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13 STORAGE DISTRICT

14  
15 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
16 COUNTY OF TULARE  
17

18 FRIANT WATER AUTHORITY, a California  
joint powers authority, and ARVIN-EDISON  
19 WATER STORAGE DISTRICT, a California  
water storage district,

20 Plaintiffs,

21 v.

22 EASTERN TULE GROUNDWATER  
23 SUSTAINABILITY AGENCY, a California  
joint powers authority, and Does 1 through 25,  
24 inclusive,

25 Defendants.  
26  
27  
28

Case No. VCU306343

Assigned for All Purposes to:  
Hon. Bret D. Hillman, Dept. 2

**FIRST AMENDED COMPLAINT FOR (1)  
BREACH OF CONTRACT; (2) BREACH  
OF IMPLIED COVENANT OF GOOD  
FAITH AND FAIR DEALING; AND (3)  
DECLARATORY RELIEF**

Action Filed: February 15, 2024

1 Plaintiff FRIANT WATER AUTHORITY (“**FWA**”), a California joint powers authority,  
2 and Plaintiff ARVIN-EDISON WATER STORAGE DISTRICT, (“**Arvin-Edison**”), a California  
3 water storage district (collectively “**Plaintiffs**”), hereby allege against Defendant EASTERN  
4 TULE GROUNDWATER SUSTAINABILITY AGENCY, a California joint powers authority  
5 (“**ETGSA**” or “**Defendant**”) and Does 1 through 25, inclusive, (collectively, “**Defendants**”) as  
6 follows:

7 **SUMMARY OF THE ACTION**

8 In January 2021, FWA and Arvin-Edison entered into an agreement with ETGSA entitled  
9 “Settlement Agreement Regarding Transitional Overdraft Pumping and Anticipated  
10 Subsidence/Repairs to the Friant Kern Canal” (“**Agreement**”). The Agreement is attached as  
11 Exhibit A and is incorporated as if fully set forth by this reference. In the Agreement, ETGSA  
12 agreed to impose penalties on landowners within ETGSA’s jurisdictional boundaries for all  
13 unsustainable (i.e., overdraft) pumping of groundwater that has and is continuing to cause  
14 subsidence damage to the Friant-Kern Canal (sometimes “**Canal**”), which is operated and  
15 maintained by FWA. ETGSA further agreed to timely invoice, collect, and remit 91% of these  
16 penalty monies to FWA as funding for the Friant-Kern Canal Middle Reach Capacity Correction  
17 Project (“**Canal Project**”) that addresses subsidence-related damage to the Canal. ETGSA is  
18 required to set these overdraft pumping penalties using the methodology specified in the  
19 Agreement in amounts that will eventually achieve, at minimum, the collection of \$220 million, of  
20 which \$200 million is to be paid to FWA for the Canal Project. ETGSA also agreed to take  
21 commercially reasonable efforts to implement certain management actions in a manner intended to  
22 avoid or minimize further subsidence damage to the Canal and to include FWA in the planning  
23 and development of such management actions. As set forth herein, Defendants have failed to  
24 satisfy their obligations under the Agreement. Specifically, Defendants have, among other things,  
25 failed to satisfy the following non-discretionary, contractual obligations under the Agreement:

- 26 • Charge landowners under ETGSA’s jurisdiction the required penalties for all unsustainable  
27 overdraft groundwater pumping as required by Section 1 of the Agreement;

- 1 • Set the overdraft pumping penalty amount based on the methodology required by Section  
2 1.B of the Agreement;
- 3 • Timely invoice, collect, and remit penalty proceeds to FWA for purposes of the Canal  
4 Project necessitated by overdraft pumping-induced subsidence as required by Sections 1.D,  
5 3.A and 14 of the Agreement;
- 6 • Create a standing Land Subsidence Management and Monitoring Committee to  
7 recommend additional management actions to limit further subsidence and include a FWA  
8 representative on that committee as required by Section 4 of the Agreement; and,
- 9 • Take commercially reasonable efforts to implement applicable management actions in a  
10 manner that will limit further subsidence impacts to the Canal as required by Sections 4  
11 and 14 of the Agreement.

12 Defendants' failure and refusal to satisfy these contractual obligations to which they agreed  
13 under the Agreement has caused damages including, without limitation, additional subsidence,  
14 damage to the Friant-Kern Canal, and has deprived Plaintiffs of significant amounts of money  
15 promised by Defendants to fund the Canal Project.

16 **THE PARTIES**

17 1. FWA is a California joint powers authority, duly organized and existing under and  
18 by virtue of the laws of the State of California, with its principal place of business located in  
19 Lindsay, California. FWA is responsible for the operation, maintenance, repair, and replacement  
20 of the Friant-Kern Canal, a key facility of the Friant Division of the federal Central Valley Project  
21 ("CVP") (owned by the United States and managed by the United States Department of the  
22 Interior, Bureau of Reclamation ("**Reclamation**"). The Canal transports water from Friant Dam,  
23 near Fresno, to the Kern River, near Bakersfield, including to Arvin-Edison.

24 2. Arvin-Edison is a water storage district, duly organized and existing under and by  
25 virtue of the laws of the State of California, with its principal place of business located in Arvin,  
26 California, and is comprised of approximately 132,000 acres of mostly prime farmland. It was  
27 organized in 1942 for the express purpose of contracting with the United States for water service  
28

1 from the CVP. Arvin-Edison has contracted with the United States for the delivery of more than  
2 350,000 acre-feet of CVP water per year and relies on the Canal for CVP water deliveries.

3           3.       ETGSA is a California joint powers authority, duly organized and existing under  
4 and by virtue of the laws of the State of California, with its principal place of business located in  
5 Porterville, California. It is a groundwater sustainability agency (“GSA”) formed pursuant to the  
6 California Sustainable Groundwater Management Act of 2014, Water Code §10720 and following  
7 (“SGMA”), which was enacted by the State of California to address the urgent need to more  
8 sustainably manage groundwater basins and minimize land subsidence and subsidence-related  
9 impacts to critical infrastructure. ETGSA’s members include Porterville Irrigation District,  
10 Saucelito Irrigation District, Tea Pot Dome Water District, Terra Bella Irrigation District,  
11 Vandalia Water District, the City of Porterville, and the County of Tulare. The jurisdictional  
12 boundaries of ETGSA, depicted on the map attached as Exhibit B, encompass a portion of the  
13 Friant-Kern Canal, which is considered “critical infrastructure” under SGMA. ETGSA has, and at  
14 all times herein relevant had, the power and authority to enter into contracts including, without  
15 limitation, the Agreement that is the subject of this lawsuit. (See Agreement, §8; Water Code  
16 §10726.2; Gov. Code §6508.)

17           4. Defendants DOES 1-25 are sued herein because they are in some manner legally  
18 responsible for the events and circumstances giving rise to the damages suffered by Plaintiffs,  
19 whether such acts and occurrences were committed intentionally, recklessly, negligently or  
20 otherwise, or are responsible for the performance obligations of Defendant under the Agreement ,  
21 or are agents, employees, representatives or other persons acting on behalf of or in concert with  
22 Defendant with respect to obligations owed to Plaintiffs under the Agreement or at law. At this  
23 time, Plaintiffs are ignorant of the true names of Defendants DOES 1-25, inclusive, and therefore  
24 name them by their fictitious names pursuant to Code of Civil Procedure section 474. When their  
25 true names and identities are ascertained, Plaintiffs will seek leave to amend this Amended  
26 Complaint to substitute their true names and identities in the place of such fictitious names.

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1 **FACTUAL BACKGROUND**

2 5. The 152-mile-long Friant-Kern Canal is one of the most important pieces of  
3 infrastructure in the Central Valley. The Canal provides irrigation water to more than one million  
4 acres of farmland through deliveries to over 30 water agencies, including Arvin-Edison  
5 (collectively “**Friant Contractors**”). It also provides drinking water to more than 250,000 San  
6 Joaquin Valley residents, including disadvantaged communities lacking reliable access to other  
7 water sources.

8 6. In recent decades, portions of the Friant-Kern Canal between mile post 88 and mile post  
9 121.5 (an area referred to as the “**Middle Reach**”), largely located within ETGSA's boundaries,  
10 have experienced upwards of nine (9) feet of cumulative subsidence caused by unsustainable (i.e.,  
11 overdraft) groundwater pumping. Because the Canal relies on gravity flow, this subsidence has  
12 reduced the conveyance capacity of the Canal, from a design capacity of 4,000 cubic feet per  
13 second (cfs) to, at present, approximately 1,500 cfs. This land subsidence has not only physically  
14 damaged the Canal but has significantly reduced deliveries to the Friant Contractors (and their  
15 agricultural and residential customers) adjacent to and south of the Middle Reach. It has also  
16 limited the ability of Friant Contractors to engage in beneficial exchanges and transfers of water  
17 with other water agencies. (See Agreement, Recital N.)

18 7. Because Arvin-Edison is located at the southern end of the Friant-Kern-Canal, it bears  
19 the most substantial brunt of the subsidence impacts in the Middle Reach. Indeed, subsidence of  
20 the Canal has already prevented the delivery of hundreds of thousands of acre-feet of water to  
21 Arvin-Edison, and, if allowed to continue, it is projected to reduce long-term deliveries by nearly  
22 100,000 acre-feet per year.

23 8. To address the reduced conveyance capacity of the Friant-Kern Canal in the Middle  
24 Reach due to land subsidence, beginning in early 2017, FWA and Reclamation began formal joint  
25 planning efforts for the Canal Project, for which FWA is responsible for providing an anticipated  
26 75% of the funding.

27 9. Because the extensive damage to the Canal from land subsidence could not be repaired  
28 in place – as that would require the closure of the Canal – the Canal Project includes the

1 construction of a parallel canal segment extending for approximately 10 miles adjacent to the  
2 existing Canal (“**Replacement Canal Segment**”). The Replacement Canal Segment (along with  
3 the portion of the existing Canal to be replaced) is located entirely within the boundaries of  
4 ETGSA. A summary of the Canal Project prepared by Reclamation is attached to the Amended  
5 Complaint as Exhibit C.

6 10. ETGSA is within a groundwater basin known as the “Tule Subbasin.” The Tule  
7 Subbasin has been designated “high-priority” by the State of California, meaning (among other  
8 things) that ETGSA was legally required under SGMA to adopt an adequate groundwater  
9 sustainability plan (“**GSP**”) by January 31, 2020. (The ETGSA GSP has still not been deemed  
10 legally adequate by the California Department of Water Resources.)

11 11. In September 2019, ETGSA released a draft GSP for public review and comment.  
12 Among other things, the September 2019 draft GSP proposed to allow continued overdraft  
13 groundwater pumping that would result in additional subsidence ranging from to 1.3 feet to 3 feet  
14 along portions of the Middle Reach of the Canal, including material subsidence forecast in the  
15 vicinity of the proposed Replacement Canal Segment.

16 12. On December 16, 2019, FWA submitted written comments to ETGSA on the draft  
17 GSP. FWA noted the impacts to the Canal that the additional projected subsidence could have in  
18 terms of reducing water deliveries to Friant Contractors in the vicinity and south of the Middle  
19 Reach, which in turn would diminish the ability of impacted Friant Contractors to contribute to the  
20 sustainable management of groundwater in their own regions due to reduced deliveries of surface  
21 water through the Canal. FWA also expressed concern that the draft ETGSA GSP contained no  
22 specific management actions or mitigation to address the projected subsidence impacts to the  
23 Canal. FWA requested that ETGSA “promptly develop and bring back for adoption management  
24 actions that would establish mechanisms to mitigate future subsidence impacts in the form of  
25 compensation to FWA and Friant [Contractors] to pay for the costs of repairs to the [Friant-Kern  
26 Canal] resulting from the transitional pumping/use permitted under the [proposed] GSP.”

1           13.     ETGSA adopted a GSP on January 17, 2020. ETGSA’s GSP continued to include  
2 subsidence thresholds permitting additional subsidence ranging from 1.3 to 3 feet along portions  
3 of the Middle Reach of the Friant-Kern Canal during the applicable twenty-year planning period.

4           14.     To address the future subsidence along the Canal forecast in the ETGSA GSP,  
5 Reclamation and FWA incorporated, at significant cost, additional embankment height to the  
6 plans for the Replacement Canal Segment of the Canal Project ranging from one (1) foot to five  
7 (5) feet.

8           15.     On August 6, 2020, ETGSA adopted its initial rules and regulations (“**Rules and**  
9 **Regulations**”), which provide the framework for the implementation of certain management  
10 actions under its GSP, including the Penalty Program and Land Subsidence Management Plan  
11 (defined and described below). (Agreement, Recital K.)

12           16.     Throughout 2020, and in furtherance of FWA’s December 2019 comment letter  
13 request, representatives of Plaintiffs and ETGSA engaged in negotiations to develop mechanisms  
14 to address future subsidence impacts to the Friant-Kern Canal in the form of an agreement, which,  
15 among other things, would provide compensation to FWA to help pay for FWA’s share of the  
16 Canal Project.

17           17.     The negotiations between Plaintiffs and ETGSA culminated in the adoption and  
18 execution of the Agreement in January 2021.

19           18.     The primary purposes and obligations of the Agreement at issue in this Amended  
20 Complaint are summarized in the following subparagraphs:

21                 a. **Avoid or Minimize Subsidence Impacts to the Friant-Kern Canal:** The  
22 Agreement requires ETGSA to avoid or minimize significant and unreasonable subsidence  
23 impacts to critical infrastructure such as the Friant-Kern Canal. This vital obligation is  
24 effectuated in Section 4 of the Agreement whereby ETGSA promised to “*take such **commercially***  
25 ***reasonable efforts** to adopt and implement such management action(s) as identified with the*  
26 *ETGSA GSP to limit additional subsidence in the Middle Reach [of the Friant-Kern Canal].”*  
27 (Agreement, §4.A; emphasis added.) One such management action is what ETGSA adopted and  
28 redesignated as its “**Land Subsidence Management Plan**” focused on identifying and

1 minimizing land subsidence along the Canal. (Agreement, Recital I.) (ETGSA has subsequently  
2 incorporated the plan into the provisions of its Rules and Regulations.) The Land Subsidence  
3 Management Plan, among other things, requires landowners who have experienced over 1.5 feet of  
4 land subsidence on their property since 2020 to meter their wells and report pumping from any  
5 well extracting water 600 feet or more below land surface.

6           **b. Implement a Groundwater Accounting Action and Transitional Pumping**  
7 **Penalty Program that Generates, at Minimum, \$220,000,000 in Penalty Revenues:** Another  
8 of the key management actions that ETGSA promised to undertake in the Agreement is to  
9 implement a “**Groundwater Accounting Action**,” which, among other things, tracks groundwater  
10 use and provides a mechanism to budget and allocate groundwater pumping. (Agreement, Recital  
11 H.) The Agreement acknowledges that ETGSA had established 1,034,553 acre-feet of overdraft  
12 water (referred to as “transitional water” because landowners are required to “transition” from  
13 overdraft to sustainable pumping over time) that is available for allocation and extraction by  
14 landowners through 2035. (Agreement, Recital K.) The Groundwater Accounting Action is  
15 identified as a management action in Section 7.2.1 of Section 7 (Projects and Management  
16 Actions) of the ETGSA GSP. The Agreement acknowledges that the Groundwater Accounting  
17 Action would be implemented through ETGSA’s Rules and Regulations, which in turn would  
18 “provide a penalty structure for all groundwater consumed above sustainable yield (i.e. all  
19 overdraft water).” (Agreement, Recital L.) The Agreement describes how the Rules and  
20 Regulations characterize this overdraft pumping. Specifically, the 1,034,533 feet of overdraft, or  
21 unsustainable, water allowed to be pumped is referred to as the “**Tier 1 Penalty Allocation**” and it  
22 has an associated penalty amount charged for each acre-foot of such overdraft water pumped  
23 (“**Tier 1 Penalty**”). (*Id.*) All overdraft water pumped in excess of the Tier 1 Penalty Allocation is  
24 referred to as “**Tier 2**” and it has a higher penalty amount (“**Tier 2 Penalty**”) to further  
25 disincentivize overdraft pumping. (*Id.*) The Agreement acknowledges that the amount of the Tier  
26 1 and Tier 2 Penalty “will be established annually by the ETGSA Board of Directors.”  
27 (Agreement, Recital M.) In addition to serving as a disincentive to pump overdraft water, and thus  
28 limit subsidence, the imposition of these penalties is also intended to generate revenues to fund a



1 portion of the Canal Project. (Agreement, Recital R.) These purposes are effectuated, in part,  
2 through Section 1 of the Agreement, which provides that “*ETGSA shall approve and maintain a*  
3 *volumetric penalty amount per acre foot consumed on transitional pumping as defined in the*  
4 *ETGSA GSP in an amount that will achieve, at minimum, the collection of \$220,000,000.*”  
5 (Agreement, §1; emphasis added.) (This program is hereafter referred to as the “**Penalty**  
6 **Program**”). The Agreement further provides that from the \$220,000,000 to be generated under  
7 the Penalty Program, “*ETGSA shall pay up to a maximum of two hundred million dollars*  
8 *(\$200,000,000) of penalty monies to FWA on a rolling basis.*” (Agreement, §3.A; emphasis  
9 added.) (This \$200,000,000 in penalties committed to FWA is hereafter referred to as the  
10 “**Penalty Obligation**”). ETGSA committed to the Penalty Obligation to resolve the dispute  
11 between Plaintiffs and ETGSA in terms of mitigating the damages arising from ETGSA allowing  
12 additional subsidence impacts to the Middle Reach of the Friant-Kern Canal under its GSP.  
13 (Agreement, Recital S.)

14           c. **Set the Tier 1 Penalty Amount Based on Actual Overdraft Water Pumped:** At  
15 the time of the execution of the Agreement, ETGSA had no data available to determine how to set  
16 the Tier 1 Penalty amount in order to achieve the Penalty Obligation. Therefore, the parties agreed  
17 that “*ETGSA shall set a penalty amount to collect Tier 1 penalty money not received in year 2020*  
18 *based on actual transitional water pumped over the next five years (2021-2026), thus increasing*  
19 *the amount of penalties expected to be received by ETGSA [and remitted to FWA] in the earlier*  
20 *years of the transitional pumping penalty program.*” (Agreement, §1.B; emphasis added.)

21           d. **Timely Invoice, Collect and Remit Penalties from Overdraft Pumping to FWA**  
22 **to Fund the Canal Project:** The Agreement obligates ETGSA to timely invoice, collect and  
23 remit a portion of the Tier 1 and Tier 2 Penalties to FWA on a continuing basis to satisfy the  
24 Penalty Obligation over time. (Agreement, §§1.D, 3.A and 14.) The importance of this obligation,  
25 particularly in the early years of the contract term, is emphasized in Section 2.A of the Agreement,  
26 which describes “*the mutual benefits that would result from FWA’s early receipt of funds that*  
27 *could be applied towards the [Canal] Project.*” (Agreement, §2.A; emphasis added.)  
28

1 e. **Obligation to Take Subsequent Actions to Fully Effectuate the Terms and**  
2 **Intent of the Agreement:** Section 14 of the Agreement requires ETGSA “to cooperate fully ...  
3 to effectuate the stated purposes of [the] Agreement ... and in the completion of any additional  
4 action that may be necessary or appropriate to give full force and effect to the terms and intent of  
5 this Agreement.” (Agreement, §14; emphasis added.)

6 19. In April and July of 2021, FWA and Reclamation entered into a cost share  
7 agreement and repayment agreement, respectively, to address the funding for the construction of  
8 the Canal Project. FWA’s total obligation is to fund approximately 75% of the Canal Project  
9 costs. The current approved budget for Phase 1 of the Canal Project (which includes the  
10 Replacement Canal Segment within ETGSA’s boundaries) is \$326 million, and the overall Canal  
11 Project budget (including Phase 2) is estimated to exceed \$650 million. In entering into the cost  
12 share and repayment agreements with Reclamation, FWA relied on the specific promises and  
13 representations made by ETGSA in the Agreement, including taking all of the actions described in  
14 Paragraph 18 above to achieve the stated purposes of the Agreement.

15 20. In January 2022, FWA and Reclamation commenced construction of Phase 1 of the  
16 Canal Project. The construction of the Replacement Canal Segment portion of the Canal Project is  
17 nearly complete.

18 21. The Groundwater Accounting provisions of the ETGSA Rules and Regulations  
19 establish a category of water referred to as “Total Precipitation” which ETGSA has elected to  
20 calculate based on the long-term average of total annual precipitation within the ETGSA  
21 boundaries. In recognition of what should be the short-term reduction in the need for groundwater  
22 pumping associated with annual rainfall, the Rules and Regulations provide landowners an annual  
23 allocation or credit for rainfall (“**Precipitation Credit**”). In 2021, after entering into the  
24 Agreement and without any discussion with or advance notice to Plaintiffs or the general public,  
25 ETGSA administratively issued to landowners under its jurisdiction a Precipitation Credit for the  
26 2020 water year (which had already passed) and a second Precipitation Credit for the then current  
27 2021 water year. The amount of the 2020 water year Precipitation Credit was 0.89 acre-feet per  
28 acre under irrigation, which resulted in a total credit spread among all applicable landowners of

1 approximately 117,000 acre-feet of water. ETGSA concurrently *subtracted* the same amount of  
2 water from the 1,034,553 acre-feet of total overdraft water budgeted for its Penalty Program – i.e.,  
3 the water from which the Tier 1 and Tier 2 Penalties are to be imposed and the resulting funds  
4 collected and paid to FWA. This improper allocation to landowners of a free Precipitation Credit  
5 for the prior 2020 water year (hereafter, “**2020 Precipitation Credit Giveaway**”) purported to  
6 recharacterize overdraft water—subject to the Penalty Program—as precipitation, when in fact any  
7 precipitation from 2020 had already been consumed or evaporated. There was (and remains) no  
8 valid basis for ETGSA’s characterization of overdraft water as purportedly sustainable  
9 precipitation. ETGSA’s issuance of the 2020 Precipitation Credit Giveaway breached the  
10 Agreement by depriving FWA of the penalty revenues promised by ETGSA for the pumping of  
11 overdraft water and the promised disincentives for landowners to limit overdraft pumping.  
12 (Agreement, Recitals K and L, §§1, 3.)

13         22.       ETGSA water year 2022 was effectively the first full year of ETGSA’s  
14 implementation of its Rules and Regulations, including the Penalty Program under the Agreement.  
15 Despite ongoing drought conditions in the San Joaquin Valley – conditions which reduced the  
16 availability of surface water and would have increased groundwater pumping in the area  
17 accordingly – ETGSA landowners purportedly consumed just 26,000 acre-feet of Tier 1  
18 Allocation overdraft water for use on the approximately 85,000 acres of land under  
19 cultivation/irrigation in ETGSA. At the same time, however, monitoring sites along portions of  
20 the Friant-Kern Canal within the boundaries of ETGSA recorded significant ongoing subsidence –  
21 nearly one foot of additional subsidence at some locations between 2020 and 2022.

22         23.       Plaintiffs are informed and believe, and thereon allege, that the additional  
23 subsidence and the purportedly limited use of Tier 1 Allocation overdraft water referenced in  
24 Paragraph 22 above is directly attributable, in significant part, to ETGSA’s 2020 Precipitation  
25 Giveaway because it incentivized rather than discouraged the pumping of overdraft water in  
26 breach of the Agreement. Notwithstanding Section 3.B. of the Agreement, the limited penalty  
27 monies received by FWA to date is attributable, in significant part, to ETGSA’s improper  
28 management of the Penalty Program; and in particular, the allowance of purported precipitation as

1 credits that insulate landowners from paying penalties for unsustainable pumping as required by  
2 the Agreement, rather than the disincentivizing nature of the penalties themselves.

3         24. In October 2022, the ETGSA Board of Directors adjusted the Tier 1 Penalty  
4 amount for water year 2023 to the amount of \$284 per acre-foot. In making the adjustment,  
5 however, the Board failed to apply the methodology required under Section 1.B of the Agreement,  
6 which requires the amount to be set based on “actual transitional water pumped.” Instead, the  
7 Board set the amount based on the total remaining amount of Tier 1 Allocation and the  
8 hypothetical assumption that all such overdraft water would be pumped and thus, when multiplied  
9 by the proposed penalty amount, it would allegedly result in sufficient funds to meet ETGSA’s  
10 \$200,000,000 Penalty Obligation. If ETGSA had set the Tier 1 Penalty amount in the manner  
11 prescribed by Section 1.B of the Agreement, the penalty amount would have been significantly  
12 higher and would have generated a correspondingly higher amount of additional penalty revenue  
13 for every acre-foot of overdraft water consumed.

14         25. In October 2023, the ETGSA Board of Directors adjusted the Tier 1 Penalty  
15 amount for water year 2024. In making the adjustment, however, the ETGSA Board again failed  
16 to apply the methodology required under Section 1.B of the Agreement. Instead, the ETGSA  
17 Board again used the improper October 2022 methodology (described in Paragraph 24, above) and  
18 set the penalty amount in a manner not allowed under the Agreement. In failing to set the Tier 1  
19 Penalty amount in the manner prescribed by Section 1.B of the Agreement, ETGSA again  
20 deprived FWA of the additional penalty revenue that would have been generated for every acre-  
21 foot of overdraft water consumed.

22         26. FWA has demanded that ETGSA revise the Tier 1 Penalty amount by following the  
23 methodology required under Section 1.B of the Agreement, but ETGSA has refused to make such  
24 revisions to the penalty amount or even acknowledge its obligation to utilize the methodology set  
25 forth in Section 1.B – all in breach of the express terms of the Agreement, and depriving FWA of  
26 funds for the Canal Project.

27         27. According to ETGSA records, there is at least \$3 million in Tier 1 Penalties that  
28 ETGSA has not collected and paid to FWA since the onset of the Penalty Program. Plaintiffs are

1 informed and believe, and thereon allege, that ETGSA has failed to timely take all commercially  
2 reasonable efforts to collect these delinquent penalties and remit them to FWA to fund the Canal  
3 Project in breach of Sections 1.D, 3.A and 14 of the Agreement.

4         28. Under the Agreement, ETGSA is required to establish a standing “Land Subsidence  
5 Monitoring and Management Committee” and to appoint a FWA representative to that committee.  
6 (Agreement, §4.) Despite multiple requests from FWA, ETGSA has not satisfied either  
7 obligation. To date, ETGSA has established only a standing “Land Subsidence Monitoring  
8 Committee,” which has not been given any purview to make recommendations to the Board  
9 regarding “management” of land subsidence within ETGSA. Instead, land subsidence  
10 management action recommendations are apparently being generated by unidentified individuals  
11 inside ETGSA on an ad hoc basis, outside of any committee where FWA has a permanent  
12 representative. ETGSA’s failure to establish a standing committee charged with making  
13 recommendations regarding land subsidence management and to appoint a FWA representative to  
14 that committee, as expressly required by Section 4 of the Agreement, has precluded FWA from  
15 “provid[ing] input and recommendations as to additional management actions that may help  
16 reduce or avoid subsidence entirely.” Therefore, ETGSA has deprived Plaintiffs of the bargained-  
17 for benefits promised under Section 4 of the Agreement.

18         29. As alleged above, one of the management actions identified in the Agreement as to  
19 which ETGSA agreed in Section 4 of the Agreement to undertake commercially reasonable efforts  
20 to implement is its Land Subsidence Management Plan that has been incorporated into the ETGSA  
21 Rules and Regulations. Section 4.05(e)(1) of ETGSA’s current Ninth Amended Rules and  
22 Regulations requires that for any land within its Land Subsidence Management Area (“LSMA”)  
23 where subsidence has exceeded 1.5 feet since January 2020, that “[a]ny wells implementing  
24 pumping of any water 600 feet below land surface will require a meter and reporting of the data  
25 monthly to ETGSA staff.” Aware that a many parts of its LSMA had surpassed 1.5 feet of  
26 subsidence by the end of calendar year 2022, ETGSA, in February 2023, sent written notices to  
27 landowners in such affected areas of the provisions of Section 4.05 of the Rules and Regulations,  
28 including the well metering and reporting requirement, but did not establish any deadline for the

1 requisite meter to be installed or the data reported to ETGSA. The ability to precisely measure  
2 groundwater pumping through the use of well metering and the reporting of data to understand the  
3 aquifer the well is drawing from are critical components of subsidence monitoring and  
4 management. Accordingly, Plaintiffs allege, on information and belief, that ETGSA's failure to  
5 timely implement the management action under Section 4.05(e)(1) of its Rules and Regulations  
6 has contributed and will continue to contribute to the allowance of additional subsidence in the  
7 Middle Reach and damage to the Friant-Kern Canal, and that such failure is a breach Section 4 of  
8 the Agreement.

9         30. Since the execution of the Agreement in January 2021, large areas along the Middle  
10 Reach of the Canal have subsided in excess of 1.8 feet. According to ETGSA's Land Subsidence  
11 2022/23 Annual Report submitted to the Department of Water Resources, land subsidence in nine  
12 ETGSA subsidence management zones has exceeded 1.5 feet during this short period. ETGSA is  
13 predicting that an additional five zones may exceed this threshold of 1.5 feet and two management  
14 zones may reach 2-feet of subsidence as early as September 2024.

15         31. Moreover, since the execution of the Agreement through the last quarter of 2023,  
16 ETGSA has reported to Plaintiffs that a total of approximately 74,000 acre-feet of Tier 1 Penalty  
17 Allocation overdraft water has allegedly been pumped (or pre-purchased) for use on the  
18 approximately 85,000 acres of land under cultivation/irrigation in ETGSA (a paltry amount for a  
19 critically overdrafted basin). On the other hand, ETGSA has reported that in excess of 50% of the  
20 groundwater consumed in ETGSA between 2021 and 2023 has allegedly come from precipitation  
21 or native safe yield allocations, despite the years 2021 and 2022 being declared drought  
22 emergencies by the Governor of California.

23         32. In recognition of the continuing high rates of subsidence along the Canal and the  
24 limited penalty revenues being generated to fund the Canal Project under ETGSA's Penalty  
25 Program, Plaintiffs have on multiple occasions since January 2023 presented ETGSA with certain  
26 technical recommendations for revisions to the Rules and Regulations, many of which focused on  
27 the calculation of the Precipitation Credit as well as the ability to carry over that credit for future  
28 use and/or transfer it to other lands and landowners. Plaintiffs made these good-faith



1 **FIRST CAUSE OF ACTION**

2 **(Breach Of Contract)**

3 **(By All Plaintiffs Against All Defendants)**

4 37. Plaintiffs hereby repeat and reallege the allegations contained in the above  
5 Paragraphs 1 through 36.

6 38. The Agreement between Plaintiffs and ETGSA constitutes a binding and  
7 enforceable agreement between Plaintiffs and ETGSA.

8 39. Under and in furtherance of the Agreement, Plaintiffs agreed and promised to  
9 undertake and satisfy certain obligations to ETGSA in exchange for valuable consideration.

10 40. Plaintiffs have duly performed all of the acts, covenants and/or conditions required  
11 under the Agreement except those that were waived, prevented and/or excused.

12 41. By its acts, refusals to act, and omissions, including, but not limited to those  
13 referenced in the above paragraphs of this Amended Complaint, ETGSA has breached the  
14 Agreement with Plaintiffs in numerous ways, including, but not limited to, the following:

15 a. Improperly converting overdraft transitional water to be assessed the Tier 1  
16 Penalty into a Precipitation Credit that could be pumped without penalty through the acts  
17 associated with the 2020 Precipitation Credit Giveaway in breach of Section 1 of the Agreement.

18 b. Improperly allocating and allowing the long-term carry over and transfer of  
19 Precipitation Credits, essentially disguised overdraft water, and allowing such overdraft water to  
20 be pumped without the imposition of any penalty in breach of Sections 1, 4 and 14 of the  
21 Agreement.

22 c. Failing to set the Tier 1 Penalty amount annually based on the methodology  
23 required under Section 1.B of the Agreement.

24 d. Failing to timely invoice, collect and remit penalty proceeds to FWA,  
25 particularly during the initial years of the Canal Project to repair subsidence damage to the Friant-  
26 Kern Canal as required by Sections 1.D, 3.A and 14 of the Agreement.

27 e. Failing to create a standing Land Subsidence Management and Monitoring  
28 Committee to recommend additional management actions to limit further subsidence and include a



1 FWA representative on that committee as required by Section 4 of the Agreement.

2 f. Failing to take commercially reasonable efforts to implement, including  
3 revise when necessary, the management actions identified in the Agreement, including but not  
4 limited to those in the Rules and Regulations pertaining to the Penalty Program and Land  
5 Subsidence Management Plan, that are intended to limit further subsidence impacts to the Canal as  
6 required by Sections 4 and 14 of the Agreement.

7 42. As a direct and proximate result of ETGSA's actions, Plaintiffs have been damaged  
8 in an amount in excess of the jurisdictional minimum of this Court, the precise amount to be  
9 proven at trial.

10 43. Any and all applicable and enforceable conditions precedent under the Agreement  
11 and applicable law to bringing the claims set forth herein and commencing this action have  
12 occurred, been satisfied and performed or have been waived, excused, or otherwise satisfied.

13 **SECOND CAUSE OF ACTION**

14 **(Breach Of Implied Covenant Of Good Faith And Fair Dealing)**

15 **(By All Plaintiffs Against All Defendants)**

16 44. Plaintiffs hereby repeat and reallege the allegations contained in the above  
17 Paragraphs 1 through 43.

18 45. The Agreement contains an implied covenant and duty of good faith and fair  
19 dealing pursuant to California law which provides that no party to the Agreement will act in any  
20 manner or in any way to hinder the performance of the other, and that neither party will engage in  
21 any conduct which will injure, or tend to injure, the right of the other party to receive the benefits  
22 of the Agreement.

23 46. ETGSA breached these implied covenants by engaging in conduct which frustrates  
24 Plaintiffs' rights to the benefits of the Agreement – including, but not limited to, failing, and  
25 continuing to fail, to cooperate with Plaintiffs as alleged herein, including but not limited to the  
26 allegations above, such that Plaintiffs would have in the past, or will in the future, receive the  
27 bargained-for benefits of the Agreement.

28 47. ETGSA has not acted – and has repeatedly refused to act – fairly and in good faith,

1 preventing Plaintiffs from receiving their benefits under the Agreement.

2 48. As a direct and proximate result of ETGSA's breaches of the implied covenant of  
3 good faith and fair dealing, Plaintiffs have been harmed and they have suffered and continue to  
4 suffer damages in an amount in excess of the jurisdictional minimum of this Court, the exact  
5 amount to be determined and proven at trial.

6 **THIRD CAUSE OF ACTION;**

7 **(Declaratory Relief, Code of Civil Procedure §1060)**

8 **(By All Plaintiffs Against All Defendants)**

9 49. Plaintiffs hereby repeat and reallege the allegations contained in the above  
10 Paragraphs 1 through 48.

11 50. An actual controversy has arisen and now exists between Plaintiffs and ETGSA  
12 (and defendants DOES 1-25), and each of them, regarding their respective rights and obligations  
13 under the Agreement regarding whether ETGSA is obligated to implement the management  
14 actions identified in the Agreement in a manner, as promised in the Agreement, that will avoid or  
15 minimize additional subsidence impacts to the Middle Reach of the Friant-Kern Canal, including  
16 the nearly completed Replacement Canal Segment, and reasonably achieve the Penalty Obligation  
17 under the Penalty Program, and in turn timely collect and remit those funds to FWA to help pay  
18 the costs of constructing the Canal Project.

19 51. Plaintiffs desire a judicial determination of their rights and duties and of the rights  
20 and obligations of ETGSA (and Defendants DOES 1-25) and a declaration as to ETGSA's  
21 obligations to adopt, implement, and where necessary revise, the management actions identified in  
22 the Agreement in a manner that will realize, and not impair, the agreed-upon assessment and  
23 collection of the Penalty Obligation under the Penalty Program, timely invoice, collect and remit  
24 such penalties to FWA to fund a portion of the Canal Project, and minimize or avoid further  
25 subsidence along the Middle Reach of the Friant-Kern Canal.

26 52. A judicial declaration is necessary and appropriate at this time and under all the  
27 circumstances so that Plaintiffs and ETGSA (and Defendants DOES 1-25) may determine their  
28 rights and duties under the Agreement.

1 **PRAYER FOR RELIEF**

2 WHEREFORE, Plaintiff prays for relief as follows:

3 **On the First Cause of Action**

- 4 1. For damages in an amount in excess of the jurisdictional minimum of this Court,  
5 according to proof at trial;
- 6 2. For prejudgment interest thereon at the legal rate;
- 7 3. For costs of suit herein;
- 8 4. For attorneys' fees, consultant costs, expert costs, and all other reasonable expenses in  
9 accordance with Section 12 of the Agreement and California Code of Civil Procedure section  
10 1717; and,
- 11 5. For such other and further relief deemed necessary and proper by the Court.

12 **On the Second Cause of Action**

- 13 1. For damages in an amount in excess of the jurisdictional minimum of this Court  
14 according to proof at trial;
- 15 2. For prejudgment interest thereon at the legal rate;
- 16 3. For costs of suit herein;
- 17 4. For attorneys' fees, consultant costs, expert costs, and all other reasonable expenses in  
18 accordance with Section 12 of the Agreement and California Code of Civil Procedure section  
19 1717; and,
- 20 5. For such other and further relief deemed necessary and proper by the Court.

21 **On the Third Cause of Action**

- 22 1. For a Declaration from the Court that:
- 23 a. ETGSA is obligated to adopt, revise and implement the management  
24 actions identified in the Agreement in a manner that will realize, and not impair, the agreed-upon  
25 Penalty Program, including establishing the penalty amounts in the manner required under the  
26 Agreement in order to achieve ETGSA's Penalty Obligation, and the timely invoicing, collection  
27 and payment of these penalties to FWA, and otherwise perform its obligations, including  
28 establishment of a Land Subsidence Monitoring and Management Committee, in a manner that

1 avoids or minimizes additional subsidence along the Middle Reach of the Friant-Kern Canal.

2           2. For attorneys' fees, consultant costs, expert costs, and all other reasonable expenses in  
3 accordance with Section 12 of the Agreement and California Code of Civil Procedure section  
4 1717; and

5           3. For such other and further relief as the court may deem proper.

6  
7 Dated: April 26, 2024

BURKE, WILLIAMS & SORENSEN, LLP

8  
9 By:



10 David Darroch  
11 Attorneys for Plaintiff, FRIANT WATER  
12 AUTHORITY

13 Dated: April 26, 2024

KAPLAN KIRSCH & ROCKWELL LLP

14  
15 By:



16 Matthew Adams  
17 Attorneys for Plaintiff, ARVIN-EDISON  
18 WATER STORAGE DISTRICT

# **EXHIBIT A**

**SETTLEMENT AGREEMENT REGARDING TRANSITIONAL OVERDRAFT  
PUMPING AND ANTICIPATED SUBSIDENCE DAMAGES/REPAIRS TO THE FRIANT  
KERN CANAL**

This Settlement Agreement (“**Agreement**”) is effective as of January 12, 2021 (“**Effective Date**”), and is made between the Friant Water Authority, a California joint powers authority (“**FWA**”), and Arvin-Edison Water Storage District (“**District**”) (FWA and District are referred to collectively as “**Friant**”), and the Eastern Tule Groundwater Sustainability Agency, a California joint powers authority (“**ETGSA**”). Friant and ETGSA are collectively referred to as the “**Parties**.”

**RECITALS**

A. FWA is a joint powers authority consisting of public agencies holding long-term repayment contracts (“**Friant Contractors**”) with the Bureau of Reclamation (“**Reclamation**”) for water service from the Friant Division of the Central Valley Project and for facilities repayment. FWA is responsible for the operation, maintenance, repair and replacement (“**OM&R**”) of the Friant-Kern Canal (“**FKC**”) which conveys water from Millerton Lake along the 152-mile length of the FKC pursuant to a long-term agreement with Reclamation.

B. ETGSA is a California groundwater sustainability agency formed to implement the Sustainable Groundwater Management Act of 2014, Water Code § 10720 et seq. (“**SGMA**”) in a portion of the Tule Subbasin as defined in the Department of Water Resources Bulletin 118. The Tule Subbasin has been designated as a high- or medium-priority basin by the Department of Water Resources (“**Department**”).

C. In enacting SGMA, as set forth in Water Code section 10720.1(a) and (c), the California Legislature intended to, among other purposes, “provide for the sustainable management of groundwater basins” and “to avoid or minimize subsidence.” All groundwater sustainability plans (“**GSPs**”) adopted in a subbasin must be implemented in a manner that achieves the subbasin’s sustainability goal and avoids significant and unreasonable undesirable results. Groundwater sustainability agencies (“**GSAs**”) must describe in their GSPs the process and criteria relied upon to define undesirable results applicable to the basin. Undesirable results occur when significant and unreasonable effects for any of the sustainability indicators are caused by groundwater conditions occurring throughout the basin. (Cal. Code Regs. Tit. 23, §354.26.)

D. SGMA requires that GSAs located in basins designated high- or medium-priority adopt a groundwater sustainability plan by January 31, 2020. (*Water Code* §10735.2.) For basins that intend to develop and implement multiple groundwater sustainability plans, an Intra-basin Coordination Agreement amongst the GSAs is required prior to the Department accepting any GSPs. (*Water Code* §10727.6.) ETGSA adopted its groundwater sustainability plan (“**ETGSA GSP**”) on January 17, 2020, which included approval of the Tule Subbasin Coordination Agreement as required pursuant to *Water Code* §10727.6. The ETGSA GSP, including the Coordination Agreement, is under review by the Department pursuant to Cal. Code Regs. Tit. 23, §355.2. The Department may issue notices of deficiency, causing further amendments to the ETGSA GSP. In addition, at least every five years the Department must review the GSP, potentially necessitating further amendments.

(*Water Code* §10733.8.) A GSA has the authority to amend its GSP pursuant to *Water Code* §10728.4.

E. Under SGMA, a groundwater sustainability plan must establish minimum thresholds that quantify groundwater conditions for each applicable sustainability indicator at each monitoring site or representative monitoring site. (Cal. Code Regs. Tit. 23, §354.28(a).) The numeric value used to define minimum thresholds shall represent a point in the basin that, if exceeded, may cause undesirable results. (Cal. Code Regs. Tit. 23, §354.28(a).) Measurable objectives must be established for each sustainability indicator, based on quantitative values using the same metrics and monitoring sites as are used to define minimum thresholds. (Cal. Code Regs. Tit. 23, §354.30(b).) Measurable objectives must provide a reasonable margin of operational flexibility under adverse conditions which must take into consideration components such as historical water budgets, seasonal and long-term trends, and periods of drought, and be commensurate with levels of uncertainty. (Cal. Code Regs. Tit. 23, §354.30(c).)

F. Pursuant to the Tule Subbasin Coordination Agreement, land subsidence shall be considered significant and unreasonable if there is a loss of a functionality of a structure or a facility to the point that, due to subsidence, the structure or facility, such as the Friant-Kern Canal, cannot reasonably operate to meet contracted for water supplies deliveries without either significant repair or replacement. (Tule Subbasin Coordination Agreement, Section 4.3.4.1.) The criteria for an undesirable result for land subsidence is defined as the unreasonable subsidence below minimum thresholds at greater than 50% of GSA Management Area RMS resulting in significant impacts to critical infrastructure. (Coordination Agreement, Section 4.3.4.2.) The ETGSA GSP requires a more stringent standard than that provided in the Coordination Agreement providing that due to the presence of the Friant-Kern Canal as critical infrastructure within the ETGSA, undesirable results for land subsidence within the ETGSA is defined as the unreasonable subsidence below the minimum threshold at one (1) representative monitoring site. (ETGSA GSP, Section 5.8.1.2.)

G. The ETGSA GSP quantifies minimum thresholds and measurable objectives for land subsidence at each monitoring site by ground surface elevation. (ETGSA GSP, Tables 5-9 and 5-10.)

H. GSPs are required to include a description of projects and management actions a GSA has determined will achieve the sustainability goal for the basin. (Cal. Code Regs. Tit. 23, §354.44.) The ETGSA GSP provides for a “**Groundwater Accounting Action**,” which will be used to track groundwater use, develop an allocation of groundwater to be used for implementation of SGMA during the plan implementation period, and to develop water budgets for individual landowners and management areas. The Groundwater Accounting Action includes a proposed ramp down schedule of allowable consumed groundwater use of the 20-year plan implementation period, which may be adjusted, and anticipates the board of directors to establish rules and regulations to set allocations accordingly. (ETGSA GSP, Section 7.2.1.)

I. The ETGSA GSP also includes in its projects and management actions a “**Land Subsidence Management and Monitoring Plan**” (ETGSA GSP, Section 7.2.3). As stated in the ETGSA GSP, the ETGSA will, “in cooperation with other interested parties, (1) identify the particular causes of land subsidence within the Area along the Friant-Kern Canal, (2) identify

potential mechanisms for minimizing subsidence in the Area, (3) identify data gaps and additional monitoring sites for the purpose of improving assessment of conditions along the FKC, (4) refinement of land subsidence management criteria for the relevant area, and (5) preparation of a land subsidence monitoring and management plan focused upon the FKC.” The ETGSA has undertaken steps towards the implementation of a Land Subsidence Management and Monitoring Plan.

J. FWA contends that additional subsidence in the vicinity of the FKC is not acceptable unless there is appropriate financial mitigation for such impact to FWA and the Friant Contractors affected by such additional subsidence. ETGSA has maintained a commitment to ensure reduced land subsidence, given legacy impacts, while maintaining its obligations under SGMA to reach sustainability by 2040.

K. The ETGSA Board of Directors has approved Rules and Regulations and a First Amended Rules and Regulations on August 6, 2020 and October 1, 2020, respectively. The Rules and Regulations as approved on those dates establish an “**ETGSA Technical Group**” which is authorized to allocate sustainable yield and transitional pumping amounts pursuant to the ramp down schedule in the GSP. The ETGSA Technical Group established the water year 2021 allocation for transitional Tier 1 waters in the amount of 92,087 acre-feet per year. Based on current data, 1,034,553 acre-feet total of transitional waters are available until 2035.

L. ETGSA’s First Amended Rules and Regulations provide a penalty structure for all groundwater consumed above sustainable yield. Rates have been established for water pumped pursuant to the ramp down schedule, characterized as “**Tier 1 Penalty Allocation**” in the First Amended Rules and Regulations. Penalties are established for pumping in excess of those rates, identified as “**Tier 2**”. In addition to monetary penalties, additional civil remedies exist for pumping in excess of the ramp down schedule.

M. On October 1, 2020, ETGSA adopted Resolution 2020-03 establishing the initial penalty rate for the Tier 1 Penalty Allocation at \$245.00 (two hundred and forty-five dollars and zero cents) per acre foot consumed and the Tier 2 penalty rate at \$500.00 (five hundred dollars and zero cents) per acre-foot consumed. The First Amended Rules and Regulations provide that the penalty rate for the Tier 1 Penalty Allocation and Tier 2 will be established annually by the ETGSA Board of Directors.

N. The FKC’s conveyance system relies on a gravity design. As of 2020, capacity has been reduced to 1,650 cubic-feet per second (cfs) between mile post 88 and mile post 121.5 of the FKC (the “**Middle Reach**”). Design capacity through the Middle Reach was 4,000 cfs. Due to various design deficiencies the design capacity has never been achieved through the Middle Reach. Historic capacity demand through the Middle Reach has been estimated to be approximately 2,500 cfs. The reduced capacity precludes the potential for delivery of significant amounts of water to Friant Contractors in and south of the Middle Reach and limits the ability for exchanges and transfers of water.

O. FWA has provided ETGSA with an engineering memorandum stating that the damages in terms of the value of the lost water that FWA would not be able to deliver to Friant



Contractors if the FKC were to subside an additional three feet in the Middle Reach would be in excess of \$263,000,000.00 (two hundred and sixty-three million dollars and zero cents). ETGSA has not evaluated the memorandum, or its allegations, and as a result does not agree to any findings therein.

P. FWA and Reclamation are developing plans to restore historic capacity to the FKC. Presently, FWA and Reclamation are nearing completion of plans to restore capacity in the Middle Reach of the FKC through a project referred to as the Friant-Kern Canal Middle Reach Capacity Correction Project (“Project”). The most current engineering estimates place the cost of the Project at approximately \$500 million. Project costs estimates are expected to change given the need for additional estimates and further design work on the Project including turnouts and appurtenant facilities in and around the Middle Reach.

Q. FWA is proposing to divide the costs of Project funding into two categories: **Zone 2** –the increased capacity of the FKC attributed to the construction of the Project that is financed by non-reimbursable public funding, GSA funding and FWA OM&R funding (including any reimbursable public funding repaid via FWA OM&R funding); and **Zone 3** - the increase in capacity of the Middle Reach of the FKC above Zone 2 that will result from the construction of the part of the Project with funds derived from additional Friant Contractor voluntary funding.

R. The purpose of the payments to FWA by ETGSA under this Agreement is to fund Project Zone 2 construction. ETGSA may participate in any Zone 3 funding through other agreements with Friant Contractors. The Parties acknowledge and agree that to fully improve capacity conditions on the FKC, further projects north of Middle Reach are necessary, and that the Parties desire to pursue such projects.

S. This Agreement reflects the desire of the Parties to resolve their differences regarding past and future subsidence on the FKC and, among other things, provide (1) FWA with needed financing to complete the Project; and (2) protection to ETGSA and landowners within ETGSA’s jurisdictional boundaries (“Landowners”) that FWA and Friant Contractors affected by subsidence in the Middle Reach will not pursue litigation provided the terms of this Agreement are satisfied and Landowners are in good standing, as defined in Section 5 below, with the ETGSA.

## AGREEMENT

In consideration of the foregoing Recitals, which are incorporated herein, and the covenants contained in this Agreement, and for other further good and valuable consideration, including but not limited to the terms herein and the avoidance of further costs, inconvenience, and uncertainties related to the Parties’ respective positions, the Parties agree as follows:

### 1. **Penalty Program.**

A. ETGSA shall approve and maintain a volumetric penalty amount per acre foot consumed on transitional pumping as defined in the ETGSA GSP in an amount that will achieve, at minimum, the collection of \$220,000,000.00 (two hundred and twenty

million dollars and zero cents), if the anticipated transitional pumping of 1,034,553 acre-feet actually occurs.

- B. ETGSA shall set a penalty amount to collect Tier 1 penalty money not received in year 2020 based on actual transitional water pumped over the next five years (2021-2026), thus increasing the amount of penalties expected to be received by ETGSA in the earlier years of the transitional pumping penalty program.
- C. FWA acknowledges that the initial penalties set by ETGSA for Tier 1 (\$245 per acre-foot) and Tier 2 (\$500 per acre-foot) are consistent with this Agreement and reflect ETGSA's agreement to collect penalties not collected in year 2020 based on actual transitional water pumped over the next five years (2021-2026), thus increasing the amount of penalties expected to be received.
- D. ETGSA agrees to take all commercially reasonable efforts to begin invoicing Landowners as soon as reasonably practicable, but no later than March 2021, for all Tier 1 and Tier 2 penalties.

**2. ETGSA Lump Sum Payment under Land-Based Assessment and Reduced Penalty Program Payment.**

- A. Lump Sum Payment. In consideration of the mutual benefits that would result from FWA's early receipt of funds that could be applied towards the Project, ETGSA will use its best efforts to take all necessary steps and actions as required by law (including compliance with Proposition 218) to submit for a vote of the Landowners a land-based assessment that could be used as a source of revenue to secure bonds, notes or other obligations ("ETGSA Bonds") that would allow for a lump sum payment of \$125,000,000.00 (one hundred twenty five million dollars and zero cents) to FWA for Zone 2 of the Project ("Lump Sum Payment").
  - 1. ETGSA will use commercially reasonable efforts to obtain landowner approval of the land-based assessment under Section 2(A) above by no later than July 1, 2022. If the land-based assessment is approved by Landowners, ETGSA will use commercially reasonable efforts to issue ETGSA Bonds and to pay the Lump Sum Payment by no later than December 31, 2022. If ETGSA does not make the Lump Sum Payment by December 31, 2022, FWA in its sole and absolute discretion can decide whether to accept the Lump Sum Payment (or a different amount) at a later date if requested by ETGSA in writing to continue to pursue such payment option.
- B. Penalty Money. ETGSA shall make quarterly installments towards the Lump Sum Payment to FWA beginning as soon as reasonably practicable, but no later than the first quarter of 2021. ETGSA shall pay ninety-one percent (91%) of Tier 1 and Tier 2 penalty monies received in each calendar quarter within forty-five (45) days following the end of the subject quarter. ETGSA is entitled to keep the remaining nine percent (9%).

1. Penalty money paid in quarterly installments to FWA under this Section 2(B) shall be credited to and reduce the Lump Sum Payment amount.
  2. Payments by ETGSA to FWA under this Section 2(B) will cease, and no further penalty monies shall be paid to FWA, upon payment of the Lump Sum Payment.
3. **ETGSA Payments under the Transitional Pumping Penalty Program.** If the land-based assessment election described in Section 2 above does not pass, ETGSA agrees to the following:
  - A. If the Proposition 218 land-based assessment election does not pass as described in Section 2, ETGSA shall pay up to a maximum of two hundred million dollars (\$200,000,000.00) of penalty monies to FWA on a rolling basis. ETGSA shall pay ninety-one percent (91%) of penalty monies received in each calendar quarter within 45 (forty-five) days following the end of the subject quarter. ETGSA will be entitled to keep the remaining nine percent (9%) of penalty monies received.
  - B. The Parties acknowledge there is no assurance that any penalty monies will be received due to, among other things, the nature of the transitional pumping program which is designed to disincentivize groundwater pumping.
4. **Land Subsidence Management and Monitoring Plan.**
  - A. ETGSA shall take such commercially reasonable efforts to adopt and implement such management action(s) as identified within the ETGSA GSP to limit additional subsidence in the Middle Reach. FWA agrees to have its staff and agents meet and confer with representatives of ETGSA in order to coordinate on the monitoring of subsidence along the FKC and to provide input and recommendations as to additional management actions that may help reduce or avoid subsidence entirely. ETGSA's current draft Land Subsidence Management Plan contemplates the creation of a long-term Land Subsidence Monitoring and Management Committee. ETGSA agrees to appoint a FWA representative to the Land Subsidence Monitoring and Management Committee.
5. **Release of Liability.**
  - A. Release of Landowners and ETGSA.

Upon FWA's receipt of the earliest to occur of: (1) the Lump Sum Payment pursuant to Section 2 above, or (2) the two hundred million dollars and zero cents (\$200,000,000.00) of penalties pursuant to Section 3 above, or (3) all penalties collected and required to be transferred to FWA under Section 3 above through 2040 ("**Release Date**"), Friant, on its own behalf and on behalf of each of its respective successors, predecessors, affiliates, assigns, members, officers, employees, and agents (collectively "**Friant Releasers**"), agrees to release and forever discharge each of the Landowners (solely with respect to each such Landowner's real property

interests within the ETGSA) and ETGSA, and their respective successors, predecessors, affiliates, assigns, members, officers, employees, agents, partners, stockholders (collectively “**ETGSA Releasees**”) from any and all claims, demands, causes of action, suits, liens, obligations, charges, losses, damages, judgments, attorneys’ fees, costs, promises, liabilities, and demands of every nature, kind, and description whatsoever, in law or in equity, whether known or unknown, fixed or contingent, suspected or unsuspected, matured or not matured, liquidated or unliquidated, which the Friant Releasors may have ever had, now have, or will have against the ETGSA Releasees, in any manner arising from or related to the effects of land subsidence on the FKC (collectively “**Claims**”) up to and after the Release Date, but excluding any action as provided in Section 5(C) below.

**B. Covenant Not to Sue by Friant Releasors.**

For so long as ETGSA and each of the ETGSA Releasees remain in compliance with this Agreement, each of the Friant Releasors covenants that, excepting any action or Claims made under the conditions prescribed by Section 5(C) below, no Friant Releasor will directly or indirectly institute any legal, equitable, administrative, or other action, complaint, or proceeding against any of the ETGSA Releasees, or in any other manner assert any Claims against any of the ETGSA Releasees arising from or related to the effects of land subsidence on the FKC, including, without limitation, any past, present, or future damages.

**C. Unreleased Claims.**

1. Injunctive relief against Landowners. Notwithstanding Section 5(A) and (B) above, in the event of significant and unreasonable land subsidence pursuant to the ETGSA GSP and SGMA is incurred and there is reasonable evidence that such significant and unreasonable land subsidence is caused by groundwater pumping in excess of sustainable yield amounts within the ETGSA boundaries (as defined in the ETGSA GSP and the Rules and Regulations), Friant may pursue injunctive relief against Landowners from either judicial or administrative authorities to enjoin such groundwater pumping.

2. Good Standing. Only Landowners which are in “good standing” with the ETGSA shall be entitled to the benefits and protections of Section 5(A) and (B) above. “**Good standing**” shall mean the Landowner is in compliance with the ETGSA’s applicable Rules and Regulations and ETGSA GSP. Pumping in exceedance of the applicable Tier 1 Penalty Allocation will be evidence of not being in “good standing” with the ETGSA. The ETGSA’s written confirmation that a Landowner is in “good standing” with the ETGSA shall constitute conclusive evidence that the Landowner is entitled to the benefits and protections of Section 5(A) and (B).

3. Breach of this Agreement. The Parties may seek to enforce the terms of this Agreement in a court of competent jurisdiction as stated in Section 10 and the prevailing party in any such action may recover attorney’s fees as stated in Section

12.

**6. Indemnification.**

- A. ETGSA agrees to indemnify and hold harmless and defend the Friant Releasors, and each of them, from and against all claims, demands, causes of action, liability, cost and expenses, including damages resulting from the death or injury to any person or property, and including attorney's fees, losses or liabilities in law or in equity, of every kind and nature whatsoever for, but not limited to injury to or death of any person or property, arising out of or related to ETGSA's adoption or implementation of this Agreement, the ETGSA GSP, the Rules and Regulations, or any land-based assessment, charge or fee, imposed by the ETGSA.
  - B. FWA agrees to indemnify and hold harmless and defend the ETGSA Releasees from and against all claims, demands, causes of action, liability, cost and expenses, including damages resulting from the death or injury to any person or property, and including attorney's fees, losses or liabilities in law or in equity, of every kind and nature whatsoever for, but not limited to, injury to or death of any person or property, arising out of or related to the Project, or subsidence on the FKC, which may be brought by or on behalf of the Department of Interior, Bureau of Reclamation, or any Friant Contractor or Friant Contractor landowner, except to the extent such loss or injury is caused by conduct amounting to an intentional tort.
7. **No Admission of Liability.** This Agreement reflects a compromise of disputed claims and neither the payment or performance of any consideration hereunder nor anything contained in this Agreement will be interpreted or construed to be an admission on the part of, or to the prejudice of, either Party.
8. **Warranty of Authority.** Each Party represents and warrants that it has the full right, power, legal capacity and authority to enter into and perform its obligations under this Agreement and that no approvals or consents of any persons are necessary in connection with it.
9. **Assignment of Claims.** Each Party warrants, represents, and covenants that it has not assigned, transferred or conveyed, or purported to assign, transfer or convey, and will not assign, transfer or convey to anyone any claim, demand, debt, sum of money, liability, account, obligation, action or cause of action herein. Each Party agrees to indemnify, defend and hold harmless any other Party from any claims which may be asserted against such Party, based on, or arising out of or in connection with any such assignment, transfer or conveyance, or purported assignment, transfer or conveyance.
10. **Choice of Law.** This Agreement is governed by and will be construed in accordance with the laws of the State of California. The Parties agree that any breach of the Agreement will be deemed to occur in the County of Tulare, California. The Parties further agree that jurisdiction of any dispute arising out of this Agreement will be in the courts of the State of California, County of Tulare.

11. **Binding Upon Successors.** This Agreement is binding upon and will inure to the benefit of the Parties and their predecessors, successors, heirs, assigns, past, present or future executors, administrators, trustees, beneficiaries, affiliated and related entities, officers, directors, agents, employees and representatives.
12. **Attorney's Fees.** In the event of any dispute in any manner arising from or related to this Agreement or any transaction or event arising therefrom, the prevailing party in any action or proceeding shall be entitled to recover all reasonable attorney's fees incurred in connection with the dispute and any resultant litigation. The prevailing party shall also be entitled to recover all other reasonable costs and expenses incurred in connection with the dispute and any resultant litigation, including, without limitation, all fees of expert consultants and expert witnesses.
13. **Time of Essence.** Time is of the essence in the performance of this Agreement.
14. **Cooperation; Execution of Documents; Subsequent Actions.** Each Party agrees to cooperate fully and in the execution of any and all other documents necessary to effectuate the stated purposes of this Agreement, including but not limited to those documents specifically described in this Agreement, and in the completion of any additional action that may be necessary or appropriate to give full force and effect to the terms and intent of this Agreement.
15. **Construction of Agreement.** This Agreement is the product of negotiation and preparation by and among each Party and its respective attorneys. Therefore, the Parties expressly waive the provisions of Civil Code section 1654 and acknowledge and agree that the Agreement will not be deemed prepared or drafted by any one Party, and will be construed accordingly.
16. **Integration.** This Agreement and the documents executed in connection with it constitute the complete agreement of the Parties with respect to the subject matters referred to in this Agreement. This Agreement supersedes all prior or contemporaneous negotiations, promises, covenants, agreements and representations of every nature whatsoever with respect to the subject matters referred to in this Agreement, all of which have become merged and finally integrated into this Agreement.
17. **Modification.** Any modification of this Agreement must be in writing and signed by all Parties. No oral modifications will be effective to vary or alter the terms of this Agreement.
18. **Entire Agreement.** All representations and promises pertaining to this Agreement are set forth herein and the Parties acknowledge and represent to each other that they are not entering into this Agreement on the basis of any other promises or representations, express or implied, oral or written. Each Party has fully and personally investigated the subject matter of the Agreement, and has consulted with and been represented by independent counsel in negotiation and execution thereof. No Party is relying upon any statement of fact or opinion by or of the other Party except as expressly set forth in this Agreement.

19. **Authorized Signature.** Each signatory to this Agreement warrants and represents that he or she is competent and authorized to enter into this Agreement on behalf of the Party for whom the signatory purports to sign.
20. **Severability.** If any provision or any part of any provision of this Agreement is for any reason, held invalid, unenforceable or contrary to public policy or law, the remainder of this Agreement will not be affected thereby, and will continue to be valid and enforceable.
21. **Enforceable Obligations.** When executed, this Agreement will be valid, binding and legally enforceable in accordance with its terms.
22. **Warranty of Non-Inducement.** The Parties declare and represent that no promises, inducements, or agreements not expressly contained herein have been made and that this Agreement contains the entire agreement between them with respect to the subject matter of this Agreement.
23. **Counterparts.** This Agreement may be executed in counterparts, including true and accurate copies of the original, all of which, when taken together, will be deemed one original agreement. Any executed copy will not be binding upon any Party until all Parties have duly executed a copy of this Agreement.
24. **Force Majeure.** No Party will be liable in damages to any other Party for delay in performance of, or failure to perform, its obligations under this Agreement if such delay or failure is caused by a force majeure event. A "Force Majeure Event" means an event not the fault of, and beyond the reasonable control of, the Party claiming excuse which makes it impossible or extremely impracticable for such Party to perform obligations imposed on it by this Agreement by virtue of its effect on physical facilities and their operation or employees essential to such performance. Force Majeure Events include (a) an "act of God" such as an earthquake, flood, earth movement, drought, or similar catastrophic event, (b) an act of the public enemy, terrorism, sabotage, civil disturbance or similar event, (c) a strike, work stoppage, picketing or similar concerted labor action, (d) delays in construction caused by unanticipated negligence or breach of contract by a third party or inability to obtain essential materials after diligent and timely efforts, or (e) an order or regulation issued by a federal or state regulatory agency after the Effective Date of this Agreement or a judgment or order entered by a federal or state court after the Effective Date of this Agreement.
25. **Landowners.** The Parties recognize and acknowledge that each of the Landowners is an intended third-party beneficiary under this Agreement, and will have standing to enforce any provision of this Agreement.

[Signatures on the following page.]

**ETGSA:**

**EASTERN TULE GROUNDWATER SUSTAINABILITY AGENCY**



Eric Borba, Chairman

1-15-21

Dated



Rogelio Caudillo, Secretary

1/15/2021

Dated

**APPROVED AS TO FORM:**



Aubrey A. Mauritson, General Counsel

**FWA:**

**FRIANT WATER AUTHORITY**



Cliff Loeffler, Chairman

Jan 11, 2021

Dated



Jim Erickson, Secretary

Jan 11, 2021

Dated

**APPROVED AS TO FORM:**



Donald M. Davis, General Counsel

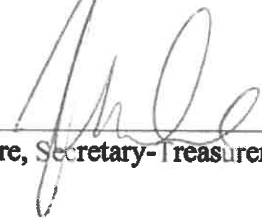


**DISTRICT:**

**ARVIN-EDISON WATER STORAGE DISTRICT**

  
\_\_\_\_\_  
Edwin Camp, President

1/13/2021  
\_\_\_\_\_  
Dated

  
\_\_\_\_\_  
John Moore, Secretary-Treasurer

1/13/21  
\_\_\_\_\_  
Dated

**APPROVED AS TO FORM:**

\_\_\_\_\_  
Scott K. Kuney, General Counsel

**DISTRICT:**

**ARVIN-EDISON WATER STORAGE DISTRICT**



Edwin Camp, President

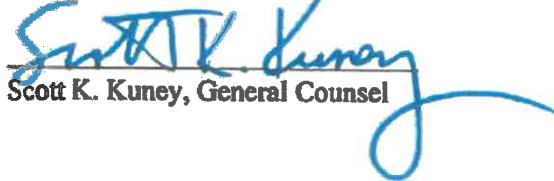
1/13/2021

Dated

\_\_\_\_\_  
John Moore, Secretary-Treasurer

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Dated

**APPROVED AS TO FORM:**

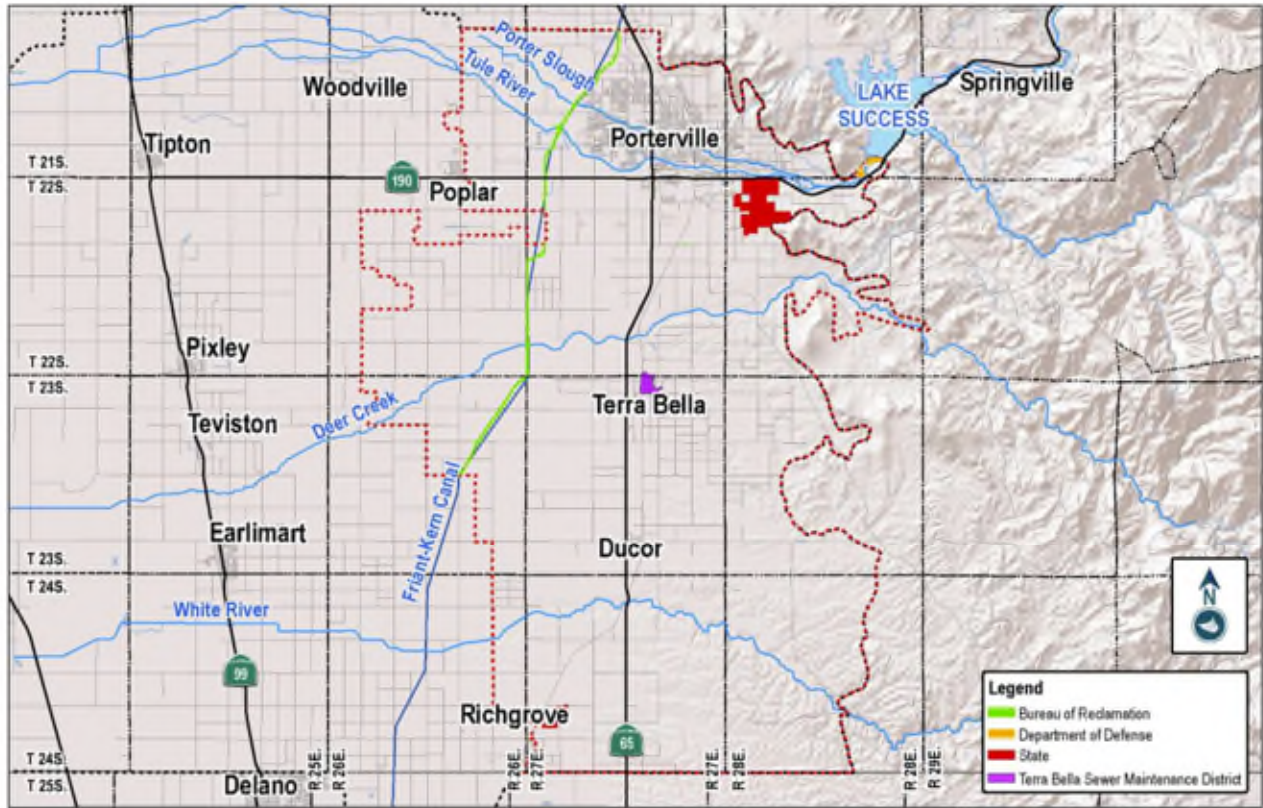


Scott K. Kuney, General Counsel

## **EXHIBIT B**

## Exhibit B

### Depiction of ETGSA Boundary and Location of the Friant-Kern Canal



Source: ETGSA GSP, Figure 3-4

## **EXHIBIT C**



# Friant-Kern Canal

## Overview

As part of the Central Valley Project, the 152-mile Friant-Kern Canal delivers water to 1 million acres of some of the most productive farmland in the country and provides drinking water to thousands of San Joaquin Valley residents. The canal begins at Friant Dam and conveys water from Millerton Lake, a reservoir on the San Joaquin River, south to its terminus at the Kern River in Bakersfield. Friant-Kern Canal was designed as a gravity-fed facility and does not rely on pumps to move water.



*The Friant-Kern Canal near Fresno*

## Subsidence and Canal Operations

Completed in 1951, Friant-Kern Canal was constructed to have a capacity of 5,000 cubic feet per second (cfs) that gradually decreases to 2,000 cfs at its terminus (one cubic foot of water is about 7.5 gallons). The canal is built in both concrete-lined and unlined earth sections. Subsidence in the area, caused by pumping groundwater faster than it can be recharged, has caused parts of the canal to sink. This negatively affects the canal's ability to convey water, reducing the canal's capacity. When the land elevation lowers, the canal must be operated at a reduced flow to ensure that water does not overflow banks, thereby restricting the ability to make full water deliveries.

The diminished capacity in the canal has resulted in as much as 300,000 acre-feet of reduced water deliveries in certain water years with effects most prominent in the middle reach of the canal (milepost 88 to milepost 121).

## Middle Reach Capacity Correction

To address the canal's capacity loss, Reclamation and the Friant Water Authority are implementing the Friant-Kern Canal Middle Reach Capacity Correction. The project will restore capacity in the 33-mile section of the middle reach where it is most restricted. When the multi-phased project is complete, the canal's conveyance capacity will be restored from the current 1,600 cfs to the original 4,000 cfs. Construction of the \$500 million project kicked off in January 2022 with Phase 1, which includes constructing 10 miles of new concrete-lined canal to replace one of the worst pinch points of the subsiding canal sections. The project is funded by Reclamation, Friant Water Authority, and California Department of Water Resources. A \$22.2 million investment from the Bipartisan Infrastructure Law was announced in March 2023.



More information on the project can be found here: [www.usbr.gov/mp/fkc-fr.html](http://www.usbr.gov/mp/fkc-fr.html)

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**PROOF OF SERVICE**

**STATE OF CALIFORNIA, COUNTY OF ALAMEDA**

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Alameda, State of California. My business address is 1999 Harrison Street, Suite 1650, Oakland, CA 94612-3520.

On April 26, 2024, I served true copies of the following document(s) described as **FIRST AMENDED COMPLAINT FOR (1) BREACH OF CONTRACT; (2) BREACH OF IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING; AND (3) DECLARATORY RELIEF** on the interested parties in this action as follows:


**SEE ATTACHED SERVICE LIST**

**BY MAIL:** I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with the practice of Burke, Williams & Sorensen, LLP for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid. I am a resident or employed in the county where the mailing occurred. The envelope was placed in the mail at Oakland, California.

**BY E-MAIL OR ELECTRONIC TRANSMISSION:** I caused a copy of the document(s) to be sent from e-mail address lneil@bwslaw.com to the persons at the e-mail addresses listed in the Service List.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on April 26, 2024, at Oakland, California.

  
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Lesley E. Neil

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**SERVICE LIST**

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GROUNDWATER SUSTAINABILITY  
AGENCY