohibiting the discharge of hazardous or other unacceptable material into the storm drain system. Accidental or unlawful hazardous or unacceptable discharges into the City’s system may not be preventable at all times. In any event, such discharges will be confined to the City Use Areas. No discharges into the District’s system will be made by the City without the District approval.

- d. The City shall only discharge stormwater into City Use Area. The City Use Area is identified in Exhibit A attached hereto. In the event of an emergency, with District approval, City may discharge excess quantities of stormwater to adjacent District Facilities, but not to exceed amounts or criteria determined by District.
- e. With City approval, District may discharge water into City Use Area for emergency purposes or to conduct groundwater recharge. Discharges into the City's Use Area shall not exceed amounts or criteria determined by City, subject to Paragraph 3 below. The District will exercise due diligence in its conveyance of water into the City Use Area including prohibiting the discharge of hazardous or other unacceptable material into the City Use Area.

B. Access:

- a. Access to the City Use Area shall be restricted to City employees, equipment and contractors (including engineering consultants) authorized by City. USBR and District personnel shall have access at all times to the City Use Area.
- b. Access to District Use Area by the City or its authorized contractor(s) shall be by District written permission only.
- c. All access gates and the basin interconnecting valve shall be interlocked with City and District locks to allow either agency to operate them, except that the interconnecting, valved pipeline shall only be operated by specifically authorized personnel of the City and the District. The interconnecting, valved pipeline shall only be operated with the full knowledge and consent of the Parties. Each Party shall install, maintain and operate appropriate and effective safety and security features to prevent unauthorized parties from entering their respective use areas or interfering with the activities contemplated by Agreement.

C. Costs: City shall be responsible for all costs of maintaining City Use Area including, but not limited to:

- a. Keep its use area reasonably free of trash and debris, including weed control and abatement.
- b. Maintain side slopes of cut faces and berms by repairing any significant erosion which may threaten the structural integrity of the slope within City Use Area.
- c. Maintain fences and gates for that portion of the site as agreed to between the agencies. Maintain all City-owned facilities located within either City or District use areas. Maintenance of the

valved pipeline connection between the District's and City's use areas shall be on a 50%-50% shared basis.

- d. Provide rodent control within the City Use Area to prevent burrowing animals from causing leakage through berms or erosion problems.
- e. Provide maintenance measures to the City Use Area as may be required by any applicable National Pollution Discharge Elimination System (NPDES) permit(s).
- f. When permission is granted by District for use of its area by City, repair any damage to the District Area caused by the City or its contractors or the agents or employees of either of them. District shall likewise repair any damage to City Use Area when granted use by City.

D. The City shall notify the District in writing prior to making any alterations, additions, or improvements to the City Use Area, including the excavation of soil.

E. Excavation of soil for any use other than those explicitly necessary for City owned infrastructure projects shall be stockpiled for District use.

3. *Acceptance of Surface Water by the City.* In the event the District has excess surface water supplies that are capable of being diverted to recharge in the City Use Area, the District will make these supplies available at its sole discretion and at no cost to the City. The City shall accept the delivery of such water contingent upon City's determination that such water can be accepted without creating basin capacity concerns and convey such water through the District or City pipe into the City Use Area, in an amount equal to or less than the capacity of the City Use Area.

4. *Allocation of Groundwater Benefit.* The District shall retain 100% of the groundwater recharge benefit for any water delivered to the City Use Area unless City purchases water from District in which case City shall retain 100% of the benefit for such delivery. Any groundwater recharge benefit will be determined based on volumetric meter readings subject to installation of such meter. The volume will be measured in acre feet, to the nearest tenth of an acre foot, using a meter owned by the District. The District will submit annual readings and volumetric calculations to the City or when requested by the City, but only when the City purchases water for delivery.

5. *Insurance.* The Parties shall each include the other Party as an additional insured on their respective liability insurance coverage, which coverage shall be in a liability amount of at least One Million Dollars (\$1,000,000.00) combined single limit, or the amount generally carried by the Parties, whichever shall be higher. The Parties shall be named by the other Party as an additional insured by endorsement of the liability policies required by this Paragraph and such endorsement shall name the entity, its officers, officials, employees, and agents. The endorsement shall require the insurer to provide the additional insured with not less than thirty (30) days prior written

notice before any cancellation of the coverage required by this Paragraph. The payment of any such deductible or self-insured retention of liability amounts shall be the sole responsibility of the insured Party. The Parties shall provide the other Party with a certificate of insurance reflecting the insurance coverage required by this Paragraph as soon as practicable after the Effective Date. Such certificates shall also be provided upon renewal of said policies and changes in carriers. If the District utilizes the services of outside design professionals, contractors or any other service providers in the course of designing or constructing the Pipe, the District will obtain appropriate general liability and automobile liability coverage naming both the District and City as additional insured as well as proof of professional liability and workers' compensation coverage with waiver of subrogation in favor of the District and City.

6. *Indemnification.*

A. The City shall at all times indemnify and save harmless the District against and pay in full all losses, damages, or expenses the District may sustain, incur or become liable for, resulting in any manner from the City's maintenance and operation of the City Use Area, including, but not limited to, any such losses, damages or expenses arising out of (a) loss of or damage to property, (b) injury to or death of persons, (c) mechanics' or other liens of any character, (d) taxes or assessments of any kind, and (e) failure to comply with any legal requirements. It is the intention of the Parties that the District's right to indemnity hereunder shall be valid and enforceable against the City regardless of negligence (whether active or passive) on the part of the District, and its officers, agents and employees, unless such injury is a result of the sole negligence of the District.

B. The District shall at all times indemnify and save harmless the City against and pay in full all losses, damages, or expenses the City may sustain, incur or become liable for, resulting in any manner from the District's work under Paragraph 2 herein and also due to the District's maintenance and operation of the District Facilities, including, but not limited to, any such losses, damages or expenses arising out of (a) loss of or damage to property, (b) injury to or death of persons, (c) mechanics' or other liens of any character, (d) taxes or assessments of any kind, and (e) failure to comply with any legal requirements. It is the intention of the Parties that the City's right to indemnity hereunder shall be valid and enforceable against the District regardless of negligence (whether active or passive) on the part of the City, and its officers, agents and employees, unless such injury is a result of the sole negligence of the City.

7. *Defense.*

A. Upon written Notice from the District, the City agrees to assume the defense of any lawsuit, administrative action or other proceeding brought against the District by any public body, individual, partnership, corporation, or other legal entity, relating to any matter related to the City's operation of the City Use Area. The City shall pay all the costs incident to such defense, including, but not limited to, attorneys'

fees, investigators' fees, litigation expenses, settlement payments, and amounts paid in satisfaction of judgments. Any and all lawsuits or administrative actions brought or threatened on any theory of relief available at law, in equity or under the rules of any administrative agency shall be covered by this section, including, but not limited to, the theories of intentional misconduct, negligence, breach of statute or ordinance, or upon any theory created by statute or ordinance, state or federal.

B. Upon written Notice from the City, the District agrees to assume the defense of any lawsuit, administrative action or other proceeding brought against the City by any public body, individual, partnership, corporation, or other legal entity, relating to any matter related to the District's operation of the District Facilities or resulting from the District's work under Paragraph 2 herein. The District shall pay all the costs incident to such defense, including, but not limited to, attorneys' fees, investigators' fees, litigation expenses, settlement payments, and amounts paid in satisfaction of judgments. Any and all lawsuits or administrative actions brought or threatened on any theory of relief available at law, in equity or under the rules of any administrative agency shall be covered by this section, including, but not limited to, the theories of intentional misconduct, negligence, breach of statute or ordinance, or upon any theory created by statute or ordinance, state or federal.

8. **Termination.** This Agreement may be terminated at any time prior to its expiration by providing written Notice to the other Party pursuant to Paragraph 12 below ("*Termination Notice*"). The Agreement will automatically terminate, without further action of either Party, two (2) years from the day following the date upon which such Termination Notice is deemed effective under Paragraph 12 below. If there is a determination that further performance would result in non-compliance with, or a violation of, applicable law or regulation, the Agreement will automatically terminate, without further action of either Party, on the thirtieth (30th) day following the date upon which such Notice is deemed effective under Paragraph 12 below. All groundwater recharged under Paragraph 4 up to and including the date of termination will be recorded and allocated pursuant to Paragraph 4 above. The groundwater recharge benefit for any water recorded and allocated under this Agreement shall continue past the date of termination.
9. **Entire Agreement.** This Agreement contains the entire agreement between the Parties relating to the rights herein granted and the obligations hereunder assumed. Any oral representations or modifications concerning this Agreement shall be of no force and effect. This Agreement may be modified or amended only in writing, signed by both parties. The terms of this Agreement are contractual and are the result of negotiation among the Parties. Each Party hereto has cooperated in the drafting and preparation of this Agreement.
10. **Amendments.** This Agreement cannot be amended, modified, or supplemented in any respect except by written agreement entered into by the Parties hereto.

- 11. Severability.** In the event any term or provision of this Agreement shall be held to be unenforceable for any reason whatsoever by any court of competent jurisdiction, such holding shall not invalidate or render unenforceable any other term or provision hereof.
- 12. Notice.** Whether expressly so stated or not, all notices, demands, requests and other communications required or permitted by or provided for in this Agreement (“*Notice*”) shall be given in writing to the Parties at their respective addresses set forth below, or at such other address as a Party shall designate for itself in writing in accordance with this Paragraph:

TO THE DISTRICT:

Madera Irrigation District
12152 Road 28^{1/4}
Madera, CA 93637
Attn: General Manager

TO THE CITY:

City of Madera
205 W. 4th Street
Madera, CA 93637
Attn: City Engineer

Notice under this Paragraph may be transmitted (i) by personal delivery, (ii) by delivery by messenger, express or air courier or similar courier, and (iii) by delivery by United States first class certified or registered mail, postage prepaid. Except as otherwise provided in this Agreement, delivery or service of any Notice shall be deemed effective only upon receipt, and receipt shall be deemed to have occurred when the Notice was delivered to the specified address without regard to whether or not a representative of the addressee was present to receive the Notice; provided, any Notice delivered after 5:00 P.M. local time of place of receipt, or on a day other than a Business Day, shall be deemed received on the next succeeding Business Day.

- 13. Liens.** A Party shall not permit to be placed against any property or facility of the other Party, or any part thereof, any design professionals’, mechanics’, materialmen’s, contractors’ or subcontractors’ liens. The Parties each agree to hold the other Party harmless for any loss or expense, including reasonable attorneys’ fees and costs, arising from any such liens which might be filed against the property or facility that is not owned or operated by that Party.
- 14. Execution of Additional Documents.** In addition to, and without replacing any other terms or provisions of this Agreement, each party further assures and represents to each other party that it will execute such other documents and take such other actions as may be reasonably necessary to further the purpose of this Agreement.
- 15. No Third-Party Beneficiary Intended.** This Agreement is made solely for the benefit of the Parties to this Agreement and their respective permitted successors and assigns,

and no other person or entity shall have or acquire any right by virtue of this Agreement.

16. No Assignment. Neither Party may assign this Agreement, or any of their respective rights or obligations hereunder, to any other person.

17. Interpretation. Headings in this Agreement are used for convenience only and shall have no force or effect regarding its interpretation or construction. The Parties have each participated in the drafting of this Agreement, and none of the Parties hereto shall be deemed to be the author of this Agreement, and any rule of construction of contracts (including, without limitation, California Civil Code Section 1654) that ambiguities are to be construed against the drafting party, shall not be employed in the interpretation of this Agreement.

18. Warranty of Authority. Each Party represents and warrants to the other that it has the right, power, and legal capacity and authority to enter into and execute this Agreement, and that the person or persons executing this Agreement on its behalf are authorized to do so and that no approval or consent of any person or entity other than those persons executing this Agreement on its behalf are necessary in connection with each Parties' obligations hereunder.

19. Exhibits. Each of the exhibits attached hereto is expressly made a part hereof by reference as though fully set forth in this Agreement.

20. Counterparts. This Agreement may be executed in one or more counterparts, each of which shall be deemed an original, and will become effective and binding upon the Parties at such time as all of the Parties have signed a counterpart of this Agreement. All counterparts so executed shall constitute an Agreement binding on all of the Parties notwithstanding that all of the Parties are not signatories to the same counterpart. Each of the Parties agree that a fully executed copy of this Agreement may be enforced as though it were an original.

21. Recitals. The "Recitals" stated above are hereby incorporated into this Settlement Agreement.

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IN WITNESS WHEREOF, the foregoing Agreement is executed on the date and year first above-written.

ATTEST:

Alicia Gonzalez, City Clerk

Approved as to Form:

By: _____
Hilda Cantu Montoy
City Attorney

ACCOUNT NUMBERS(S)

CITY OF MADERA:

By: _____
Andrew J. Medellin, Mayor

MADERA IRRIGATION DISTRICT:

By: _____

Title: _____