

July 19, 1999

To: Board of Directors (Legal and Claims Committee--Action)

From: General Manager _____
 General Counsel _____

Subject: Hearing on and Amendment to Resolution of Necessity and Authorization for Agreement for Joint Public Use of Land Owned by San Bernardino Valley Water Conservation District (Santa Barbara Superior Court Case No. 225737)

RECOMMENDATION(S)

It is recommended that the Legal and Claims Committee hold a hearing on the **attached proposed amendment to the Resolution of Necessity** previously adopted as Resolution Number 8614 and recommend adoption by the Board of Directors by a two-thirds vote, of said amendment; and to authorize entering into an agreement with the San Bernardino Valley Water Conservation District for joint public use of the property which is the subject of the said Resolution of Necessity as amended.

EXECUTIVE SUMMARY

On October 13, 1998, the Board adopted Resolution Number 8614, authorizing the General Counsel to seek condemnation of property owned by the San Bernardino Valley Water Conservation District ("Water Conservation District"). On February 9, 1999, the Board adopted an amendment to Resolution Number 8614 clarifying certain particulars of the Resolution. On June 8, 1999, the Board approved a settlement with the Water Conservation District's tenant on the subject property, Robertson's Ready Mix, Inc., a settlement which has been consummated. A tentative agreement has now been entered into between Metropolitan and the Water Conservation District for joint public use of the property and possession of the property has passed to Metropolitan, all subject to the Board's approval at its August meeting. The agreement provides for protection in place of all existing utilities, the continued operation of the spreading basins and canals by the Water Conservation District, access across the easement area for spreading and mining purposes, the future provision of a haul road as needed to assure viability of mining operations on the remainder properties consistent with the Robertson's Ready Mix, Inc. agreement, and the inclusion of these joint use provisions in an amendment to the existing Resolution of Necessity, as amended. The parties have not agreed on compensation for the take.

DETAILED REPORT

Metropolitan has reached a settlement, subject to the Board's approval, with the Water Conservation District on all joint use and compatibility issues. The parties have not agreed on compensation for the taking. The subject eminent domain proceeding, commenced pursuant to Board Resolution Number 8614, seeks to take a permanent pipeline easement in 250 feet wide from property owned by the Water Conservation District which splits two aggregate mining tenancies, Robertson's Ready Mix on the east and a similar tenancy on the west (Sunwest). The tenancy area on the west is the subject of a separate eminent domain proceeding. In addition to the 250-foot permanent pipeline easement, Metropolitan seeks to condemn a permanent slope easement which would require that Robertson's Ready Mix, or any future sand and gravel tenant, maintain a three-to-one slope to assure lateral support for the Inland Feeder Project. The amount deposited by Metropolitan as representing the total value of the take was \$780,000. The previous settlement with Robertson's Ready Mix, Inc. was for \$450,000, plus future accommodation of a haul road over the pipeline as necessary to assure the ability to mine aggregate.

The Water Conservation District long before commencement of the subject action, opposed the taking and the proposed pipeline alignment. It appeared before the Board and appropriate committees to voice its objections. As a consequence, long before these appearances, Metropolitan explored alternative alignments. Metropolitan found that the proposed alignment crosses the Santa Ana River Wash through an existing utility corridor, for the shortest distance possible, and that the alternative suggested alignments add additional cost, reduce pipeline capacity, and in one case, would subject the pipeline to miles of potential river scouring by placing it lateral to the active Wash. Further, Metropolitan agreed before it sought a Resolution of Necessity, to protect all current facilities in place and to accommodate the Water Conservation District's spreading activities before, during, and after construction.

The action was originally filed in San Bernardino County, but was immediately transferred to Santa Barbara County, a more neutral forum. Superior Court Judge William McLafferty, assigned to the case, appointed a retired Santa Barbara attorney, R. A. Carrington, to act as Special Master. Judge McLafferty charged Mr. Carrington with the exploration of options to make the parties' use of the subject property compatible and to facilitate potential settlement.

After protracted negotiations, Metropolitan and the Water Conservation District have reached an agreement on the joint use of the subject property. Under the proposed joint use settlement, Metropolitan has agreed to 1) protect all utility facilities in place; 2) assure that all existing and proposed future facilities located outside the property are not affected; 3) restore or relocate any facilities of the Water Conservation District located within the property that are altered or in any way affected during preconstruction and construction activities; 4) rechannel any water contained in the Water Conservation District's canals and ditches which are diverted during construction; and 5) not interfere or prevent in any way existing spreading and mining operations on Water Conservation District properties. In addition, Metropolitan has agreed to accommodate access across the easement area, including an accommodation for a future haul road as needed for aggregate mining on remainder properties. The parties have agreed that the particulars of this joint use agreement shall be incorporated into an amendment to the operative Resolution of Necessity.

By order effective mid-July 1999, Judge McLafferty gave Metropolitan possession of the subject easements. The proposed settlement is recommended because it 1) assures Metropolitan's continued possession of the easements; 2) assures the Water Conservation District's continued performance of its governmental function related to spreading of river waters for the local aquifer; 3) that mining operations can continue on adjacent lands; and 4) removes Water Conservation District opposition to the right to take the subject easements. Metropolitan's representatives will continue to pursue settlement of compensation issues with the Water Conservation District, although it is entirely likely that those issues will not resolve until the companion eminent domain action regarding the Sunwest side of the property is amenable to resolution.

LRB:rl

Attachment 9-6A

Attachment 9-6A

RESOLUTION NO. _____

AN AMENDMENT TO CONDEMNATION RESOLUTION 8614

AS AMENDED BY RESOLUTION NO. 8626

The Board of Directors of The Metropolitan Water District of Southern California (“MWD”) or (“District”) adopted Condemnation Resolution No. 8614 on October 13, 1998. This Condemnation Resolution amended by Resolution No. 8626 on February 9, 1999. Resolution No. 8614 as amended directs the condemnation of certain properties situated in the County of San Bernardino (“Inland Feeder Project”).

NOW, THEREFORE, the Board of Directors of The Metropolitan Water District of Southern California (the “District”) resolve as follows:

WHEREAS the District’s Board on October 13, 1998, by a vote of more than two-thirds of all its members, adopted Resolution 8614 which found and determined that the public interest and necessity require, for public use, the construction, operation and maintenance of water conveyance facilities (“Inland Feeder Project”) in the County of San Bernardino for the transportation and distribution of water for use within the District’s boundaries and that certain property situated in the County of San Bernardino is necessary therefore; and

WHEREAS the District’s Board adopted Resolution No. 8626, which amends Resolution 8614; and

WHEREAS Resolution 8614 as amended by Resolution 8626 is in full force and effect; and

WHEREAS MWD and the San Bernardino Valley Water Conservation District have entered into a Joint Use Agreement relating to the parcels being condemned under the provisions of *Code of Civil Procedure* §1240.510 and §1240.610, which Agreement requires that the property being acquired be subject to certain terms and conditions for its use and occupancy as more particularly expressed in that Agreement; and

WHEREAS Resolution No. 8614 as amended refers to its **Exhibit “A”**, which contains a description of the terms and conditions of the property being acquired and its legal description, together with maps showing its location. Provisions for the Joint Use Agreement must be provided for in **Exhibit “A”** to conform to the Joint Use Agreement referred to in the previous recital.

NOW, THEREFORE, District Board hereby further amends Amended Resolution 8614 as follows:

SECTION 1: **Exhibit “A”** of the original Resolution as amended, is hereby amended and restated as set forth in **Exhibit “A”** to this Resolution.

SECTION 2. The District's Board hereby finds and determines that Resolution 8614 as amended by Resolution 8626 and as amended by this Resolution shall continue in full force and effect.

I HEREBY CERTIFY that the foregoing Resolution was adopted at the meeting of the Board of Directors of The Metropolitan Water District of Southern California held the _____ day of August, 1999, by a vote of two-thirds of more than all of its members, and I further certify that the foregoing is a full, true and correct copy of the Resolution.

Executive Secretary
The Metropolitan Water District of Southern
California

EXHIBIT A

INFED1-27-870PEA2
(Permanent Easements)
San Bernardino Valley
Water Conservation
District

Parcel A -- Pipeline Easement

A permanent easement to construct, reconstruct, maintain, operate, enlarge, remove, and replace a line or lines of pipe at any time and from time to time, for water transportation, with every appendage or structure necessary or convenient to be installed at any time in connection therewith, within the property more particularly described as Parcel "A" in **Attachment "1"** which is attached hereto and incorporated herein by reference as though set forth at length. Maps showing the location of Parcel "A" are attached hereto as **Attachment "2"** and incorporated herein by reference.

This easement is subject to the following conditions:

1. This easement is subject to the rights of San Bernardino Valley Water Conservation District to make use of the surface of the easement area for ditches, canals, or similar water conveyance facilities for the transfer of water.
2. Except for the water conveyance facilities constructed by San Bernardino Valley Water Conservation District, no change to the existing grade or other modification of the topography of the easement area which affects the depth of cover over or weight of cover on the pipeline(s) shall be made without the prior written consent of The Metropolitan Water District of Southern California, which consent shall not be unreasonably withheld.
3. Except for the water conveyance facilities constructed by San Bernardino Valley Water Conservation District and any roads constructed at existing grade, no building wall, or other permanent structure shall be constructed or maintained within the easement area with the prior written consent of The Metropolitan Water District of Southern California, which consent shall not be unreasonably withheld.
4. No trees shall be planted with 15 feet of the centerline of any line or lines of pipe constructed within the easement area. Trees shall be permitted to be planted and maintained on the remaining portion of easement area; provided, however, if The Metropolitan Water District of Southern California should require use of the remaining portion of the easement area for replacement or relocation of its pipeline(s), or for a future pipeline, any such trees shall be removed by Owner and no trees shall be replanted within 15 feet of the centerline of the replaced, relocated, or future pipeline.
5. The Metropolitan Water District of Southern California shall not interfere with reasonable access over and across the easement area during the term of this easement.

Parcel B -- Easement for Lateral and Subjacent Support

A permanent easement to provide lateral and subjacent support for a line or lines of pipe for water transportation located within the permanent pipeline easement area described as Parcel "A", above, acquired concurrently and contiguous with this easement. The easement granted herein is over, across and within the property more particularly described as Parcel "B" in **Attachment "1"** which is attached hereto and incorporated herein by reference as though set forth at length. Maps showing the location of Parcel "B" are attached hereto as **Attachment "2"** and incorporated herein by reference. Subject to the right of San Bernardino Valley Water Conservation District to construct and maintain ditches, canals, or similar water conveyance facilities for the transfer of water, and subject to the construction and maintenance of roads at existing grade, no grading, excavation or earth movement of any kind shall be permitted or performed within the area of this easement.

JOINT USE AGREEMENT

In addition to the foregoing conditions for the use and occupancy of parcel "A" - the pipeline easement and Parcel "B" - the easement for lateral and subjacent support, the use and occupancy of MWD and its successors and assigns and the Conservation District, and its successors and assigns shall be subject to the rights, duties and obligations as expressed in a Joint Use Agreement between such parties which is attached as **Attachment "3"** hereto and incorporated herein by reference as though set forth at length.

Attachment 1 to Exhibit A

EXHIBIT A

INFED1-27-870PEA2
(Permanent Easement)
San Bernardino Valley
Water Conservation District

Those certain parcels of land hereinafter designated Parcels "A" and "B", in Section 7, Township 1 South, Range 2 West, San Bernardino Meridian, in the County of San Bernardino, State of California, described as follows:

PARCEL A

The westerly 250 feet of Lots 1, 2 and 3 of said Section 7.

All as shown on Exhibit "B", attached hereto and made a part hereof.

PARCEL B

The easterly 450 feet of the westerly 700 feet of Lots 1, 2, and 3 of said Section 7.

EXCEPTING from said easterly 450 feet that portion lying above a plane that begins on the west line of said easterly 450 feet and slopes downward at a uniform ratio of 3 foot horizontal to 1 foot vertical (3:1) at right angles from the existing ground elevation along said west line of said easterly 450 feet. All as shown on Exhibit "B" attached hereto and made a part hereof.

PREPARED UNDER MY SUPERVISION


Peter G. Wiseman P.L.S. 6241

Date

9/10/98



Attachment 2 to Exhibit A

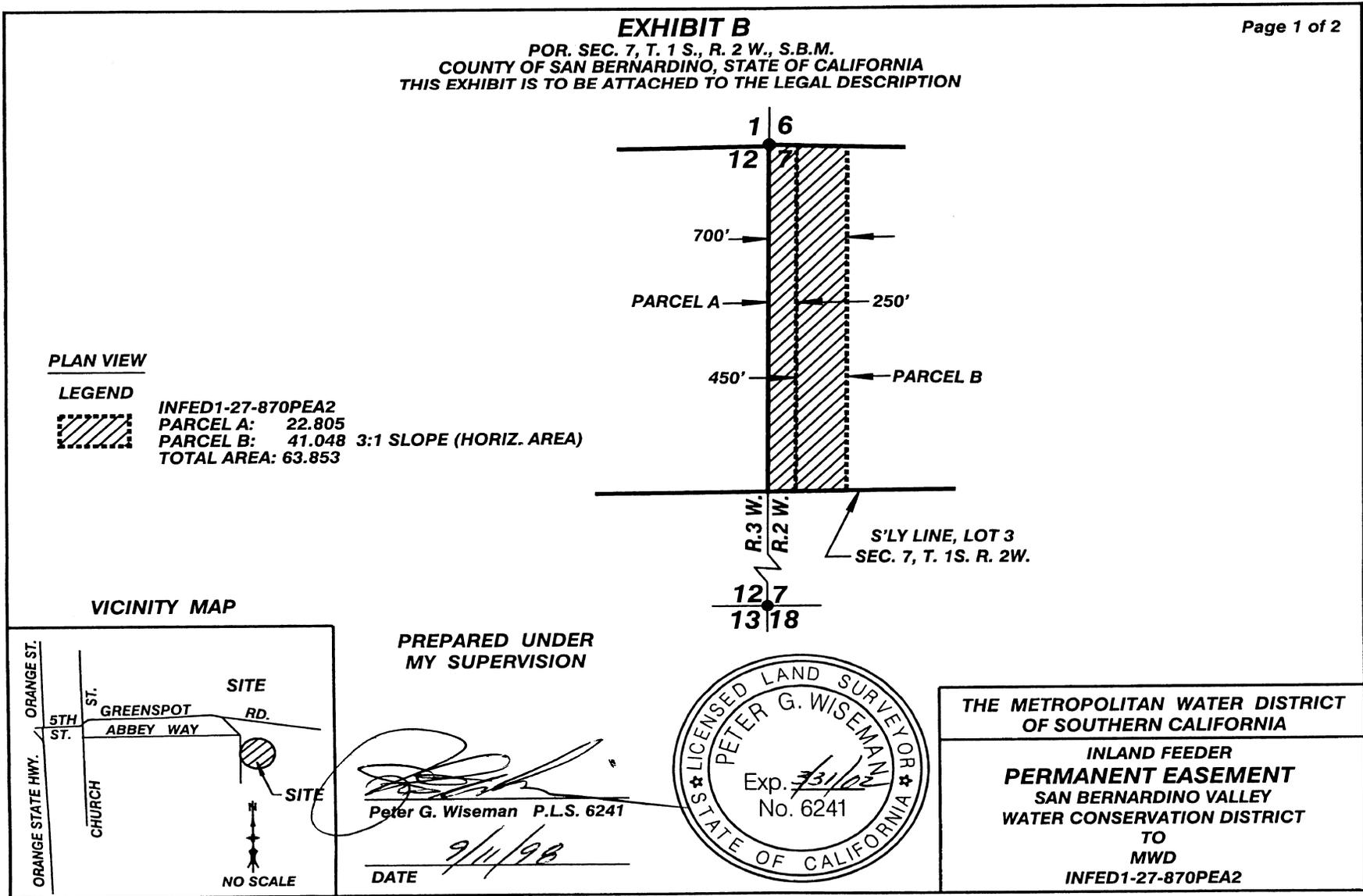


EXHIBIT B
 POR. SEC. 7, T. 1 S., R. 2 W., S.B.M.
 COUNTY OF SAN BERNARDINO, STATE OF CALIFORNIA
 THIS EXHIBIT IS TO BE ATTACHED TO THE LEGAL DESCRIPTION

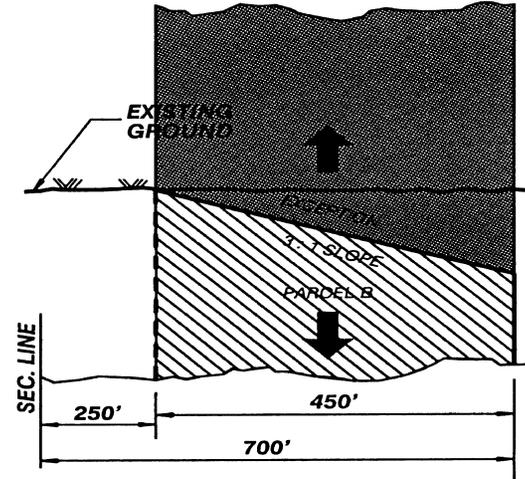
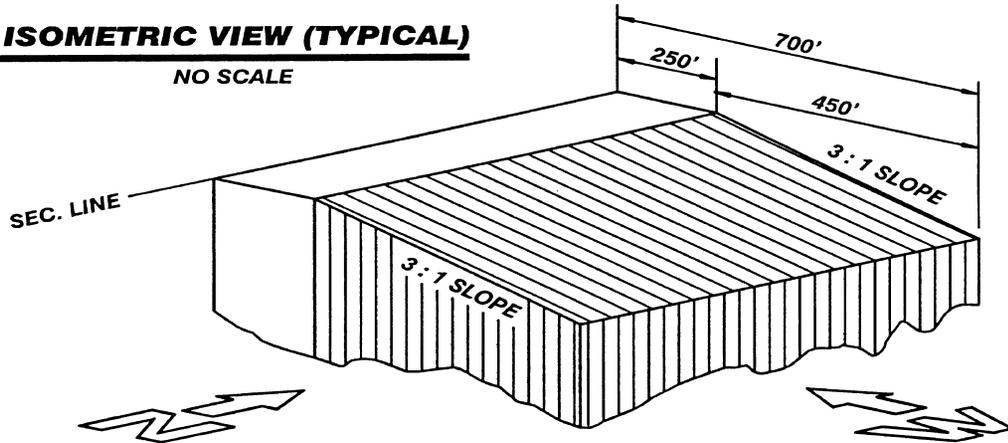
LEGEND



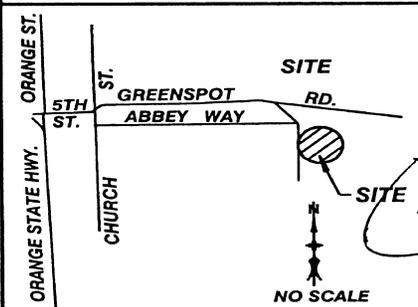
PARCEL B : INFED1-27-870PEA2
450' WIDE PERMANENT EASEMENT

ISOMETRIC VIEW (TYPICAL)

NO SCALE



VICINITY MAP

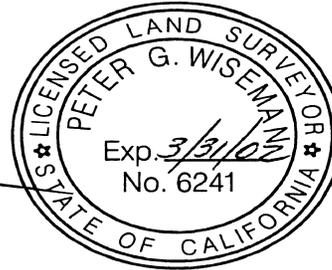


PREPARED UNDER
MY SUPERVISION

Peter G. Wiseman P.L.S. 6241

DATE

9/4/98



END VIEW - LOOKING NORTH

NO SCALE

THE METROPOLITAN WATER DISTRICT
OF SOUTHERN CALIFORNIA

INLAND FEEDER
PERMANENT EASEMENT
SAN BERNARDINO VALLEY
WATER CONSERVATION DISTRICT

TO
MWD
INFED1-27-870PEA2

Attachment 3 to Exhibit A
JOINT USE AGREEMENT

THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA ("**MWD**"), and the SAN BERNARDINO VALLEY WATER CONSERVATION DISTRICT ("**WCD**") (hereafter called "**Parties**"), enter into this Agreement regarding the terms and conditions for the **Parties'** joint use of **the Property** which is the subject of the above-entitled action.

RECITALS

A. **MWD** has undertaken a major water supply tunnel and pipeline project known as the Inland Feeder, which is planned to traverse a portion of property owned by **WCD** by way of a permanent pipeline easement ("**Pipeline Easement**") and an adjacent slope easement ("**Slope Easement**") which are legally described as Parcels "A" and "B" above. The **Pipeline Easement** and **Slope Easement** are sometimes referred to collectively below as "**the Property**"; and

B. **MWD** intends to use **the Property** for the construction of an Inland Feeder water transmission line ("**the Pipeline**").

NOW THEREFORE, **MWD** and **WCD** in consideration of the provisions set forth in the Recitals above, agree on the terms and conditions upon which **the Property** is taken, and the manner and extent of the use by each of the **Parties** of **the Property** as follows:

1. MWD Obligations.
 - a. **MWD** and any and all of its lessees, licensees, permittees, contractors, representatives, employees, agents, directors, volunteers, successors, assigns and any party to whom **MWD** grants, transfers, or hypothecates any interest in **the Property**, (collectively "**MWD Related Parties**") shall not excavate, remove, destroy, damage, or otherwise affect any of **WCD**'s existing or proposed future facilities located outside of **the Property**, including but not limited to canals, ditches, and spreading basins, or otherwise disrupt or damage any of **WCD**'s property or property interests outside the boundaries of **the Property**.
 - b. **MWD** and the **MWD-Related Parties** shall promptly replace or restore any of **WCD**'s facilities located within **the Property** that are altered or in any way affected during **MWD**'s preconstruction activities, construction, maintenance, and/or use of **the Pipeline**, to the condition of such facilities existing prior to the time they are altered or affected.
 - c. **MWD** and **MWD-Related Parties** will rechannel any water contained in **WCD**'s canals and ditches which are diverted during **MWD**'s construction of **the**

Pipeline, and any water pumped from **MWD's** construction trenching, to a location as **WCD** shall reasonably determine, which location shall not be more than five hundred (500) feet from the point of diversion or dewatering.

2. Easements Not to Interfere with **WCD's** Activities, Waiver.

Neither the **Pipeline Easement** nor the **Slope Easement** shall include any right, title or interest in any way to prevent **WCD** and its lessees, licensees, permittees, contractors, representatives, employees, agents, directors, volunteers, successors, and assigns (collectively "**WCD-Related Parties**"), from doing any of the following, all of which **WCD** and **WCD-Related Parties** may undertake without limitation and without any liability whatsoever to **MWD** or the **MWD-Related Parties**;

- a. Initiate or continue any and all legal uses of any of its property interests, including, but not limited to existing or future water diversion, conveyance, spreading, and groundwater recharge operations outside of **the Property** prior to, during, and after the construction of **the Pipeline**, whether or not such activities by **WCD** or **WCD-Related Parties** may have any impact on **the Pipeline** or any of its appurtenances.

- b. Initiate or continue any and all use of its existing, and planned future, canals, ditches, or any other water conveyance facility on, over, and through **the Property**, prior to, during and after the construction of **the Pipeline**, without regard to impacts such water conveyance facilities may have on **the Pipeline** or any of its appurtenances.

- c. Conduct any and all necessary or convenient maintenance activities of all existing and future facilities, located within or without the boundaries of **the Property**, including but not limited to grading and/or scraping the floor of spreading basins, repairing erosion, breaches, settlement, any cracks, holes, or other failures in the berms of such basins.

- d. Initiate or continue any and all water spreading activities within the boundaries of the **Slope Easement**.

- e. It is understood and agreed that **the Pipeline** will vary in depth from 7 to 15 feet below the surface of the ground within the **Pipeline Easement** after construction is complete; **WCD** and **WCD-Related Parties** have a right to traverse **the Property**, and in such traverse may use such equipment as is necessary or convenient for their operations up to

a maximum of 148,000 pounds gross weight, provided however that such equipment may traverse only at locations where **the Pipeline** is buried to a depth of at least 15 feet. Each crossing will be no more than 50 feet in width. It is agreed **the Pipeline** will be at a depth of at least 15 feet in two (2) or more locations along the easement. **MWD** will designate the locations where **the Pipeline** is at a depth of at least 15 feet below the surface after construction. **WCD** will choose two (2) of such designated locations over which to traverse **the Pipeline**. When the crossings are designated, the locations will be surveyed at **MWD's** expense and a record of survey map will be prepared showing the locations of such crossing and such survey map will be recorded. The right to traverse **the Pipeline**, however, shall not extend to passage over **the Property** by heavy mining equipment, the transportation of which requires the construction of a "**Haul Road**". Passage over **the Property** by such equipment is the subject of paragraph 3 below.

- f. **MWD**, on behalf of itself and all **MWD-Related Parties**, waives, fully, finally, and forever, any claim for any injury or damage to **the Pipeline** or any of its appurtenances, or to any person,

property, equipment, vehicles, improvements, or other items placed on or passing over **the Property**, whether in connection with any activity undertaken by **MWD** or any **MWD-Related Party** or otherwise, caused by, related to, or arising out of any of the activities listed in this Paragraph 2 by **WCD** or the **WCD-Related Parties**.

- g. In entering into this waiver, **MWD**, on behalf of itself and all **MWD-Related Parties** specifically waives any protection it may have under California Civil Code Section 1542, against the operation of this waiver to facts, circumstances or conditions currently unknown or unknowable. California Civil Code Section 1542 provides:

A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM MUST HAVE MATERIALLY AFFECTED HIS SETTLEMENT WITH THE DEBTOR.

MWD acknowledges it has consulted with legal counsel regarding the effects of waiving the provisions of Civil Code Section 1542, and voluntarily and knowingly waives them.

3. Haul Road.

- a. At the time this agreement is made, mining in the vicinity of the **Pipeline Easement** is contemplated

but permits to permit such mining have not been obtained. In connection with the sand and gravel mining operations, **WCD** or the **WCD-Related Parties** will need to pass over the easement areas described in the complaint with heavy equipment. This is likely to require construction of a **Haul Road** to facilitate the movement of such equipment across **the Property**. **The Pipeline** will require protection to withstand loads imposed by such heavy equipment in the **Haul Road** areas. Since permits have not been obtained as of the date of this Agreement and the exact location of the **Haul Road** has not been determined, **MWD** will construct its project **Pipeline** within the easement areas without any current protection for accommodating heavy loads in any projected **Haul Road** area.

- b. **MWD** and the **MWD-Related Parties**, will upon notice, from **WCD** or **WCD-Related Parties** at any time within 20 years from the date hereof, at the sole cost of **MWD** or the **MWD-Related Parties**, provide for the accommodation of a **Haul Road** crossing over **the Property** so long as **WCD** or the **WCD-Related Parties** obtains: (1) the permits needed to conduct mining operations; and (2) the permits needed to construct the **Haul Road**. In the event Notice is given by a **WCD-Related Party**, **WCD** hereby consents

and agrees to the following construction activities in connection with the **Haul Road**.

- (1) When all the necessary permits are obtained or approved for **WCD** or the **WCD-Related Parties** to (a) conduct mining operations and (b) construct a **Haul Road**, **WCD** or the applicable **WCD-Related Parties**, will notify **MWD** in writing of the exact location and depth of the **Haul Road**, which shall be no wider than 200 feet (100 feet on each side of the **Haul Road** center line) and which shall require a reduction in grade of the then existing surface of the ground no more than 20 feet ("**Haul Road area**");

- (2) Within 12 months from the date of **MWD's** receipt of such written notification of the location and depth of the **Haul Road**, **MWD** and the **MWD-Related Parties** at their sole cost, shall take all the necessary steps, as **MWD** deems appropriate, to protect **the Pipeline** in the area where it is traversed by the **Haul Road** to buttress **the Pipeline** from the weight of vehicles having the following maximum specifications: (a) Total truck weight of 800 kilo-pounds, (b) 2 x 2 trailer plus one

driver, (c) axle load of 187.5 kilo-pounds, and (d) payload of 240 tons per trip. After construction of the structure, **WCD** and the **WCD-Related Parties** shall have the right to cross **the Property** using the **Haul Road** area without interruption as may be necessary or convenient for any mining operations.

- (3) Prior to **MWD's** accommodation for the **Haul Road**, **MWD** will furnish **WCD** or the applicable **WCD-Related Party** the plans and specifications for **MWD's** construction activities related to the accommodation for the **Haul Road**.
- (4) **MWD** and the **MWD-Related Parties** shall be responsible for the continued maintenance of all structures built by **MWD** or the **MWD-Related Parties** to accommodate the traverse of **the Pipeline** by the **Haul Road**.
- (5) **WCD** and the **WCD-Related Parties** shall have the right to pass on or over **the Property** in the area of the **Haul Road**, to traverse across **the Property** without objection from **MWD** as long as the vehicles traversing the **Haul Road** meet the specifications delineated in Section 3 above.

4. Utilities.

- a. **MWD** and the **MWD-Related Parties** shall protect in place and/or relocate any and all presently existing utilities within **the Property**, including but not limited to all pipelines and other facilities of the East Valley Water District, at the sole expense and sole obligation of **MWD** and the **MWD-Related Parties** to maintain their existing operation.

5. Indemnification/Hold Harmless.

Irrespective of any insurance which may be carried by **MWD**, and notwithstanding any other provision herein to the contrary, **MWD** on behalf of itself and the **MWD-Related Parties** shall agree to indemnify and hold harmless **WCD** as follows:

a. Indemnification for Claims.

MWD, on behalf of itself and the **MWD-Related Parties**, indemnifies **WCD** and the **WCD-Related Parties** from any claim or liability which may be asserted by any person, partnership, corporation, or other entity or individual, including **WCD** and the **WCD-Related Parties**, arising out of or related to any damage to persons, any and all interests in real or personal property, and any actions,

claims, demands, judgments, penalties, obligations, or expenses of any kind caused by the planning, preconstruction activity, placement, construction, maintenance, operation, relocation, repair, or rehabilitation of **the Pipeline**, or any activity undertaken in furtherance thereof or pursuant thereto, or any other actions undertaken by MWD or any **MWD-Related Party** or any third party, in connection with **the Pipeline** or any other use of **the Property** by MWD or any **MWD-Related Party**. ("Indemnification Claim.")

b. Hold Harmless.

MWD, on behalf of itself and the **MWD-Related Parties**, holds the **WCD** and **WCD-Related Parties** harmless from any claim or liability that may be asserted by any person, partnership, corporation, or other entity or individual, including **MWD** and **MWD-Related Parties**, for any damage to **the Pipeline** or any of its appurtenances, or any fixtures, equipment, vehicles, other personal property, or improvements that may be placed in, on, or around **the Property** by **MWD** or any **MWD-Related Party**, arising out of or in connection with any and all lawful activities undertaken by **MWD** or any **MWD-Related Party**, or by **WCD** or any

WCD-Related Party, on any property **WCD** owns, or over which **WCD** holds any easement, license, water diversion or water spreading rights, or other right to use, whether alone or in conjunction with any lease or other agreement, with any party, public or private. ("Hold Harmless Claims.")

c. Exclusion.

The foregoing **Indemnification Claims** and **Hold Harmless Claims** shall exclude claims arising from the negligence or intentional misconduct of the **WCD** or the **WCD-Related Parties**, as determined by a court of law or other agreed arbitrator, referee, or finder of fact; ("**Non-Covered Claims**") provided, however, that any performance by **WCD** or any **WCD-Related Party** or any of the activities described in paragraph 2 above shall not constitute a **Non-Covered Claim**.

6. MWD Indemnification and Hold Harmless Obligations.

In connection with all **Indemnification Claims** and **Hold Harmless Claims** except **Non-Covered Claims**, **MWD** and the **MWD-Related Parties**, shall:

- a. Defend, at its own cost, expense, and risk, any and all such Claims, and any actions, proceedings,

suits, or hearings in connection therewith, in law or equity;

- b. Promptly pay and satisfy any judgment, award, decree, or other remedy that may be rendered against **WCD** or any **WCD-Related Party**; and
- c. Promptly reimburse **WCD** or any **WCD-Related Party** for any and all legal expenses and costs incurred by them, and each of them, in connection with any such Claim, or in connection with enforcing the **Indemnification** or **Hold Harmless Agreements** stated herein; provided however, that **WCD** and any **WCD** related party shall promptly notify **MWD** of any claim and allow **MWD** to defend any such claim. As long as **MWD** agrees upon tender of the claim to indemnify and hold harmless and defend **WCD** and **WCD-Related Parties**, such entities shall not incur costs or litigation expenses including attorneys' fees in the matter and shall not be entitled to reimbursement for such unnecessary fees or costs. In the event **MWD** or an **MWD-Related Party** rejects any indemnification or defense, it shall notify **WCD** or the applicable **WCD-Related Party(ies)** in writing five (5) business days, specifying in detail all such grounds for the rejection. In the event of any dispute regarding any indemnification obligation herein, either party hereto may seek

judicial intervention to determine the **Parties'** rights to such indemnification and defense. The prevailing party in such proceeding shall be entitled to reasonable attorneys' fees and costs.

7. General Provisions.

- a. This Agreement shall inure to the benefit of **MWD** and **WCD**, and their successors and assigns.
- b. In the event of any action or proceeding to enforce the terms of this Agreement, and in addition to any other relief or remedy which may be available at law or in equity, the prevailing party shall be entitled to an award of reasonable attorneys' fees. As used herein, "**attorneys' fees**" shall include fees for legal services, costs for reproduction of exhibits and documents, and recoverable costs. Attorneys' fees shall be recoverable whether or not the matter proceeds to final judgment, and the court, arbitrator or other finder of fact shall be requested to name a prevailing party.