MEMORANDUM OF UNDERSTANDING

FOR THE PRE-CONSTRUCTION PHASE OF THE

SITES RESERVOIR EXPANSION PROJECT

AND SHARING OF COSTS

By and Between

United States Department of the Interior

Bureau of Reclamation, California Great Basin

and

Sites Joint Powers Authority

This Memorandum of Understanding (MOU) is made and entered into by and between the United States Department of the Interior, Bureau of Reclamation, California-Great Basin Region (Reclamation), and the Sites Joint Powers Authority (Sites JPA), collectively referred to as (Parties) for the purposes of undertaking and completing preconstruction activities (post-feasibility activities) for the Sites Reservoir Project (Project).

WHEREAS, Reclamation in coordination with Sites JPA Reclamation developed a Final Feasibility Report for the Sites Reservoir in 2020 that was delivered to Congress in December of 2020; and

WHEREAS, Sites JPA and Reclamation desire to enter into an MOU for pre-construction activities for the Project as defined by the scope in Article 5(c) of this MOU; and

WHEREAS, Reclamation is hereby joining Sites JPA in conducting and advancing the Project, and each entity recognizes the unique relationships and opportunities, mutual and exclusive needs and dependencies, Federal and Non-Federal standards and procedures, potential outcomes and applications of the preconstruction activities, and related decision-making and approval processes; and

WHEREAS, Reclamation is the lead agency under the National Environmental Policy Act (NEPA) and Sites JPA is the lead pursuant to the California Environmental Quality Act; and

WHEREAS, Reclamation is the lead agency for Section 7 Consultations under the Endangered Species Act (ESA) for listed species or critical habitat and Sites JPA is the lead pursuant to ESA permitting; and in combination with Reclamation, would coordinate and interact with other permitting and/or regulatory agencies.

WHEREAS, Sites JPA is the lead for obtaining permits under Section 404 and 401 of the Clean Water Act.

WHEREAS, Reclamation is lead federal agency for Consultation under the National Historic Preservation Act and Sites JPA is the lead pursuant to National Historic Preservation Act permitting; and in combination with Reclamation, would coordinate and interact with other permitting and/or regulatory agencies.

WHEREAS, Reclamation will lead applications with the State Water Resources Control Board (SWRCB) for water right actions held by the United States, as necessary, and Sites JPA will lead applications with the SWRCB for water rights held by Sites JPA.

WHEREAS, Sites JPA and Reclamation have the full authority and capability to perform as hereinafter set forth and intend to cooperate in cost-sharing and financing in the preconstruction of the Project in accordance with the terms of this MOU.

NOW, THEREFORE in consideration of mutual and dependent covenants and conditions contained herein, which each Party acknowledges results in respective benefit, the Parties agree as follows:

1. Definitions The following terms shall have the following meanings when used in this MOU:
   1. Parties: Shall mean Reclamation and SITES JPA.
   2. Contributed Funds Agreement: Shall mean a legal financial agreement used by Reclamation to receive “all moneys … from any State, municipality, corporation, association, firm, district, or individual for Projects, surveys, construction work, or any other development work incident thereto involving operations similar to those provided for by the Reclamation law, are covered into the Reclamation fund and shall be available for expenditure for the purposes for which contributed in like manner as if said sums had been specifically appropriated for said purposes,” 43 USC § 395. Any such Contributed Funds Agreement would be separate from the MOU.
   3. Cost-Share: Shall mean the Parties’ contribution as in-kind services as further defined in Articles 1(d) and 5(a) of this MOU, and contributed funds, if a separate Contributed Funds Agreement referenced in Article 1(b) is completed.
   4. In-Kind Service: Shall mean eligible donated time and effort, real and personal property, and goods and services, as defined by the Department of the Interior. In-kind services may be used as a cost-share, but the value of the in-kind contributions must be evaluated and documented. Valuation of in-kind services shall be in accordance with 2 CFR Part 200.
   5. Intellectual Property: Shall mean any information that is privileged or protected from public release under the Freedom of Information Act (FOIA), 5 USC 552(b), or the California Public Records Act (CPRA), California Government Code § 6250 et. seq.
   6. Confidential Information: Shall mean any information that is legally protected through patents, copyrights, trademarks, and trade secrets, or otherwise protectable under Title 35 of the United States Code, under 7 USC § 2321, et. seq., or under the patent laws of a foreign country.
   7. Confidential Business Information: Shall mean trade secrets or commercial or financial information that is privileged or confidential under the meaning of FOIA. 5 USC § 552(b)(4), or the CPRA.
   8. Key Personnel: Shall mean team members involved in the administration, management, or performance of the preconstruction activities as defined in this MOU.
   9. Subject Invention: Shall mean any invention or other intellectual property conceived or first reduced to practice under this MOU which is patentable or otherwise protectable under Title 35 of the United States Code, under 7 USC § 2321, et. seq., or under the patent laws of a foreign country.
   10. Project Management Plan (PMP): Shall mean the document prepared by Reclamation for the Pre-Construction Phase of the Project, and routinely updated by Reclamation throughout the duration of the Project to reflect current project schedule and approach, that serves as a guideline describing how Reclamation will manage and conduct the Project.
   11. Scope of the Project: Those preconstruction activities, actions, and products set forth in the PMP, Final Feasibility Report, and any authorizing legislation that will be conducted during the Term of the MOU are subject to the requirements of the MOU.
   12. Preconstruction Activities: Those activities that are involved in but not limited to planning, engineering, design, and environmental permitting that occur between the Final Feasibility Report and Environmental Impact Statement but before commencement of physical construction, mitigation, or land acquisition has begun, including Definite Plan Report.
   13. Non-Federal Proportionate Cost-Share: The percentage of the total construction cost of the Project assigned to the non-federal cost-share partner, Sites JPA, in accordance with Article 5(a).
   14. Federal Proportionate Cost-Share: The percentage of the total construction cost of the Project assigned to the Federal Government, in accordance with Article 5(a).
2. Purpose of MOU The Parties herein agree that the purpose of this MOU is to clearly define and implement the responsibilities of the Parties to complete Pre-Construction activities and specified documents consistent with the Final Feasibility Report, PMP, and any Project authorizing legislation and to share costs as outlined in the MOU, consistent with the authorizations identified below and other pertinent Federal, State, and local laws and policy.
3. Authority for MOU Reclamation authority to enter this MOU:
   1. Water Infrastructure Improvements for the Nation Act, 2016 (P.L. 114-322).
4. Roles and Responsibilities of Reclamation and Sites JPA
   1. Executive Steering Committee: Each Party to this MOU will assign an executive-leadership-level representative to participate on the Executive Steering Committee for the duration of the Project. Members on the committee will provide both program and project leadership, address issues affecting study progress, and identify and strategize resolution of evolving issues or conditions. This committee will meet on an as needed basis.
   2. A Project Management Team (PMT): A PMT shall be established. Each Party will identify a Project Manager and representatives to participate on the PMT. Reclamation shall chair the PMT. Meetings will be held as needed and used to track status of the preconstruction activities, coordinate reviews of documents, share both Parties’ perspectives on various topics, prepare briefings for the Executive Steering Committee, and any other items the Parties wish to discuss related to the Project. It is anticipated that PMT meetings will be held monthly. Meetings are intended to be in-person but may use remote technology. The PMT shall, on a quarterly basis, share an accounting of the actual expenses incurred by each Party under this MOU in accordance with Article 5 of this MOU.
   3. Reservoir Operations Team (ROT): A Reservoir Operations Team (ROT) shall be established. Each Party will identify representatives to participate on the ROT. The purpose of the ROT is to develop an operating plan for the Project that identifies proposed reservoir operations, affects to the Central Valley Project and State Water Project, and effects to any other party not a signatory to this MOU. Participation in the ROT is not limited to the Parties. Non-party stakeholders may participate in and be a member of the ROT if it is agreed upon by the Parties and the non-party stakeholder has special expertise with respect to any operational impact involved in the Project. The ROT is expected to meet bi-weekly to maintain the progress of the Project.
   4. Cooperative Partnership: The Parties will participate cooperatively as both cost-share and project partners to complete the preconstruction activities effectively and efficiently, with intent to manage and perform joint and/or separate activities; monitor and account for actions; produce documents for review, revision, and distribution to support decision making, approval, and related actions. The Parties commit to sharing all required documents (e.g. technical memoranda, administrative draft and final reports, supporting materials, work products, and summaries of expenditures and expenses) within their respective authorities. Each Party is responsible for ensuring their respective policy, technical, and legal requirements are met.
   5. Coordination with Local Water Agencies: Sites JPA will coordinate with the local water agencies if and when any additional parties sign an MOU with Sites JPA with the intent to perform joint and/or separate activities needed to contribute to the Project, including but not limited to development of local water supply demands and reservoir facilities and operations.
5. Financial Obligations
   1. Cost Sharing: Reclamation and Sites JPA will share the eligible costs of the preconstruction activities and any supporting documentation as required. The proportionate cost-share between Sites JPA and Reclamation is established by the total project cost assignment percentage split between the federal assigned percentage and the non-federal assigned percentage published in the Final Feasibility Report. The assigned proportionate cost-share is subject to change from the published Final Feasibility Report to an updated assignment if during preconstruction Project benefit calculations or categories are changed. Reclamation’s proportionate cost-share for a state-owned storage facility must not equal more than 25% of the total project cost. This project is being conducted under the beneficiary pays principles of cost allocation and payment responsibility.
      1. In accordance with Reclamation Directives and Standards, Sites JPA shall account for the actual expenses incurred by Sites JPA and any local water agencies participating in the Project. These expenses shall be provided to Reclamation on a quarterly basis. Requirements of such accounting shall, at a minimum, include the following:
         1. An explanation, in the form of a progress report, of the work performed for each activity completed during the reported quarter.
         2. Progress reports shall include a summary of all costs incurred by SITES JPA and any local water agencies participating in the Project. Allowable costs include payroll costs, contract costs, overhead costs, expense vouchers, and other costs as provided in the applicable Office of Management and Budget regulations. Each activity should be supported by reports from SITES JPA’s financial system as well as the local water agencies’ financial systems providing a breakdown of actual costs incurred for the current submission and total costs to date for each activity.
         3. A cover letter or memorandum signed by an authorized representative of SITES JPA should accompany the submission. The cover letter shall reference this MOU and any enclosures (i.e. progress report, expenses/payroll summary).
   2. Financial Obligations: This MOU is not a funding document and does not obligate or transfer funds between parties. Reclamation, subject to the availability of funds through the Federal appropriations process for this Project, shall expend funds on federally authorized preconstruction activities pursuant to Federal laws, regulations, and policies. Any funds expended by Reclamation towards evaluating its own participation in and operations of the Sites project is not accounted for in Sites JPA participant funding.
   3. Scope of the Project: The Final Feasibility Report, PMP, any Federal authorizing legislation, and any relevant Reclamation Directive and Standard for Pre-Construction and/or Construction, detail the initial scope of work and level of effort. When the Parties identify new tasks, specific scopes and requirements will be negotiated between the Parties. The PMP can be routinely updated by Reclamation as required and Sites JPA and any other non-Federal cost-share partners will be notified as appropriate. Reclamation action is limited to Federal authorizations for the preconstruction of the Project.
   4. In-Kind Services: Submission of documentation for in-kind services shall be submitted quarterly. Quarterly accounting must detail work done for agreed upon items. Only costs incurred against a cost-share agreement need to be documented and submitted for approval. Project numbers must be used to distinguish various tasks and work phases. Items required for proper verification of work done include certified payroll, applicable contract numbers (i.e. consultant contracts), quarterly reports that coincide with Federal reporting requirements and generally accepted accounting principles, identification of cost-share partners, and scopes of work. Services cannot be included in any other Federal award in a current or prior period and their value must be based upon current market prices.
   5. If Reclamation projects that the value of Sites JPA’s contributions provided under Article 5(a) of this MOU will be less than the assigned Non-Federal Proportionate Cost-Share then SITES JPA shall provide an additional cash contribution to Reclamation in the amount necessary to make Sites JPA’s total contribution equal to Sites JPA’s assigned proportionate cost-share of the preconstruction activities.
   6. If Reclamation determines that the value of Sites JPA’s contributions provided under Article 5(a) of this MOU will be more than the assigned Non-Federal Proportionate Cost-Share then Reclamation, subject to the availability of funds, shall reimburse Sites JPA for any such value in excess of Sites JPA’s assigned proportionate cost-share of the preconstruction activities. Reclamation’s storage account size within the Sites project will be adjusted such that it accurately represents contributed funds.
   7. Reclamation shall perform a final accounting in accordance with Article 5 of this MOU to determine the contributions provided by Sites JPA and to determine whether Reclamation and the Sites JPA have met their proportionate cost-share obligation.
   8. Sites JPA shall not use Federal funds to meet Sites JPA’s share of the preconstruction costs under this MOU unless the Federal granting agency verifies in writing that the expenditure of such funds is expressly authorized by statute.
6. Term and Termination
   1. Term: This MOU shall take effect upon the date of signature by both Parties and, unless terminated per Article 6(e), will expire 3 years from the date of Reclamation’s signature to this MOU.
   2. Amendment: If either Party desires a modification to this MOU, the Parties shall confer in good faith to determine the desirability of such modification. Any amendment must be mutually agreed upon in-writing by Reclamation and Sites JPA. Any such modification shall not be effective until a written amendment to this MOU is signed by Reclamation and Sites JPA.
   3. Addition of non-Federal Cost-Share Partners by Sites JPA: Sites JPA retains sole discretion to add local water agencies as signatories to its formation/organizational document (Sites JPA’s MOU) for the purpose of considering these agencies as potential partners in project implementation, including appropriate cost-share arrangements. Addition of local water agencies shall be consistent with Sites JPA Board Principles, if applicable to completion of the Project. Sites JPA shall notify Reclamation of such negotiations, if they occur.
   4. Addition of Project Partners by Reclamation: Reclamation retains sole discretion to enter into additional agreements for the purpose of undertaking and completing all relevant preconstruction activities related to the Project, including but not limited to appropriate cost-share arrangements to reduce the Federal cost-share of the Project. Reclamation will notify Sites JPA of such negotiations, if they occur.
   5. Termination: Prior to the expiration of this MOU, upon 60 calendar days written notice to the other Party, either Party may elect without penalty to terminate this MOU or to suspend future performance under this MOU. In the event that either Party elects to terminate this MOU pursuant to this Article, both parties shall cease their activities relating to the Project and proceed to a final accounting in accordance with Article 5 of this MOU. Any termination of this MOU in accordance with this Article shall not relieve the Parties of liability for any obligation previously incurred.
   6. Suspension: If either Party suspends its performance, the other Party is relieved of any obligation to perform under this MOU until the suspension is terminated. Any such suspension shall remain in effect until either Reclamation or SITES JPA terminates this MOU, or the suspending Party notifies the other Party of its intent to end the suspension and perform in accordance with this MOU. Any suspension of future-performance under this MOU in accordance with this Article shall not relieve the Parties of liability for any obligation previously incurred. Financial Obligations and payment for in-kind services to the date of suspension or termination shall be satisfied.
7. Publications, Reports, and Confidentiality
   1. Publications: The Parties understand and agree this MOU may be disclosed to the public in accordance with the FOIA or the California Public Records Act. Subject to the requirements of confidentiality and preservation of rights in Subject Inventions, described in Article 1(i) herein, either Party may publish the results of the Project described in this MOU. Any formally published or publicly shared report, memorandum, whitepaper, technical report, or other document must be consistent with applicable Department of the Interior and Reclamation procedures, requirements, and policy, provided:
      1. The other Party is allowed to review the proposed publications(s) at least 60 days prior to submission for publication by submission to the authorized agent.
      2. The final decision as to the publication content rests with the Party that writes the publication(s).
   2. Reports: The results of the science, engineering, operations, and technology data that are collected, compiled, and evaluated pursuant to this MOU, including administrative drafts and final draft reports and/or supporting documents, shall be shared and mutually interchanged by the Parties, consistent with Article 4 above and pertinent Reclamation directives, standards, and policy.
   3. Confidentiality: Any confidential business information used in implementing this MOU shall be clearly marked “CONFIDENTIAL” or “PROPRIETARY” by the submitter, and shall not be disclosed by the recipient without permission of the owner in accordance with applicable law (i.e. E.O. 12600) and this MOU. To the extent either Party orally submits confidential business information to the other Party, the submitting Party will prepare a document marked “CONFIDENTIAL” or “PROPRIETARY” embodying or identifying in reasonable detail such orally submitted confidential information and provide the document to the other Party within 30 days of disclosure.

Any confidential information disclosed by one Party to the other Party shall remain confidential and protected from disclosure to the maximum extent allowable by applicable law. Neither Party shall be bound by confidentiality if the confidential information received from the other Party:

* + 1. Is already available to the public or the recipient.
    2. Becomes available to the public through no fault of the recipient.
    3. Is non-confidentially received from another Party legally entitled to it.

It shall not be a breach of this MOU if the recipient of confidential information is required to disclose confidential information by a valid order of a court or other government body, or as otherwise required by law, or as necessary to establish the rights of either Party under this MOU; provided that the recipient of confidential information shall provide prompt prior notice thereof to the other Party in order to seek a protective order or otherwise prevent such disclosure, and provide further that the confidential information otherwise shall continue to be confidential.

* 1. Intellectual Property: Unless otherwise agreed by the Parties, custody and administration of inventions made as a consequence of, or in direct relation to, the performance of activities under this MOU shall remain with the respective inventing Party. In the event that an invention is made jointly by employees of the Parties or an employee of an agency’s contractor, the Parties shall consult and agree as to future actions toward establishment of patent protection for the invention.

1. General
   1. Liability: It is understood and agreed that neither Party to this MOU shall be responsible for any damages or injuries arising out of the conduct of activities governed by this MOU, except to the extent that such damages or injuries were caused by the negligent or wrongful acts or omissions of its employees, agents, or officers. Reclamation’s liability shall be limited by the Federal Tort Claims Act. 28 USC § 2671, et seq., while SITES JPA’s liability shall be limited by the California Government Claims Act, California Government Code § 810 et seq.
   2. Limitations: This MOU sets out the Parties’ intentions and objectives and does not apply to any person outside Sites JPA and Reclamation. This MOU is not intended to and does not create, any right, benefit, or trust responsibility, substantive or procedural, enforceable at law or equity, by anyone against the United States, its agencies, its officers, or any person.
   3. Notices: Notices between the signatories and copies of correspondence shall be sent to the Reclamation and Sites JPA points of contact below:

Executive Director Regional Director

Sites JPA Bureau of Reclamation

122 Old Highway 99W 2800 Cottage Way

Maxwell, CA 95955 Sacramento, CA 95825

Telephone: (530) 438-2309 Telephone: 916-978-5012

* 1. Anti-Deficiency Act: All activities, responsibilities, and communications made under or pursuant to this MOU are subject to the availability of funds and each Parties’ budget priorities, as determined by each Party. No provision herein shall be interpreted to require obligation or payment of funds. Further, no provision shall be interpreted in violation of the Anti-Deficiency Act, 31 USC 1341, and no liability shall accrue to the United States in the event that funds are not appropriated or allotted. No liability of one party may be transferred to the other party.
  2. Counterparts: This MOU shall be executed in duplicate and each original, once fully executed, shall be equally effective.
  3. Subcontracting Approval: A Party hereto desiring to obtain and use the services of a third party via contract or otherwise shall give prior notice to the other Party, including details of the contract or other arrangement. This requirement is to assure confidentiality is not breached and rights in subject inventions are not compromised.
  4. Assignment: Neither Party has the right to assign this MOU or any of its responsibilities hereunder.
  5. Endorsement: Sites JPA shall not in any way state or imply that this MOU, or the results of this MOU, is an endorsement by the Federal government, Department of the Interior, or Reclamation or its organizational units, employees, products, or services except to the extent permission is granted by an authorized representative of Reclamation.
  6. Regulatory Compliance: Both Parties acknowledge and agree to comply with all applicable laws and regulations of the Federal, State, and local environmental, cultural, and paleontological resource protection laws and regulations as applicable to the activities or projects for this MOU. These regulatory compliance requirements may include but are not limited to, the NEPA including the Council on Environmental Quality and Department of the Interior regulations implementing NEPA, the Clean Water Act, The Endangered Species Act, consultation with potentially affected tribes, and consultation with the State Historic Preservation Office.
  7. Disputes: Any dispute arising under this MOU, which cannot be readily resolved, shall be submitted jointly to the key personnel officials, identified above. Each Party agrees to seek in good faith to resolve the issue through negotiation, or other forms of nonbinding dispute resolution processes, if mutually acceptable to the Parties. Pending the resolution of any dispute or claim, the Parties agree that performance of all obligations shall be pursued diligently.

1. Signatures and Authorities In Witness Thereof, the Parties execute this MOU on the date and year indicated below.
   1. Bureau of Reclamation
   2. Sites Reservoir

U.S. DEPARTMENT OF THE INTERIOR

Dated:­­­­­­­­­­­\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ By:\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Deputy Regional Director

SITES JOINT POWERS AUTHORITY

Dated:­­­­­­­­­­­\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ By:\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Executive Director