

For example purposes only. Actual agreement may differ. Highlighted portions needed only if federal income tax deductions sought.

WATER FORBEARANCE AGREEMENT¹²

This Water Forbearance Agreement (“Agreement”) is entered into this ___ day of _____, 202_, (“Effective Date”) between _____ (“Participant”), a [entity’s legal description], and _____ (“Organization”) [entity’s legal description] (collectively, the “Parties”).

RECITALS

A. Participant is the owner of certain property in _____ County, which is described in Exhibit A (“Property”).

B. Participant is the owner of a certain water right [description of source, point of diversion, place of use, purpose of use, amount, Statement/License/Application #s] (“Water Right”). Documentation of the Water Right is provided in Exhibit B.

C. [Organization Description].

D. For the purposes of improving streamflows in [describe river reach to be enhanced], Participant agrees to [general description of water conservation measures undertaken, which water rights implicated, whether water will be formally transferred to fisheries enhancement use] according to the terms of this Agreement.

E. [[One party] has obtained an appraisal for the value of the water to be forgone pursuant to this Agreement (exhibit).³

F. Participant’s involvement in the water forbearance is voluntary, and is not in response to any existing regulatory requirements.⁴

G. Participant’s permanent forbearance of diversion of water represents a dedication in perpetuity of a fractional interest in the Water Rights, a real property right (see Treas. Reg. § 1.170A-7(b)(1)(i))]⁵

THEREFORE, the parties agree as follows:

¹ If water to be formally transferred under § 1707, change agreement title to “Agreement for Fish and Wildlife Enhancement Use” and remove references to Forbearance because water will be beneficially used under agreement.

² In some cases, calling this a “Water Use Coordination Agreement” or “Water Conservation Agreement” may be more palatable: agricultural users are incentivized to consider streamflow needs in their farm/ranch management.

³ If permanent and seeking federal income tax deduction.

⁴ *Id.*

⁵ *Id.*

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AGREEMENT

1. Term. This Agreement will be in effect from the Effective Date through _____.

2. Forbearance.

2.1 Forbearance Period. [If not operated annually, description of trigger to forbear (“Trigger”) (e.g., flow rate at certain gage, groundwater levels at a certain well, date range, other) and description of “Forbearance Period”]

[2.2 Forgone Water Alternative 1. “Forgone Water” means water available but not diverted [pumped] at the Water Right headgate [well] during the Forbearance Period. The amount of Forgone Water is the difference between the lesser of (1) the [decreed/licensed/historically used]⁶ amount of the Water Right or (2) the amount of water physically and legally available to the Water Right, and the actual amount of water diverted [pumped] pursuant to the Water Right. Forgone Water does not include water not diverted [pumped] because of the inability to exercise the Water Right, including but not limited to water infrastructure maintenance or failures, regulatory curtailments, or power loss.⁷]

[2.2 Forgone Water Alternative 2. “Forgone Water” means the reduced consumptive use attributable to reduced water application to XX acres.]

2.3 Verification of Forgone Water. [Description of quantification and verification process]⁸

3. [Compensation⁹

3.1 Price. Organization shall pay Participant \$ ___ per acre-foot of Forgone Water.

3.2 [Incentive Payments.]¹⁰

⁶ Depending on the context, this quantification may need to be formalized to conform to a physical solution, voluntary agreement, or a GSA program. Or, if not part of a regulatory program, the quantification may be quite informal.

⁷ In a regulatory context, the immediate reason behind the reduced use may be inconsequential; however, if the participant is being compensated, the organization should not pay for unintentional reduced use.

⁸ *Id.*

⁹ Add if compensation is required.

¹⁰ Circumstances may warrant incentive payments (e.g., when the organization is working with multiple participants to meet a specific streamflow target, incentives could be used to add enrollees or increase reductions at critical times).

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3.3 Payment Schedule. [Description of payment schedule and other payment details.]]

4. Limitations. [Description of any payment limitations (e.g., maximum payment per year, when streamflow conditions too high to warrant forbearance/compensation, minimum number of days of forbearance, availability of funding)]

5. Water Right Protections.¹¹

6. Implementation, Access and Monitoring.

6.1. Implementation.¹² Participant retains all rights to diversion works operation and discretion as to its water use. [This Agreement conveys no right to the Organization to operate Participant's diversion works [pumps] or to determine the timing or extent of the Participant's water use.]¹³

6.2 Access and Monitoring. Participant shall provide Organization [GSA/watermaster/third party regulators – if necessary] and its monitoring contractors reasonable access to [diversion points and places of current and former use] for the limited purpose of monitoring compliance with this Agreement, including such access reasonably necessary for water monitoring and measurement activities. Any monitoring or measurement data results shall be made available to the Participant, upon request.¹⁴

7. [Retained Use of Water Right. This forbearance of the Water Right represents the dedication of a fractional interest in Participants real property right to use water. Participant maintains the use of any portion of the Water Rights it retains outside of the Forbearance Period, as well as any fractional interest of the

¹¹ This section addresses protecting the underlying water right from diminishment due to voluntary conservation. In drafting the term, the drafter must take into account the type of water right (e.g., appropriative, riparian) and the existing or foreseeable regulatory context (e.g., a groundwater allocation program under SGMA or a coming or existing adjudication). Depending on the circumstances, the term may address abandonment, forfeiture, self-help, dormant uses, and conservation statutes such as Water Code § 1011.

¹² The drafter must consider whether the Agreement requires conservation or only incentivizes conservation. What remedies does the organization have to enforce conservation if conservation is required?

¹³ If the regulatory context requires submission of forms or other monitoring, those actions should be detailed here with assigned responsibilities.

¹⁴ If the participant owns land near the stream to be monitored, consider whether this agreement should incorporate an agreement to place a gage on the participant's property.

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Water Right in excess of the fractional interest Participant hereby agrees to forbear.]¹⁵

8. Representations and Warranties.¹⁶ Participant hereby represents and warrants to Organization, and such warranties shall be applicable and in full force and effect throughout the entire term of this Agreement, that:

8.1 No known actions, proceedings or investigations are pending or threatened against Participant which would interfere with Participant's ability to enter into this Agreement, and consummate the same;

8.2 No uncured violations of federal, state, or municipal laws, ordinances, or requirements, relating directly or indirectly to the Property or the Water Right, exist or are outstanding;

8.3 No casualty and/or condemnation with respect to the Property, or any part thereof, nor the Water Right, has occurred and no such known condemnation is pending or threatened;

8.4 No uncured violations of any law, ordinance, order, or regulation of any governmental authority having jurisdiction of the Property or Water Right exist requiring any work, repair, construction, alteration or installation on, or in connection with such water rights that have not been complied with, and paid for;

8.5 Participant has the authority to enter into this Agreement, and to consummate the transaction contemplated herein;

8.6 No portion of the Property or Water Right is currently the subject of any other type of proceeding except as described in this Agreement, including, but not limited to, any transfer application or other application or action pending before the Department, and no portion of the Water Right has been changed or modified from the terms and conditions identified under each of the Certificates governing the use of the Water Right; and

8.7 Participant has not entered into any agreement regarding the Property or Water Right other than this Agreement, and that title to the Water Right is free and clear of any claims or encumbrances arising by, through, or under Participant.

¹⁵ If tax deduction desired.

¹⁶ If uncompensated, many of these terms may be unnecessary.

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9. Default.¹⁷ Time is of the essence. Except as otherwise provided herein, if any payment due hereunder is not paid, honored or tendered when due, or if any other obligation hereunder is not performed as herein provided, there shall be the following remedies:

9.1 Default by Organization. Upon failure or default of Organization in the payment of the Compensation Amount or any part thereof, or in satisfying any other obligation, under this Agreement, Participant may, fifteen (15) days after Organization receives written notice by certified mail of such failure or default, declare this Agreement to be null and void and of no further force and effect. Organization shall have the right to cure any default with respect to payment of the Compensation Amount by delivering any unpaid balance to Participant within fifteen (15) days of receiving any written notice of default from Participant. If such failure or default has not been cured by Organization within such time period, all amounts previously paid by Organization pursuant to this Agreement, if any, shall be retained by Participant as liquidated damages and not as a penalty. The Parties agree that declaration of nullity and retainment of funds paid by Organization to Participant shall be Participant's only remedies.

9.2 Default by Participant. Upon failure or default of Participant to satisfy any obligation under this Agreement, including, but not limited to, those representations and warranties in Paragraph 3, Organization may, fifteen (15) days after providing Participant with written notice by certified mail of such failure or default, declare this Agreement to be null and void and of no further force and effect. If such failure or default has not been cured by Participant to Organization's satisfaction within such time period, Participant shall repay or authorize repayment to Organization of all amounts previously paid by Organization to Participant pursuant to this Agreement, if any. In addition to such declaration of nullity and return to Organization of all amounts previously paid to Participant, Organization shall be entitled to seek specific performance of this Agreement.

10. Termination. [Description of right to terminate, if any].

11. Miscellaneous Provisions.

11.1 Commission. The Parties agree that no commissions are due and owing as a result of this Agreement.

11.2 Indemnification of Organization by Participant. Participant agrees to indemnify and hold harmless [defend?] Organization, its directors, officers, employees, agents, successors, and assigns from and against any and all claims, demands, losses, liabilities, expenses, damages, lawsuits or actions arising out of or

¹⁷ If uncompensated, many of these terms may be unnecessary. Drafter should consider whether specific performance should be the only remedy under the Agreement.

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in any way related to Participant's breach of this Agreement, including without limitation, any failure of Participant's representations and warranties identified under Section 3 herein to be true or any negligence or misconduct by Participant.

11.3 Indemnification of Participant by Organization.¹⁸ Organization agrees to indemnify and hold harmless Participant, and Participant's agents, successors, and assigns, from and against any and all claims, demands, losses, liabilities, expenses, damages, lawsuits, or actions arising of or in any way related to Organization's breach of this Agreement.

11.4 Attorney's Fees and Costs. [Require mediation first? Consider whether each party should be responsible for own attorney's fees to limit incentive to litigate]. Anything to the contrary herein notwithstanding, in the event of any dispute, proceeding, suit, action, or arbitration arising out of this Agreement, the prevailing party shall be entitled to all reasonable attorney fees and costs, including such fees and costs as may be incurred on any subsequent appeal or additional review.

11.5 Notice. Except where specifically provided otherwise in this Agreement whenever any notice, demand or request is required or provided for under this Agreement, such notice, demand or request shall be provided in writing to the following addresses or such other addresses as the Parties may indicate in writing, by postage prepaid, certified or registered mail:

To Organization:

To Participant:

Notices shall be deemed to have been delivered upon receipt by the other party, unless the notice is returned and no forwarding address provided to the other party, and then notice shall be deemed to have occurred upon mailing.

11.6 Binding Effect. The undersigned have the legal authority to execute this Agreement and all provisions hereof shall apply to, bind, and inure to the benefit of the Parties, their agents, heirs, successors and assigns.

11.7 Complete Agreement. This Agreement supersedes any and all prior agreements, written and oral, between the Parties and constitutes the complete and entire agreement of the Parties.

11.8 Assignment. Neither party may assign its rights and obligations under this Agreement without the other party's prior written consent.

¹⁸ Drafter must consider what legal risks to Participant's water rights exist, and whether there is an opportunity to mitigate those contractually.

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11.9 Headings for Convenience Only. The paragraph headings are for convenience only and the substantive portions hereof control without regard to the headings.

11.10 Amendment. This Agreement shall be amended by writing only, which writing must be executed by the Parties in order to be effective. [Any modification that threatens the tax-deductibility of Participant's dedication shall be invalidated and severed from the Agreement.]

11.11 Waiver. No waiver will be binding on a party unless it is in writing and signed by the party making the waiver. A party's waiver of a breach of a provision of this Agreement will not be a waiver of any other provision or a waiver of a subsequent breach of the same provision.

11.12 Controlling Law and Operation. This Agreement shall be governed under, and construed pursuant to, the laws of the State of California or, as applicable, under the laws of the United States. Each of the Parties hereto acknowledges that they have been given the opportunity to obtain counsel, or that they have been represented by counsel of their own choice and that they have read this Agreement and have had it fully explained to them by such counsel, and that they are fully aware of the contents of this Agreement, and of its legal effect.

11.13 No Third Party Beneficiaries. This Agreement is intended to describe the rights and responsibilities of and between the Parties and is not intended to, and does not, confer any rights on any persons or entities not named as parties, and does not limit in any way the powers and responsibilities of the Parties or any other entity not a party hereto.

11.14 Execution. This Agreement may be executed in multiple counterparts and shall be binding upon each party who executes a counterpart hereof regardless of whether that counterpart is executed by the other party, so long as at least one counterpart of this Agreement is executed by each party. At the request of either party, the other party will confirm a copy of an original signature page or a signature page transmitted by electronic mail or facsimile by delivering an original signature page to the requesting party. Facsimile or electronic copies or photocopies of signatures shall be binding and have the same force and effect as original ink signatures.

11.15 Recording. Each party has the right, but not the obligation, to record this Agreement with the Clerk and Records Office of _____ County.

[11.16 Completion of Form W-9. Since Organization is providing payment to Participant under this agreement, Organization will be required to provide a 1099 form to the Internal Revenue Service documenting payments made. Participant agrees to complete the attached form W-9 and return it to Organization as a condition of and prior to payment under Paragraph 3.]

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Executed as of the date first set forth above.

Organization

By: _____

Title: _____

Participant

By: _____

Title: _____