

**Agreement between West Kern Water
District and Kern Water Bank Authority for
the Exchange and Recharge of Water (2013)**

**AGREEMENT BETWEEN
WEST KERN WATER DISTRICT AND KERN WATER BANK AUTHORITY
FOR THE EXCHANGE AND RECHARGE OF WATER**

THIS AGREEMENT (“Agreement”) is made and effective as of December 1, 2013, by and between WEST KERN WATER DISTRICT (“West Kern”), a County water district, and the KERN WATER BANK AUTHORITY (“KWBA”), a California joint powers authority. West Kern and KWBA will be collectively referred to in this Agreement as the “Parties.”

RECITALS

A. West Kern and KWBA entered into the Agreement between West Kern Water District and Kern Water Bank Authority for the Annual Exchange and Recharge of Water (the “Exchange Agreement”) as of September 30, 2003. The purpose of the Exchange Agreement was to establish a long-term agreement between West Kern and KWBA to exchange water supplies to help achieve and enhance their respective water management goals and programs. Paragraph 3.3.1 of the Exchange Agreement provides that West Kern may terminate the Exchange Agreement if the recharge provided by KWBA proves ineffective in meeting West Kern’s operational needs in the West Kern Project and a mutually agreeable solution cannot be negotiated. The Parties have negotiated and wish to enter into this Agreement to augment and enhance the purposes of the Exchange Agreement to more effectively meet the Parties’ operational needs on a long term basis.

B. West Kern and KWBA have, since 2002, from time to time implemented operating plans, the objectives of which were to (a) improve water security for both West Kern and KWBA, (b) protect water quality, and (c) monitor and mitigate potential threats to water supplies. Performance of those operating plans has resulted in information and knowledge that the Parties now wish to implement by way of this Agreement to accomplish the same objectives.

AGREEMENT

NOW, THEREFORE, the parties agree as follows:

1. DEFINITIONS

- 1.1 “Additional Recharge Water” means the water recharged by West Kern under this Agreement.
- 1.2 “CC&R’s” means the Declaration of Covenants, Conditions and Restrictions dated December 14, 1995, recorded August 9, 1996 between KWBA and the Kern County Water Agency.
- 1.3 “Easement” means an easement in a form acceptable to Parties for the construction of one well site and one discharge pipeline in the area shown on the attached **Exhibit A**, including ingress to and egress from those facilities.
- 1.4 “Member Entities” means the member entities of KWBA.
- 1.5 “Recharge Capacity” means a first priority recharge capacity in the Kern Water Bank consisting of (a) 20,000 AF per calendar year in the West Kern Project Vicinity and (b) 11,000 AF per calendar year in the ‘W’ ponds of the Kern Water Bank, as those areas are identified on the attached **Exhibit A**.
- 1.6 “Recharge Fee” and “Recovery Fee” means the same operation, maintenance and capital rates that Member Entities pay to KWBA for their recharge of water upon or recovery of water from the KWBA project, which is currently less than ‘fair compensation’ under the CC&R’s.
- 1.7 “Right of First Refusal” means a right of first refusal applicable to any proposal from a third party for (a) expansion of the capacity of the Kern Water Bank Canal

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up to an additional 100 cfs, and/or (b) any long-term use of unused capacity for KWBA wells 21G1, 21D1, and 21A2.

- 1.8** “Resolved Operational Issues” means any operational issues, including claims, causes of actions and liabilities that either of the Parties might hold against the other, or its respective officers, directors, employees, legal representatives and agents, relating to any past, present and future groundwater and surface water impacts that the operation of either the West Kern Project or the West Kern North Project on the one hand, or the Kern Water Bank project on the other hand, may have had, is having, or will have in the future, on the other project. Resolved Operational Issues will not include, however, operational issues relating to groundwater and surface water impacts arising after termination of this Agreement.
- 1.9** “West Kern North Project” means the recharge and recovery project as defined in West Kern’s Groundwater Banking Project Environmental Impact Report State Clearinghouse No. 2009071022, March 2010.
- 1.10** “West Kern Project” means the property owned by West Kern located in Township 30, Range 25, Sections 21, 22, 23 and 28, M.D.B. & M.

2. TERM

- 2.1** The term of this Agreement will commence on the date first above written and will terminate on December 31, 2035, unless terminated sooner by mutual agreement of the Parties or by operation of law. This Agreement shall extend thereafter from year to year unless by October 1, 2035, or October 1st of any year following, either party provides notice to the other of termination of this Agreement, in which event

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this agreement shall terminate on December 31st of that year. This Agreement will survive any earlier termination of the Exchange Agreement.

- 2.2** Upon termination of this Agreement, West Kern shall within 60 days quitclaim the Easement to KWBA together with any well constructed on that site. West Kern may, however, remove any pumps, motors and equipment associated with that well prior to delivering the quitclaim Easement to KWBA. Additionally, the Parties shall within that 60 day period meet and confer in a good faith attempt to develop a new agreement to achieve the same purpose as this Agreement consistent with the conditions then existing. Upon termination, West Kern shall also quitclaim to KWBA any pipeline easement conveyed pursuant to section 4.2.

3. RECHARGE CAPACITY PROVIDED BY KWBA TO WEST KERN

- 3.1** KWBA shall provide the Recharge Capacity to West Kern. The right of West Kern to the Recharge Capacity is subject to all of the following:

3.1.1. West Kern is entitled to recharge water at any rate of flow up to 75 cfs. Any recharge rates above 75 cfs must be approved by KWBA.

3.1.2. KWBA may suspend West Kern's right to the Recharge Capacity at any time that unregulated or at-risk water supplies are available to Member Entities. In that event, the Recharge Capacity will be reduced by a proportionate amount for such times as those water supplies are available to Member Entities. For example, if high-flow Kern River flood water is available for three weeks, then the Recharge Capacity will be reduced to 18,846 AF $[(49/52) \times 20,000]$ and 10,365 AF $[(49/52) \times 11,000]$ for that calendar year.

3.1.3. The Recharge Capacity is deemed a first priority exchange and/or program under sections 4.1 and 4.1.2 of the CC&R's.

3.2 KWBA may redirect the Additional Recharge Water to exchange programs without payment of compensation to West Kern.

3.3 The Recharge Capacity will be subject to (a) whatever additional or revised rules and policies governing recharge of water that apply to Member Entities, (b) applicable legal requirements and constraints, and (c) reasonable and customary terms and conditions as KWBA may require, including those that regulate the quality of water to be recharged.

3.4 West Kern shall pay to KWBA the Recharge Fee for any portion of the Recharge Capacity that West Kern elects to use.

4. CONVEYANCE OF WELL SITE TO WEST KERN AND USE OF KWBA WELL

4.1 KWBA shall convey the Easement to West Kern. KWBA reserves the right to review and approve the design of the well allowed under the Easement to ensure that the design is compatible with Kern Water Bank project operations. Conveyance of the Easement will be at no cost to West Kern.

4.2 Upon request by West Kern, KWBA shall convey to West Kern a first priority right to use Kern Water Bank Well T30S/R25E-21G, together with a pipeline easement to construct, operate, maintain, repair and replace a pipeline along a mutually agreeable alignment that is least costly to West Kern and least intrusive to KWBA, generally along the levee road that extends southeast from such Well to the West Kern Property. Following that conveyance, West Kern shall pay KWBA an annual charge of \$20,000 for the use of the well so long as the well is operational. The

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pipeline will be owned by West Kern and its construction, operation, maintenance, repair and replacement will be at no cost to KWBA. The well will be owned and operated by KWBA and its maintenance, repair and replacement will be at KWBA's discretion. West Kern shall pay to KWBA the Recovery Fee for use of this well.

- 4.3** Construction of the well and any future pipeline as provided in sections 4.1 and 4.2 will be mitigated under the provisions of the KWBA HCP. Such mitigation for disturbance on KWBA property shall be permanent and temporary for the well and temporary for any future pipeline.

5. RIGHTS OF FIRST REFUSAL FOR WEST KERN

KWBA hereby grants the Right of First Refusal to West Kern. Upon receipt by KWBA of a proposal that is otherwise acceptable to KWBA for expansion of the Kern Water Bank Canal or use of the wells identified in the Right of First Refusal, KWBA shall promptly notify West Kern of the proposal. West Kern will then have 45 days within which to notify KWBA if West Kern wishes to exercise the Right of First Refusal under substantially the same terms and conditions as that proposed by the third party to KWBA (including the time for completing the proposed transaction). If West Kern does not timely respond in the affirmative under substantially same terms and conditions, or does not timely consummate such transaction, that portion of the Right of First Refusal will terminate (although the other portions of the Right of First Refusal will continue if not already triggered).

6. RIGHTS NOT TRANSFERRABLE

West Kern may not transfer the Recharge Right, Easement, or Right of First Refusal.

7. ACKNOWLEDGMENT OF WEST KERN'S 3,000 AF PRESCRIPTIVE RIGHT

West Kern has entered into agreements with others that describe a right to annually pump 3,000 AF of groundwater. KWBA shall not contest or challenge those prescriptive rights.

8. USE OF WEST KERN'S UNUSED CVC CAPACITY BY KWBA

8.1 KWBA may use any and all of West Kern's capacity that West Kern is not using for West Kern's own uses at any point in time in the Cross Valley Canal in either a westward or eastward direction, including West Kern's rights to unused capacity of other Cross Valley Canal participants, as that capacity is available under the provisions of the "Agreement for the Assignment of Certain Rights and Obligations of the Kern County Water Agency in the Construction and Operation of the Cross Valley Canal Expansion Program," dated December 1, 2006.. West Kern's capacity in the Cross Valley Canal is currently 4.35 cfs in the eastward direction.

8.2 KWBA shall reimburse West Kern for the costs associated with KWBA's use of West Kern's capacity in the CVC and any incremental costs that West Kern incurs as a result of KWBA using that unused capacity. West Kern shall invoice KWBA for those costs. KWBA shall pay each invoice within 45 days of receipt.

9. COMPLETE AND FINAL COMPROMISE AND SETTLEMENT

This Agreement is a complete and final compromise between the Parties of the Resolved Operational Issues, and will be deemed to be satisfactory mitigation for any of the Resolved Operational Issues. This Agreement will not, however, constitute an admission by either of the Parties that its project has caused, is causing or may cause harm to the other entity or project, or of any wrong doing whatsoever. Except as provided in this Agreement, the Parties understand and agree that this Agreement is a full and final release of all claims, known or unknown, related to or

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arising out of the Resolved Operational Issues. With respect to claims related to or arising out of the Resolved Operational Issues, the Parties expressly waive all rights or benefits available under section 1542 of the Civil Code of the State of California, which provides as follows:

A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known to him or her must have materially affected his or her settlement with the debtor.

The Parties are executing this Agreement voluntarily, with full knowledge of its significance, and with the express intention of altering the legal consequences provided for in the provisions of Civil Code section 1542, regarding the extinguishing of all obligations and liabilities of the Parties, known or unknown, related to or arising out of the Resolved Operational Issues.

10. MISCELLANEOUS PROVISIONS

10.1 Effect of Headings. The subject headings of the paragraphs and subparagraphs of this Agreement are included for purposes of convenience only and shall not affect the construction or interpretation of any of its provisions.

10.2 Entire Agreement. This Agreement constitutes the entire agreement between the parties pertaining to the subject matter contained in it and supersedes all prior and contemporaneous agreements, representations, and understandings of the parties, except for the Exchange Agreement. No supplement, modification, or amendment of this Agreement shall be binding unless executed in writing by all of the parties hereto.

- 10.3** Counterparts and Facsimile Signatures. This Agreement may be executed in any number of counterparts and each such counterpart shall be deemed to be an original instrument, all of which together shall constitute one and the same instrument. Facsimile and electronic signature pages shall constitute originals.
- 10.4** Binding Effect. This Agreement shall be binding upon and inure to the benefit of the heirs, executors, administrators, assigns, and successors of the parties hereto.
- 10.5** Professionals' Fees. Should any action or proceeding be commenced between the parties hereto concerning this Agreement, or the rights and duties of any party in relation thereto, the party prevailing in such action or proceeding shall be entitled, in addition to such other relief as may be granted, to recover from the losing party a reasonable sum for its attorneys', paralegals', accountants', and other professional fees and costs incurred in connection with such action or proceeding.
- 10.6** Governing Law. This Agreement shall be governed by the laws of the State of California. Venue for any action arising hereunder shall be in Kern County, California.
- 10.7** Notices. All notices under this Agreement shall be effective (i) when personally delivered to either Party, (ii) when sent by facsimile or email on a business day between the hours of 8 a.m. and 5 p.m. Pacific time (with written confirmation of transmission) to either Party, at the numbers set forth below, provided that a copy is mailed as indicated below, or (iii) three business days after deposit in the United States mail, registered or certified, postage fully prepaid and addressed to the respective parties as follows:

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To KWBA: Kern Water Bank Authority
1620 Mill Rock Way, Suite 500
Bakersfield, CA 93311

To West Kern: West Kern Water District
800 Kern Street
Taft, CA 93268-1105

or such other address, facsimile number or email addresses as the parties may from time to time designate in writing.

10.8 Severability. If any provision of this Agreement is declared invalid, illegal or unenforceable, such provision shall be deemed reformed so as to valid, legal and enforceable to the maximum extent permitted by law, and the balance of this Agreement shall remain in full force and effect notwithstanding such invalidity, illegality or unenforceability.

10.9 Cumulative Rights; Waiver. No failure by either party to exercise, and no delay in exercising any rights, shall be construed or deemed to be a waiver thereof, nor shall any single or partial exercise by either party preclude any other or future exercise thereof or the exercise of any other right. Any waiver of any provision or of any breach of any provision of this Agreement must be in writing, and any waiver by either party of any breach of any provision of this Agreement shall not operate as or be construed to be a waiver of any other breach of that provision or of any breach of any other provision of this Agreement.

10.10 Further Action. The parties agree to perform all further acts, and to execute, acknowledge, and deliver any documents that may be reasonably necessary, appropriate or desirable to carry out the purposes of this Agreement.

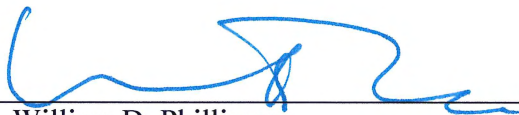
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10.11 Ambiguities. This Agreement shall not be construed against any party in the event of an ambiguity. The transactions contemplated herein have been negotiated at arms-length, between persons sophisticated and knowledgeable in the matters dealt with in this Agreement. In addition, each party has been advised by legal counsel. Accordingly, any rule of law or legal decision that requires interpretation of ambiguities against the party who has drafted it is inapplicable and waived. The provisions of this Agreement shall be interpreted in a reasonable manner to effectuate the intent and purposes of the parties to this Agreement as if they had been jointly drafted by the parties.

10.12 Authority. The signatories represent and warrant that they have been duly authorized by their respective governing boards to enter into this Agreement on behalf of the party for which they sign.

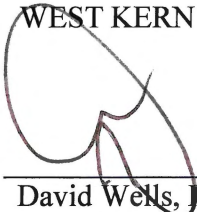
10.13 Opinions and Determinations. Where the terms of this Agreement provide for action to be based upon the opinion, judgment, approval, review or determination of either of the Parties, those terms are not intended to allow and may not be construed as allowing that opinion, judgment, approval, review or determination to be arbitrary, capricious or unreasonable.

KERN WATER BANK AUTHORITY

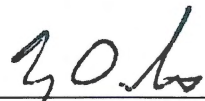
By 

William D. Phillimore,
Chairman of the Board

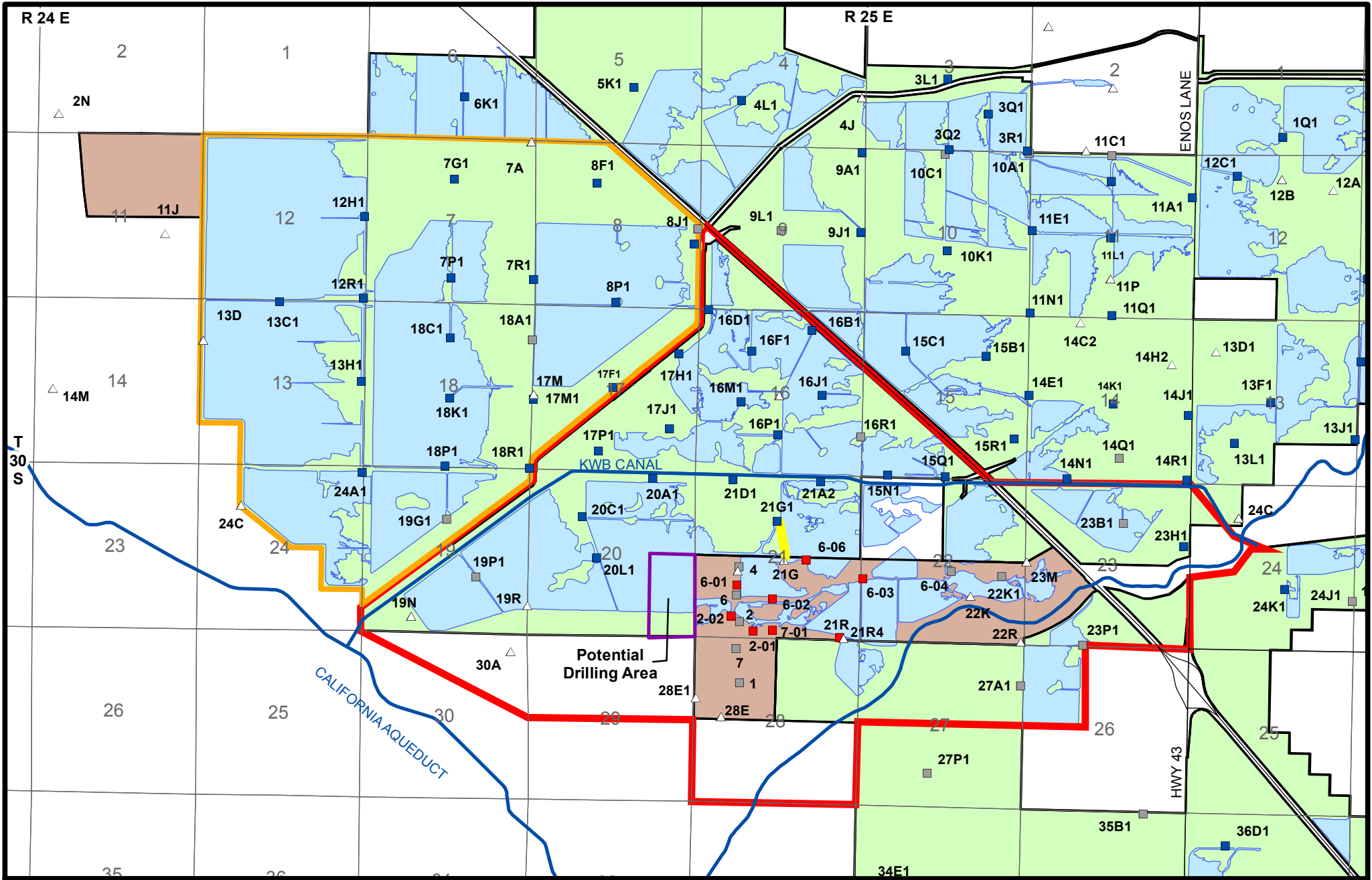
WEST KERN WATER DISTRICT

By 

David Wells, President


By 

Secretary



- Well 21G1 PL Easement
- W Ponds
- West Kern Project Vicinity
- Potential Drilling Area
- West Kern WD
- Kern Water Bank

Exhibit A



0 0.25 0.5 Mi.

KERN WATER BANK AUTHORITY