

# Staff Report

for the Regular Meeting of the Board of Directors, February 13, 2019

**TO:** Board of Directors

**FROM:** Remleh Scherzinger, MBA, P.E., General Manager

**DATE:** February 5, 2019

**SUBJECT: NID-PCWA JPA for the Drum Spaulding Water Supply Reliability Study**

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## ***ADMINISTRATION***

### **RECOMMENDATION:**

Approve the Joint Powers Memorandum of Agreement with the Placer County Water Agency to establish the NID-PCWA Drum Spaulding Water Supply Reliability Study Team, and authorize the General Manager to execute the necessary documents.

### **BACKGROUND:**

PG&E filed for bankruptcy on January 29, 2019. PCWA and NID are both concerned that one of the possible outcomes from the bankruptcy proceedings will be the transfer of PG&E's Drum-Spaulding Project to a third party, which could have disastrous impacts on the water supply reliability for both agencies.

The purpose of the proposed Joint Powers Agreement is to study the feasibility of the members jointly taking over ownership and/or operation of the Drum-Spaulding Project.

Our Coordinated Operating Agreement with PG&E provides for an exclusive six month period to develop a framework agreement for the transfer of the Drum Spaulding Project, and if the parties are successful in negotiating that framework agreement, it provides for another exclusive six-month period to finalize the terms and conditions of such transfer. The agreement also makes it clear that these exclusive negotiations may include PCWA if both PCWA and NID so choose. These are very short timeframes for what will likely be a very complex agreement.

After discussion with PCWA management, we both agree that it would be in our mutual best interest to begin working together in preparation for the possibility that

an outcome of the PG&E bankruptcy proceedings will be the divestiture of the Drum-Spaulding Project.

The attached draft Joint Powers Agreement primarily provides that the parties will work together on that effort through the formation of an NID-PCWA Drum-Spaulding Project Water Supply Reliability Study Team with equal funding from both members. NID and PCWA would each contribute an initial sum of \$50,000 towards this effort.

The Joint Powers Agreement also contemplates the future formation of a Joint Powers Authority to hold ownership of the Drum-Spaulding Project if the transfer were to take place. However, all details of such an Authority remain to be worked out later.

**BUDGETARY IMPACT:**

Funds will be utilized from Account #10115-52603 – Consulting/Contractor Fees. The current balance in this account is \$312,397, and will be \$262,397, pending Board approval of this item.

RS

Attachments (1):

- Draft MOA

**MEMORANDUM OF AGREEMENT TO EXERCISE JOINT POWERS AND  
ESTABLISHING THE NID-PCWA DRUM-SPAULDING WATER SUPPLY  
RELIABILITY STUDY TEAM**

THIS AGREEMENT is entered into by the Nevada Irrigation District, a California irrigation district (NID), and the Placer County Water Agency, a county water agency (PCWA) (each hereafter known individually as a “Member” and collectively as “Members”) and is effective on the date the last Member has signed this Agreement (Effective Date).

**RECITALS**

A. Whereas, the Pacific Gas & Electric Company (PG&E) currently owns and operates the Upper Drum-Spaulding Hydroelectric Project (Federal Energy Regulatory Commission (FERC) Project No. 2310) and the Lower Drum Hydroelectric Project (FERC Project No. 14531) (Collectively the Drum-Spaulding Project); and

B. Whereas, PG&E previously operated certain public water systems that were supplied with water from the Drum-Spaulding Project; and

C. Whereas, over time, PG&E transferred certain portions of those water systems to the Members, and continued to provide water from the Drum-Spaulding Project for the operation of those water systems; and

D. Whereas, PG&E transports NID water through the Drum-Spaulding Project, specifically through Spaulding Reservoir, South Yuba Canal, Chalk Bluff Canal, Drum Canal, Bear River Canal, Upper Wise Canal, Lower Wise Canal, South Canal, and Middle Fiddler Green Canal; and

E. Whereas, NID transports PG&E water through NID’s Yuba Bear Project, specifically the Bowman-Spaulding Conduit, Fall Creek Flume, Dutch Flat 2 Flume, and Chicago Park Flume, and NID stores PG&E water in NID’s Rollins Reservoir; and

F. Whereas, on January 29, 2019, PG&E filed for Chapter 11 bankruptcy in the United States Bankruptcy Court, Northern District of California, San Francisco Division; and

G. Whereas, the Yuba-Bear project and the Drum-Spaulding project are intricately intertwined and cannot operate without one another; and

H. Whereas, the projects are a highly organized system and an interruption would cause significant hardship on the members and their customers; and

I. Whereas, PG&E and NID coordinate the operation of their respective Drum-Spaulding Project and Yuba-Bear Project through a Coordinated Operations Agreement; and

J. Whereas, PG&E's commitment to continue to own and operate the Drum-Spaulling Project is uncertain given the pending bankruptcy proceeding; and

K. Whereas, NID and PG&E transport and backstop water deliveries to Rock Creek Reservoir for delivery to PCWA; and

L. Whereas, the Members are reliant on the continued operation of the Drum-Spaulling Project to supply the water needs of over 250,000 residents and businesses within NID and PCWA's service areas; and

M. Whereas, the Members believe that the water rights and water supply associated with the Drum-Spaulling Project have been dedicated to public service within the Members' service areas such that PG&E has a utility service obligation to continue serving each of them; and

N. Whereas, the Members currently operate their own hydroelectric facilities; and

O. Whereas, the Members desire to jointly study the possibility of pursuing joint and equal ownership/operation of the Drum-Spaulling Project in order to continue to generate hydroelectric power and ensure local water supply reliability historically provided by the Project;

P. Whereas, the California Joint Exercise of Powers Act, California Government Code section 6500, et seq., provides that two or more public agencies, by agreement, may jointly exercise any power common to the contracting parties.

**THEREFORE, in consideration of the mutual promises, covenants and conditions herein set forth, the Members agree as follows:**

I. **DEFINITIONS.** As used in this Agreement, unless the context requires otherwise, the meaning of the terms hereinafter set forth shall be as follows:

- A. **"Administrator"** means the Member designated to administer the activities contemplated by this Agreement.
- B. **"Agreement"** shall mean this Memorandum of Agreement Establishing the NID-PCWA Drum-Spaulling Water Supply Reliability Study Team.
- C. **"Budget"** means the budget provided for in this Agreement.
- D. **"Funds"** means funds received by the Administrator from the Members or another source for use in carrying out the purposes of this Agreement.
- E. **"Member"** shall mean any of the signatories to this Agreement and "Members" shall mean all of the signatories to this Agreement, collectively.

- F. **“Member Representative”** means the staff member (and/or alternates), designated from time to time by each Member, who is authorized to take actions under this Agreement to the extent permitted, until such time as the Member notifies the Administrator and the other Members of a change in its Member Representative.
- G. **“Team”** means the collective body formed by this Agreement comprised of the Member Representatives.

## II. **FORMATION, PURPOSE AND POWERS**

- A. **Certification.** Each Member certifies and declares that it is a public agency authorized to contract with each other for the purposes of this Agreement.

- B. **General Purposes of this Agreement:**

1. The Members desire to jointly exercise powers, under the authority granted in the Joint Exercise of Powers Act (Gov. Code sec. 6500 et seq.) to work together, as equal partners, through this Agreement and the Team established hereunder, to jointly study the feasibility of the Members jointly taking over ownership and/or operation of the Drum-Spaulding Project through a voluntary purchase and sale of the Drum-Spaulding Project from PG&E, or by other means.
2. The Members intend through this Agreement to provide joint funding and a method of developing and sharing information to fulfill the purposes of this Agreement.
3. In the event the Members each authorize a joint action to take over ownership and/or operation of the Drum-Spaulding Project, the Members anticipate negotiating and executing a successor joint powers agreement creating a new, separate, Joint Powers Authority to own and/or operate the Drum-Spaulding Project. In that event, the Members agree to work cooperatively to reach terms and conditions of a mutually agreeable joint powers agreement for that purpose.
4. This Agreement does not create a separate legal entity under the Joint Exercise of Powers Act.

- C. **Creation and Composition of the ‘NID – PCWA Drum-Spaulding Water Supply Reliability Study Team’:**

1. The members hereby create the ‘NID – PCWA Drum-Spaulding Water Supply Reliability Study Team.’ (“Team”).
2. The Team shall consist of a total of four Member Representatives. Each Member shall appoint, in writing, two staff members to serve on the Team. Each Member shall also

appoint one alternate to serve in the event one of its Member Representatives is unavailable. The appointed staff members shall be known and act as, "Member Representatives."

3. A Member Representative shall have authority to act under this Agreement on behalf of the Member that he or she represents, consistent with the agreed upon scope of activities and the Budget.

**D. Scope of Team Activities:**

1. The Team shall Cooperatively carry out the purposes of this Agreement; and
2. At the conclusion of the study and investigation contemplated by this Agreement, synthesize the information gathered, and present that information to the governing bodies of the Members, so that each Member may make an informed decision concerning whether to jointly pursue ownership and/or operation of the Drum-Spauling Project with the other Member.

**E. Appointment and Actions of the Administrator.** The Members hereby initially appoint NID to be the Administrator of this Agreement. The Members may change the Administrator from time to time by mutual agreement. In carrying out its duties under this Agreement, the Administrator shall comply with the legal and regulatory requirements applicable to the Administrator (e.g., procurement procedures).

**F. Administrator Authorities.** The Administrator shall be authorized to take the following actions to the extent they are consistent with this Agreement and the decisions of the Team:

1. To inform the other Member, in writing, of the actions approved by the Team.
2. To undertake or arrange for approved activities in accordance with the provisions of this Agreement and the decisions of the Team;
3. To apply for, receive, separately account for, and disburse Funds for use in carrying out the purposes of this Agreement;
4. To hold Funds for the purposes herein mentioned, and to invest Funds subject to applicable law, provided such Funds are not presently needed to pay costs related to the authorized uses of such Funds under this Agreement;
5. To make and enter into contracts reasonably necessary to carry out the purpose of this Agreement, consistent with the approved Budget and decisions of the Team.

### III. GOVERNANCE

- A. **Conduct of Business.** Team activities and decisions shall be carried out in accordance with the provisions of this Section.
- B. **Quorum.** A majority of all Member Representatives will constitute a quorum of the Team.
- C. **Voting.** Except as to specific approval and voting requirements contained in this Agreement, action by the Team on any item shall require the affirmative vote of at least three Member Representatives.
- D. **Unanimous Vote Requirement for Certain Actions.** The following actions will require a unanimous vote by all Member Representatives:
  - 1. Approval of the Team's annual budget.
- E. **Compliance with Ralph M. Brown Act.** Meetings of the Team shall be conducted in accordance with the provisions of the Ralph M. Brown Act. Such compliance shall include, without limitation, the posting of Agendas, holding open and noticed public meetings, and providing opportunities for public comment.
- F. **Vote and Approval Reserved to Members.** The following actions are reserved for, and will require the approval of both Members' respective governing bodies:
  - 1. Funding the budget approved by the Team.
  - 2. Decisions to appropriate for the purposes of this Agreement additional funds not provided for under the Team's approved annual budget.
  - 3. Decisions to admit additional Members to this Agreement.
  - 4. Decisions to terminate this Agreement.
  - 5. Decisions to amend this Agreement.
  - 6. Any other actions as may be determined appropriate by the Member Representatives.

### IV. FINANCIAL PROVISIONS

- A. **Initial Contributions.** Upon execution of this Agreement, each Member shall contribute fifty-thousand dollars (\$50,000). Such funds shall be held in an account

designated by the Administrator and may be appropriated by the Team in accordance with this Agreement to fund the activities contemplated by this Agreement.

- B. **Funding.** The members shall be responsible for funding future approved contributions in equal shares.
- C. **Budget.** Within ninety (90) days of the effective date of this Agreement, the Team shall prepare and agree upon a Budget. Thereafter, the Team shall agree upon a Budget no later than February 1 of the succeeding calendar year. The Budget must be agreed upon by unanimous vote of the Member Representatives and separately approved by the governing body of the individual Members.
- D. **Accounting of Funds.** At the request of any Member, the Administrator shall provide for an accounting of funds collected, held, and disbursed for the current or prior year.

**V. TERM, CHANGES TO MEMBERSHIP, WITHDRAWAL AND TERMINATION**

- A. **Term.** This Agreement shall be effective as of the Effective Date and shall remain in effect until terminated in accordance with this Agreement.
- B. **Termination.** This Agreement may be terminated by a written mutual agreement of the Members at any time.
- C. **Disposition of Property Upon Expiration or Termination.** Upon termination of this Agreement, any surplus Funds will be returned to the Members in proportion to the contributions made by them except for any Funds obligated to pay for expenses incurred prior to the date of termination.
- D. **Withdrawal of a Member.** Either Member may withdraw from this Agreement effective upon thirty (30) day's written notice to the other Member. The withdrawing Member shall be responsible for its share of financial obligations incurred under this Agreement prior to the effective date of the withdrawal. This Agreement shall terminate at any time only one Member remains subject to its terms.
- E. **New Members.** One or more New Members may be admitted into this Agreement by the mutual written agreement of each of the original Members. In such event, this Agreement shall be amended as necessary to address the rights and responsibilities of the New Member(s). The revised Agreement shall be adopted by all Members.

F. **Use of Data.** Upon withdrawal or termination, any Member shall be entitled to use any data or other information developed by the Team during its time as a Member.

## VI. MISCELLANEOUS PROVISIONS

- A. **Amendments.** This Agreement may be amended from time to time by a unanimous vote of the Members.
- B. **Notice.** Any notice or instrument required to be given or delivered under this Agreement may be made by: (a) depositing the same in any United States Post Office, postage prepaid, and shall be deemed to have been received at the expiration of 72 hours after its deposit in the United States Post Office; (b) transmission by electronic mail; or (c) personal delivery, as follows:
- a. Placer County Water Agency  
Einar Maisch, General Manager  
P.O. Box 6570  
144 Ferguson Road  
Auburn, CA 95604  
elmaisch@pcwa.net
  - b. Nevada Irrigation District  
Remleh Scherzinger, General Manager  
1036 W. Main St.  
Grass Valley, CA 95945  
scherzinger@nidwater.com
- C. **Counterparts.** This Agreement may be executed by the Members in separate counterparts, each of which when so executed and delivered shall be an original. All such counterparts shall together constitute but one and the same instrument.
- D. **Choice of Law.** This Agreement shall be governed by the laws of the State of California.
- E. **Severability.** If one or more clauses, sentences, paragraphs or provisions of this Agreement is held to be unlawful, invalid or unenforceable, it is hereby agreed by the Members that the remainder of the Agreement shall not be affected thereby. Such clauses, sentences, paragraphs or provisions shall be deemed reformed so as to be lawful, valid and enforced to the maximum extent possible.
- F. **Headings.** The paragraph headings used in this Agreement are intended for convenience only and shall not be used in interpreting this Agreement or in determining any of the rights or obligations of the Members to this Agreement.

G. **Construction and Interpretation.** This Agreement has been arrived at through negotiation and each Member has had a full and fair opportunity to revise the terms of this Agreement. As a result, the normal rule of construction that any ambiguities are to be resolved against the drafting Member shall not apply in the construction or interpretation of this Agreement.

H. **Entire Agreement.** This Agreement constitutes the entire agreement among the Members and supersedes all prior agreements and understandings, written or oral. This Agreement may only be amended by written instrument executed by all Members.

IN WITNESS WHEREOF, the Members have executed this Agreement on the day and year first above-written.

For PCWA:

For NID:

\_\_\_\_\_   
 Einar Maisch

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 Date

\_\_\_\_\_   
 Remleh Scherzinger

\_\_\_\_\_   
 Date